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	)	

COMMENTS OF THE FREE STATE FOUNDATION*

I. INTRODUCTION AND SUMMARY

These comments are submitted by the Free State Foundation in response to the Commission's request for comments concerning 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). This transaction is primarily a "vertical" integration, combining NBCU programming assets with Comcast distribution assets. The potential competitive concerns raised by vertical integrations are almost always much less than those raised by horizontal ones. This is true in this instance because the applicants largely operate in separate markets. To the extent there are any legitimate competitive

* These comments express the views of Randolph J. May, President of the Free State Foundation and Seth L. Cooper, Adjunct Fellow of 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. We thank Cody Williams, Research Assistant, Free State Foundation, for his assistance. The Free State Foundation is an independent, non-profit free market-oriented think tank.

concerns, any conditions imposed to address them should be narrowly drawn so as not to lose the benefit to consumers of the intended pro-competitive efficiencies.

Already the proposed joint venture has engendered much commentary, and much of it consists of hyperbole and overheated rhetoric. It is important as the Commission moves forward in the merger review process for it to cut through empty rhetoric surrounding the proposed merger and to carry out its review function in a way that demonstrates it is focusing on the relevant facts in light of sound economic principles.

The Commission also needs to ensure the merger review process comports with sound principles of administrative law and fairness to the parties.[1] Particularly considering the opportunity for input provided by the Commission's public comment period, and the extension of the comment deadlines to allow additional time for public input, treating the parties fairly means the Commission should act without unnecessary delay. This means rejecting calls to conduct repeated "regulatory road shows," whereby the review process would be dragged out without providing the agency with additional meaningful input that could not be made known through public comments.

Moreover, acting under its vague "public interest" authority, the FCC should not impose any conditions on the applicants that do not relate directly to competitive impacts allegedly caused by the merger. To the extent the Commission believes new rules are necessary – a doubtful proposition in the current dynamic, competitive communications marketplace – the

---

[1] *See* Edward Lazarus, FCC Chief of Staff, Transcript of the Proceedings: Conversation on FCC's Policies and Processes, Free State Foundation's Annual Winter Telecom Policy Conference, at 30 (January 29, 2010): "... I know [Comcast is] here, that I have given my personal pledge, for whatever that's worth, to the parties that they will get a thorough, fair, and as expeditious as possible, consistent with being thorough, review...." Transcript Available at: http://www.freestatefoundation.org/images/Edward_Lazarus_Lunch_Session_-_Final.pdf.

agency should propose such rules in generic rulemaking proceedings, not through a back-door "regulation-by-condition."

II. REVIEW OF THE PROPOSED MERGER SHOULD BE ANCHORED IN DISCIPLINED ECONOMIC ANALYSIS OF ITS COMPETITIVE EFFECTS

First, it is important to make clear what the FCC's merger review process is, or ought to be, and what it is not, or ought not to be. In essence, the public interest determination should be an examination of the likely costs and benefits brought about by the proposed transaction based primarily upon sound economic analysis of potential competitive impacts. It ought not to be a politicized process, or a process dependent on gauging the "intensity" or the "numbers" of individuals or interest groups in favor of, or opposed to, the merger.

The Commission's merger review decisions are based largely on antitrust precedents which are informed by economic analysis that considers the likely efficiencies and harms arising from a particular merger to consumer welfare.[2] Antitrust precedents also have been used to establish the market definitions that the Commission has incorporated into prior merger reviews. The Commission should continue to rely upon these precedents.

The Commission's precedents recognize that a different set of likely efficiencies and harms to consumer welfare will be present depending on the type of transaction at issue. In particular, the potential competitive efficiencies and harms raised by a "horizontal" integration between two companies operating in the same market differ from the potential competitive

[2] *See* Thomas B. Leary, *Antitrust Economics: Three Cheers and Two Challenges* (2001): " People may not fully appreciate the extent to which economic analysis has become the dominant framework for resolving antitrust problems. Up to relatively recent times, there was a rigorous debate about possible alternative sources for antitrust decisions, like dispersion of political power, wealth transfer effects, and various social considerations, but economic analysis of consumer welfare effects has swept the board. Many who are reluctant to accept welfare economics as the sole objective of public policy seem to recognize that it provides the most practical guidance and is least likely to lead to arbitrary results." Available at: http://www.ftc.gov/speeches/leary/learythreecheers.shtm.

efficiencies and harms arising from a non-horizontal or "vertical" integration involving "firms that do not operate in the same market."[3] Commission precedents define the relevant market as:

> a product or group of products and a geographic area in which the product or products are produced or sold such that a hypothetical profit-maximizing monopolist would impose at least a "small but significant and nontransitory" increase in price, assuming the terms of the sale of all other products are held constant.[4]

As the Commission observed in the *Adelphia Order*, "vertical transactions, standing alone, do not directly reduce the number of competitors in either the upstream or downstream markets."[5] Rather, most antitrust concerns arise in horizontal mergers, mergers of two like companies.[6] As Professor Richard Epstein recently observed in a Free State Foundation *Perspectives* paper:

> Under the traditional analysis of a merger, the pro side consists of the efficiency gains that are obtained from the integration of the facilities of the two firms. The negative side, in turn, consists of the increase in market concentration to the extent that it allows the new firm to raise its prices above the competitive level. As a matter of basic theory, this risk may materialize in horizontal mergers, but rarely will appear in vertical ones, which involve the integration of two facilities or services at different levels in the chain of production.[7]

For example, if the only two, or two of a few, television manufacturers attempt to merge or if the only two, or two of a few, delivery companies attempt to merge, the potential competitive harm is apparent. The merged entity would have a larger market share, which could

---

[3] Department of Justice, *Non-Horizontal Merger Guidelines,* at 1 (1984) http://www.justice.gov/atr/public/guidelines/2614.pdf

[4] *News-Corp.-Hughes Order,* 19 FCC Rcd 473, 500 (2004) (citing and quoting *Horizontal Merger Guidelines,* § 1.0).

[5] *Adelphia Order,* 21 FCC Rcd 8203, 8238 (2006). *See also, e.g., News-Corp.-Hughes Order*, 19 FCC Rcd at 624-625 ("vertical integration is less likely than horizontal integration to have anticompetitive effects").

[6] The framework for horizontal mergers is also the subject of more scrutiny than that of vertical mergers. The guidelines for vertical mergers number only 8 pages in length and they have not been updated since 1984. The guidelines for horizontal mergers, aside from the initial 1984 guidelines, were updated in 1992 and 1997, and the Department of Justice and Federal Trade Commission have recently jointly released a new version of the horizontal guidelines for comment. For a quick overview of the proposed guidelines, *see* Josh Wright, *Proposed Merger Guidelines Released,* http://www.truthonthemarket.com/2010/04/20/proposed-merger-guidelines-released/.

[7] Richard A. Epstein, "The Comcast and NBCU Merger: The Upside Down Analysis of Dr. Mark Cooper," *Perspectives from FSF Scholars*, Vol. 5, No. 4, at 1 (February 12, 2010), available at: http://www.freestatefoundation.org/images/The_Comcast_and_NBCU_Merger.pdf.

allow it to charge higher rates and/or degrade service quality. With a vertical integration, however, these concerns are alleviated because the merged entity is growing "up" instead of "across."

Accordingly, the Commission should continue to adhere to its precedents recognizing the significant differences between vertical and horizontal integrations, including the potential pro-competitive efficiencies and anti-competitive harms posed by each. Simply put, anticompetitive concerns relating to horizontal integrations are not present in vertical integrations. And in analyzing vertical integrations the Commission should be careful not to adopt a heavy-handed approach that would undermine the pro-competitive efficiencies attainable by vertical integrations. Instead, if the Commission believes that a vertical integration presents either of the two unlikely and narrow classes of "foreclosure" harms recognized in its precedents, it should narrowly tailor any remedies to address only such harms — and only after determining that such remedies would not cause greater potential harms than those posed by the proposed transaction itself.[8]

Significant for the Commission's analysis of the proposed transaction, agency precedents recognize both a distribution market of programming to consumers and a market for the acquisition of network programming.[9] These Commission precedents recognizing the respective dynamics of the distribution and programming content markets should guide the analysis concerning whether the proposed transaction is primarily a horizontal integration transaction or

---

[8] *See* Christine A. Varney, Commissioner, Fed'l. Trade Comm'n., PLI 36th Annual Antitrust Institute, *Vertical Merger Enforcement Challenges At The FTC* (July 17, 1995): "As a part of the FTC's case-by-case analysis, antitrust enforcers must take great care when considering the nature and extent of the remedy in vertical merger cases. Since many vertical mergers result in procompetitive efficiencies, we must craft relief narrowly to permit procompetitive efficiencies to come to fruition whenever possible." Available at: http://www.ftc.gov/speeches/varney/varta.shtm.

[9] *News Corp.-Hughes Order*, 19 FCC Rcd at 500; *Adelphia Order*, 21 FCC Rcd at 8234.

primarily a vertical integration. It should be clear that the proposed transaction is primarily a vertical integration.

As a general matter, the proposed transaction will combine NBCU's programming and online content with Comcast's cable and Internet distribution. In Professor Epstein's words:

> To be sure, there are some horizontal components to the merger, which could be met by a partial divestiture in some local markets if the concentration levels are thought to move too high. But the vast bulk of this transaction lies on the vertical side of the line, which involve the linkage of a transmission company — Comcast — with a content company — NBC Universal.[10]

Since the parties to the proposed transaction operate in different segments of the media value chain, the proposed transaction is primarily a non-horizontal or "vertical" integration of "firms that do not operate in the same market."[11]

Although Commission precedents recognize that anticompetitive harms are less likely in vertical integrations than in horizontal ones,[12] in the *NewsCorp-Hughes Order*, the agency recognized the possibility of anticompetitive harms arising from vertical integrations in two limited ways. First, anticompetitive harm is a possibility where vertical integration creates a new entity with sufficient market power in the programming distribution market that the new entity can foreclose access to its distribution network by refusing to buy programming from unaffiliated programmers.[13] Second, anticompetitive harm is a possibility where a vertical integration allows the new entity to discriminate against or refuse to sell its programming to unaffiliated distributors in order to gain a competitive advantage over its rival distributors.[14]

In considering the possibility of competitive harms arising from the proposed joint venture, the Commission must be very mindful of the video marketplace's rapid transformation

---

[10] Richard Epstein, "The Comcast and NBC Merger," *Perspectives from FSF Scholars*, Vol. 5, No. 4, at 2.
[11] *See* fn.3, *infra*.
[12] *See* fn 5, *infra*.
[13] *NewsCorp-Hughes Order*, 19 FCC Rcd at 473, 520.
[14] *Id*. at 524.

through innovation and competition. At a much earlier point in time, foreclosure concerns relating to vertically integrated programming distributors had greater plausibility. During the days when traditional over-the-air broadcasters and perhaps a single cable operator served a particular territory, carriage on the cable operator's system likely was a matter affecting the financial fate of unaffiliated network and independent programmers. But, today, there are a multitude of program competitors and an increasing variety of distribution channels. According to the applicants, upon completion of the proposed transaction, the new NBCU will have about 12% of the overall national cable network advertising and affiliate revenues, and approximately six out of seven networks carried by Comcast Cable will be unaffiliated with Comcast or the new NBCU.[15] As the U.S. Court of Appeals for the District of Columbia Circuit observed last fall in *Comcast v. FCC*, "the record is replete with evidence of ever increasing competition among video providers…Cable operators, therefore, no longer have the bottleneck power over programming that concerned the Congress in 1992."[16]

In addition to cable operators, most areas are served by two viable satellite companies that compete with cable on a nationwide basis. Meanwhile, telecommunications companies have also entered the video marketplace to provide competing services. These developments constrain the ability of vertically integrated programming distributors to successfully exclude competitors from the market to the detriment of consumers.

Other trends demonstrate a transformative media marketplace unlike any which has existed in years past. Over 95% of Americans have access to broadband – and the ability to

[15] Applications and Public Interest Statement, *In the Matter of Applications for Consent to the Transfer of Control of Licenses: General Electric Company, Transferor, to Comcast Corporation, Transferee*, MB Docket 10-56 (filed January 28, 2010), at. iv.
[16] *Comcast v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

access video online.[17] Hulu or YouTube, unknown only a handful of years ago, now are widely known as alternative online outlets for consumers to access video programming and other content. With the continuing deployment of high-speed broadband, we face the possibility of future "Internet-only" households whose residents have migrated completely away from cable, DBS or other video services and who instead access all of their video content online or through retail outlets.

One example of these new methods of distribution is the success story of *Dr. Horrible*. The show was well-received: It won a People's Choice award, and *Time* named it as the fourth best television show in 2008.[18] The irony – and the instructive lesson for present purposes – is that *Dr. Horrible* was never broadcast on television, or even available initially on any TV connected to a DVD player. That is because the show was "broadcast" initially only on a single website. Later it became available on Hulu. Later still it became available as a download in the Apple iTunes store. Eventually, it was made available as a DVD through Amazon. Of course, none of this would have been predictable just five years ago, even to those in the marketplace who are always attempting to create innovative new products and services. Suffice it to say, the FCC commissioners and agency staff generally are no more adept, if as adept, at predicting the evolution of markets in the fast-changing communications environment.

Interestingly, even Public Knowledge, not known for its free market views, recently had this to say to the Commission:

> Today, by contrast, broadcasters enjoy distribution options beyond the cable incumbent in nearly every designated market area ("DMA"). Two national direct broadcast satellite ("DBS") providers, DIRECTV and

---

[17] Amy Schatz, "Nearly 20% of U.S. is 'Digitally Uncomfortable' or 'Digitally Distant,' FCC Says," Digits: Technology News and Insights (February 23, 2010), available at: http://blogs.wsj.com/digits/2010/02/23/nearly-20-of-us-is-"digitally-uncomfortable"-or-digitally-distant-fcc-says/

[18] Josh Catone, "Dr. Horrible: The Future of Television," SitePoint (January 17, 2009), available at: http://www.sitepoint.com/blogs/2009/01/14/dr-horrible-the-future-of-television/.

> DISH Network, are the second and third largest distributors of video programming nationwide. Local exchange carriers ("LECs") such as Verizon (FiOS) and AT&T (U-verse) are new entrants in the video marketplace and are adding hundreds of thousands of video customers each quarter. And the Internet is developing into yet another viable platform for broadcasters to distribute their content to consumers.[19]

The Commission should keep in mind the dynamic, competitive nature of today's video market when undertaking its analysis. No one can predict the future, and it is impossible for anyone to predict the exact outcome of a merger. Business models change quickly in such a dynamic market, and Schumpeter's "creative destruction" is the norm.[20] Accordingly, the Commission must avoid a backward-looking view that bears little relationship to the present communications marketplace.

While perhaps they no longer are necessary in today's competition environment, nevertheless it is true that there are existing regulatory mechanisms that address potential foreclosure concerns. First, pursuant to Section 616 of the Communications Act, the Commission has adopted rules that, among other things:

[19] Public Knowledge, et al., *Petition for Rulemaking to Amend the Commission's Rules Governing Retransmission Consent*, MB Docket No. 10-71 (filed March 9, 2010,) at 4-5. The petition was filed by Public Knowledge and thirteen other parties.

[20] *See* Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (3d ed.) at 83 (1950): "The opening up of new markets, foreign or domestic, and the organizational development from the craft shop and factory to such concerns U.S. Steel illustrate the same process of industrial mutation—if I may use that biological term—that incessantly revolutionizes the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism. It is what capitalism consists in and what every capitalist concern has got to live in."

For further insights in this regard, *see, e.g*., Richard A. Epstein, "The Dogmatic Posture of a Consumer Advocate: A Second Response to Mark Cooper," *Perspectives from FSF Scholars*, Vol. 5, No. 6, at 5-6 (March 15, 2010): "It may well be that this merger will crater like the Time Warner/AOL deal. But that is not an antitrust concern, but a sober reminder that bigger is not always better, and that even sophisticated business parties can make mistakes in gauging the gains from trade and the future direction of markets. But it is precisely because all mergers face economic pressures of self-correction that we should regulate them with a light hand." Available at: http://www.freestatefoundation.org/images/The_Dogmatic_Posture_of_a_Consumer_Advocate.pdf. *See also*, e.g., Thomas W. Hazlett, Prepared Testimony of Thomas W. Hazlett, Panel on the Comcast-NBCU Venture, U.S. House of Representatives, Judiciary Committee (February 25, 2010) at 3:"The simple fact is that no one fully understands where today's tide is headed. Cable operators do not know if they need fear Verizon or EchoStar, Google or Apple. Time Warner believes that splitting its cable operations from its program ownership is the best way to prepare for the coming storm. Comcast has come to a much different conclusion. Markets allow these rival strategies to be tested and winning strategies rewarded. I wish Comcast and General Electric shareholders well in their educated guesses." Available at:, http://judiciary.house.gov/hearings/pdf/Hazlett100225.pdf.

> prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.[21]

The Commission's program carriage rules include a complaint process under which programmers can seek redress where violations of the rules are alleged.[22]

Second, Section 628 of the Communications Act and implementing program access regulations make it:

> unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.[23]

Also, although the Commission concluded in the *Adelphia* and *NewsCorp-Hughes* orders that a vertically integrated cable or DBS provider might have an incentive to foreclose *temporarily* regional sports network (RSN) access to competing distributors, the Commission has *not* held that cable or DBS providers have the incentive to engage in *permanent* foreclosure. Moreover, Comcast is not acquiring any RSNs in the proposed merger.[24]

In addition to analyzing carefully the extent to which existing statutory requirements and regulations address any potential anticompetitive harms raised by the proposed transaction, the Commission should also take into account the commitments offered in Comcast's application meant to address any concerns about potential vertical foreclosure harms arising from the transaction. These include Comcast's commitments to "add two new independently-owned and

[21] 47 U.S.C. § 536(a)(3).
[22] *Id.*at § 536(a)(4).
[23] 47 U.S.C. § 548(b).
[24] *See* Applications and Public Interest Statement, MB Docket 10-56, at 122.

–operated channels to its digital line-up each year for the next three years on customary terms and conditions);[25] apply “program access rules to the high-definition (HD) feeds of any network whose standard definition (SD) feed is subject to the program access rules for as long as the Commission’s current program access rules remain in place”);[26] and “extend the key components of the FCC’s program access rules to negotiations with MVPDs for retransmission rights to the signals of NBC and Telemundo O&O stations for as long as the Commission’s current program access rules remain in place”).[27]

III. THE REVIEW PROCESS SHOULD AVOID IMPOSING CONDITIONS APPROPRIATE FOR GENERAL RULEMAKINGS AND SHOULD BE DATA-DRIVEN, NOT DISTRACTION-RIDDEN

Too often in the past, the Commission has allowed its merger review process to drag on far too long, with its consideration of the XM-Sirius transaction only the most recent example. And just as often, unfortunately, it has allowed the process to become unseemly. Increasingly, the agency has engaged in a practice, as the deadline for acting on the merger nears, of extracting so-called “voluntary” conditions from the applicants. Often, these "voluntary" commitments are unrelated to any merger-specific competitive concerns. The Commission should eschew this practice in carrying out this merger review, and it should also avoid letting the process become overwhelmed by overheated rhetoric having nothing to do with economic analysis of the competitive effects of the proposed transaction.

[25] *Id*., at 112 (“Commitment #13”)
[26] *Id*, at 117 (“Commitment #14”).
[27] *Id*, at 121 (“Commitment #15”).

Agency delay is harmful to the merging parties and to consumers that stand to gain from efficiencies and economies of scale.[28] In a competitive, dynamic market, such delay is also harmful to the consumers who would otherwise benefit from improved services or prices provided by the merged entity. As the Department of Justice's Antitrust Division Chief has observed, "the vast majority of mergers are either procompetitive and enhance consumer welfare or are competitively benign."[29] Even where a proposed merger poses real anticompetitive concerns, prompt and decisive agency decisionmaking gives the merging parties finality and lets them turn their attention elsewhere. Agency delays keep potential merging parties in a state of suspended animation.

The Commission should not use its merger review process to bring about "regulation-by-condition."[30] 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.[31] This misguided approach has resulted in conditions extraneous to any potential harm posed by the transaction. And given the precarious position of merging parties who have endured lengthy administrative delay in receiving a decision from the Commission, the

[28] This paragraph draws on insights from Seth L. Cooper, "FCC's Slow-Motion Merger Review," FSF Blog (October 12, 2009), available at: http://freestatefoundation.blogspot.com/2009/10/fccs-slow-motion-merger-review.html.

[29] Christine A. Varney, Third Annual Georgetown Law Global Antitrust Enforcement Symposium (September 22, 2009), available at: http://www.justice.gov/atr/public/speeches/250238.htm.

[30] *See* Randolph J. May, "Any Volunteers? The FCC unfairly regulates 'by condition' when it extracts concessions from merging telecom companies," *Legal Times* (March 6, 2000), available at: http://www.freestatefoundation.org/images/Any_Volunteers--Legal_Times.pdf.

[31] *See, e.g., In the Matter of AT&T Inc. and BellSouth Corporation, Application for Transfer of Control*, 22 FCC Rcd 5662 (2007), Appendix F: Merger Commitments: Net Neutrality. *See also, e.g.*, Seth L. Cooper, Process Problems Plague FCC Review of Harbinger Merger, FSF Blog (May 3, 2010) ("In sum, the FCC claimed for itself authority to bind not only the mobile satellite service providers that are parties to the transaction but also a power of sole discretionary approval of future business deals involving non-parties to the merger"), available at: http://freestatefoundation.blogspot.com/2010/05/process-problems-plague-fcc-review-of.html; Seth L. Cooper, "FCC Regulating Outside Its Orbit," FSF Blog (April 1, 2010), available at: http://freestatefoundation.blogspot.com/2010/04/fcc-regulating-outside-its-orbit.html.

voluntariness of so-called "voluntary" conditions is highly suspect.[32] Conditions imposed through secretive "Let's Make A Deal"-style negotiations are inconsistent with a data-driven process rooted in economic analysis, and they are inconsistent with fundamental principles of administrative law and due process. They erode the public's confidence in the Commission's work.

"Regulation-by-condition" is particularly problematic because it "unfairly singles out merger applicants for regulation that, if justified at all, should be applied on an industrywide basis."[33] Specific conditions not tied to anticompetitive harms put merging parties at a disadvantage relative to competitors. The Commission recently displayed sensitivity to this concern in the *AT&T-Centennial Order*. There the Commission rejected comments proposing merger conditions — barring handset exclusivity arrangements — the Commission ultimately determined were more appropriate for consideration in a generic proceeding: "We find that the proposed conditions prohibiting exclusive handset arrangements are not narrowly tailored to prevent a transaction-specific harm, but apply broadly across the industry and are more appropriate for a Commission proceeding where all interested industry parties have an opportunity to file comments."[34]

---

[32] For example, Bryan Tramont, then legal advisor to FCC Commissioner Harold Furchtgott-Roth, had this to say about the license transfer process at the FCC in 2000: "In many cases, all the other transaction processes have been completed long before the FCC signals its intentions. Companies — facing pressure from all quarters to close the transaction — feel they have little choice but to come calling on the Commission, hats in hand, prepared to "voluntarily" do almost anything to close the deal. In the end, the current Commission often insists on extensive "voluntary" license-transfer conditions. These conditions are based on some vague sense of competition and antitrust policy — areas clearly and effectively dealt with by the Justice Department or the Federal Trade Commission." Bryan Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary" Agreements*, 53 FED. COMM. L.J. 49, 57 (2000).

[33] *Id.*

[34] *In the Matter of Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, WT Docket No. 08-246 at 58, para. 141 (2009), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-09-97A1.pdf.

The Commission should likewise reject calls for a string of "regulatory roadshows."[35] While there is nothing inherently wrong with having a few public hearings around the country if the Commission does not allow them to delay its review process, in truth, such public hearings add little or nothing to the record that the regular comment process cannot accommodate. Indeed, "[e]ngaging in such a process is likely to turn consideration of the merger into distracting opportunities for showmanship that add no information to the record that cannot be supplied through normal processes."[36] Harm to competition is determined primarily by rigorous economic and technical analysis, not overheated rhetoric.

The Commission also should avoid giving undue weight to "form letters." "Although mass form letter-writing campaigns may be a relevant consideration in a purely legislative process…it is inappropriate for them to be given such decisional weight in the consideration of an adjudicatory decision that should be grounded, in significant part, on expert economic and technical analysis."[37] Such letters add essentially nothing of substance to the merger's docket. While the Commission may not choose to ignore such participation, its consideration of the merger should not be affected in any material way by the number of form letters submitted or the number of attendees on one side or the other at a public hearing. The merger's effect on competition should remain at center stage.

Ultimately, the Commission will best use its resources if it largely refrains from duplicating the merger review processes performed by the Department of Justice. This is not a new suggestion. In fact, the Antirust Modernization Committee suggested this approach in

[35] *See* John Eggerton, *Comcast-NBCU: FCC's Clyburn Calls for Field Hearings on Merger* (May 11, 2010), available at: http://www.broadcastingcable.com/article/452529-Comcast_NBCU_FCC_s_Clyburn_Calls_for_Field_Hearings_on_Merger.php

[36] Randolph J. May, "Unreasonable Tactics, Reasoned Decisionmaking, and the Rule of Law at the FCC," FSF Blog (May 25, 2010), available at: http://freestatefoundation.blogspot.com/2010/05/unreasonable-tactics-reasoned.html.

[37] *Id.*

2007,[38] and others have suggested as much.[39] As the process now stands, the Commission spends valuable time and effort duplicating much of the same analysis done by the DOJ. This duplication needlessly wastes valuable resources and drags out the Commission's own review. The Commission would improve its process if it would rely substantially on DOJ's institutional expertise to analyze competitive impacts.

IV. CONCLUSION

The Commission should act consistently with these comments with respect to the substance of its review as well as the process employed.

Respectfully submitted,

Randolph J. May
President

Seth L. Cooper
Adjunct Fellow

The Free State Foundation
P. O. Box 60680
Potomac, MD 20859
301-984-8253

June 21, 2010

[38] *See* "AMC Seeks End to Duplicative FCC Antitrust Merger Reviews," *Tech Law Journal* (April 3, 2007), available at: http://www.techlawjournal.com/topstories/2007/20070403.asp (brief summary). An archived copy of the report is available at: http://govinfo.library.unt.edu/amc/report_recommendation/introduction.pdf. *See also* May, "Any Volunteers?" *Legal Times* ("most productive approach would be to require the FCC to rely presumptively on the competitive analysis of the DOJ or the FTC").

[39] *See* Philip J. Weiser, *Reexamining the Legacy of Dual Regulation: Reforming Dual Merger Review by the DOJ and the FCC*, 61 FED. COMM. L. J. 1, note 3 (2008).