Federal Trade Commission
600 Pennsylvania Avenue NW
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U.S. Department of Justice Antitrust Division
450 5th St NW # 8700
Washington, DC 20530

Re: Request for Information on Merger Enforcement

COMMENTS OF
THE FREE STATE FOUNDATION

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I. Introduction and Summary

These comments are submitted in response to the Request for Information on Merger Enforcement (RFI) issued on January 18, 2022, by the Federal Trade Commission (Commission) and the Department of Justice Antitrust Division (the agencies). The RFI and recent statements by the Commission's majority suggest an intention to diverge from past guidelines' case-by-case merger review process that weighs the totality of the circumstances – particularly merger-specific efficiencies – among other contextual factors such as market structure and dynamic innovation. The agencies should not abandon that proven approach. To explain why, the Free State Foundation, which focuses primarily on communications and Internet law and policy, below provides its perspective on some of the issues raised in the RFI.[1]

First, the RFI questions whether "the guidelines reflect the best evidence regarding how often mergers in fact achieve the cost savings and other benefits claimed by merging parties" and requests "examples of cases where merger-specific efficiencies were, in fact, realized . . . ." In response, we discuss at length the T-Mobile/Sprint merger, which exemplifies the probative value of an efficiency-centered, case-by-case approach. As predicted, that merger already has led to substantial pro-consumer efficiencies, including expedited deployment of next generation 5G service, network quality improvements, and continued downward pressure on prices. It also has confirmed the folly of relying on narrow market definitions in complex, dynamic markets. Indeed, that no consumer harm resulted is likely because, viewed through the appropriate lens –

[1] These comments express the views of Randolph J. May, President of the Free State Foundation, Andrew Long, Senior Fellow, and Andrew K. Magloughlin, Legal Fellow. They do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is a nonpartisan, non-profit free market-oriented think tank.

that is, the broader "broadband market" rather than the outdated mobile-only market – the T-Mobile/Sprint merger did not constitute a "4-to-3" merger as some alleged.

Next, we address guideline revisions for vertical mergers. First, the decision to revoke the 2020 Vertical Merger Guidelines placed businesses in a state of uncertainty. Second, any revised guidelines should not adopt presumptions of harm. There is no clear empirical evidence that vertical mergers are harmful on net. But there are numerous examples where predictions of harm have not materialized, including the AT&T/Time Warner, Comcast/NBC Universal, and AOL/Time Warner mergers, combinations with which Free State Foundation scholars are very familiar. The inaccuracy of those often overheated pre-merger prognostications of harm confirms that a case-by-case approach remains preferable to presumptions of harm for vertical mergers.

Further, for vertical mergers, the guidelines should continue to consider efficiencies, despite FTC Chair Lina Khan's statements indicating otherwise. Free State Foundation scholars, who supported a broader consideration of efficiencies in the 2020 Vertical Merger Guidelines proceeding, believe that merger-specific efficiencies are a valuable indicator of future consumer benefits and therefore should continue to play a central role in evaluating proposed transactions.

Moreover, heightened skepticism of vertical mergers would fail to achieve its goal while distorting business decisionmaking. Merger is only one form of vertical integration, so if the agencies want to reduce vertical integration, they would need to embark on the impossible mission of policing business inventories for contractual and home-grown vertical integration, as well. Otherwise, the practical result would be to distort business decisions to prefer less efficient, costlier arrangements than merger solely to avoid antitrust scrutiny.

Lastly, we make two points about digital markets. Use of overly-narrow market definitions in highly dynamic digital markets risks, to a greater extent than in other contexts,

underestimating the extent of competition. The Sirius/XM merger should inform the agencies in this respect. Critics of that merger said it would create a monopoly in the "satellite radio market," but disruptive, dynamic competition from online streaming ventures and other non-satellite entrants were looming on the horizon. The FCC therefore should have considered, and approved, the merger within the context of the broader "audio entertainment market." Instead, the FCC focused solely on satellite radio, and concluded that conditions were necessary – conditions that, shortly thereafter, it removed due to increasing competition from other available audio formats. The agencies should apply that lesson to digital platform markets, where competition occurs primarily based on differentiated and frequently updated product features, and potential impacts are mitigated by zero-pricing and multihoming.

We also agree with FTC Commissioner Noah Phillips that, in the case of so-called "killer acquisitions," the unique potential for a nascent competitor to compete with an acquiring monopolist, even where it appears the proposed transaction could generate substantial efficiencies, in narrow circumstances may warrant a more proactive approach. In our view, this is particularly so in digital markets defined by strong network effects. Revised guidelines therefore could favor enforcement in such narrow circumstances.

II. The T-Mobile/Sprint Merger Exemplifies the Wisdom of an Efficiency-Centered, Case-by-Case Approach

The RFI poses questions seemingly designed to justify a departure from the case-by-case merger review process that considers efficiencies along with market history, structure, and other contextual factors. That fact-intensive approach, which the 2010 Horizontal Merger Guidelines embodied, has benefitted consumers. We provide the following discussion of the T-Mobile/Sprint merger as proof thereof. In just a few short years, that merger, which was

vigorously opposed, already has provided substantial benefits to consumers, including rapid deployment of 5G service, improved network quality, and continued downward pressure on prices.

a. The T-Mobile/Sprint Merger Has Delivered Substantial Efficiencies, Including Expedited 5G Deployment, Better Network Performance, and Pricing Constraints

The T-Mobile/Sprint merger is a prime example where consumers are benefiting from the realization of asserted merger-specific efficiencies.[2] As promised, the combined company has expedited its rollout of next-generation 5G service, substantially improved network performance, and continued downward pressure on prices.[3]

Prior to the merger's approval, the Free State Foundation filed comments with the FCC predicting that the merger would result in substantial efficiencies. The comments explained that, absent the merger, only AT&T and Verizon appeared financially capable of deploying nationwide 5G networks in a timely manner.[4] At that time, AT&T and Verizon each served more than 30% of wireless broadband customers,[5] percentages that may have increased absent the merger.

As individual carriers, both T-Mobile and Sprint faced substantial, but unique, barriers to deploying a nationwide 5G network.[6] Sprint's lack of low-band spectrum, which is necessary to cover rural areas and rough terrains, would have restricted Sprint's 5G networks to urban areas.

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[2] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Request for Information on Merger Enforcement, Docket No. FTC-2022-0003, at 14.b. (Jan. 18, 2022) (*RFI*).
[3] Comments of the Free State Foundation, WT Docket No. 18-197, at 4, 16-17 (Aug. 27, 2018), https://freestatefoundation.org//wp-content/uploads/2019/08/FSF-Comments-T-Mobile-Sprint-Merger-082718.pdf (*FSF T-Mobile/Sprint Comments*); *see also* New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 206 (S.D.N.Y. 2020) (*Deutsche Telekom*).
[4] FSF T-Mobile/Sprint Comments, at 4, 16-17.
[5] Free State Foundation scholars disagreed, and continue to disagree, with "wireless broadband" as the appropriate market, which should have instead been the "broadband market." *Id.* at 3; *infra* Section II.b.
[6] *See* FSF T-Mobile/Sprint Comments, at 6.

And its deteriorating financial standing raised serious questions as to whether it even could find the capital necessary to deploy 5G at all.[7] T-Mobile lacked both the mid-band spectrum needed for a nationwide 5G network and the size necessary realistically to compete with AT&T and Verizon in spectrum auctions and infrastructure deployment.[8]

FSF's comments also explained how, separate from the introduction of 5G service, the combined network resulting from the merger would provide users with speeds and capacities magnitudes greater than possible on either individual network.[9] And the merged network would deliver that superior service over a greater coverage area. By combining the two companies' spectrum assets, the merger benefited competition through improved service quality and the creation of a third robust option for 5G service, for which FSF scholars predicted exploding consumer demand. That prediction has proven out, with 54 million 5G connections added in North America just last year.[10]

Judge Victor Marrero echoed our assessment of merger-specific efficiencies while reviewing the T-Mobile/Sprint merger under Section 7 of the Clayton Act. Applying the case-by-case contextual analysis of the Horizontal Merger Guidelines, he found that the merger-specific efficiencies of expedited 5G deployment, improved network quality, and input cost reductions were persuasive and far more likely to occur than harm to consumers.[11] He wrote:

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[7] FSF T-Mobile/Sprint Merger Comments, at 15-16; Reply Comments of the Free State Foundation, WT Docket No. 18-197, at 2 (Sept. 17, 2018), https://freestatefoundation.org//wp-content/uploads/2019/08/FSF-Reply-Comments-T-Mobile-Sprint-091718.pdf ("Although Sprint announced plans for capital expenditures of $5 to $6 billion in 2018, [market analyst Craig Moffett] reacted: 'To state the obvious, this is money that Sprint doesn't have.'").
[8] FSF T-Mobile/Sprint Merger Comments, at 16-17.
[9] *Id.* at 2.
[10] *See, e.g.*, Seth Cooper, "Data Shows 5G Network Connections Surged Again in 2021," *FSF Blog* (Mar. 24, 2022), http://freestatefoundation.blogspot.com/2022/03/data-shows-5g-network-connections.html.
[11] Deutsche Telekom, 439 F. Supp. 3d at 208 ("[T]his Court will consider evidence of efficiencies, given courts' and federal regulators' increasingly consistent practice of doing so, and because Section 7 requires evaluation of a merger's competitive effects under the totality of the circumstances.").

> These cases and the record evidence confirm that there is substantial merit to . . . claims that the efficiencies arising from the Proposed Merger will lead T-Mobile to compete more aggressively to the ultimate benefit of all consumers, and in particular the subscribers of each of the four major competitors. Sprint customers would benefit from greater coverage, T-Mobile customers would benefit from greater speeds and 5G service sooner. And even AT&T and Verizon customers would benefit insofar as New T-Mobile continued T-Mobile's past practice of pushing AT&T and Verizon to adopt pro-consumer offerings.[12]

More than two years have passed since consummation of the T-Mobile/Sprint merger, and it appears that FSF's predictions have proven accurate. According to *OpenSignal*, T-Mobile's 5G network has been the fastest in the country for five consecutive quarters.[13] *OpenSignal* also reports that T-Mobile's 5G network has the best coverage and fastest speeds, averaging 150 mbps.[14]And critically, T-Mobile's mobile wireless prices are still the lowest of the three biggest carriers.[15]

Moreover, the Consumer Price Index shows that real wireless broadband prices are declining industry-wide,[16] indicating that the merger did not lead to anticompetitive price coordination, explicit or tacit, among the major carriers.[17] To the contrary, it appears that post-merger T-Mobile's fast, low-price service continues to exert downward pressure on prices.

The efficiencies and consumer welfare enhancement resulting from the T-Mobile/Sprint merger caution against abandoning the case-by-case approach that considers a totality of the circumstances, including industry context and, in particular, potential efficiencies. A lessening of

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[12] *Id.* at 210.
[13] Opensignal, "5G Experience Report" (Jan. 2022), https://www.opensignal.com/reports/2022/01/usa/mobile-network-experience-5g.
[14] *Id.*
[15] Monica Alleven, *T-Mobile's Pricing Propels Lead in Analyst's Latest Ranking*, FIERCE WIRELESS (Dec. 8, 2021), https://www.fiercewireless.com/wireless/t-mobiles-pricing-gives-it-leg-analysts-latest-ranking.
[16] Consumer Price Index – February, 2022, Bureau of Labor Statistics (Mar. 10, 2022), https://www.bls.gov/news.release/pdf/cpi.pdf; Nicholas Jasinski, *Wireless Services Are Defying Inflation. Here's Why.*, BARRON'S (Feb. 10, 2022), https://www.barrons.com/articles/wireless-bill-inflation-51644516899.
[17] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines, at § 7 (2010).

the role that efficiencies play would make it more likely that pro-competitive mergers with strong consumer benefits, like the T-Mobile/Sprint merger, would be prohibited. Consumers and the nation's economy both would suffer from a reversion to the trite statistics-only merger review process that the Supreme Court rejected in *General Dynamics*.[18]

b. The T-Mobile/Sprint Merger Shows the Folly of Overly-Narrow Market Definitions in Complex, Dynamic Markets

Another reason why the T-Mobile/Sprint merger has not caused the predicted harms is that those predictions rested upon a flawed product market definition. FSF scholars opposed evaluation of the T-Mobile/Sprint merger under a narrow "retail mobile wireless telecommunications service" market definition because it failed to capture the dynamism of the broadband marketplace.[19] Mobile broadband carriers and fixed broadband providers increasingly compete, as 5G deployment and improvements to mobile and Wi-Fi speeds have made the services more substitutable than ever.[20] And the broadband market includes choice between bundles of multiple communications services as well as individual standalone offerings, not a simple comparison between standalone wireless plans.[21]

Within the past few years, service providers once thought of as exclusively mobile and exclusively fixed have expanded their offerings – and, as a result, increasingly compete with one another, often via one-stop packages that deliver robust connections both inside the home and on

[18] United States v. General Dynamics Corp., 415 U.S. 486, 498 (1974) (quoting Brown Shoe v. United States, 370 U.S. 294, 321-322 (1962)) ("Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market – its structure, history and probable future – can provide the appropriate setting for judging the probable anticompetitive effect of the merger.").
[19] FSF T-Mobile/Sprint Comments, at 3.
[20] Seth L. Cooper and Andrew K. Magloughlin, "The Broadband Internet Services Market in January 2022: 5G, Cable, Fixed Wireless, Wi-Fi 6, and Fiber Are Benefitting Consumers," *Perspectives from FSF Scholars Vol. 17, No. 5* (Jan. 5, 2022).
[21] Deutsche Telekom, 439 F. Supp. 3d at 235 ("[P]rice is not the only dimension on which competition occurs [in the mobile broadband market].").

the go. Leading wireline Internet service providers like Comcast and Charter now leverage their ubiquitous Wi-Fi hotspots, supplemented with wholesale mobile service, in order to bundle low-price wireless service with their fixed broadband subscriptions, and they have each rapidly attracted millions of wireless customers.[22] And mobile broadband carriers like T-Mobile and Verizon now offer fixed wireless service that, in a technologically neutral fashion, provide an alternative in-the-home high-speed Internet access solution. Given the increasing cross-substitutability of the services, marketed historically by "wired" and "wireless" service providers, it is apparent that a narrow and antiquated wireless-only product market definition fails to account for the full consumer benefit that the merged T-Mobile provides.

Thus, while we agree with Judge Marrero's holding that the T-Mobile/Sprint merger likely would not harm consumers even under the narrow "retail mobile wireless telecommunications service" market definition, we contend that the characterization of the transaction as a "4-to-3 merger" improperly ignored the full extent of competition in the broadband market, the proper market for assessing the competitive impact of the merger.[23] In reality, the combined company competes with countless other wireline and wireless providers in a technology agnostic "broadband market," making it far from a "4-to-3" merger.

Narrow market definitions, especially those based on legacy service distinctions, thus risk ignoring relevant competition in dynamic, innovative markets. We recognize that use of narrow market definitions may appear to be a superficially enticing tool for accomplishing Chair Khan's

[22] Comcast and Charter now have 3.67 million and 3.2 million mobile broadband subscribers, respectively. Cooper and Magloughlin, *supra* note 20. At the time of the Free State Foundation's T-Mobile/Sprint Comments, Comcast had 577,000 mobile broadband subscribers and Charter had just launched its service. FSF T-Mobile/Sprint Comments, at 8.
[23] Deutsche Telekom, 439 F. Supp. 3d at 223.

goal of reducing "consolidation."[24] But as the T-Mobile/Sprint merger exemplifies, an accurate assessment of the consumer benefits arising from a transaction hinge upon market definitions that include all competitors and potential competitors.

III. Revised Vertical Merger Guidelines Should Reject Presumptions of Harm and Continue to Weigh Efficiencies

In 2020, the FTC adopted helpful revisions to the Vertical Merger Guidelines that embraced suggestions made by Free State Foundation President Randolph May and Board of Academic Advisors member Theodore Bolema. However, in September 2021, after a change in administration, the Commission withdrew those guidelines – and, along with them, clarity and guidance for transacting businesses.[25] The RFI signals a dramatic change of course, specifically a plan to adopt presumptions of harm and substantially reduce the weight given to efficiencies.[26] Both are bad ideas that will distort business decisionmaking.

a. Revised Guidelines Should Not Adopt Vertical Presumptions of Harm

Revised merger guidelines should not establish "specific metrics or observable features of a transaction, firm, or market" that would create vertical presumptions of harm.[27] Generally, vertical mergers raise fewer competitive concerns than horizontal mergers because vertical

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[24] *See* Remarks of Lina M. Khan Regarding the Request for Information on Merger Enforcement, Chair, Fed. Trade Comm'n, at 1 (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf.
[25] Noah Joshua Phillips & Christine S. Wilson, Comm'rs, Fed. Trade Comm'n, Dissenting Statement Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596388/p810034phillipswilsonstatementvmgrescission.pdf (Phillips & Wilson Dissent on Vertical Mergers).
[26] Lina M. Khan, Rohit Chopra, & Rebecca Kelly Slaughter, Chair & Comm'rs, Fed. Trade Comm'n, Statement on the Withdrawal of the Vertical Merger Guidelines (Sept. 15, 2021) (Majority Statement on Vertical Mergers) ("The 2020 VMGs contravene the text of the statute, devoting a whole section to the discussion of procompetitive effects, or efficiencies, of vertical mergers. This approach is legally flawed because the statute does not provide for a balancing test where an 'efficient' merger is allowed even if it may lessen competition. Many 'efficiencies' simply make the merged firm more profitable, without affecting the level of competition in the market.").
[27] RFI at 5.e.

mergers do not involve combination of direct competitors and can result in substantial efficiencies.[28] Historically, it has been difficult to predict with any degree of certainty when vertical mergers may result in harm to competition, partly because those harms are rare. Even those calling for stronger enforcement against vertical mergers recognize that empirical evidence does not show net consumer harm from vertical mergers.[29]

Three prominent mergers from the communications industry exemplify the risk of adopting presumptions of harm for vertical mergers: AT&T/Time Warner, Comcast/NBC Universal, and AOL/Time Warner. In each case, regulators predicted harm to competition through unilateral effects such as foreclosure, but it appears that none caused consumer harm. A commonality among the three mergers is that the merging parties, struggling to compete in markets undergoing rapid change, attempted new business strategies in response to disruptive innovation.[30] Indeed, it may have been dynamic innovation that caused the otherwise struggling legacy businesses to consolidate – giving them a chance to combine resources and innovate in response to new entrants' evisceration of the status quo. Appreciation of these important larger

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[28] Phillips & Wilson Dissent on Vertical Mergers; Comment of the Global Antitrust Institute, The Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, at 3-5, Sept. 6, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3245940 (explaining that empirical evidence collected from 2009-2018 tends to confirm the conclusion of Lafontaine & Slade (2007) and Cooper et al. (2005) that vertical mergers benefit consumers on net).

[29] *See* Marissa Beck & Fiona Scott Morton, *Evaluating the Evidence on Vertical Mergers*, 59 REV. INDUS. ORG. 273 (2021) ("Even setting aside these methodological issues, the literature finds both procompetitive and anticompetitive effects. We discern no pattern in the results.").

[30] United States v. AT & T Inc., 310 F. Supp. 3d 161, 197 (D.D.C. 2018) (*AT&T*) ("I simply cannot evaluate the Government's theories and predictions of harm . . . without factoring in the dramatic changes that are transforming how consumers view video content."); Competitive Impact Statement, United States v. Comcast Corp., Case No. 1:11-cv-00106 (2011) ("Recognizing the enormous potential of OVDs, dozens of companies are innovating and experimenting with products and services that either distribute online video programming or facilitate such distribution. New developments, products, and models are announced on almost a daily basis by companies seeking to satisfy consumer demand. A number of companies are committing significant resources to this industry."); Fed. Trade Comm'n, "FTC Approves AOL/Time Warner Merger with Conditions," (Dec. 14, 2000, available at: https://www.ftc.gov/news-events/news/press-releases/2000/12/ftc-approves-aoltime-warner-merger-conditions ("'In the broad sense, our concern was that the merger of these two powerful companies would deny to competitors access to this amazing new broadband technology,' said Robert Pitofsky, Chairman of the FTC.").

contexts demands retention of a case-by-case approach, not the imposition of vertical presumptions of harm.

In 2018, the DOJ Antitrust Division challenged the merger of AT&T, a video distributor, and Time Warner, a video content producer, under Section 7 of the Clayton Act. The Division's chief theory of consumer harm was that the combined company would be able to raise prices for its "must have" content or refuse outright to license it to rivals, thereby harming video distribution competition.[31]

Judge Leon rejected the government's theories, finding it unlikely that AT&T could leverage Time Warner's content to harm competition. The D.C. Circuit affirmed.[32] Incontrovertibly, since the consummation of the AT&T/Time Warner merger, AT&T did not in fact harm competition in the video market, as evidenced by the continued growth of rival streaming services and the company's spin-off of both its video distribution businesses and Time Warner itself just a few years after they merged.[33]

In a similar 2011 vertical case, the DOJ Antitrust Division challenged the Comcast/NBC Universal merger under Section 7 of the Clayton Act. That case did not go to trial, but the Division subjected the merger to conditions for approval based on similar theories of harm to those alleged in AT&T/Time Warner.[34] Harvard Professor Susan Crawford suggested even more substantial harms in her book, *Captive Audience*, predicting that the merger would enable Comcast to entirely monopolize competition in the online video market, killing off Netflix and

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[31] United States v. AT & T Inc., 310 F. Supp. 3d 161, 163-64 (D.D.C. 2018).
[32] United States v. AT&T, Inc., 916 F.3d 1029 (D.C. Cir. 2019) (*AT&T*).
[33] Alex Sherman, *AT&T to Spin Off WarnerMedia in $43 Billion Discovery Media Merger, Cuts Dividend*, CNBC (Feb. 1, 2022), https://www.cnbc.com/2022/02/01/att-to-spin-off-warnermedia-in-43-billion-discovery-media-merger; Alex Werpin, *AT&T Completes Spinoff of DirecTV In Deal With TPG*, HOLLYWOOD REPORTER (Aug. 2, 2021), https://www.hollywoodreporter.com/business/business-news/directv-spun-off-att-independent-video-1234991624/.
[34] Complaint, United States v. Comcast Corp. (D.D.C. 2011) (No. 1:11-cv-00106).

"any" other streaming services by (1) raising programming costs, and (2) leveraging its broadband network to degrade online rivals' video quality.[35]

The government's theories of harm to video competition and Professor Crawford's prediction of a Comcast streaming monopoly have been mugged by the real-world marketplace. The trial record in *AT&T* reflected that the Comcast/NBC Universal merger did not result in price increases for content.[36] Comcast, like every traditional video distributor, has lost millions of subscribers to "cord-cutting."[37] And Netflix thrives today, with 222 million subscribers, alongside at least half a dozen multibillion dollar streaming rivals, including Amazon, Apple, Disney, HBO Max, Hulu, and Paramount+, all of which have more subscribers and offer cheaper subscriptions than legacy video networks. Ironically, these streaming services are vertically integrated – they invest substantial capital in content creation, including a projected $50 billion from the largest 7 streamers this year alone.[38]

Last, but not least, in 2000, the FTC approved the AOL/Time Warner merger, subject to conditions. That merger involved AOL, an Internet service provider (ISP), and Time Warner, a cable provider, broadband ISP, and content producer. Commentators and competitors reacted harshly to this proposed transaction, predicting, among other things, that a combined AOL/Time

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[35] SUSAN CRAWFORD, CAPTIVE AUDIENCE 175, 180 (2012) ("If Netflix as an independent over-the-top service has disappeared by the time you read this book, crushed by the forces I have described here . . . just insert the words 'any new online video-distribution company' every time you see the word Netflix.").
[36] AT&T, 310 F. Supp 3d at 217-18.
[37] *See, e.g.*, Leichtman Research Group, "Major Pay-TV Providers Lost About 4,700,000 Subscribers in 2021" (Mar. 8, 2022), available at: https://www.leichtmanresearch.com/major-pay-tv-providers-lost-about-4700000-subscribers-in-2021/ (explaining that Comcast lost 1,670,000 video subscribers in 2021, continuing the industry-wide trend).
[38] Tony Maglio, *From Disney to Peacock: Here's What the Top 7 Streamers Will Spend on Content in 2022*, INDIEWIRE (Mar. 8, 2022), https://www.indiewire.com/2022/03/streaming-wars-content-spend-disney-netflix-hbo-paramount-1234703867/ (explaining that Netflix spent $17 billion on content in 2021 and Disney plans to spend $16 billion on streaming content in 2022).

Warner would dominate both the broadband and video content markets.[39] But those foreclosure theories were never realized, and by 2009, the companies split.[40]

Together, the absence of consumer harm from these three mergers, despite contrary predictions, show the prudence of refusing to adopt vertical presumptions of harm. The marketplace impact of each merger may have been uncertain at the time of the transaction. But the substantial competitive check of disruptive innovation in dynamic markets muzzled potential harms such as foreclosure or coordination.[41]

b. Revised Merger Guidelines Should Continue to Weigh Vertical Merger Efficiencies on a Case-by-Case Basis

Revised merger guidelines should not reject the 2020 Vertical Merger Guideline's case-by-case approach to weighing efficiencies. Even some proponents of heightened enforcement recognize that vertical mergers can result in a broad array of efficiencies.[42] The Free State Foundation's comments in the agencies' 2020 Vertical Merger Guidelines proceeding explained that, in addition to elimination of double marginalization, other efficiencies from vertical mergers include "being able to combine complementary assets, streamline production processes, reduce supply chain risk, and spread overhead costs over a larger production base."[43] The now-revoked guidelines appropriately reflected that such vertical merger efficiencies can lead to consumer welfare gains and bolster competition.

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[39] Randolph J. May, "At the Time of the Merger," *FSF Blog* (Sept. 26, 2012), http://freestatefoundation.blogspot.com/2012/09/at-time-of-merger.html.
[40] *Id.*
[41] *See, e.g.*, Daniel Kline, *Cord Cutting Hits Epic Levels (Goodbye Cable, Hello Streaming)*, STREET (Mar. 23, 2022), https://www.thestreet.com/investing/cord-cutting-hits-epic-levels-cable-comcast-charter-att.
[42] *See, e.g.*, Steven C. Salop, *Reinvigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1980 (2020); Jonathan Baker et al., *Five Principles for Vertical Merger Enforcement Policy*, 33 ANTITRUST L.J. 12, 15 (2019).
[43] *Id.*

But it now appears that the FTC's Democratic majority may believe that it is unlawful for the antitrust agencies to consider efficiencies once mergers cross a certain threshold of consolidation.[44] This position conflicts with the approach developed by the circuit and district courts over the last four decades and represents a rejection of the consumer welfare standard, which allows mergers that lead to price decreases and enhanced competition to proceed.[45] As we stated above, a case-by-case merger review process that considers efficiencies along with other factors benefits consumers. That is true for vertical mergers, as well.

c. Increased Scrutiny of Vertical Mergers Would Distort Business Decisionmaking

Increased scrutiny of vertical mergers, the apparent goal of the Commission's Democratic majority, would distort business decisions by incentivizing less efficient forms of vertical integration. Vertical mergers are one component of standard business decisions for growth and supply strategies.[46] But merger is not the only path to vertical integration – vertical integration can also come through contract relationships or through investment in in-house vertical production like the strategy Netflix, once solely a video distributor, has embraced.[47] Any serious government attempt at unwinding vertical integration, which we believe to be foolhardy given the lack of evidence of consumer harm, would have to target *more than just vertical mergers*.[48]

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[44] Majority Statement on Vertical Mergers, at 3.
[45] *See, e.g.*, AT&T, 916 F.3d at 1029; Phil Gramm & Christine Wilson, *The New Progressives Fight Against Consumer Welfare*, WALL ST. J. (Apr. 3, 2022), https://www.wsj.com/articles/the-new-progressives-fight-against-consumer-welfare-deregulating-antitrust-enforcement-economy-bipartisan-11649017074.
[46] Minority Dissent on Vertical Mergers, at 2.
[47] *See* Jonathan M. Jacobson, *Exclusive Dealing, Foreclosure, and Consumer Harm*, 70 ANTITRUST L.J., 311, 361 (2002); "Netflix: How a DVD Rental Company Changed the Way We Spend Our Free Time," Business Models Inc., https://www.businessmodelsinc.com/exponential-business-model/netflix/ ("In 2013, Netflix started to develop their own production and shows, based on the analysis of their own customers' data.").
[48] *Supra* notes 28, 29.

Attempting that feat could fail to achieve its goal while causing serious uncertainty and distortions for business decisionmaking. An outright vertical merger would draw obvious scrutiny when merging companies submit Hart-Scott-Rodino forms, while home-grown or contractual vertical integration could avoid such scrutiny because these forms of integration do not need *ex ante* government approval. Any attempt to equalize enforcement between the various methods of vertical integration would task the antitrust agencies with surveying, indefinitely, the supply chain assets of the entire economy for allegedly anticompetitive vertical structures. That gargantuan task would transition the antitrust agencies into the Nationwide Inventory Review Commission, and it seems nearly certain that in-house and contractual vertical relationships would tend to fly under the radar while the antitrust enforcers scrutinize vertical mergers.[49] But all vertical business strategies accomplish the same ends, so a hyperfocus on vertical mergers will distort business decisions towards achieving other forms of vertical integration, which are likely less efficient when merger was the first choice. In other words, the agencies would be wasting time and resources.

The sensible approach would be to continue applying the case-by-case, contextual analysis that considers efficiencies.

IV. For Digital Marketplaces, Merger Guidelines Should Avoid Narrow Market Definitions and Refrain From Eliminating Nascent Competitors of Dominant Firms Aided by Strong Network Effects

Lastly, we raise two points with respect to digital markets. First, use of overly-narrow market definitions risks underestimating competition or potential competition to an even greater

[49] If the antitrust agencies attempted such a roving survey of nation's economy, it would not be the first time that an antitrust agency's ambitious goals mismatched its available resources. *See* William E. Kovacic, *"Competition Policy in Broadest Sense:" Michael Pertschuk's Chairmanship of the Federal Trade Commission 1977-1981*, 60 WM. & MARY L. REV. 1269, 1317-25 (2019).

extent in digital markets, which typically evolve at a pace too fast for regulators to respond in a timely manner.[50] Firms in digital markets often compete based on differentiated product features, and evidence of consumers switching between platforms despite differentiated features should suggest that a narrow market definition is inappropriate. This is especially true for digital markets characterized by zero-pricing. Second, because network effects can bolster market power, the relevance of those network effects to acquisitions of nascent upstarts should be considered in a case-by-case analysis, and evidence of such network effects may constitute a reason to block mergers between dominant platforms and nascent competitors in the narrow circumstances that FTC Commissioner Noah Phillips has suggested.

a. Overly-Narrow Market Definitions Risk Underestimating Competition in Digital Markets

As we explained while discussing the T-Mobile/Sprint merger, use of overly-narrow rigid market definitions that undercount competition can harm consumers by overstating potential harms and understating market realities. This point is worth further explication in the context of digital markets, which often involve competition based on product features rather than price. The Sirius/XM merger is a telling example.

In 2007, satellite radio providers Sirius and XM proposed merging in response to dynamic competition in the audio market from online streaming, mp3 players, Internet radio services, and other sources.[51] The two Democratic FCC commissioners at that time voted to

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[50] RFI at 11.c., 11.g.

[51] *See, e.g.*, Statement of Robert M. McDowell, Comm'r, Fed. Comm. Comm'n, Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57 (Aug. 5, 2008), https://www.fcc.gov/proceedings-actions/mergers-transactions/xm-and-sirius.

block the transaction, criticizing it as a merger to "monopoly" in the satellite radio market.[52] Applying its Public Interest standard, the FCC allowed the combination to proceed, subject to conditions it deemed necessary. It appears that the Sirius/XM merger did not result in consumer harm, and shortly after, in 2011, a Democrat-led FCC removed conditions imposed on the merger in light of increasing audio competition.[53]

The lack of harm resulting from the Sirius/XM merger shows the "audio entertainment market" was the correct market, not the "satellite radio market." The Free State Foundation filed comments in the FCC's merger review proceeding urging use of the "audio entertainment market" definition, an approach clearly vindicated over time.[54] Competition from other audio providers in a dynamic digital market, often on the basis of differentiated features from radio, provided sufficient check on post-merger Sirius/XM to prevent it from harming consumers.

The risk of undercounting competition through narrow myopic market definitions is particularly acute in the digital realm, especially with respect to products characterized by zero pricing. For example, the FTC defined the relevant product market in *FTC v. Facebook* as "personal social networking services" based on specific features of Facebook's product, expressly excluding TikTok from the market.[55] The Commission excluded TikTok despite widespread evidence of fierce competition between Facebook and TikTok in the popular short-video

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[52] *See, e.g.*, Dissenting Statement of Jonathan S. Adelstein, Comm'r, Fed. Comm. Comm'n, Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, MB Docket No. 07-57 (Aug. 5, 2008), https://www.fcc.gov/proceedings-actions/mergers-transactions/xm-and-sirius.
[53] Seth L. Cooper, "FCC Marks End of Merger Price Controls By Better Recognizing Market Competition," *FSF Blog* (July 29, 2011), http://freestatefoundation.blogspot.com/2011/07/fcc-marks-end-of-merger-price-controls.html.
[54] Comments of the Free State Foundation, MB Docket No. 07-57 (July 9, 2007), https://freestatefoundation.org //wp-content/uploads/2019/08/FCC_Comments_Initial-070907-1.pdf.
[55] The alleged distinction between the markets in which Facebook and TikTok operate is that Facebook's "personal social networking service" is geared towards connecting with people that users personally know, while TikTok is a "content broadcasting and consumption service" by which users connect to people that they do not personally know. First Amended Complaint, Fed. Trade Comm'n v. Facebook, Inc. at 57-58 (D.D.C. 2021) (No.1:20-cv-03590-JEB).

category, as well as evidence of Facebook adopting product features such as "Reels" and "Groups" that allows users to connect with people they do not know, the alleged distinction between Facebook and TikTok.[56] This narrow market definition could also possibly enable a Facebook/Twitter merger.[57]

That Facebook appears to be competing with TikTok may be explained by the observation that, in zero-price digital markets, or "attention" markets, firms compete primarily based on product features. Product feature competition in zero-price digital markets may be facilitated by "multihoming," by which users easily download multiple applications and maintain accounts on multiple platforms simultaneously. Multihoming allows users to test features of different products easily. If granular market definitions are drawn around specific product features, then relevant competitors will be excluded.

b. Network Effects in Digital Markets May Warrant Additional Protections for Nascent Competitors

Commissioner Phillips has suggested that the agencies should err towards enforcement against mergers that combine a monopolist and a nascent competitor when it appears that the nascent firm has a realistic and unique chance of directly competing against the dominant firm,

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[56] *See* Taylor Lorenz & Drew Harwell, *Facebook Paid GOP Firm to Malign TikTok*, WASH. POST (Mar. 30, 2022), https://www.washingtonpost.com/technology/2022/03/30/facebook-tiktok-targeted-victory/; Shirin Ghaffary, *Reels is Facebook's TikTok clone — and Its Future*, VOX (Mar. 30, 2022), https://www.vox.com/recode/23002679/reels-facebook-tiktok-video; Abram Brown, *Facebook Knows It's Losing The Battle Against TikTok*, FORBES (Feb. 4, 2022), https://www.forbes.com/sites/abrambrown/2022/04/05/both-trump-and-musk-want-to-screw-with-twitter-only-one-has-a-plan-thats-working/?sh=3116ed610014; Yifan Yu, *Facebook Shares Plunge as Competition from TikTok Bites*, NIKKEI ASIA (Feb. 3, 2022), https://asia.nikkei.com/Business/Technology/Facebook-shares-plunge-as-competition-from-TikTok-bites.

[57] Andrew Magloughlin (@MagloughlinA), Twitter (Apr. 19, 2022, 10:25 AM), https://twitter.com/MagloughlinA/status/1514610840485261313 ("Would be hilarious if the Facebook/Twitter merger happened after @FTC claimed Facebook and Twitter aren't competitors, Twitter isn't a "personal social networking service" in FTC v. Facebook complaint.").

even where the proposed combination has the potential to generate efficiencies.[58] For digital markets, the significance of network effects, actual and potential, that appear to lead to market dominance should be analyzed as part of the case-by-case, context-specific merger review approach embodied by the existing merger guidelines.[59] To the extent that the existing guidelines do not make that clear, they could be revised to explain that network effects will be considered as relevant "context of the particular industry."[60] In the context suggested by Commissioner Phillips, the guidelines could favor enforcement in mergers between a dominant and nascent competitor in a digital market characterized by strong network effects, where the nascent competitor appears to be "one of only a few firms with a decent chance of meaningfully against the monopolist."[61]

As Commissioner Phillips explained, because nascent competitors are underdeveloped, predicting the likely effects of mergers becomes especially uncertain. It therefore may be prudent for the guidelines to err towards enforcement. However, he emphasized, and we agree, that these are *narrow* circumstances. A December 2021 Free State Foundation *Perspectives* suggested that the Facebook/Instagram merger may have been such a circumstance: at the time, Facebook had few competitors, and Instagram was a nascent competitor with a substantial social networking user base, likely had low costs of adding Facebook-like features, and appeared capable of monetization.[62] But the narrow circumstances would not be present for non-horizontal mergers, including vertical mergers and mergers where a dominant platform expands into a new market.

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[58] Prepared Remarks of Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, Reasonably Capable? Applying Section 2 to Acquisitions of Nascent Competitors, at 9 (Apr. 29, 2021), https://www.ftc.gov/system/files/documents/public_statements/1589524/reasonably_capable_-_acquisitions_of_nascent_competitors_4-29-2021_final_for_posting.pdf.
[59] RFI at 11.b.; FSF Vertical Merger Comments, at 2.
[60] General Dynamics, 415 U.S. at 498 (quoting Brown Shoe v. United States, 370 U.S. 294, 321-322 (1962)).
[61] *See id.*
[62] Seth L. Cooper and Andrew K. Magloughlin, "Net Neutrality's 'Founder' Was Wrong About Broadband Markets:

V. Conclusion

While reviewing the T-Mobile/Sprint merger, Judge Marrero described the evidence parties offered to predict the effects of a merger as "competing crystal balls."[63] We posit that the antitrust agencies, in revising the merger guidelines, should not do so in a way that purports to craft a foolproof crystal ball. A case-by-case, contextual merger analysis that considers efficiencies is preferable for the foregoing reasons.

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Competition Protects Internet Access But Big Tech Poses Realistic Harms," *Perspectives from FSF Scholars*, Vol. 16 No. 64 (Dec. 7, 2021).

[63] Deutsche Telekom, 439 F. Supp. 3d at 187.