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The Federal Communications Commission and Lessons of Recent Mergers & Acquisitions Reviews

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I. INTRODUCTION

The FCC's actions on big mergers and acquisitions have attracted a lot of comment and I'm proud of what we've achieved. But why did we come to the views that we've held? What were our theories and our core concerns? What forms of analysis did we employ? Some of that is in the public record, some is not. Let me address how we came to take the actions we did.

In the time that Tom Wheeler has been Chairman at the FCC, the Commission has faced the possibility of three telecommunications mergers that I'd like to discuss: First, the suggested Sprint-T-Mobile merger; second, the proposed acquisition of Time Warner Cable by Comcast; and, third, the acquisition of DIRECTV by AT&T. The first was not pursued, the second was abandoned, and the third was approved, with important, pro-competition conditions.

Let's start with the most important lesson. Chairman Wheeler has recited his basic mantra over and over again: "Competition. Competition. Competition." (And I know that the TPRC itself beginning in the 1970s may deserve some of the credit for this way of thinking at regulatory agencies). At the FCC, in every transaction review, the burden is on the applicants to demonstrate that a transaction will further the public interest, and that starts with competition. A central question always is: Will a deal bring more competition for the benefit of American consumers?

Of the three proposed transactions, it is not surprising that the one that was approved is the one that was brought more competitive choices to a highly concentrated market. But that is not the only test. The public interest standard, for example, considers whether a firm will bring better products, other new innovations, or wider deployment to consumers. And it is concerned with more than just standard economic analysis. Diversity, multiple avenues for expression, the importance of broadband access for all parts of society—all of these can be important.

The Commission's charge is broad, but not limitless. In some quarters, the belief exists that political connections or viewpoints are important to our review. In fact, they are not relevant. Others may believe that we are passing judgment on the past practices and customer reputation of firms. We are not; our perspective is entirely prospective: We look to the future to decide whether the outcomes of a transaction will—or will not—advance the public interest.

[1] Jonathan Sallet is the General Counsel for the U.S. Federal Communications Commission. This paper is based on remarks made at the September 2015 Telecommunications Policy Research Conference. The views expressed here are those of the author alone and do not necessarily represent the views of the U.S. Federal Communications Commission.

Finally, the Commission's recent reviews have taken place against the backdrop of changing industries. I will discuss some of those dynamics below; for example, the rise of new forms of online video delivery. But one stands out apart from the rest. 2014 was the first year in which cable companies had more broadband customers than video customers.[2] In other words, the term "cable" industry" is a bit of a misnomer—these are companies who supply more consumers with the ability to connect to the internet than with the ability to watch proprietary Pay TV. This proved to be of importance to both the Comcast/Time Warner and the AT&T/DIRECTV reviews.

Below, I would like to offer personal views as to why these three merger outcomes establish a set of important principles, while dispelling myths as to how the Federal Communications Commission operates in this sphere.

II. FIVE IMPORTANT PRINCIPLES

The shibboleths are easy to state: It has been said—wrongly in each instance—that, because of our public interest standard, the Commission departs from close economic and factual analysis of transactions. As a result, it is alleged that: (i) the Commission does not rigorously examine potential public benefits, especially when proffered by parties as voluntary commitments; (ii) it does not add independent value beyond that supplied by the antitrust agencies; and (iii) it does not ensure compliance with those conditions that are imposed.

It is hard for me to see how this bundle of assertions could have survived the Commission's work in the Comcast/NBC and AT&T-T-Mobile transactions—yes, old ideas die hard—but to the extent any legitimate doubt remains, the last 20-odd months should safely confine these old assertions to the dustbins of history.

To say it another way, the work of the Commission in connection with these three recent transactions has demonstrated five important principles:

1. **Facts and the core methodologies of antitrust are the starting place of the Commission's analysis.** Consider the potential Sprint-T-Mobile merger where the Chairman made plain that a national horizontal merger in a concentrated market would not get a green light in the absence of a serious factual review building on the learnings of AT&T/T-Mobile. Or the use of state-of-the-art merger simulation models considered in the AT&T/DIRECTV transaction to advance the Commission's thinking.
2. **The broader legal standard entrusted to the Commission—namely the requirement that applicants demonstrate that their proposed transactions will further the public interest—is an appropriate means to look beyond the traditional strictures of the antitrust laws (most notably the Clayton Act).** The Commission has traditionally noted that it can take merger-specific steps to enhance, and not just protect, competition.[3] One can view the conditions imposed in the AT&T/DIRECTV order as both protecting

[2] Press Release, Leichtman Research Group (August 15, 2014), *available at* http://www.leichtmanresearch.com/press/081514release.html.

[3] *See, e.g.*, *SBC-Ameritech Order*, 14 FCC Rcd 14712, 14738 (1999).

competition and enhancing it. That transaction was, as the Commission recognized, “a bet on competition.”

3. **The Commission closely examines public-interest commitments that applicants offer.** There has been little discussion of the proposed conditions that the Commission declined to accept in AT&T/DIRECTV, but I believe that important lessons can be drawn from the Commission’s analysis, including that public-interest commitments are most important when they directly address potential harms from a proposed transaction.
4. **The Commission is putting in place strong mechanisms to ensure compliance with conditions.** The AT&T merger, for example, saw the establishment by the Commission of an independent compliance monitor with enhanced selection criteria.
5. **The Commission brings particular expertise, especially in the economics and engineering of networks, that complements the expertise of antitrust agencies.** In all three of these matters, and perhaps most closely and extensively in the proposed Comcast/Time Warner Cable transaction, the Commission worked in harmony with the Antitrust Division of the Department of Justice in a way, I believe, that improved the work of both agencies.

Before I get into the substantive analysis, let me offer two caveats. First, I am using the term “Commission” in its broadest sense to include not just the Chairman’s views but also views of the staff including, as in Comcast/Time Warner Cable, views that were never finalized. That is a very important limitation. Of the three transactions under discussion, only one—AT&T/DIRECTV—was formally presented to all of the Commissioners and resulted in a full Commission order. That is one reason it is especially important to emphasize that these are my personal views.

Second, there is a penchant for using the outcomes of past mergers as a template for pending or future mergers. To be sure, the articulation of principles is designed precisely to allow future conduct to be assessed in that manner. Here I am offering thoughts on Comcast/Time Warner Cable because I believe it is important for the public, and not just the Applicants, to have insight into staff thinking. But any application of what I say here to predict the outcome of any specific pending or future merger review would be inevitably and seriously flawed. That is because, as I have already said, factual analysis matters most of all, and critical facts concerning a Sprint/T-Mobile transaction were never presented to the Commission and the most critical facts concerning Comcast/Time Warner Cable are highly confidential. I personally would place little faith in a prediction of Commission action in any particular case that is not based on a detailed factual analysis—a task made more challenging by the submission of proprietary, confidential business materials to the reviewing agencies.

Let me proceed with a discussion of each of the transactions and then, in conclusion, briefly re-visit the five core conclusions I have offered.

III. SPRINT/T-MOBILE

In early 2014, Softbank, the parent corporation of Sprint Nextel, approached the Chairman seeking early reaction to its potential acquisition of T-Mobile. According to press reports at the time, Softbank believed that a combined company would bring lower prices and deploy more mobile broadband than either company would alone.

In February, Chairman Wheeler and senior FCC staff met with Softbank and Sprint Nextel representatives. Chairman Wheeler told the companies that he would, of course, keep an open mind during any review process but he also responded to their request for an initial reaction. He told them that he was highly skeptical that the acquisition would advance the public interest.

This reaction should not be a surprise. In 2011, the Antitrust Division sued to block AT&T's acquisition of T-Mobile and the FCC staff expressed concern that the loss of horizontal competition, with a merger of two of the largest four competitors, would be harmful. By early 2014, DOJ Assistant Attorney General Bill Baer was able to report that, in the aftermath of the withdrawal of the proposed AT&T/T-Mobile transaction, T-Mobile had taken action to "offer cheaper and better customer contracts," that Sprint "began offering unlimited plans with aggressive prices and innovative service arrangements," and that bigger competitors had responded with improved products of their own.[4]

In other words, in this instance the Commission was being asked to give an early green light to a 4-to-3 merger in a market in which competitive trends were on the upswing in the wake of an earlier 4-to-3 merger proposal (AT&T/T-Mobile) that had been abandoned after a DOJ legal challenge and FCC staff recommendation to designate for an administrative hearing. This is not to say that a serious factual review could not have found merit in the proposal—that's why the Chairman emphasized that he would approach any review with an open mind. It is to say that the Commission is not likely to make casual judgments, before the close examination of facts, especially in markets where the Commission has recently conducted extensive evaluation and determined that the existing market structure enables competition.

In August of 2014, the proposed tie-up was abandoned and Chairman Wheeler said, "Four national wireless providers is good for American consumers." More than a year later, that position has been vindicated.[5] Sprint has announced plans to build out and improve its wireless network.[6] T-Mobile continues its "un-carrier" campaign, reporting continued customer additions, and describing itself as "the fastest growing wireless company in America."[7] And, as of the second quarter of 2015, T-Mobile had increased its market share to 16 percent, catching up to Sprint.[8]

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[4] Speech, "Reflections On Antitrust Enforcement In The Obama Administration," Assistant Attorney General Bill Baer (January 2014), *available at* www.justice.gov/atr/file/517761/download.

[5] *See, e.g.*, *How T-Mobile Changed the Wireless Industry – and Our Lives – Forever*, David Poge (Aug. 28, 2015) *available at* https://www.yahoo.com/tech/how-t-mobile-changed-the-wireless-industry-and-127690231194.html; *Sprint Undercuts T-Mobile, Offers iPhone 6S for $1/month with an iPhone trade-in*, Phil Goldstein, Fierce Wireless (Sept. 24, 2015) *available at* http://www.fiercewireless.com/story/sprint-undercuts-t-mobile-offers-iphone-6s-1month-leasing-payments-iphone-t/2015-09-24?utm_medium=nl&utm_source=internal.

[6] Blog, *Closing the Gap on Network Performance*, Jon Saw, Sprint CTO (Aug. 18, 2015) *available at* http://newsroom.sprint.com/blogs/sprint-perspectives/blog-closing-the-gap-on-network-performance.htm.

[7] Press Release, *T-Mobile Reports Double-Digit Revenue Growth and Strong Profitability in Q2* (July 30, 2015), *available at* http://newsroom.t-mobile.com/news/q2-earnings-2015.htm.

[8] Report, *Market share of wireless subscriptions held by carriers in the U.S. from 1st quarter 2011 to 2nd quarter 2015*, *available at* http://www.statista.com/statistics/199359/market-share-of-wireless-carriers-in-the-us-by-subscriptions/. *See also, T-Mobile Reports Profit Alongside Customer Growth, Revenue rose 14% in latest quarter;*

IV. AT&T/DIRECTV

The merger of AT&T and DIRECTV was, in the first instance, a merger of horizontal video competitors. As separate companies, both provided multichannel video programming distribution, or what I will also call Pay TV service, to American consumers. AT&T offered video service under its U-verse brand within portions of 22 states and DIRECTV offered satellite video service to consumers nationwide.

While acknowledging that the merger would result in a loss of horizontal competition in video distribution, the companies argued that—because AT&T's broadband service and DIRECTV's satellite service were complementary—their merger would result in more and better, integrated bundles of broadband and video that could better compete against incumbent cable companies. This, they said, would promote, not harm, competition.

Underlying their conclusion was a view that as standalone companies, neither had the necessary assets to compete over the long term. DIRECTV lacked the broadband capabilities that are key to providing the convenient interactive viewing experiences that consumers demand. And AT&T, which could only offer video in locations where it had deployed its higher speed broadband, had fewer than 6 million video subscribers and a disproportionately slower broadband network than its cable competitors. Because larger MVPDs tend to have lower per subscriber costs for programming, AT&T argued that it paid more for programming than its video competitors—larger satellite and cable companies—thus limiting AT&T's competitiveness and ability to expand service.

AT&T and DIRECTV had tried to overcome these limitations by partnering to offer consumers a so-called "synthetic" bundle of AT&T broadband and DIRECTV satellite. However, the inefficiencies associated with two companies selling what the cable companies provided on their own also precluded effective competition. As one company, AT&T and DIRECTV argued, they could do better, offering consumers more convenient and lower-priced bundles of video and broadband. And, after careful analysis of the facts and economic data, the Commission agreed.

The Commission's econometric analysis was an important aspect of the Commission's review of the AT&T/DIRECTV transaction, and it is carefully and expansively described in the Commission's published Order and technical appendix. The Commission's work, building on AT&T's excellent submissions, marked an important step forward. This was the first time the Commission gave significant weight to this kind of econometric analysis in approving a license transfer, following the Commission's longstanding recognition of the importance of econometrics. It did so for a variety of reasons specific to this transaction, including the strength of the available data, the quality of the merger simulation, and the fact that the companies offered competing and complementary products. Of course, the Commission also examined the documentary and record evidence, which confirmed the conclusions drawn from the economic analysis and independently supported our view that the improved bundle of AT&T broadband and DIRECTV video would promote competition.

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wireless carrier is optimistic for rest of year, WALL ST. J (July 30, 2015), *available at* http://www.wsj.com/articles/t-mobile-raises-subscriber-growth-outlook-1438257047.

The merger simulation analysis is based in large part on the Commission's review of the Applicants' own merger simulations. As with all merger simulations, the Commission considered whether: "Assuming that all industry participants' product offerings remain the same, what price changes arise from the changed pricing incentives created by the proposed transaction?" This involved an analysis of three primary price effects: (1) the "horizontal effect" from the loss of a competitor in the geographic areas where AT&T and DIRECTV both offered video services; (2) a "bundle effect" that results from AT&T and DIRECTV jointly pricing, as a single firm, AT&T broadband and DIRECTV video; and (3) the effect of the reduction in ATT's programming costs to DIRECTV's levels.

Our expert FCC economists adjusted the Applicants' merger simulations, along with using third-party data available to the Commission, and ultimately agreed that the economic modeling supported a conclusion that the transaction was likely to produce consumer benefits. The transaction would put downward pricing pressure on the bundle of DIRECTV's video service with AT&T's broadband service, which, in turn, would put downward pricing pressure on bundles provided by cable companies. AT&T's programming payment reductions would produce further benefits because that reduction would also exert downward pressure on the price of AT&T's video service.

It's important to understand the market structure that provided the backdrop for this analysis. Earlier in the year, the Commission had concluded that high-speed residential broadband requires a minimum of 25 Mbps down and 3 Mbps up. But the same report revealed that about 70 percent of American residential units have fewer than two choices for such broadband.[9] Thus, the proposal that AT&T would be able to offer additional choices and greater competition for high-speed broadband proved important.

While significant, that was only one part of the Commission's public interest analysis. We also concluded that the transaction created the potential for public interest harms in two important respects. First, there was an obvious loss of a Pay TV competitor in the areas of AT&T and DIRECTV overlap. And, second, the record supported our conclusion that post-transaction AT&T would have an increased incentive to use its broadband assets to discriminate against competing online video distributors ("OVDs") such as Netflix or Hulu. AT&T could raise the cost to consumers of using those services, which in turn would favor DIRECTV satellite video or the combined entity's online video products.

To address these public interest harms, the Commission imposed conditions that combined ensure more, faster, and open broadband, some of which I would like to discuss here. Such broadband creates a pathway for online video to replace the loss of horizontal video competition and also solves for AT&T's increased incentive to erect barriers to that competition. Specific conditions also were needed to confirm the public interest benefits of the transaction.

First, under the terms of the FCC Order, AT&T will deploy fiber to the home to 12.5 million locations within four years. When AT&T announced the proposed transaction, it stated that a benefit of the merger was that it could deploy fiber to 2 million additional locations. The

[9] 2015 Broadband Progress Report at ¶ 82.

requirement that they build to 12.5 million locations goes beyond that by capturing all of AT&T's pre-transaction *planned* deployment, its *projected* deployment absent the transaction, and the deployment that the record suggested was profitable as a result of the transaction. This additional build-out is about 10 times the size of AT&T's current fiber-to-the-premise deployment, increases the entire nation's residential fiber build by more than 40 percent, and more than triples the number of metropolitan areas AT&T has announced plans to serve with high-speed broadband.

Second, to specifically prevent discrimination against online video competition, AT&T is prohibited from excluding its affiliated video services and content from data caps on its fixed broadband connections. One of the asserted benefits of the transaction was the launch of affiliated online video services by the merged entity. OVDs would directly compete with these newly offered services and, at the time of the merger, AT&T was alone among the large ISPs in applying set data caps across its fixed broadband connections. This condition prevents AT&T from using those broadband service retail terms to discriminate against new forms of video competition.

In addition, and to bring greater transparency to interconnection practices, the company will be required to submit all completed interconnection agreements to the Commission, along with regular reports on network performance. This will help the Commission address any future concerns about the nature of AT&T's interconnection practices and their effect on competition and consumers. Interconnection, namely the set of agreements that enable internet traffic to move seamlessly between networks is, of course, fundamental to the idea that the internet is a network of networks.

As a group these conditions create the opportunity for more robust broadband and video distribution competition. To ensure that the goals of these conditions are achieved, the Commission required that AT&T employ an independent, outside officer responsible for monitoring and reporting to the Commission any failure to comply with the conditions.

It is important to emphasize that these conditions—alone and in combination—are transaction specific. They remedy public interest harms and ensure public interest benefits. As is often the case in major transaction reviews, when AT&T and DIRECTV announced their proposed merger they offered certain "public commitments." But these were not the starting point for, or the end of, the Commission's analysis. Indeed, the Commission did not impose, as conditions, all of the offered commitments. In particular, the Commission did not adopt as part of its Order the company's commitments to abide by the Commission's 2010 Open Internet Order, since superseded; to offer standalone retail broadband Internet access service "at reasonable market-based prices;" to offer standalone DIRECTV satellite video service at nationwide package prices; or to build out wireless local loop technology to 13 million locations.

It's important to recognize that AT&T is free to move forward, for example, by following through with its plan to deploy wireless local loops in unserved areas. But the Commission's common theme in declining to impose these commitments is that merger conditions should remedy transaction-specific harms or ensure transaction-specific, *verifiable*, public interest benefits.

As I have noted earlier, there has been a perception that the major transaction reviews are an opportunity to bargain—the parties bargain with the agencies to get to "yes" and the agencies bargain with the parties to achieve other goals unrelated to the transaction. The conditions imposed on AT&T belie that perception.

V. COMCAST/TIME WARNER CABLE

We conducted our analysis of the AT&T/DIRECTV transaction alongside our review of the proposed transaction between Comcast and Time Warner Cable.

The core facts of the Comcast transaction were these: Comcast—the nation's largest cable company, Pay TV, and broadband provider—proposed to acquire Time Warner Cable, the second-largest cable company, fourth-largest MVPD, and third-largest broadband provider. The proposed transactions involved (i) the acquisition of Time Warner's cable systems serving approximately 12 million broadband and 11 million video customers, (ii) a sale of certain systems to Charter, (iii) a swap between Comcast and Charter of certain other systems, and (iv) a spin-off of Comcast systems to a new cable company serving approximately 2.5 million subscribers. With the four proposed transactions, Comcast would acquire approximately 8.5 million additional broadband subscribers and approximately 7 million additional video subscribers, and significantly enhance its position in the top markets in the country.

After a careful review of the risk of harm and the potential benefits, staff concluded that the risks decidedly outweighed any benefits. Because the transaction was abandoned before the proposed order was submitted to, much less approved by, the full Commission, there is no public record about the staff's basic theoretical approach or the reasoning behind the staff's view that the transactions should be subject to an administrative hearing that would compel a detailed factual record on which the Commission would then make its final decision.

While the parties to the transaction were, with the Chairman's concurrence, provided an explanation and an opportunity to respond to the staff analysis, there is a gap in the understanding of lawyers, economists, and the public generally as to the staff's core theoretical approach. Initial commentary has been presented in academic settings, but I'd like to use this article to also help fill in the gaps, with the understanding, of course, that confidential material cannot be publicly discussed and that, therefore, this discussion is necessarily incomplete.

Simply put, the core concern came down to whether the merged firm would have an increased incentive and ability to safeguard its integrated Pay TV business model and video revenues by limiting the ability of OVDs to compete effectively, especially through the use of new business models.

An OVD that seeks to successfully compete with a traditional cable system needs a few things. It needs programming. It needs access to broadband providers' networks. It needs to be certain that, once delivered to those networks, its video traffic will find its way to the intended consumer. It may also need access to devices used by consumers. And, it needs to ensure that consumers are not dissuaded from using its OVD services because of retail broadband terms and conditions that might raise the price of online video in a discriminatory way. The AT&T commitment I described above addresses the potential for discrimination in the application of data caps, for example.

The portrait of OVD business models changed markedly during the pendency of the applications and these changes sharpened the focus on potential harms to the basic building blocks of OVD services. What must have seemed publicly as a series of high-profile conflicts between Netflix and large broadband providers in the winter and spring of 2014 gave way in the fall of that year and the early months of 2015 to a new phenomenon—the emergence of a variety of business models offering different flavors of OVD services.

For example, DISH's Sling service offered so-called linear programming of the same kind offered by Pay TV systems, including ESPN. Sony announced its plan to link the supply of programming to its popular gaming console. Owners of programming, including HBO and CBS, launched standalone online services.

The potential for increased consumer welfare as a result of these market developments was obvious—greater competition and potential competition leading to lower prices, greater output, and new innovation. In other words, for the first time, multiple OVD services were launching or planning to launch services to provide consumers the ability to stream live, linear programming—including sports—as part of packages that threatened revenue streams derived from traditional Pay TV packages. In general, these new offerings may allow consumers to purchase smaller bundles or view current programming without the need for a contract with a cable company containing the traditional bundle or a traditional set-top box.

We understood that entrants are particularly vulnerable when competition is nascent. Thus, staff was particularly concerned that this transaction could damage competition in the video distribution industry by increasing both Comcast's incentive and its ability to disadvantage OVDs and thus retard or permanently stunt the growth of a competitive OVD industry. In doing so, consumers would be denied the benefits that innovative competition could bring.

We looked at theory and we looked at facts and we arrived at a series of important conclusions about the nature of the marketplace and competition.

First, we concluded that the following was *not* outcome-determinative: that there was minimal horizontal overlap between the Applicants in the local markets for residential broadband and Pay TV services. This is important. At the outset of the merger review, some commenters said there could be no competitive issue given the lack of horizontal competition in those markets. But we concluded that assessment of the net impact of the proposed transaction required a wider aperture.

Second, we determined that our analysis needed to take into account the fact that both firms participated in national distribution markets, one for broadband distribution and another for Pay TV distribution. While the merging parties did not compete directly in the distribution of programming to consumers in local markets, OVDs do seek to distribute programming throughout the United States, and negotiate for nationwide distribution rights. The ability of the larger merged firm to limit OVD distribution of programming nationwide, for example by negotiating contractual provisions that inhibited an OVD's ability to obtain nationwide online distribution rights, was carefully examined.

Similarly, we also considered a national market for interconnection in which ISPs negotiate with OVDs (and their content delivery networks) over the terms by which the OVDs would reach consumers. Post-transaction, an OVD might have needed an interconnection agreement with the merged entity in order to achieve national distribution, so we also considered the ability of the merged company to impose terms that would disadvantage the OVD.

Third, staff concluded that, with these markets in mind, the combination of video and broadband distribution assets could increase the merged entity's incentives and abilities to take actions against rivals that would pose a competitive threat to online video entry—that is, current and potential competition. Increased incentives are a direct result of the increased footprint of the merged firm. Without the merger, a company taking action against OVDs for the benefit of the Pay TV system as a whole would incur costs but gain additional sales—or protect existing sales—only within its footprint. But the combined entity, having a larger footprint, would internalize more of the external "benefits" provided to other industry members.

Alongside incentives came ability. Increased bargaining power was the central concern. The combination of distribution assets had the potential to increase the merged entity's bargaining power in both national markets—the market where video distributors negotiate the terms and conditions to distribute video content for programmers and the interconnection market through which broadband providers provide mass-market delivery services to OVDs. Because OVDs are subject to national economies of scale, the merged company could significantly impair an OVD's ability to compete.

Consider the circumstance of a new OVD. Success, and the scale necessary for success, might not require access to every consumer in the country, but foreclosure from big swaths of the nation could erect a significant barrier to OVD entry. Suppose there were two cable companies supplying broadband services, East and West, each with 50 percent of the nation and imagine that an OVD could be financially successful by reaching 50 percent of American households. Prior to a merger of East and West, an OVD would be successful if it was able to compete in either territory. Having two alternative interconnection partners gives an OVD the potential ability to play Cable East and Cable West off each other. But after a merger, that OVD would have to strike a bargain with only one firm, which would give that company the ability to disadvantage the OVD, or perhaps even exclude the OVD from reaching its subscribers.

Fourth, we looked at how any greater ability might be used, and here we came to another, separate conclusion. The effects of the transaction on the national markets for video programming and interconnection were significant in our analysis, each considered independently. But we also considered them among the other levers available to the merged firm that, combined, presented a risk of competitive harm. For example, we considered their competitive effect when combined with data caps and other retail broadband terms and conditions that raised the price of OVDs for consumers.

Staff consideration of the cumulative impact of these levers on competition is itself a critical point. The question was not only whether a single kind of action—access to devices, or data caps, or interconnection, or video programming terms—by itself would degrade competition. It was also whether the merged company would possess the toolkit that would allow it to put sand in the gears of competition through the totality of its efforts. Indeed, for strategic reasons, an entity might have an incentive to spread the effects of anticompetitive actions across multiple forms of actions, and shift their impact over time, in order to attempt to avoid effective monitoring of their impact. Staff did not believe that its concerns could be remedied through conditions.

Finally, the verifiable benefits of the proposed transactions—such as faster broadband speeds for TWC customers, cost savings, enhanced competition for business customers—were viewed by staff as incapable of outweighing the potential harms. Unlike AT&T/DIRECTV, this was not a transaction in which additional competitive choices would flow to consumers. But as in AT&T/DIRECTV, the staff assessed all of these competition issues in light of consumers' limited broadband alternatives, particularly at higher download speeds. As the Department of Justice noted, in language equally applicable to the FCC staff perspective, "the transaction would [have left] Comcast with close to 60 percent of all high-speed broadband subscribers in the United States, strengthening its ability to block the adoption of innovative products, including 'over-the-top' video services that threaten the traditional cable business model."[10]

The FCC staff, with the Chairman's concurrence, presented these theories and concerns to the Applicants explaining the reasons that they had not met their burden of demonstrating that approval of the transactions was in the public interest, and inviting further dialogue. After listening to the concerns outlined here, as well as important factual analysis that cannot be discussed publicly due to the restraints of confidentiality, the Applicants abandoned the proposed transactions. Thus, the Commission's work remains incomplete but, perhaps like Dickens' unfinished work *The Mystery of Edwin Drood*, the staff's views may be of interest to lawyers, economists, and the public generally.

VI. CONCLUSION

I hope that I've been able to show successfully how the Commission approaches its important statutory responsibilities seriously, and how the staff digs into the facts and applies disciplines of economics, engineering, and law as it formulates its recommendations to the Commission. That requires a lot of effort from all parts of the Commission, starting with the Chairman.

Experts in the Media, Wireline Competition, and Wireless Telecommunications Bureaus—and there are too many to name individually—all contributed invaluable analysis to these questions, under the leadership of Bill Lake, Julie Veach, Matt DelNero, and Roger Sherman. Outside economists Bill Rogerson and Jon Asker, who worked with the Commission's chief economists Tim Brennan and David Waterman and our own excellent internal economics team, pushed the frontiers of both theoretical and empirical analysis.

Of particular note are the attorneys who ran the AT&T/DIRECTV and Comcast/Time Warner merger reviews at the FCC. It is no coincidence that both Hillary Burchuk and Jamillia Ferris had earlier worked in the Department of Justice's Antitrust Division and we gained greatly from their understanding of the two institutions.

I've offered five basic principles that I believe best explain the Commission's approach:

[10] Speech, "Remarks at the Chatham House Annual Antitrust Conference," Assistant Attorney General Bill Baer (June 18, 2015), *available at* http://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-chatham-house-annual-antitrust.

1. Start with the facts and economic analysis.
2. Consider carefully both traditional competition-law principles and the Commission's special charge to examine merger-specific outcomes in light of the potential for enhanced competition and service to the public interest.
3. Require conditions that are needed to address potential harms and offer verifiable benefits to consumers.
4. Make sure that conditions are enforceable.
5. And, very importantly, work closely with the antitrust agencies to provide complementary expertise to the advantage of both. The opportunity to work with colleagues at the Department of Justice is a personal pleasure and, I submit, has led to tangible public benefits.