

CPI Antitrust Chronicle

April 2014 (1)

**Beneficence Is Beside the Point:
The Antitrust Realities of the
Comcast/Time Warner Cable
Merger**

Geoffrey A. Manne
International Center for Law and
Economics

Beneficence Is Beside the Point: The Antitrust Realities Support the Comcast/Time Warner Cable Merger

Geoffrey A. Manne¹

I. INTRODUCTION

Critics of Comcast have long discussed the cable company as if it were sinister monster aiming at complete dominance of American media by consuming all competitors.² The merger between Comcast and NBCUniversal was thought to be a tipping point in consolidation that would allow Comcast to choke competition in the cable, content, and broadband markets. All evidence indicates these fears were exaggerated, to say the least.

Nonetheless, and keeping with tradition, the “big-is-bad” critics have again come out against Comcast’s proposed acquisition of Time Warner Cable (“TWC”). But while the merger is significant in size, it doesn’t give rise to any plausible theory of anticompetitive harm under modern antitrust analysis.

In a recent essay, Allan Grunes & Maurice Stucke pose a thought experiment: If Comcast can acquire TWC, what’s to stop it acquiring all cable companies?³ The authors’ assertion is that the arguments being put forward to support the merger contain no “limiting principle,” and that the same arguments, if accepted here, would unjustifiably permit further consolidation. In a second essay in this volume, Grunes & Stucke anticipate defenses of the merger, and argue each fails to give good reason to allow it.⁴ But there *is* a limiting principle: competitive harm. Size doesn’t matter, as courts have repeatedly reiterated.⁵

This overwhelming concern about Comcast’s apparent dominance is indicative of a troubling status quo bias.⁶ We need to take a longer view of the market. In 2008, everyone

¹ Geoffrey A. Manne is Executive Director of the International Center for Law and Economics.

² See, e.g., SUSAN CRAWFORD, CAPTIVE AUDIENCE (2013).

³ Allen P. Grunes & Maurice E. Stucke, *Crossing the Rubicon*, GLOBAL COMPETITION REVIEW (Feb. 25, 2014), available at <http://geyergorey.com/crossing-rubicon-comcasttime-warner-merger-blocked-global-competition-review-25-february-2014/>.

⁴ Allen P. Grunes & Maurice E. Stucke, *The Beneficent Monopolist*, 4(1) CPI ANTITRUST CHRON., (April, 2014) (earlier version was available on SSRN).

⁵ And they have done so even *before* the advent of modern economic analysis in antitrust: “The characterization of a company as a ‘large conglomerate’ should not impose a presumption of anti-competitive guilt. Section 7 of the Clayton Act nowhere so provides.” *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 538 (3d Cir. 1969).

⁶ A problem that afflicts many critics of cable/broadband markets. For example, Susan Crawford last year declared fiber to be “future proof” for the next 50 to 100 years. See <http://thedianerehmsshow.org/shows/2013-01-10/susan-crawford-captive-audience/transcript>. She could conceivably end up being right, but it’s extremely unlikely. See, e.g., Adam Thierer, *The Rule Of Three: The Nature of Competition In The Digital Economy*, FORBES, (Jun. 29, 2012), <http://www.forbes.com/sites/adamthierer/2012/06/29/the-rule-of-three-the-nature-of-competition-in-the-digital-economy/> (“The graveyard of tech titans is littered with the names of many other once-mighty giants. Schumpeter’s ‘gales of creative destruction’ have rarely blown harder through any sector of our modern economy.”).

worried about fiber's dominance, dismissing the threat of cable. Now the concern is about the dominance of cable. Five years from now it will be wireless—or something we haven't even heard of yet. Apocalyptic visions about market dominance have nearly always been proved wrong in time. And with the remarkable pace and extent of technological innovation in broadband and video markets in particular—DOCSIS 3.0, DSL vectoring and bonding, LTE Advanced, IP multicasting, and perhaps even satellite broadband—the relentless focus on historical market conditions and the status quo to make claims regarding competitive effects in these markets is simply unjustified.

As always, understanding the competitive effects of economic activity requires understanding extremely complex market dynamics that extend far beyond the simplistic counting of similar competitors.⁷ Properly understood, the proposed Comcast/TWC merger presents no competitive concerns.

II. THE HORIZONTAL ISSUES

A. You Can't Get Comcast in Albany, Anyway: Consumer Video and Broadband Markets

It is well understood at this point that Comcast and TWC don't compete directly for subscribers in any relevant market; in terms of concentration and horizontal effects, the transaction will neither reduce competition nor restrict consumer choice. To the contrary, the transaction should enable the combined firm to take advantage of scale and other efficiencies and, as Comcast described in its Public Interest Statement, will likely enhance competition in key market segments like business services. TWC consumers will receive the immediate benefits of Comcast's faster internet speeds, advanced video products like X1, Comcast's video-on-demand and TV Everywhere, and an upgraded network based on DOCSIS 3.0, which will progress to DOCSIS 3.1 in the near future.⁸

In the multichannel video programming distributor ("MVPD") market, Comcast faces competition almost everywhere from Dish and DirecTV, as well as from Verizon FiOS and/or AT&T U-verse in many markets. Nowhere does it have a monopoly—and nowhere does it compete with TWC.

Claims that Comcast faces only one "real" broadband competitor, or that wireless is not a viable source of competition, are irrelevant for purposes of analyzing this merger. Even if Comcast were a true monopolist provider of broadband service in certain geographic markets, the DOJ would have to show that the merger would be substantially likely to lessen

⁷ For a comprehensive assessment of the video marketplace and its regulation, see Geoffrey A. Manne, *The Future of Video Marketplace Regulation*, Testimony before the House Energy & Commerce Committee, Communications & Technology Subcommittee, Jun. 12, 2013, available at <http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Manne-CT-Satellite-TV-Law-2013-6-12.pdf>.

⁸ James B. Stewart, *A Vision Beyond Cable for Comcast After Merger*, NEW YORK TIMES (Mar. 28, 2014), available at <http://www.nytimes.com/2014/03/29/business/a-vision-for-comcast-in-a-post-merger-world.html>; David L. Cohen, *Comcast and Time Warner Cable File Applications and Public Interest Statement with the FCC*, COMCAST VOICES (Apr. 8, 2014), <http://corporate.comcast.com/comcast-voices/comcast-and-time-warner-cable-file-applications-and-public-interest-statement-with-fcc>.

competition—a difficult showing to make where Comcast and TWC are neither actual nor potential competitors in any of these markets.

But the reality is that Comcast does face significant and increasing competition in broadband—just not from TWC. Instead, not only Verizon FiOS, but also U-verse, Google Fiber, Dish, and a host of other providers offer substitute services for Comcast’s high-speed internet. And for antitrust purposes, not only actual competition, but potential competition is relevant. Recent technological advances have made DSL, satellite, and wireless broadband increasingly viable competitors for high-speed internet service, and these technologies have only just begun rolling out.⁹

When critics of this merger toss out market shares, those numbers seem never to include competitors other than those offering broadband service via coaxial cable or fiber; DSL and other technologies with a lower average top-end speed are excluded. So are satellite broadband services like Exede, even though satellite broadband is becoming increasingly fast (Exede, for example, offers its service at 12 Mbps) and reliable.¹⁰

While “high-speed” may be an amorphous term, for policy purposes it has a well-defined definition: at least 4 Mbps down/1 Mbps up.¹¹ Netflix helpfully explains that its content “will work on internet connection speeds of 0.5 Mbps, but we recommend 1.5 Mbps or higher for the best experience. For HD movies Netflix recommends 5 Mbps.”¹² Claims that only [fill in your preferred, higher minimum speed requirement for “sufficient” streaming capability] Mbps service presents real competition are easily refuted: Netflix notes that the average speeds at which the major internet Service Providers (“ISPs”)—ranging from fiber to DSL—stream its content don’t differ significantly, and even the fastest, Google Fiber, comes in at only 3.74 Mbps.¹³ In other words, there are plenty of services capable of meeting this threshold.

But whatever market power Comcast may currently possess, the proposed merger simply does nothing to increase it, nor to facilitate its exercise. The absence of any reduction in competition should end the inquiry into any potentially anticompetitive effects in these consumer markets resulting from the horizontal aspects of the transaction.

B. Seventy Percent of Us Will Still Pretend We Don’t Watch The Bachelor on Networks Other than Comcast: The Input Market for Video Content

Critics repeatedly assert that the combined entity will gain bargaining leverage against content providers from the merger, resulting in harm (here, lower content prices) to

⁹ For the increasing significance of wireless broadband, see the 16th *Mobile Wireless Competition Report*, 28 FCC Rcd. 3700 ¶ 371 (2013) (“[M]obile wireless providers have made substantial progress in upgrading their networks with higher-speed technologies and expanding coverage with these technologies. In some cases mobile broadband networks are being used as a replacement for wireline last-mile solutions.”).

¹⁰ The FCC, for example, included satellite broadband in its most recent *Measuring Broadband America Report*. *Measuring Broadband America Report* (Feb. 2013), available at <http://www.fcc.gov/measuring-broadband-america>.

¹¹ FCC, *Eighth Broadband Progress Report*, 27 FCC Rcd 10342, ¶¶ 18-19 (2012).

¹² Netflix, *How Fast Should My internet Connection Be to Watch Netflix?*, available at <https://help.netflix.com/en/node/306>.

¹³ See Netflix, *USA ISP Speed Index, February 2014*, available at <http://ispspeedindex.netflix.com/usa>.

programmers. These claims are offered without economic support and appeal instead to some sort of intuition about the dynamics of bilateral negotiations. The reality is far more complicated.¹⁴

After the transaction, Comcast will serve fewer than 30 percent of total MVPD subscribers in the United States. This share is insufficient to give Comcast market power over sellers of video programming.

The FCC has tried to impose a 30 percent cable ownership cap, and twice it has been rejected by the courts. The D.C. Circuit concluded more than a decade ago—in far less competitive conditions than exist today—that the evidence didn’t justify a horizontal ownership limit “lower than 60%” on the basis of buyer power.¹⁵ In 2009 the court again concluded that the “justification for the 30% cap is even weaker now than in 2001....”¹⁶ And this was before telco providers made significant inroads in the MVPD marketplace, taking significant share from the cable companies.

Perhaps even more significantly, the recent exponential growth in online video distributors (“OVDs”) like Google, Netflix, Amazon, and Apple gives content providers even more ways to distribute their programming. This further undermines any idea that Comcast somehow controls the video distribution marketplace. Programmers have more ways to reach viewers than even before and this transaction doesn’t alter that.

Meanwhile, as Greg Rosston and Michael Topper aptly point out in their Declaration accompanying Comcast’s Public Interest Statement, Comcast and TWC don’t compete for programming because they don’t compete for customers. And, at the same time, programming is non-rivalrous—meaning Comcast’s purchase of programming doesn’t affect TWC’s (or any other distributor’s) ability to purchase the same programming. Thus the merger simply won’t affect Comcast’s market power over the supply or cost of programming.¹⁷

In fact, greater concentration among cable operators has coincided with an enormous increase in output and quality, in this case of video programming:

1. The total number of cable channels available to consumers increased from 565 in 2006 to approximately 800 in 2013,¹⁸ an increase of about 42 percent.
2. Total spending on programming increased 29 percent in inflation-adjusted dollars during this period.¹⁹

¹⁴ In fact, the transaction may actually reduce the combined entity’s bargaining power because, among other things, counterparties will have an increased incentive to resist concessions that would apply over a greater number of consumers. See Tasneem Chipty & Christopher M. Snyder, *The Role of Firm Size in Bilateral Bargaining: A Study of the Cable Television Industry*, 81 REV. ECON. & STAT. 326 (1999).

¹⁵ Time Warner II, 240 F.3d 1126, 1136 (D.C. Cir. 2001).

¹⁶ Comcast Corp. v. FCC, 579 F.3d 1, 9 (D.C. Cir. 2009).

¹⁷ Rosston & Topper Declaration, ¶ 177-78.

¹⁸ NCTA, *Industry Data*, <https://www.ncta.com/industry-data>.

¹⁹ Meg James, *Cable TV Networks Feel Pressure of Programming Costs*, LOS ANGELES TIMES (Dec. 8, 2011), <http://articles.latimes.com/2011/dec/08/business/la-fi-ct-cable-economics-20111208>.

3. Indeed, 2010 inflation-adjusted programming expenditures increased by 2.3 percent²⁰—more than the average cable price.²¹

Moreover—not to sound like a broken record—because the merger doesn’t alter the competitive make-up of any relevant consumer market, Comcast will have no greater ability to threaten to withhold carriage of content in order to extract better terms. This is because it will face exactly the same risk post-transaction of losing subscribers to competitors if it doesn’t carry the programming as it does today—and that risk is substantial.²²

Finally, programmers with valuable content have significant bargaining power and have been able to extract the prices to prove it.²³ None of that will change post-merger.

III. THE VERTICAL ISSUES

A. Competing Networks Will Still Show Shows, and Comcast Will Still Air The Bachelor (Not that Any of Us Watches It)

At the outset, it bears repeating that the merger would represent only 30 percent of the national market (for MVPD services), with 70 percent of the market still available for content distribution. But even this significantly overstates the extent of possible foreclosure. Over-the-Top (“OTT”) providers increasingly vie for the same content as cable (and satellite). Netflix alone has as many customers as Comcast will have after the merger and this provides an added avenue of distribution and revenue stream for programmers.

For regional content the analysis is somewhat different. Instead of a national market, for obvious reasons, regional content (like that provided by regional sports networks (“RSNs”)) is a local issue. But once again, the transaction doesn’t alter the extent of direct competition within any local market.

Nevertheless, in a few markets the shift from non-vertically integrated TWC to Comcast may change the extent of vertical integration, which could in turn affect the firm’s incentive to license its own content to competing distributors. But in the past when regulators have considered this issue—in the 2005 Adelphia/Comcast/TWC deal, under far less competitive conditions—the antitrust agency (the FTC in that case) found no substantial threat of anticompetitive harm.²⁴ And while the FCC did identify a potential risk of harm in its review of

²⁰ *Id.* (citing SNL Kagan).

²¹ FCC, *Report on Cable Industry Prices*, MM Docket No. 92-266 at 9, Table 3 (Mar. 9, 2012), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-377A1.pdf.

²² TWC reportedly lost 300,000 subscribers in its recent retransmission fee battle with CBS. See Hillary Lewis & Alex Ben Block, *Time Warner Cable Loses 306,000 TV Subscribers Amid CBS Dispute*, THE HOLLYWOOD REPORTER (Oct. 31, 2013), available at <http://www.hollywoodreporter.com/news/time-warner-cable-loses-306000-652131>.

²³ Meg James, *Cable TV Networks Feel Pressure of Programming Costs*, LOS ANGELES TIMES (Dec. 8, 2011), <http://articles.latimes.com/2011/dec/08/business/la-fi-ct-cable-economics-20111208>.

²⁴ See Michael Salinger, *Prepared Statement of the Federal Trade Commission on Sports Programming and Cable Distribution: The Comcast/Time Warner/Adelphia Transaction*, Before the Committee on the Judiciary United States Senate (Dec. 7, 2006) (“After careful consideration, the staff concluded for various reasons that the evidence did not indicate that the proposed transaction was likely to make exclusive contracts profitable for either Comcast or TWC in the geographic markets impacted by the transaction.... The Commission majority concluded that the investigation did not produce evidence that indicated that the transaction was likely to reduce competition. Indeed,

the Adelphia deal, its solution was to impose arbitration requirements for access to this programming—which are already part of the NBCUniversal deal conditions and will be extended to the new territory and new programming from TWC.²⁵

This shouldn't be surprising. Comcast already licenses its content to and from TWC (as well as the range of other competitors) in essentially every market where it owns RSNs. There is little to suggest that vertical integration in a local market actually matters to the decision whether to license RSN content, and the FCC rules and the Comcast-NBCUniversal merger conditions provide plenty of additional safeguards.²⁶

Most significantly, the dynamic realities of the market should put these issues to rest. Almost immediately upon the announcement of the merger there were suggestions that the merger would drive independent content providers further into the arms of OTT providers like Netflix and Amazon, which would mean more intense competition between OTT providers and cable. The availability of such outlets and the prospects for enhanced competition arising from market changes like the proposed merger demonstrate both the complexity of these markets and the concomitant unreliability of unsophisticated analyses based on simplistic assessments of market structure.

B. Netflix Will Be Just Fine: The Market for Broadband Interconnection

The argument that the merger will increase Comcast's incentive and ability to impair online video content or other edge providers is similarly without merit. Fundamentally, Comcast benefits from providing its users access to edge providers, and it would harm itself if it were to constrain access to these providers.

Content providers, even as they (sometimes) work to hamstring distributors through regulation, recognize the symbiotic relationship. Reed Hastings, Netflix's CEO, recently noted that

Consumers purchase higher bandwidth packages mostly for one reason: high-quality streaming video. ISPs...are working closely with us and other streaming video services to enable the ISPs' subscribers to more consistently get the high-quality streaming video consumers desire.²⁷

Some have argued, of course, that Comcast's vertical structure would nonetheless make foreclosing access to edge providers profitable, suggesting that the company could make up in sales of its own video content (either through cable subscriptions, video-on-demand, or Xfinity

under certain circumstances, exclusive arrangements may have procompetitive benefits for consumers by helping firms differentiate themselves and compete more effectively.”).

²⁵ *Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia*, 21 FCC Rcd. 8203 (2006).

²⁶ One analysis does suggest that prices may be higher for integrated RSNs, but only minimally so (4-7 percent of the mean license fee per subscriber per month). Moreover, the data do not support a conclusion that the effects are anticompetitive. Kevin W. Caves, Chris C. Holt & Hal J. Singer, *Vertical Integration in Multichannel Television Markets: A Study of Regional Sports Networks*, 12 REV. NET. ECON. 61 (2013).

²⁷ Reed Hastings & David Wells, *Netflix Q4 2013 Shareholder Letter* at 6 (Jan. 22, 2014), available at <http://files.shareholder.com/downloads/NFLX/2913616374x0x720306/119321bc-89c3-4306-93ac-93c02da2354f/Q4%2013%20Letter%20to%20shareholders.pdf>.

services) what it might lose from impairing its broadband offerings. But these arguments don't stand up to scrutiny, either.

In the first place, foreclosure effects would be limited. On a national level, the combined firm would have only about 40 percent of broadband customers (excluding mobile broadband, which, when included, would leave the combined firm with much a lower share of broadband customers).²⁸ This leaves at least 60 percent—and quite possibly far more—of customers available to purchase content and support edge providers reaching minimum viable scale, even if Comcast were to attempt to foreclose access.

Some have also argued that because Comcast has a monopoly on access to its customers, transit providers are beholden to it. But that's not quite true. The transit market through which edge providers bring their content into the Comcast network is highly competitive. Edge providers can access Comcast's network through multiple channels, undermining Comcast's ability to deny access or degrade service to such providers.²⁹ The transit market is also almost entirely populated by big players engaged in repeat interactions and, despite a large number of transactions over the years, marked by a trivial number of disputes.

Netflix's decision to connect with Comcast directly and bypass the middleman (e.g., Cogent or Level 3) was a business decision, the price of which deserves no special regulatory treatment.³⁰ As it had done previously, Netflix (like all edge providers) could have continued to purchase transit from any of the many companies that peer with Comcast, or it could have continued to use (as it had also done previously) a CDN service from a multitude of providers, all of which have interconnection agreements with Comcast. Instead, Netflix chose to interconnect directly with Comcast under an arrangement that offered an economically attractive alternative to indirect transit and provided it with more control over its service.³¹

The recent Comcast/Netflix agreement demonstrates that the sophisticated commercial entities in this market are capable of resolving conflicts—conflicts that appear to affect only the distribution of profits among contracting parties but not raise anticompetitive concerns:

Thus, although peering is often misrepresented as zero-price interconnection, it is more properly regarded as a form of barter and is conditional on an even exchange. ... [Netflix] would prefer it if the ISPs bore as much of the burden of the additional costs of carrying this traffic as possible.... As in the typical case, both

²⁸ Jim Edwards, *Check Out How Much Of The US Market Comcast Will Control After The Time Warner Deal*, BUSINESS INSIDER (Feb. 13, 2014), available at <http://www.businessinsider.com/comcast-market-after-time-warner-deal-2014-2>

²⁹ See, e.g., *Global Crossing & Level 3 Application for Consent to Transfer Control*, Memorandum Opinion, 26 FCC Rcd. 14056 ¶¶ 28-29 (2011).

³⁰ And, for what it's worth, neither does Netflix itself, as Scott Hemphill noted recently in the New York Times. See James B. Stewart, *A Vision Beyond Cable for Comcast After Merger*, NEW YORK TIMES (Mar. 28, 2014), available at <http://www.nytimes.com/2014/03/29/business/a-vision-for-comcast-in-a-post-merger-world.html>.

³¹ Dan Rayburn, *Here's How the Comcast & Netflix Deal is Structured, With Data & Numbers*, STREAMINGMEDIA (Feb. 27, 2013), <http://blog.streamingmedia.com/2014/02/heres-comcast-netflix-deal-structured-numbers.html>; see also Richard Bennett, *Paid Peering and the internet of Video Things*, HIGH TECH FORUM (Mar. 28, 2014), <http://www.hightechforum.org/paid-peering-the-internet-of-video-things/>.

sides reached an interconnection agreement that divides the costs.³²

Even if we take as given Netflix's preferred transit model, there is still no reason to believe that Comcast has any ability to exercise welfare-reducing market power, and even less reason to think this merger would affect that ability. Among other things:

- Transit agreements are usually determined based on expected throughput, so there is no reason it should cost Netflix more to serve 30 million users if they are split between two networks than if the same number is concentrated in one.
- If anything it might cost less, as some of Netflix's interconnection points with Comcast's existing network might be close enough to serve former TWC customers where previously they might have been served through a separate interconnection point (and a separate agreement).

If Netflix does end up paying more to access Comcast's network over time it won't be because of market power or this merger. Rather, it's an indication of the evolving market and the increasing popularity of OTT providers.

There are also under-appreciated pro-competitive justifications for such arrangements. Charging Netflix allows Comcast to better distinguish between the high-usage Netflix customers (two percent of Netflix users account for 20 percent of all broadband traffic) and everyone else. This should lower cable bills on average, improve incentives for users, and lead to more efficient infrastructure investments by both Comcast and Netflix.³³

C. Rivals and Unaffiliated Programmers Will Be Just Fine, Too: The Market for MVPD Video Content

Critics have alleged that the vertically integrated Comcast may withhold its content from MVPDs or OVDs, or deny carriage to unaffiliated programming. In theory, by denying competitors or potential competitors access to popular programming, a vertically integrated MVPD might gain a competitive advantage over its rivals. Similarly, an MVPD that owns cable channels may refuse to carry at least some unaffiliated content to benefit its own channels.

As a preliminary matter (once more) these issues are not transaction specific. In fact, the issues were exhaustively addressed and resolved in the NBCUniversal proceeding; it is unclear why that resolution would now be deemed inadequate. But, regardless, Comcast will not be able to engage in successful foreclosure strategies following this transaction.

Comcast does not have market power as either a buyer or a seller of programming. The transaction has no effect on Comcast's share of national programming. And while it will have a larger share of national distribution post-merger, as noted above (and as the courts have

³² Christopher S. Yoo, *Testimony before the United States Senate Committee on the Judiciary, Hearing on "Examining the Comcast-Time Warner Cable Merger and the Impact on Consumers,"* Apr. 9, 2014, available at <http://www.judiciary.senate.gov/imo/media/doc/04-09-14YooTestimony.pdf>.

³³ See Jim Cicconi, *Who Should Pay for Netflix?*, AT&T PUBLIC POLICY BLOG (Mar. 21, 2014), available at <http://www.attpublicpolicy.com/consumers-2/who-should-pay-for-netflix/>. See also Berin Szoka, *Killing Net Neutrality Helps Underdogs Succeed*, WIRED (Feb. 17, 2014), available at <http://www.wired.com/2014/02/oh-cries-net-neutrality-comcast-time-warner-merger/>.

repeatedly found), a 30 percent market share is nonetheless insufficient to confer buyer power in today's highly competitive MVPD market.

Moreover, the programming market is highly dynamic and competitive, and Comcast's affiliated programming networks face significant competition. As Rosston & Topper explain:

[F]oreclosing other MVPDs' access to Comcast's national cable networks would not benefit Comcast's MVPD service as it would not only cause the networks to lose revenues but also would likely not lead to many subscribers of other MVPDs switching to Comcast.³⁴

For much the same reason (the prevalence of, and demand for, competing content), Comcast already has no ownership interest in the overwhelming majority of content it distributes. This will not measurably change post-transaction.

Even if there were any concern here, the FCC's existing program access and program carriage rules, as well as the NBCUniversal conditions, provide plenty of safeguards, and there is no indication that these safeguards have failed to work since Comcast acquired NBCUniversal.

IV. THE PRO-COMPETITIVE BENEFITS

While the proposed transaction doesn't give rise to plausible anticompetitive harms, it should bring well-understood pro-competitive benefits from increased scale, expanded geographic reach, and improvements to TWC's technology and governance.

Most notably, the transaction will bring significant scale efficiencies in a marketplace that requires large, fixed-cost investments in network infrastructure and technology. And bringing a more vertical structure to TWC will likely be beneficial, as well. Vertical integration can increase efficiency,³⁵ and the elimination of double marginalization often leads to lower prices for consumers.³⁶

Let's be clear about the baseline here. Remember all those years ago when Netflix was a mail-order DVD company? Before either Netflix or Comcast even considered using the internet to distribute Netflix's video content, Comcast invested in the technology and infrastructure that ultimately enabled the Netflix of today. It did so at enormous cost (tens of billions of dollars over the last 20 years) and risk. Absent broadband we'd still be waiting for our Netflix DVDs to be delivered by snail mail, and Netflix would still be spending three-quarters of a billion dollars a year on shipping.

The ability to realize returns—including returns from scale—is essential to incentivizing continued network and other quality investments. The cable industry today operates with a small positive annual return on invested capital ("ROIC") but it has had cumulative negative ROIC over the entirety of the last decade. In fact, on invested capital of \$127 billion between 2000 and

³⁴ Rosston & Topper Declaration, ¶ 223.

³⁵ Thomas W. Hazlett, *Vertical Integration in Cable Television: The FCC Evidence* at 5 (Oct. 19, 2007), available at <http://www.arlingtoneconomics.com/studies/vertical-integration-in-cable-television.pdf>.

³⁶ Gregory L. Rosston, *The Proposed Comcast-NBCU Transaction: Response to Comments and Petitions Regarding Competitive Benefits and Advertising Competition*, (Jul. 21, 2010), <http://www.comcast.com/nbcutransaction/pdfs/REDACTED%20Rosston-Topper%20Reply%20Report%20-%20FINAL.pdf> ("the reduction in double marginalization...is based on empirical evidence").

2009, cable has seen economic profits of negative \$62 billion and a weighted average ROIC of negative 5 percent.³⁷ Meanwhile Comcast's stock has significantly underperformed the S&P 500 over the same period and only outperformed the S&P over the last two years.

V. CONCLUSION

In sum, the fears about anticompetitive effects arising from the proposed Comcast/TWC merger are unfounded. Although at times plausible-sounding, the alleged problems just don't stand up to scrutiny. In most cases they are also not transaction-specific and have no place in an appropriate merger review. Unless and until further analysis reveals as-yet unidentified, transaction-specific harms, the merger should pass antitrust muster.

³⁷ Larry Dignan, *Broadband Networks: Returns on Invested Capital Stink*, SEEKING ALPHA (Dec. 23, 2010), <http://seekingalpha.com/article/243441-broadband-networks-returns-on-invested-capital-stink>.