MERGER ANTITRUST LAW

Unit 15: Vertical Mergers

Classes 22-23

Professor Dale Collins
Georgetown University Law Center
Fall 2023

Table of Contents

DEPARTMENT OF JUSTICE

The Interesting Case of the Vertical Merger

JON SALLET
Deputy Assistant Attorney General For Litigation
Antitrust Division
U.S. Department of Justice

Remarks as Prepared for Delivery
ABA Fall Forum

Washington, DC

November 17, 2016

Introduction

Thank you. And thanks as well to Barry Nigro, Kathleen Foote, Bill MacLeod, and the ABA Antitrust Section, for the opportunity to speak today at the Fall Forum. This all came about over the summer, when I thought that it might be interesting to do a presentation on how the Division has looked recently at vertical mergers. Not a broadly engrossing topic, I thought at the time, but one that might be of some limited utility to antitrust practitioners. But now there's actually a vertical merger in the news. To be very serious, the timing of this was coincidental, and this speech does not address any pending transaction in any way. Nor do I want you to read into it any kind of coded messages. It's just an attempt to summarize recent developments in what Sherlock Holmes, in a different context, said was a question of "some interest."

My purpose today is to provide my personal views of the import of the Division's recent approach to vertical mergers and other mergers that raise the potential for vertical restraints on competition. Of course, you may be familiar with the so-called Non-Horizontal Guidelines, which were issued in 1984.[1] But it is widely recognized that the competitive effects theories now applied by the Division in assessing vertical and other non-horizontal mergers go beyond those articulated in 1984 and reflect more recent economic literature and practical experience on whether and how a vertically integrated firm would act to harm competition. In other words, the Division's concern with possible foreclosure, raising rivals' costs, and other mechanisms for harming competition that can arise from such deals is substantially broader than what the 1984 Guidelines express. Moreover, efficiencies are not always cognizable and remedies will not always be efficacious, issues the 1984 Guidelines do not adequately address.

I recognize that some observers have suggested that the continued existence of the Non-Horizontal Guidelines means that the Division does not devote many resources to the review of vertical transactions; I believe that this conclusion is belied by the recent work of the Division, in completed reviews such as Comcast/NBCU, Google/ITA, UTC/Goodrich, Monsanto/Delta & Pine Land, the reviews of first Comcast's and then Charter's proposed acquisition of Time Warner Cable, and most recently, Lam/KLA. The FTC has also challenged vertical mergers, for

[1] Dep't of Justice, Non-Horizontal Merger Guidelines (June 29, 1984), available at https://www.justice.gov/atr/non-horizontal-merger-guidelines.

example in GE/Avio, Pepsi/PBG, and Coca-Cola/CCE, under similar theories of harm to those I will be discussing today. Indeed two decades ago then-DAAG Steven Sunshine told the Spring Meeting that "vertical merger enforcement is an important part of the Department's merger policy,"[2] and I think the record reflects that is still true today.

The starting point of analysis should be this: "vertical" is a term that describes the economic relationship between firms. "Vertical" is a subset of the class of non-horizontal relationships where two companies operate at different levels of production or distribution—insofar as their relationship is vertical, they are typically not serving, or seeking, the same set of customers with the same types of products or services. By "vertical," I mean specifically the set of supply-chain relationships with a single firm present in both an "upstream" market of providers and a "downstream" market, usually of distributors. (One recognizes that the use of the terms "upstream" and "downstream" rests on the perspective of the observer. Distributors can be described as "downstream" of manufacturers, who create an input into the distribution, or as "upstream" of the manufacturing market, to which they provide an input. For purposes of today's discussion, I will use the former formulation and describe manufacturers as "upstream" of distributors).

The key point I wish to make is this: "vertical" describes a business relationship; but the identification of that business relationship does not by itself render a judgment as to whether competition may be helped or harmed. To answer that question, we must go beyond simply the vertical nature of the business relationship to pose a series of questions about markets and competitive effects.

So let me address three issues: first, how the Division has recently assessed vertical transactions considering potential competitive benefits and harms. Second, how the Division takes note of mergers in which an outcome may be to increase the risk of vertical restraints, for example through increased bargaining leverage. Third, how we have recently been thinking

[2] Vertical Merger Enforcement Policy, Address by Steven C. Sunshine, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, before the American Bar Association Section of Antitrust Law Spring Meeting. Text Published May 11, 1995. Available at https://www.justice.gov/atr/speech/vertical-merger-enforcement-policy.

about the use of conduct remedies in these kinds of transactions. I'll begin with some background applicable to all three.

Background

It's been a long time since the Supreme Court last adjudicated a vertical merger. That was in *Ford-Autolite* in 1972.[3] But in the late 1970's the Supreme Court took a significant step in changing the previous view of vertical contractual relationships. Although not a merger case, *GTE Sylvania* has long been recognized as very important in the analysis of vertical relationships, undoing the *per se* rule for nonprice vertical restraints and recognizing their potential to enhance competition. But I want to suggest that *GTE Sylvania* and one of its successor cases, *Leegin*, stand for three principles that are reflected in the Division's recent work on vertical transactions.

First, Justice Powell's opinion in *GTE Sylvania* rested on the principle that facts matter. Justice Powell, for whom I clerked, was very proud of this opinion; and, in emphasizing the importance of factual analysis, he was hewing close to a core aspect of how he saw the business of judging. From the Division's perspective, the result, of course, is a careful analysis of the specific circumstances presented.

Second, the Court had a very specific reason for concluding that the facts in that case pointed towards a pro-competitive outcome. As Justice Powell's opinion explained, the vertical restrictions in that case "promote[d] interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."[4] So the fundamental point was not merely that the relationship was vertical, but that on the facts before the Court the vertical relationship led to an outcome that increased competition in a market.

Third, the 2007 *Leegin* opinion found similarly: vertical price restraints are no longer prohibited *per se*; their effects are evaluated under the rule of reason because they can benefit competition.[5] Here the analysis of the Court reinforces and extends the understanding of the Court in *GTE Sylvania*. As with the Powell opinion, the *Leegin* Court recognized that resale

[3] *Ford Motor Co. v. United States*, 405 U.S. 562 (1972).
[4] *Continental Television v. GTE Sylvania*, 433 U.S. 37, 54-55 (1977).
[5] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

price maintenance could "increase interbrand competition by encouraging retailer services."[6] But the Court understood that, as always under a rule of reason, anti-competitive outcomes would also be possible, explaining that resale price maintenance, for example, could be used by a powerful retailer to forestall innovation in distribution that cuts costs or by a powerful manufacturer to curb the sale of competing products of "smaller rivals or new entrants."[7] In these observations, we see the recognition of both input and customer foreclosure theories.

These three themes run through our recent analysis of vertical mergers. We ask, again and again, what do the facts tell us about the potential impact of a new arrangement on what the *GTE Sylvania* and *Leegin* Courts called interbrand competition? And we examine very carefully the potential for input and customer foreclosure.

In other words, I believe that, while we have sharpened some of our tools, the essential inquiry has not changed. But what we are seeing may well have.

It's worth remembering the classic hornbook example of a vertical transaction. A vegetable retailer buys a vegetable farm in order to be able to assure her retail customers that they will get uniformly high quality vegetables. There are a lot of vegetable retailers and a lot of vegetable farmers (and low barriers to entry for both) and the hypothetical often assumes the acquisition improves the competitive strength of the company, offering consumer benefits that could not be achieved through contract. The hypothetical may similarly assume benefits to the upstream vegetable grower, who gains a stable retail outlet around which to plan crop inventory and harvests. With those assumptions, the transaction raises no antitrust concerns; in fact, it appears to be procompetitive.

And here it's worth emphasizing that vertical integration can create significant efficiencies that benefit suppliers, distributors, and consumers alike. Antitrust experts of different stripes have recognized that vertical mergers can supply competitive benefits. In Judge Bork's famous "Antitrust Paradox," he wrote that "vertical mergers are means of creating efficiency," that "may cut sales and distribution costs, facilitate the flow of information…create

[6] *Id.* at 891.
[7] *Id.* at 894.

economies of scale in management, and so on."[8] Steve Salop, in two co-authored articles, has helpfully described a taxonomy of cognizable efficiency benefits, which include cost and quality efficiencies, increased investment incentives, circumstances in which a vertical merger might reduce the potential for coordination, improvements in design and production, and eliminating double mark up of costs.[9]

In many cases, the Division has ultimately determined a vertical transaction would create efficiencies. For example, in Google/ITA, Google suggested the transaction would give it a platform on which to develop new and innovative flight search services for consumers. The Division ultimately settled on a remedy that retained this benefit of the transaction.[10] Many of the vertical transactions cleared by the Division have presented significant potential efficiencies that factored into our final decision.

We have not always accepted claimed efficiencies, however.

The reduction of double marginalization is a good example of the need for a careful scrutiny of claimed efficiencies. As a matter of arithmetic, if two firms with vertically related or complementary products both have some market power, they may be able to lower the price charged to the downstream market by eliminating the above-market markup otherwise charged on two separate products. Vertical integration can solve this problem and benefit consumers. But other factors may be important to consider. For example the DOJ's competitive impact statement in Comcast/NBCU explains how, after reviewing documents, data, and testimony, the Division concluded "much, if not all, of any potential double marginalization is reduced, if not completely eliminated, through the course of contract negotiations."[11] Indeed, I think it is fair to say that an omni-present question in the recent completed reviews of vertical transactions is

[8] Bork, Robert H. (1993). *The Antitrust Paradox* (second edition) at 226-227. New York: Free Press.
[9] Salop, Steven C. and Culley, Daniel P., Potential Competitive Effects of Vertical Mergers: A How-To Guide for Practitioners, Georgetown Law Faculty Publications and Other Works Paper 1392 (2014); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513 (1995).
[10] Competitive Impact Statement, *United States v. Google Inc.* (2011) available at https://www.justice.gov/atr/case-document/file/497671/download.
[11] Competitive Impact Statement, *United States et al. v. Comcast Corp. et al.* (2011) available at https://www.justice.gov/atr/case-document/competitive-impact-statement-72.

whether benefits are merger-specific or whether the same efficiencies can be gained through contracting.

Of course the question, especially, when vertical mergers involve concentrated markets is the potential for harm to competition. Let me turn to how that's come up in some of our recent reviews.

1. Competitive Effects

The circumstances that have given rise to concerns in vertical merger reviews differ from the simple vegetable hypothetical. As a starting point, we've seen concentrated markets, upstream, downstream, or both. Sometimes we've seen upstream inputs of competitive significance, and even uniqueness, to other downstream firms. Downstream opportunities may be foreclosed to upstream rivals. In some cases we've seen the flow of competitively-sensitive information that tends to create unilateral or coordinated effects. The hallmark of the inquiry, whatever circumstances we observe, is to look for power over a relevant market and examine how it may be enhanced or maintained as a result of the transaction. It's ultimately the question *GTE Sylvania* and *Leegin* addressed: does the merger threaten interbrand competition? Like identifying efficiencies, assessing those threats often requires a fact-intensive inquiry.

a. Input Foreclosure and Raising Rivals' Costs

Input and customer foreclosure theories arise from the fact that vertical transactions can create opportunities and incentives for firms to handicap rivals, and such actions can harm competition if they weaken the constraint that rivals impose on the merged firm's market power (or, in some cases, the combined market power of a collection of firms that can coordinate on a higher price, lower output, or other non-competitive result). The Division's UTC/Goodrich review in 2012 is a good example. The transaction would have made UTC both a major producer of large aircraft turbine engines and the sole-source supplier of critical components to one of its leading engine competitors. Our investigation revealed the merged firm would have had the ability and incentive to withhold or delay delivery of critical components, among other things, to that direct competitor. An impact—here an adverse impact—on interbrand competition naturally follows from this kind of foreclosure—competitors without access to critical parts do not constrain market power as well as those who can timely and effectively bring competing products to market. That problem was resolved through divestitures that also remedied more traditional horizontal concerns.[12]

A similar concern arose in Comcast's acquisition of NBCU, where Comcast was buying unique content that was an extremely valuable component of rival video distributors' channel packages. Comcast enjoyed market power in video distribution, and the investigation suggested it could weaken competitive threats by raising the costs of critical content to downstream rivals like competing video distributors. Similar to completely foreclosing access to an input, raising its costs can decrease the ability of downstream competitors to constrain market power.

b. Innovation Effects

The concern in Comcast/NBCU extended not just to the current video distribution ecosystem, but to nascent online video rivals that were then beginning to disrupt and change the delivery model. That added an important layer of analysis that sometimes arises in vertical transactions: we look not only at existing products and distribution systems but at how innovation and disruption are changing them to consumers' benefit. The Comcast/NBCU decree not only sought to protect existing video rivals from foreclosure, but it was also designed to prevent the merged firm from foreclosing or raising the costs of developing business models with which online entrants would attack long-prevailing incumbent market power. The prospect was that online distributors would enter and bring new forms of competition to established video-programming business models of the kind traditionally operated by cable companies. We recognized in our Competitive Impact Statement that online entry was nascent but that the merged company might use its new-found assets to diminish its competitive significance.

The Division's consent decree with Monsanto in its acquisition of Delta & Pine Land is another example of how innovation can factor into a vertical foreclosure analysis.[13] Monsanto developed genetic traits to put into its seeds, while Delta and Pine Land, also a seller of seeds, had a history of partnering with independent developers of traits, and was an especially

---

[12] *See* Competitive Impact Statement, *United States v. United Technologies, Inc. and Goodrich Corp.* (2013) available at https://www.justice.gov/atr/case-document/competitive-impact-statement-217.
[13] *See* Competitive Impact Statement, *United States v. Monsanto Co. and Delta and Pine Land Co.* (2007) available at https://www.justice.gov/atr/case-document/competitive-impact-statement-154.

important partner for those developers. So Monsanto would be buying a company that was an important participant in the process of competing against Monsanto's traits. The Division concluded that the merger would lessen competition in the development of cotton traits that would compete against Monsanto's traits. We ultimately entered into a consent decree with both divestiture and conduct remedies that reduced this risk while also preventing separate horizontal effects of that transaction. You'll see similar innovation concerns reflected in the competitive impact statement for Google/ITA, relating in that case to software platforms,[14] and in our recent press release upon the abandonment of the proposed merger between Lam Research Corp. and KLA Tecnor.[15]

c. Competitively Sensitive Information Facilitating Coordination

In addition to potential foreclosure effects, we have also sometimes considered whether a vertical transaction will harm interbrand competition by facilitating coordination, such as through the exchange of competitively sensitive information. We had an information concern in 2011 when GrafTech sought to acquire Seadrift Coke LP.[16] GrafTech is one of the largest producers of graphite electrodes in the world, and Seadrift Coke was the second largest supplier of a critical input—petroleum needle coke. GrafTech already had a supply arrangement with an upstream rival to Seadrift, and based on a close examination of that arrangement and the companies' businesses, we concluded confidential information would likely have flowed between competitors and facilitated coordination. Our consent decree limited the flow of that information in several respects, in order to reduce that concern. Our decree in the Google/ITA transaction had similar requirements, walling off aspects of Google's business from the customer data available to ITA.

[14] "A vertically integrated monopoly is less likely to spur innovation and efficiency than competition between vertically integrated firms, and a vertically integrated monopoly is unlikely to pass the benefits of innovation and efficiency onto consumers." Competitive Impact Statement, *United States, et al. v. Ticketmaster Event Entertainment, et al.* (2010) available at https://www.justice.gov/atr/case-document/competitive-impact-statement-209.
[15] https://www.justice.gov/opa/pr/lam-research-corp-and-kla-tencor-corp-abandon-merger-plans.
[16] Competitive Impact Statement, *United States v. GrafTech International Ltd. et al.* (2010) available at https://www.justice.gov/atr/case-document/competitive-impact-statement-116.

d. Other Theories of Harm

There are other theories of harm in vertical transactions that are beyond the scope of these remarks, such evasion of regulation. Steve Salop and Daniel Culley recently wrote a helpful article in the Journal of Antitrust Enforcement that sets out such theories,[17] and Jonathan Baker has written about this as well in the context of the Comcast/NBCU deal,[18] as have others. These theories are worthy of examination and, in the right case, may be the basis for the Division's factual analysis.

2. Vertical Mechanisms of Harm without Vertical Integration

The second topic I'll touch on briefly is the presence of vertical mechanisms of harm in mergers that don't necessarily involve a combination of vertically-related assets. That's part of what we saw in Comcast/Time Warner Cable (TWC) and Charter/TWC.

Both Comcast/TWC and Charter/TWC would have been mergers of geographically non-overlapping cable and internet networks, strictly speaking, and they were not predominantly mergers involving vertical integration of supplier and distributor like the vegetable grower hypothetical. When Comcast/TWC was announced, commentators assumed that we would focus on geographic product markets for cable subscribers and the lack of overlap between the companies in those downstream markets. We did look closely at those markets, but found the lack of geographic overlap was not determinative because the transaction increased the ability of the merged entity to take actions that harmed nationwide downstream rivals.

In Comcast/TWC, the post-merger firm would have controlled nearly 60% of high-speed broadband internet connections nationwide. Comcast would therefore have controlled a large proportion of the connections all internet content providers need to deliver content to household customers. Comcast would have also had greater incentive and ability to harm rivals to its cable television business including online video distributors like Netflix or Amazon Prime, by, for example, charging even higher interconnection fees for access to customers or degrading the

[17] Steven Salop and Daniel P. Culley, Revising the US vertical merger guidelines: policy issues and an interim guide for practitioners, Journal of Antitrust Enforcement, 2015, 0, 1–41.
[18] Baker, Jonathan B., Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis, *Antitrust*, Vol. 25, No. 2 (Spring 2011).

quality of service. This concern about the cost and quality of upstream providers' access to downstream customers arose even though Comcast merging with Time Warner Cable did not primarily involve vertical integration. Comcast ultimately abandoned the transaction after both DOJ and FCC expressed concerns along these lines.

Charter's acquisition of Time Warner Cable raised similar concerns, although with smaller shares.[19] The consent decree that Charter agreed to last year illustrates the vertical nature of the theory of programming foreclosure in that case. The decree prevents Charter from entering into vertical contracts with upstream programmers that would harm video rivals by limiting their access to programming that they would use to compete against incumbent pay television providers like Charter. Whereas the Comcast/NBCU complaint focused on whether the merged firm would itself withhold content from rivals, the Charter/TWC complaint focuses on the ability of the merged firm to raise rivals' costs through the use of bargaining power with independent programmers. The decrees address a similar mechanism of harm notwithstanding the different structures of the transactions themselves.

3. Remedies

Let me turn to my third topic, the subject of remedies. Where we have identified that a vertical transaction threatens interbrand competition, we must still consider how to resolve that concern, particularly where substantial efficiencies are also identified.

In vertical transactions, observers sometimes assume that conduct remedies will always be available and sufficient. But that is not the current practice of the Division—if it ever was. Indeed, while the Antitrust Division Policy Guide to Merger Remedies (2011) says explicitly that "conduct remedies can be an effective method for dealing with competition concerns raised by vertical mergers," it adds that creating an appropriate remedy requires identification of the relevant competitive concerns and it warns that "[n]o matter what type of conduct remedy is considered, however, a remedy is not effective if it cannot be enforced."[20] For example, the Policy Guide explains, "[r]emedial provisions that are too vague to be enforced, or that can

[19] *See* Competitive Impact Statement, *United States v. Charter Communications Inc., et al.* (2016) available at https://www.justice.gov/atr/case/us-v-charter-communications-inc-et-al.

[20] Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies (June 2011) available at https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf.

easily be misconstrued or evaded, fall short of their intended purpose and may leave the competitive harm unchecked." Thus, the core question under the antitrust laws will always be whether conduct relief is adequate to eliminate the risk of anti-competitive harms. To be employed, conduct remedies must be adequate to address identified risks, must be able to be monitored by the Division or a court, and must be capable of being effectively enforced in a timely manner. As the Policy Guide to Merger Remedies makes plain, the question in any case is whether such criteria can be met. Some vertical transactions may present sufficiently serious risks of foreclosing rivals' access to critical inputs or customers, or otherwise threaten competitive harm, that they require some form of structural relief or even require that the transaction be blocked.

Conclusion

We've talked about economics and evidence. But we should end by acknowledging the importance of experience. Courts call the Sherman Act a common law statute. And a different Holmes, Oliver Wendell Jr., started his first lecture on the Common Law by reminding us that the evolution of law looks not only to logic but also to experience. Today I have attempted to provide a review of the recent experience reviewing vertical transactions. We have a touchstone—namely whether mergers, vertical or otherwise, will result in harm to competition, what *GTE Sylvania* focused on as interbrand competition, and what *Leegin* suggested foreclosure could cause. In conducting that inquiry, we should try to remember what Sherlock Holmes also said: "It is a capital mistake to theorize before one has data." Perhaps that is overly strong, and we should say, it would be a mistake to conclude an inquiry based just on theory without a dedicated detective's desire for detail and data. A conclusion that economics, evidence and experience suggest, one might say, is Elementary.

Thank you.

Vertical Merger Guidelines

Vertical Merger Guidelines

U.S. Department of Justice
&
The Federal Trade Commission

June 30, 2020

Table of Contents

U.S. DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION

VERTICAL MERGER GUIDELINES

1. OVERVIEW

These Vertical Merger Guidelines outline the principal analytical techniques, practices, and enforcement policies of the Department of Justice and the Federal Trade Commission (the "Agencies") with respect to a range of transactions often described as vertical mergers and acquisitions.[1] The relevant statutory provisions include Section 7 of the Clayton Act, 15 U.S.C. § 18, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1–2, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Most particularly, Section 7 of the Clayton Act prohibits any merger or acquisition if, "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." This provision applies to vertical mergers, as Congress made plain in the 1950 amendments to the Clayton Act.

These Guidelines describe how the agencies analyze a range of non-horizontal transactions. Where they use the term "vertical," that term should not be read to narrow the applicability of these Guidelines. The analytical techniques, practices, and enforcement policies described in these Guidelines apply to strictly vertical mergers (those that combine firms or assets at different stages of the same supply chain), "diagonal" mergers (those that combine firms or assets at different stages of competing supply chains), and vertical issues that can arise in mergers of complements. In describing a vertical relationship, a stage closer to final consumers (such as a distributor, retailer, or finished goods manufacturer) is termed "downstream," and a stage further from final consumers (such as a supplier, wholesaler, or input manufacturer) is termed "upstream."

Mergers often present both horizontal and vertical elements, and the Agencies may apply both the Horizontal Merger Guidelines[2] and the Vertical Merger Guidelines in their evaluation of a transaction. In addition, if one of the parties to a transaction could use its pre-existing operations to facilitate entry into the other's market, the Agencies may consider whether the merger removes competition from a potential entrant, using the methods described in the Horizontal Merger Guidelines.

These Guidelines are intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement

[1] These Guidelines supersede the extant portions of the Department of Justice's 1984 Merger Guidelines, which are now withdrawn and superseded in their entirety. They reflect the ongoing accumulation of experience at the Agencies. These Guidelines may be revised from time to time as necessary to reflect significant changes in enforcement policy, to clarify existing policy, or to reflect new learning.

[2] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010).

decisions. They may also assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws to the types of transactions discussed herein.[3]

These Guidelines should be read in conjunction with the Horizontal Merger Guidelines. Many of the principles and analytic frameworks used to assess horizontal mergers apply to vertical mergers. For example, Section 1 of the Horizontal Merger Guidelines—describing in general terms the purposes and limitations of the Horizontal Merger Guidelines and the goals of merger enforcement—is also relevant to the consideration of vertical mergers. Other topics addressed in the Horizontal Merger Guidelines, but not addressed herein – such as the analytic framework for evaluating entry considerations, the treatment of the acquisition of a failing firm or its assets, and the acquisition of a partial ownership interest – are relevant to the evaluation of the competitive effects of vertical mergers as well.

Vertical mergers, however, also raise distinct considerations, which these Guidelines address. For example, vertical mergers often benefit consumers through the elimination of double marginalization, which tends to lessen the risks of competitive harm. While the agencies more often encounter problematic horizontal mergers than problematic vertical mergers, vertical mergers are not invariably innocuous. These Guidelines describe the framework applied by the Agencies in distinguishing anticompetitive from procompetitive (and competitively neutral) vertical mergers.

As with horizontal mergers, the Agencies normally examine effects on the actual and potential direct customers of the merging parties, and, if different, the final consumers of firms that utilize the goods or services of the merging parties. The Agencies are concerned with harm to competition, not to competitors. When a merger involves products at different levels of a supply chain, the direct customers the Agencies will consider are actual and potential buyers of the downstream products. Absent convincing evidence to the contrary, the Agencies presume that adverse effects on these direct customers lead to adverse effects on final consumers.

The enhancement of market power by buyers, sometimes called "monopsony power," has adverse effects comparable to the enhancement of market power by sellers. The Agencies employ an analogous framework to analyze vertical mergers that may enhance the market power of buyers.

In evaluating effects, the Agencies focus on the likely changes in competitive outcomes caused by a merger. Therefore, the Agencies focus on competitive outcomes caused by conduct that would be compatible with firms' abilities and incentives following a vertical merger, but would not be in the absence of the merger. To the extent practicable, the Agencies use a consistent set of facts and assumptions to evaluate both the potential competitive harm from a vertical merger and the potential benefits to competition.

[3] These Guidelines are not intended to describe how the Agencies will conduct the litigation of cases they decide to bring. Although relevant in that context, these Guidelines neither dictate nor exhaust the range of evidence the Agencies may introduce in litigation.

2. EVIDENCE OF ADVERSE COMPETITIVE EFFECTS

The Agencies consider any reasonably available and reliable evidence to address the central question of whether a vertical merger may substantially lessen competition. The types of evidence described in Section 2.1 of the Horizontal Merger Guidelines can also be informative about the effects of vertical mergers, including actual effects observed in consummated mergers, direct comparisons based on experience, and evidence about the disruptive role of a merging party. The Agencies may also consider evidence about the disruptive role of non-merging firms – for example, when evaluating a theory that a vertical merger may allow the merged firm to discipline disruptive rivals. The Agencies may also consider market shares and concentration in relevant markets (*see* Section 3), and may rely on evidence of head-to-head competition between one merging firm and rivals that trade with the other merging firm when evaluating unilateral effects (*see* Section 4). The sources of evidence on which the Agencies rely are the same as those set forth in Section 2.2 of the Horizontal Merger Guidelines and include documents and statements of the merging parties, their customers, and other industry participants and observers.

3. MARKET DEFINITION, RELATED PRODUCTS, MARKET SHARES, AND CONCENTRATION

In any merger enforcement action involving a vertical merger, the Agencies will normally identify one or more relevant markets in which the merger may substantially lessen competition. Many of the general purposes and limitations of market definition described in Section 4 of the Horizontal Merger Guidelines are also relevant when the Agencies define markets for vertical mergers, and the Agencies generally use the methodology set forth in Sections 4.1 and 4.2 of the Horizontal Merger Guidelines to define relevant markets for vertical mergers.

When the Agencies identify a potential competitive concern in a relevant market, they will also specify one or more related products. A related product is a product or service that is supplied or controlled by the merged firm and is positioned vertically or is complementary to the products and services in the relevant market. For example, a related product could be an input, a means of distribution, access to a set of customers, or a complement. The same transaction can give rise to more than one vertical concern, and different concerns may affect different relevant markets.

Example 1: Relevant markets can be upstream or downstream

Situation: A retail chain buys the manufacturer of Brand A cleaning products.

Discussion: In this example, the merged firm's supply of Brand A cleaning products (the related product) could affect downstream competition between retailers in a given geographic area (the relevant market). The Agencies may also consider whether the merged firm's retailing of cleaning products in a given geographic area (the related product) could affect competition between manufacturers of cleaning products in that area (the relevant market).

The Agencies may consider measures of market shares and market concentration in a relevant market in their evaluation of competitive effects. The Agencies evaluate market shares and concentration in conjunction with other reasonably available and reliable evidence for the ultimate purpose of determining whether a merger may substantially lessen competition.

The Agencies use the methodology set out in Section 5 of the Horizontal Merger Guidelines to measure shares and concentration in a relevant market, but do not rely on the thresholds in Section 5.3 as screens for or indicators of competitive effects from vertical theories of harm. Existing levels of concentration may nonetheless be relevant. For example, high concentration in the relevant market may provide evidence about the likelihood, durability, or scope of anticompetitive effects in that relevant market.

4. Unilateral Effects

A vertical merger may diminish competition between one merging firm and rivals that trade with, or could trade with, the other merging firm. This section discusses common types of unilateral effects arising from vertical mergers. Section (a) discusses foreclosure and raising rivals' costs. Section (b) discusses competitively sensitive information. These effects do not exhaust the types of possible unilateral effects.

a. Foreclosure and Raising Rivals' Costs

A vertical merger may diminish competition by allowing the merged firm to profitably use its control of the related product to weaken or remove the competitive constraint from one or more of its actual or potential rivals in the relevant market. For example, a merger may increase the vertically integrated firm's incentive or ability to raise its rivals' costs by increasing the price or lowering the quality of the related product. The merged firm could also refuse to supply rivals with the related products altogether ("foreclosure").

In identifying whether a vertical merger may diminish competition due to unilateral foreclosure or raising rivals' costs,[4] the Agencies generally consider whether the following conditions are satisfied:

(1) *Ability*: By altering the terms by which it provides a related product to one or more of its rivals, the merged firm would likely be able to cause those rivals (a) to lose significant sales in the relevant market (for example, if they are forced out of the market; if they are deterred from innovation, entry, or expansion, or cannot finance those activities; or if they have incentives to pass on higher costs through higher prices) or (b) to otherwise compete less aggressively for customers' business.

---

[4] For ease of exposition, the principal discussion is about input foreclosure and raising rivals' input costs following a merger between vertically related firms, where the concern is that the merged firm could profitably use its supply of an input (the related product) to weaken the competitive constraint it faces from rivals in the downstream market (the relevant market). Examples in this section discuss the analogous analysis for foreclosure or raising rivals' costs that raise barriers to entry, customer foreclosure and raising rivals' distribution costs, and mergers of complements.

This element would not be satisfied, and in turn a merger would rarely warrant close scrutiny for its potential to lead to foreclosure or raising rivals' costs, if rivals could readily switch purchases to alternatives to the related product, including self-supply, without any meaningful effect on the price, quality, or availability of products or services in the relevant market.

The Agencies' review of the merged firm's rivals' ability to switch to alternatives to the related product may include, but is not limited to, the types of evidence the Agencies use to evaluate customer switching when implementing the hypothetical monopolist test, listed in Section 4.1.3 of the Horizontal Merger Guidelines.

(2) *Incentive*: The merged firm, as a result of the merger, would likely find it profitable to foreclose rivals, or offer inferior terms for the related product, because it benefits significantly in the relevant market when rivals lose sales or alter their behavior in response to the foreclosure or to the inferior terms.

This element would not be satisfied, and in turn a merger would rarely warrant close scrutiny for its potential to induce foreclosure or raise rivals' costs, if the merged firm would not benefit from a reduction in actual or potential competition with users of the related product in the relevant market.

The Agencies' assessment of the effect of a vertical merger on the incentive to foreclose rivals or raise their costs by changing the terms of the related product will be fact-specific. For example, in the case of foreclosure, the Agencies generally consider whether the merged firm's gains in the relevant market would likely outweigh any losses from reduced sales of the related product.

Mergers for which these conditions are met potentially raise significant competitive concerns and often warrant scrutiny.

For mergers that warrant scrutiny, the Agencies will determine whether, based on an evaluation of the facts and circumstances of the relevant market, the merger may substantially lessen competition. This evaluation will generally include an assessment of the likely net effect on competition in the relevant market of all changes to the merged firm's unilateral incentives. The merged firm may foreclose its rivals or raise their costs by changing the terms offered for the related product, but a vertical merger can also change other incentives. The elimination of double marginalization, for example, can confer on the merged firm an incentive to set lower downstream prices. The price that a downstream firm pays for an input supplied by an independent upstream firm may include a markup over the upstream firm's marginal cost. If a downstream and an upstream firm merge, and the merged firm supplies itself with its own related product, it will have access to the input at cost. (*See* Section 6.) The likely merger-induced increase or decrease in downstream prices would be determined by considering the impact of both these effects, as well as any other competitive effects.

To the extent practicable and appropriate, the Agencies will use the same set of facts and assumptions to evaluate both the potential harm from a vertical merger and the potential benefits of the elimination of double marginalization, and will focus on evaluating conduct that would be most profitable for the merged firm as a whole.

Where sufficient relevant data are available, the Agencies may construct economic models designed to quantify the net effect on competition. The Agencies may employ merger simulation models to assist in this quantitative evaluation. These models often include independent price responses by non-merging firms and may incorporate feedback from the different effects on incentives. The Agencies do not treat merger simulation evidence as conclusive in itself, and they place more weight on whether merger simulations using reasonable models consistently predict substantial price increases than on the precise prediction of any single simulation. The Agencies may also determine that a merger may substantially lessen competition based on an evaluation of qualitative evidence of all potential effects.

The next paragraphs provide illustrative examples of the application of this general framework. The examples do not exhaust the types of possible foreclosure concerns.

Example 2: Input foreclosure and raising rivals' costs

Situation: Upstream firms supply oranges to downstream firms, which use the oranges to produce orange juice. All orange suppliers make take-it-or-leave-it offers to sell at constant unit prices.[5] A supplier of oranges (the related product) merges with a producer of orange juice (the relevant market) that buys its entire orange demand from the supplier.

Discussion: The merged firm may have the ability to restrict the supply of oranges to rival orange juice producers. If those rivals lack alternative sources of oranges to those of the merged firm in sufficient quantity at comparable price and quality, the merged firm may be able to increase their costs by raising the price at which it sells them oranges or by refusing to sell them oranges altogether.

The Agencies may assess whether the merged firm would likely have an incentive to raise the price at which it supplies oranges to rivals. This assessment may focus on the resulting reduction in competition, including any reduction due to the diversion of sales of orange juice to the merged firm. Capturing the downstream margin on the diverted sales through merger may make a price increase profitable, even though the price increase would not be profitable for the orange supplier absent the merger. The effect on the price the merged firm charges for oranges depends on the merged firm's gains from diverted sales in the relevant market and from increased prices in the relevant market.

The Agencies may also consider whether the merged firm may have an incentive to stop supplying oranges to rival orange juice producers altogether. In doing so, the merged firm would lose the margin on the forgone sales of oranges, but may benefit from a higher margin and increased sales of orange juice diverted from its rivals. If the benefits from

[5] By "constant unit prices," we refer to a simple linear price per-unit with no other fees or offsets. The pricing structure is relevant to the likelihood and the degree of both raising rivals' costs and the elimination of double marginalization.

increased downstream sales outweigh the costs of the forgone upstream sales, the merged firm may find it profitable to foreclose.

In either case, the merged firm will likely source its oranges at reduced cost rather than paying a price that includes a margin to an independent firm, giving it an incentive to set lower prices on its own orange juice products (the effects of eliminating double marginalization). To determine whether the merger may substantially lessen competition, the Agencies would analyze the specific facts and circumstances, including in particular the relative magnitude of these offsetting incentives.

Example 3: Raising the input costs of rivals with bargaining

Situation: A firm supplies Product A to a number of competing downstream retailers, each of which would lose significant business overall if it did not stock Product A. Terms are set through bargaining, and contracts take the form of constant unit wholesale prices. The supplier of Product A merges with one of the retailers.

Discussion: The vertical merger may diminish competition between retailers (the relevant market) by giving the merged firm the leverage to raise its rivals' costs by negotiating increased wholesale prices for the firm's supply of Product A (the related product) from its rival retailers. Compared to the manufacturer of Product A acting independently, the merged firm may benefit downstream if it refuses to supply one or more of its downstream rivals and if such rivals lose sales as a result. This benefit improves the merged firm's alternative to a supply agreement should negotiations take time to resolve, or fail altogether, and thus may increase the merged firm's bargaining leverage with rival retailers.

Rivals that pay higher wholesale prices for Product A would likely set higher retail prices. In contrast, the merged firm will likely lower its costs for sourcing Product A because it will not pay a wholesale price to a third party that includes a markup over cost, providing the merged firm with an incentive to lower its retail price for Product A. It is a factual question whether competition in the retail market would be substantially lessened, such that consumers in the retail market would pay higher prices, on average, after the merger.

Example 4: Creating the need for two-level entry

Situation: Company A is the sole supplier of an active ingredient required to make an off-patent pharmaceutical drug produced only by Company B. Company A's supply of the active ingredient is the related product. It sets a constant unit price. Company C is considering entering the relevant market with its own version of the drug. Were it to enter, head-to-head competition with Company B would be significant and prices for the drug would likely fall significantly, leading to increased sales. Company B buys Company A. In the absence of the merger, Company A would benefit from Company C's entry.

Discussion: The merger may diminish competition in the relevant market by making entry by Company C less likely. In the absence of the merger, Company A would likely have an incentive to facilitate the entry of Company C and to supply Company C if it did enter. The merged firm, on the other hand, may have the ability to prevent Company C from successfully entering the relevant market by refusing to supply Company C with any active ingredient. In this case, Company C's successful entry into the relevant market may require Company C to produce the active ingredient as well. This two-level entry may be more costly and riskier than entering the relevant market alone, and thus may deter Company C from entering. Moreover, the merged firm may have an incentive to refuse to supply Company C unless it is markedly more efficient or targeting additional customer groups or markets.

The Agencies would also consider the effects on competition if the merged firm would eliminate double marginalization by sourcing the active ingredient at cost rather than paying a price that included a markup. The likely net effect on competition in the relevant market would depend, in part, on the extent to which entry was likely absent the merger.

Example 5: Raising rivals' costs of distribution

Situation: A distributor of components to customize trucks for different uses offers competing liftgates for loading. Liftgates are supplied at a constant unit wholesale price. The distributor buys a manufacturer of liftgates. The distributor has developed a strong position in Region X based on offering superior support and developing close customer relationships. Many customers consider other distributors to be inadequate substitutes for the merged firm's distribution of liftgates in Region X (the related product).

Discussion: The Agencies may consider whether the merger would harm competition in the market for the manufacture of liftgates in Region X (a relevant market). Because customers prefer the merged firm's superior distribution service, the merged firm may be able to disadvantage manufacturers of rival liftgates by setting higher retail prices for their products. The profitability of such a strategy would depend on diversion to the merged firm's liftgates as well as sales lost to rival distributors.

A potential harm in this example is diminished competition between manufacturers of liftgates (a relevant market upstream from the market for the distribution of liftgates). The Agencies, however, may consider the impact on retail prices when evaluating the effects on competition in the relevant market. The competitiveness of upstream manufacturers depends, in part, on the derived demand from customers of the downstream distributors, who choose among manufacturers' products based on downstream retail prices. Competition in the retail sale of liftgates may be harmed if the merged firm raises retail prices for rival brands, even though rival manufacturers may respond to the change in the merged firm's incentives by setting lower, not higher, wholesale prices. The Agencies would also evaluate the extent of the merged firm's incentive to set a lower price for liftgates because of the elimination of double marginalization.

Example 6: Merger of complements raising vertical issues

Situation: Manufacturers use batteries and motors when making electric scooters. Electric scooter manufacturers use different batteries and motors based on their production technologies. The two components are complements: manufacturers make more scooters, and demand more of both components, when the price of either component falls. All components are sold under contracts that specify a constant unit price. The leading maker of motors for scooters merges with a manufacturer of batteries for scooters.

Discussion: Motors and batteries are complementary inputs into the production of electric scooters. Neither input is upstream nor downstream from the other in the supply chain. The Agencies may investigate whether the merged firm would have the ability and incentive to disadvantage rival manufacturers of batteries. For example, the merged firm might do so by increasing the price of its motors (the related product) to its customers (*e.g.*, electric scooter manufacturers) that do not also buy the merged firm's batteries. The merged firm may also have an incentive to offer lower prices for batteries to its customers that do buy both components from it. If the Agencies conclude that both countervailing price effects are likely to be present post-merger, the Agencies will conduct a balancing of the effects to determine the net effect on the prices customers will likely pay.

The Agencies may also use an analysis similar to the above to investigate whether the merged firm would have the ability and incentive to disadvantage rival manufacturers of motors (in an additional relevant market) by increasing the price of batteries (the related product) to its customers that do not also buy the merged firm's motors.

Example 7: Diagonal merger

Situation: An electronics firm develops a component that enhances the wireless capability of low-end laptop computers. This component intensifies competition between low-end laptop computers that incorporate the component as an input and high-end laptop computers that already provide premium wireless capabilities without the component. The largest manufacturer of high-end laptop computers with premium wireless capability acquires this electronics firm. The acquisition neither expands nor improves the functionality that the acquiring firm can provide. The acquired technology is not compatible with the acquiring firm's products, and redesigning its products to incorporate the acquired technology would neither lower its marginal costs nor improve the wireless capabilities of its laptops.

Discussion: The Agencies may investigate whether the merged firm would have the ability and incentive to reduce competition in the market for laptop computers (a relevant market) by increasing the price, degrading the quality, or reducing the availability of the component providing wireless capability (the related product). The incompatibility between the technologies of the merging firms strongly suggests that this merger is unlikely to generate any benefits due to the elimination of double marginalization.

b. Access to Competitively Sensitive Information

In a vertical merger, the transaction may give the combined firm access to and control of sensitive business information about its upstream or downstream rivals that was unavailable to it before the merger. For example, a downstream rival to the merged firm may have been a premerger customer of the upstream firm. Post-merger, the downstream component of the merged firm could now have access to its rival's sensitive business information. In some circumstances, the merged firm can use access to a rival's competitively sensitive information to moderate its competitive response to its rival's competitive actions. For example, it may preempt or react quickly to a rival's procompetitive business actions. Under such conditions, rivals may see less competitive value in taking procompetitive actions. Relatedly, rivals may refrain from doing business with the merged firm rather than risk that the merged firm would use their competitively sensitive business information as described above. They may become less effective competitors if they must rely on less preferred trading partners, or if they pay higher prices because they have fewer competing options.

5. Coordinated Effects

In some cases, a vertical merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers. Section 7 of the Horizontal Merger Guidelines describes how the Agencies evaluate coordinated effects. In particular, Section 7.1 notes that the Agencies are more likely to challenge a merger on the basis of coordinated effects when the relevant market shows signs of vulnerability to coordinated conduct, and the Agencies have a credible basis on which to conclude that the merger may enhance that vulnerability. Section 7.2 sets forth evidence relevant to evaluating whether a market is vulnerable to coordination. The theories of harm discussed in the Horizontal Merger Guidelines, as well as those discussed below, are not exhaustive, but rather are illustrations of the manner in which a merger may lessen competition due to coordinated effects.

A vertical merger may enhance the market's vulnerability to coordination by eliminating or hindering a maverick firm that otherwise plays or would play an important role in preventing or limiting anticompetitive coordination in the relevant market. For example, the merged firm could use its control over a related product or service to harm the ability of a non-merging maverick to compete in the relevant market, thereby increasing the likelihood of coordinated interaction among the merged firm and rivals participating in that market.

Coordinated effects may also arise in other ways, including when changes in market structure or the merged firm's access to confidential information facilitate (a) reaching a tacit agreement among market participants, (b) detecting cheating on such an agreement, or (c) punishing cheating firms.

Example 8: Vertical merger raising coordinated effects issues

Situation: A merger combines a manufacturer of components and a maker of final products.

Discussion: Where the component manufacturer supplies rival makers of final products, it will have information on the rival's volume of final product, and thus will be better able to detect cheating on a tacit agreement to limit the output of final products. As a result, the merger may make an agreement to limit supply more effective.

Some effects of a vertical merger may make the market less vulnerable to coordination. For example, a vertical merger's elimination of double marginalization (*see* Section 6) may increase the merged firm's incentive to cheat on a tacit agreement, thereby reducing the risk of coordinated effects.

6. Procompetitive Effects

Vertical mergers combine complementary economic functions and eliminate contracting frictions, and therefore have the capacity to create a range of potentially cognizable efficiencies that benefit competition and consumers. Vertical mergers combine complementary assets, including those used at different levels in the supply chain, to make a final product. A single firm able to coordinate how these assets are used may be able to streamline production, inventory management, or distribution. It may also be able to create innovative products in ways that would not likely be achieved through arm's-length contracts.

The Agencies evaluate efficiency claims by the parties using the approach set forth in Section 10 of the Horizontal Merger Guidelines, as elaborated here. Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. The Agencies do not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is unlikely to be anticompetitive in any relevant market.[6]

Due to the elimination of double marginalization, mergers of vertically related firms will often result in the merged firm's incurring lower costs for the upstream input than the downstream firm would have paid absent the merger. This is because the merged firm will have access to the upstream input at cost, whereas often the downstream firm would have paid a price that included a markup. The elimination of double marginalization is not a production, research and development, or procurement efficiency; it arises directly from the alignment of economic incentives between the merging firms. Since the same source drives any incentive to foreclose or raise rivals' costs, the evidence needed to assess those competitive harms overlaps substantially with that needed to evaluate the procompetitive benefits likely to result from the elimination of double marginalization.

---

[6] The Agencies in their prosecutorial discretion may also consider efficiencies that are not strictly in the relevant market, using the principles set out in footnote 14 of the Horizontal Merger Guidelines.

Mergers of firms that make complementary products can lead to a pricing efficiency analogous to the elimination of double marginalization. Absent the merger, the merging parties would set the price for each complement without regard to the impact of lower prices for one on demand for the other. If the two merge, the merged firm has an incentive to set prices that maximize the profits of the firm as a whole, which may result in lower prices for each component. Any incentive to offer lower prices may be more pronounced if the merged firm can target lower prices at customers that buy both components from it.

While it is incumbent upon the merging firms to provide substantiation for claims that they will benefit from the elimination of double marginalization, the Agencies may independently attempt to quantify its effect based on all available evidence, including the evidence they develop to assess the potential for foreclosure or raising rivals' costs. In verifying the elimination of double marginalization, the agencies typically examine the likely cost saving to the merged firm from self-supplying inputs that would have been purchased from independent suppliers absent the merger. Creditable quantifications of the elimination of double marginalization are generally of similar precision and reliability to the Agencies' quantifications of likely foreclosure, raising rivals' costs, or other competitive effects.

In assessing the merger-specificity of the elimination of double marginalization, the Agencies typically examine whether it would likely be less costly for the merged firm to self-supply inputs following the merger than for the downstream firm to purchase them from one or more independent firms absent the merger. The merging parties' evidence about existing contracting practices is often the best evidence of the price the downstream firm would likely pay for inputs absent the merger. The Agencies also consider other evidence, such as contracts between similarly situated firms in the same industry and contracting efforts considered by the merging firms. The Agencies do not, however, reject the merger specificity of the elimination of double marginalization solely because it could theoretically be achieved but for the merger, if such practices are not reflected in documentary evidence. The Agencies will generally take the same approach to evaluate the likely contractual arrangements absent the transaction as the one they use when evaluating raising rivals' costs or foreclosure.

The Agencies' assessment of the effects of the elimination of double marginalization on competition in the relevant markets relative to unilateral and coordinated effects is described further in Sections 4 and 5.

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Rebecca Kelly Slaughter

DISSENTING STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER

In re FTC-DOJ Vertical Merger Guidelines
Commission File No. P810034
June 30, 2020

Summary

I voted against the Commission's release of the Vertical Merger Guidelines ("Guidelines") because the process adopted by the Federal Trade Commission and the Department of Justice ("the Agencies") short-circuited the more thorough discussion that the public and this effort deserve and because I continue to have substantive concerns about the Guidelines. I very much appreciate the extensive and thoughtful commentary stakeholders provided on the first draft of the Guidelines released in January 2020 and the work staff has done since then. While I continue to appreciate the need to withdraw and update the old Guidelines, the final version the Commission releases today misses the mark on both process and substance. I expand on each of these concerns below.

Process

The Guidelines make sweeping changes to the original draft first proposed in January. This fact alone supports a second public comment period, at a minimum, as well as another public workshop to replace the one that the FTC canceled due to COVID-19.[1] The utility of the detailed, thoughtful comments the Agencies received on the first draft of the Guidelines serves to underscore the value of having further public input on this substantially revised version. A second comment period would have not only demonstrated the FTC's commitment to transparency and good government but also provided the opportunity to continue the discussion of topics critical to vertical-merger enforcement and improve the final product. Finally, the benefits afforded by a rigorous second comment period far outweigh an immaterial delay in the final issuance of the Guidelines, and the decision not to engage in one leaves the Guidelines seriously lacking.

Substance

---

[1] The FTC cancelled a public workshop in March 2020 due to COVID-19. Now, more than three months later, we have seen very successful public panels and workshops conducted virtually. Notably, the FTC plans to hold its annual Privacy Con virtually.

Turning to my substantive concerns, I must first acknowledge that I appreciate the staff's hard work and the ways in which the revisions to the Guidelines are responsive to my concerns and those of many commenters with whom I agree.[2] Among the positive changes are: the elimination of the quasi-safe harbor based on market share; the more thorough discussions and corresponding examples of potential competitive harm from vertical mergers, such as creating the need for two-level entry and raising rivals' distribution costs; and the discussion of some unique considerations regarding mergers of complements, diagonal mergers, and acquisitions of firms that are the most likely potential competitors.

However, this progress is compromised by provisions that undermine one of the key points of the Guidelines: to disavow the false assertion that vertical mergers are almost always procompetitive. I also fear that the Guidelines signal that the Agencies will view vertical mergers as likely to be procompetitive and will use the Guidelines to justify lack of enforcement against vertical mergers.[3] I come to this conclusion based on the following issues that I will address in turn: (1) the over-emphasis of the benefits of vertical mergers; (2) failure to identify merger characteristics that are most likely to be problematic; (3) the treatment of the elimination of double marginalization ("EDM"); and (4) the omission of important competition concerns including buy-side power, regulatory evasion, and remedies.

Over-emphasis on the benefits of vertical mergers

From the outset, the Guidelines appear to put a thumb on the scale in favor of vertical mergers. The Overview section notes that there are "distinct considerations" raised by vertical mergers that are not considered in the Horizontal Merger Guidelines.[4] However, the only "distinct consideration" recognized in the Overview is the potential procompetitive benefit of EDM.[5] The Vertical Merger Guidelines are inexplicably mute on the well-known and well-supported fact that the potential anticompetitive harms from raising rivals' cost and foreclosure are also "distinct considerations" in vertical-merger analysis.[6] This opening unbalanced treatment of the

---

[2] *See* Comm'r Rebecca Kelly Slaughter, Fed. Trade Comm'n, Statement on the FTC-DOJ Draft Vertical Merger Guidelines, File No. P810034 (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561721/p810034slaughtervmgabstain.pdf.

[3] When I refer to "vertical mergers," I am using this as shorthand to refer also to mergers of complements and diagonal mergers that implicate similar potential for competitive harm.

[4] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES § 1 (2020) [hereinafter "GUIDELINES"].

[5] *Id*.

[6] Commissioner Chopra's statement notes particular harms that have come to fruition following vertical mergers, including AT&T/DirecTV and AT&T/Time Warner. *See also* Public Knowledge & Open Technology Institute, Public Comment on FTC-DOJ Draft Vertical Merger Guidelines 7–10 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/pk_oti_comments_on_draft_vertical_merger_guidelines_022620.pdf; Open Markets Institute & American Economic Liberties Project, Public Comment on FTC-DOJ Draft Vertical Merger Guidelines 13 (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/comment_to_ftc-doj_re_vertical_merger_guidelines.pdf. For the academic theory of the harms associated with vertical mergers, see Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986). For a literature summary of the harms associated with vertical mergers see

potential harms and benefits of vertical mergers sets the tone for all that follows. It raises concerns regarding the Agencies' analysis and likely disposition in evaluating vertical mergers. The Overview should clearly articulate what we all know to be true based on the economic evidence and what motivated these Guidelines in the first place—that vertical mergers can and frequently do raise serious anticompetitive concerns. This asymmetry continues in the treatment of EDM that I discuss more fully below.

Failure to identify merger characteristics that are most likely to be problematic

The Guidelines set out considerations for identifying whether a vertical merger will increase the incentive and ability of the merged firm to engage in foreclosure or raising rivals' costs. In explaining the concepts of incentive and ability, they identify when mergers will "rarely warrant scrutiny."[7] However, they are considerably weaker in terms of indicating when mergers *will* warrant scrutiny and be more likely to warrant enforcement action.[8]

At all stages of merger review, the Agencies must determine whether there is reason to believe that the merger violates the law. For that reason, scrutiny by way of investigation is often needed to determine whether there is likely to be an increase in incentive and ability to engage in foreclosure or raising rivals' costs. Yet, the Guidelines appear to require a determination that incentive and ability are "likely" in order to warrant scrutiny.[9]

The Guidelines should make clear that scrutiny may be applied in the first instance and affirm that scrutiny is not dependent on meeting any set of conditions. I am worried that, with this omission, parties will use the Guidelines against the Agencies in the early stages of investigations to argue that the investigation itself is inappropriate. The Guidelines should instead make clear that a merger *will* warrant scrutiny when conditions indicate that the merged firm has the potential to gain the incentive and ability to engage in foreclosure or raising rivals' costs. Further investigation will then indicate whether an enforcement action is warranted. A failure to make clear that scrutiny is warranted to evaluate the potential for anticompetitive foreclosure or raising rivals' costs leads me to question how committed the Agencies are to examining vertical mergers seriously.

Beyond simply identifying when mergers likely warrant scrutiny, the Guidelines should also clearly indicate what conditions, if found during an investigation, would most likely present competitive concerns and merit enforcement. For example, the Guidelines should explicitly raise

---

Marissa Beck & Fiona Scott Morton, Public Comment on FTC-DOJ Draft Vertical Merger Guidelines (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/beck_scott_morton_comments_on_draft_vertical_merger_guidelines_022620.pdf.

[7] GUIDELINES, *supra* note 4, § 4(a)(1) (explaining conditions under which "[t]his element would not be satisfied, and in turn a merger would rarely warrant close scrutiny for its potential to lead to foreclosure or raising rivals' costs"); *id*. § 4(a)(2) (same).

[8] *See id*. § 4(a) ("Mergers for which these conditions are met potentially raise significant competitive concerns and often warrant scrutiny.").

[9] "[T]he Agencies generally consider whether the following conditions are satisfied." *Id*. They then go on to describe conditions that "would likely" occur. *Id*. § 4.

the alarm that the most dangerous mergers are those that likely result in the exit of rival firms or increased barriers to entry.[10] To illustrate by using an example from the Guidelines, if the merging orange supplier has the ability and incentive to raise the cost of oranges to rival orange-juice producers, or completely foreclose rival orange-juice producers, and the effect of this act is to cause the exit of one or more rival orange-juice suppliers because continued operation is unprofitable, the merger may be particularly problematic. Clearly articulating conditions under which the most problematic mergers are likely to be found would provide needed guidance for the courts and could deter problematic mergers from being proposed in the first place.

Indeed, explicit presumptions of harm might be appropriate to help clarify competitively problematic mergers; at a minimum, the Agencies would have benefited from additional comments and consideration of this concept of presumptions of harm (as opposed to presumptions that a merger is competitively benign, which the first version of the Guidelines proposed).[11]

Treatment of EDM

The Guidelines' treatment of EDM continues to cause me concern. This topic alone merits another round of public comment. Specifically, I will discuss concerns and questions about how the Guidelines treat: (1) the cognizability and likely achievement of EDM; (2) the short-term benefits of EDM versus the potential for long-term harm to competition; and (3) other theories of harm that may offset the benefits of EDM to consumers.

As we know, when firms can eliminate double marginalization—the mark-up at both levels in a supply chain—through vertical integration, there may be benefits for competition and consumers on top of the benefits for the merged firm. However, achieving EDM is not guaranteed. Nor are the benefits of EDM always passed along to consumers.[12] I worry that, even though the Guidelines indicate some skepticism of EDM, in total they are overly optimistic that EDM will be achieved and translate into benefits.

---

[10] Commissioner Chopra's statement details concerns about entry suppression, particularly in digital markets, which I share.

[11] An additional public comment period and workshop could have examined in more depth the potential for more explicit presumptions of harm that could be helpful to guide courts. As Baker, Rose, Salop, and Scott Morton suggest, "If the upstream merging firm in a concentrated market is a substantial supplier of a critical input to the competitors of the other merging firm and a hypothetical decision to stop dealing with those downstream competitors would lead to substantial diversion of business to the downstream market firm," then there should be a rebuttable presumption of harm to competition. Jonathan B. Baker, Nancy L. Rose, Steven C. Salop, & Fiona Scott Morton, *Five Principles for Vertical Merger Enforcement*, 33 ANTITRUST 12, 16 (Summer 2019).

[12] *See, e.g.*, Martin Gaynor, Public Comment on FTC-DOJ Draft Vertical Merger Guidelines 2 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/gaynor_comment_vmg_feb_26_2020.pdf ("It's worth noting that EDM is not, in general, a necessary consequence of vertical (non-horizontal) integration.").

It is notable that the Guidelines explicitly import the principles of Section 10 of the Horizontal Merger Guidelines, which indicate that efficiencies must be merger-specific and cognizable.[13] This is a critical point that could go a long way to ensuring that the burden will be placed squarely on the merging parties to demonstrate that EDM is achievable. However, in elaborating on the concept of EDM, the Guidelines appear to limit the rigor imposed by Section 10.[14] In addition, the discussion of EDM in the section on foreclosure fails to adopt the provisions of Section 10, which place the burden on the parties to prove that an offsetting efficiency, or in this case benefit from EDM, is timely, likely, and merger-specific.[15]

Furthermore, the Guidelines do little to identify the well-recognized reasons why EDM may not be achieved in a vertical merger.[16] The lone reference is found in Example 7, which notes technological incompatibility between the upstream and downstream firms. However, the Guidelines fail to identify several other reasons, supported by economic literature, that EDM may not be achieved. For example, the downstream firm may not be able to use inputs from the upstream firm when it is locked into a long-term contract with another supplier, when it faces switching costs, or when there is geographic incompatibility that makes it irrational to source from the vertically integrated upstream firm. In addition, the upstream firm also may have limited capacity that can be switched over to the newly acquired downstream firm. Or the downstream firm might already be vertically integrated and therefore not obtain any new benefit of EDM.[17] Finally, a growing body of literature indicates that vertically integrated firms do not often self-supply and therefore do not benefit from EDM.[18] A more complete discussion of the

---

[13] GUIDELINES, *supra* note 4, § 6 ("The Agencies evaluate efficiency claims by the parties using the approach set forth in Section 10 of the Horizontal Merger Guidelines, as elaborated here."). Section 10 of the Horizontal Merger Guidelines states, "The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies." U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 10 (2010).

[14] GUIDELINES, *supra* note 4, § 6 ("Due to the elimination of double marginalization, mergers of vertically related firms will often result in the merged firm's incurring lower costs for the upstream input than the downstream firm would have paid absent the merger.").

[15] *Id.* § 4. In a speech last February, Assistant Attorney General Delrahim explained that the merging parties bear the burden of demonstrating EDM. *See* Makan Delrahim, Assistant Attorney General, Antitrust Div., Dep't. of Justice, Remarks at the George Mason Law Review 22nd Annual Antitrust Symposium: "Harder Better Faster Stronger": Evaluating EDM as a Defense in Vertical Mergers (Feb. 15, 2019) (explaining that "the burden is on the parties in a vertical merger to put forward evidence to support and quantify EDM as a defense"). The DOJ made the same argument in the recent AT&T-Time Warner case. *See* Proposed Conclusions of Law 44, United States v. AT&T Inc., No. 1:17-cv-02511-RJL (D.D.C. filed May 8, 2018), ECF No. 127 ("Defendants bear the burden of their efficiencies defense."). *See also* State Attorneys General, Public Comment on FTC-DOJ Draft Vertical Merger Guidelines 20–21 (Feb. 26, 2020), https://www.justice.gov/atr/page/file/1258786/download (arguing that the merging parties bear the burden of proving EDM).

[16] *See, e.g.*, Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1970–71 (2018) (discussing why EDM may not occur in a vertical merger).

[17] *See id.*

[18] *See* Enghin Atalay, Ali Hortaçsu, & Chad Syverson, *Vertical Integration and Input Flows*, 104 AM. ECON. REV. 1120, 1120 ("We find that most vertical ownership does not appear to be primarily concerned with facilitating physical goods movements along a production chain within the firm, as is commonly presumed. Upstream units ship surprisingly small shares of their output to their firms' downstream establishments. Almost one-half of upstream

circumstances under which EDM will not be achieved in a vertical merger would provide better guidance for the courts and the marketplace.

Merger specificity is required for efficiencies to be deemed cognizable in the Horizontal Merger Guidelines.[19] How to apply such merger specificity in the context of vertical mergers is an issue that would also benefit from additional public comment. Some commenters say that, if we are truly importing Section 10 of the Horizontal Merger Guidelines and truly committed to scrutinizing EDM, the evaluation of EDM requires addressing the same questions and evidence of cognizability and pass-through.[20] Others say that EDM should be presumed merger-specific and cognizable if the merging parties failed to achieve EDM through contracting before the merger.[21] That is, if the merging firms have not achieved EDM prior to the merger, that should be sufficient to prove that EDM is unlikely to occur absent the merger.

Next, I am concerned that, in balancing EDM against the harms from a vertical merger as described in the Guidelines, the Agencies may be trading short-term EDM benefits for long-term harm to competition.[22] Specifically, even for a vertical merger in which our analysis indicates that the procompetitive benefits such as EDM just offset the harm due to raising rivals' cost for foreclosure, there may still be a significant shift in profits from the rivals to the merged firm. In this case, consumers may be unharmed (on balance) in the short run, but there still may be a significant shift in profits among suppliers. This reduction in profits for the rivals may adversely affect their ability to finance innovation or expansion activities. So competition and consumers may still be harmed in the end. The Guidelines are silent on this possibility.

---

establishments do not report making shipments inside their firms."). *See also* Beck & Scott Morton, *supra* note 6 (reviewing the academic literature on vertical mergers).

[19] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES, *supra* note 13, § 10 ("The Agencies credit only those efficiencies likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects. These are termed merger-specific efficiencies. Only alternatives that are practical in the business situation faced by the merging firms are considered in making this determination.").

[20] *See, e.g.*, State Attorneys General, *supra* note 15, at 20–21 (arguing that the merging parties' burden to demonstrate EDM "applies as much to vertical as to horizontal mergers"); Steven C. Salop, Public Comment on FTC-DOJ Draft Vertical Merger Guidelines 18 (Mar. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/salop_suggested_vertical_merger_guidelines.pdf ("The Agencies will not presume merger-specificity simply because it was not achieved in the pre-merger market, but will expect the parties to provide credible evidence of pre-merger impediments and how the merger will eliminate the impediments.").

[21] *See, e.g.*, Comm'r Christine S. Wilson, Fed. Trade Comm'n, Remarks at the DOJ Workshop on Draft Vertical Merger Guidelines: "Reflections on the 2020 Draft Vertical Merger Guidelines and Comments from Stakeholders" (Mar. 11, 2020), https://www.ftc.gov/system/files/documents/public_statements/1568909/wilson_-_vertical_merger_workshop_speech_3-11-20.pdf ("For me, the relevant question is whether the firms *did* achieve efficient contracting before merging, not whether they *could*."); Geoffrey A. Manne & Kristian Stout, Public Comment on FTC-DOJ Draft Vertical Merger Guidelines 1 (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/icle_vmg_draft_comments_0.pdf ("[The agencies should clearly disavow . . . the implications of the presumed functional equivalence of vertical integration by contract and by merger.").

[22] *See* Delrahim, *supra* note 15 ("Longer term harms to competition may support challenging a merger even if the effect of EDM is greater than the price effect from foreclosure or raising rivals' costs in the short term.").

In addition to questions regarding whether EDM can be achieved and is merger specific, the Guidelines do not discuss theories of harm that may at least partially offset the effect of EDM on the downstream price of the merged firm. Specifically, if the merged firm raises its price in the downstream market, downstream rivals may increase their sales, which could increase their demand for inputs from the merged firm's upstream business. Capturing this benefit through merger may make a downstream price increase more profitable, thereby offsetting the effect of EDM on the prices consumers pay at least to some degree. The extensive nature of these questions and concerns regarding the treatment of EDM alone merit another comment period. I would have liked to also receive reactions from commenters about the placement of the EDM discussion in both the Unilateral Effects section (Section 4) and the new "Procompetitive Benefits" section (Section 6).

Failure to discuss buy-side concerns, remedies, regulatory evasion

Finally, three additional important topics are omitted from the Guidelines. First, the Guidelines make only a passing reference in the Overview to the relevance of monopsony, or buy-side, concerns. The Guidelines should explicitly explain, for example, that vertical merges may harm suppliers, particularly workers, by increasing the likelihood of coordination.[23]

Second, as I noted in my January statement, the Guidelines should include regulatory evasion as a potential theory of harm. While some commenters have noted that recent vertical mergers have not involved such a theory of harm, I do not see any reason for excluding it in order to put firms on notice that this is a theory the Agencies may investigate and on which an enforcement action may be based.[24]

Third, as noted by several commenters, the Guidelines do not address how the Agencies will address remedies in vertical mergers. Discussion of Agency considerations regarding remedies, whether behavioral or structural, would have been helpful, and additional comment specifically on this topic could have been solicited. Given that this was not included, the Agencies should consider doing a formal review of past vertical-merger action or inaction by the Agencies. How effective have behavioral remedies been? Were the remedies easily enforceable, and what has the burden been on the Agencies to enforce them? Have fixes such as supply agreements, negotiated privately between the merging parties and downstream customers or upstream suppliers, been effective?

---

[23] Salop, *supra* note 20, at 5.

[24] *See, e.g.*, American Antitrust Institute, Public Comment on FTC-DOJ Draft Vertical Merger Guidelines 9–10 (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/aai_comments_draft_vm_guidelines_f.pdf (explaining the need to include regulatory evasion in the Guidelines); Gaynor, *supra* note 12, at 2 (recommending the inclusion of regulatory evasion). In 2008, the FTC brought a vertical merger action based on this theory—that a firm can evade rate regulations by acquiring an upstream input and raising the cost of that input, which can lead to a regulator to authorize a higher downstream regulated rate based on that higher input cost. *See* Press Release, Fed. Trade Comm'n, FTC Challenges Vertical Agreement Between Fresenius and Daiichi Sankyo (Sept. 15, 2008), https://www.ftc.gov/news-events/press-releases/2008/09/ftc-challenges-vertical-agreement-between-fresenius-and-daiichi.

Conclusion

To close, I want to share some forward-looking views on vertical mergers and the implementation of the Guidelines issued today. Even those who disagree on the substance of the Guidelines must share the view that how they are implemented will be critically important. This is not merely an academic or theoretical exercise. Vertical-merger enforcement will be relevant across the economy, especially in health care, agriculture, digital, and telecommunications markets, and it will affect every American.[25]

To that end, the FTC must aggressively investigate and apply the theories of harm that are identified in the Guidelines and be open to additional theories of harm as economic learning and investigatory experience evolves. This includes carefully considering whether a vertical merger will substantially increase the barriers to entry; it also includes appropriate skepticism about unsupported efficiency claims, such as EDM. While EDM may be beneficial in some cases, the Commission must not take that as a given, and parties must demonstrate that it is likely to be achieved. It is also incumbent on the FTC to strengthen its commitment to retrospective reviews of mergers, including mergers against which the Commission opted not to take action.

Effective implementation means deploying adequate resources to rigorous investigations when the evidence indicates a reasonable possibility for an anticompetitive outcome. This means not settling for inaction when the body of evidence is complicated or messy. Finally, this means accepting more litigation risk and refusing the call to avoid the false positives of over-enforcement at the expense of allowing the false negatives of under-enforcement. To some antitrust enforcers and observers, uncertainty points clearly in the direction of less enforcement. To me, high uncertainty means only that we have a challenging job in front of us, which will require greater effort in the name of protecting competition and consumers.

[25] This is particularly true given the breadth of industries and consumers that will be affected by the Guidelines. *See, e.g.*, AIDS Healthcare Foundation, Public Comment on FTC-DOJ Draft Vertical Merger Guidelines (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/ftc_doj_vergical_merger_guidelines_comments_ahf_2-26-20.pdf (commenting with respect to the healthcare industry); Organization for Competitive Markets, Public Comment on FTC-DOJ Draft Vertical Merger Guidelines (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/ocm_public_comments_on_doj_and_ftc_draft_vertical_merger_guidelines.pdf (commenting with respect to agricultural and food industries).

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Rohit Chopra

DISSENTING STATEMENT OF COMMISSIONER ROHIT CHOPRA

Regarding the Publication of Vertical Merger Guidelines
Commission File No. P810034
June 30, 2020

Today, the Federal Trade Commission and the U.S. Department of Justice have published new Vertical Merger Guidelines ("Vertical Merger Guidelines" or "Guidelines"). I respectfully dissent, because they are incomplete and rely too heavily on unproven assumptions.[1] First, they do not directly address the many ways that vertical transactions may suppress new entry or otherwise present barriers to entry. Second, the guidelines make assumptions based on contested economic theories and ideology rather than historical, real-world facts and empirical data in line with modern market realities.

One of the most troubling trends of the U.S. economy over the last 40 years has been the persistent decline of new firm formation as a proportion of business activity and employment.[2] Entrepreneurship is in retreat, as it becomes more difficult to break in to concentrated, vertically integrated markets.

The digital economy is a stark example of this decline. The internet in its infancy was heralded as a platform for new ideas and innovation because barriers to entry were practically nonexistent. Anyone with a connection could launch a blog, a new business, or the next big idea. Success was determined by skill and strategy. These highly competitive conditions were not by accident or an intrinsic feature of the technology; they were the result of government policies that prevented incumbent phone and cable companies from using their market power to dominate a nascent industry.[3]

---

[1] I also share many of the concerns raised by Commissioner Rebecca Kelly Slaughter. I believe it was imprudent not to seek additional comment on this new iteration, which is drastically different from the original draft released for public comment. In addition, public forums to discuss the project were canceled and never rescheduled or replaced with an online format.

[2] *See* ECON. INNOVATION GROUP, DYNAMISM IN RETREAT: CONSEQUENCES FOR REGIONS, MARKETS, AND WORKERS (Feb. 2017), https://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf; Ian Hathaway & Robert E. Litan, THE BROOKINGS INSTITUTION, *Declining Business Dynamism in the United States: A Look at States and Metros*, at 1 (May 2014), https://www.brookings.edu/wpcontent/uploads/2016/06/declining_business_dynamism_hathaway_litan.pdf; Stacy Mitchell, INST. FOR LOCAL SELF-RELIANCE, MONOPOLY POWER AND THE DECLINE OF SMALL BUSINESS: THE CASE FOR RESTORING AMERICA'S ONCE ROBUST ANTITRUST POLICIES (Aug. 2016), https://ilsr.org/wp content/uploads/2018/03/MonopolyPower-SmallBusiness.pdf.

[3] Lina M. Khan, *The Separation of Platforms and Commerce* 119 COLUM. L.J. 973, 1045-51 (2019) (identifying how regulators and enforcers prohibited certain dominant intermediaries from entering adjacent markets in order to safeguard competition).

Today's internet bears little resemblance to its infancy. The government held the incumbents at bay long enough for the startups to grow and then watched as both old and new giants entrenched and consolidated control. Now startups launch with the express goal of being bought and subsumed by one of the Big Tech incumbents. Killer apps quickly become killer acquisitions.[4] Immeasurable innovation has been lost because the government stopped preventing dominance from blocking disruption.

The same economic calcification has happened in virtually every sector.[5] It is hard to quantify the benefits our society has lost from the discoveries and breakthroughs that never saw the light of day. Public policy choices, like narrowing the scrutiny of vertical mergers to allow mass consolidation, likely contributed to the startup slump. One of the many side effects of this decline has been the deterioration of supply-chain resilience and the reduction in productive capacity – both of which have become increasingly evident as the COVID-19 pandemic has unfolded.[6] If we don't change course on concentration, these economic failings are likely to further hamper our pandemic response and our economy recovery.

Unfortunately, the newly released Vertical Merger Guidelines support the status-quo ideological belief that vertical mergers are presumptively benign, and even beneficial. These benefits often accrue to incumbents at the expense of the competitive market,[7] a fact frequently overlooked by the theories underpinning this economic worldview. While the Guidelines state that the "Agencies are concerned with harm to competition, not to competitors,"[8] they rely on economic models that focus on changes to competitors' behavior instead of changes to the market or market structure. These speculative models are based on the often-inaccurate theoretical presumption that vertical mergers only change the relationships among market participants, not the number of market participants. Therefore, they assume that a merger's impact on competition can be measured by weighing the likely occurrence of certain abusive conduct against the potential for efficiencies that lower consumer prices.

But this balancing theory doesn't capture the ways that vertical mergers can restructure the market to make it difficult or impossible for other companies to compete with a merged firm. Indeed, mergers that reduce the actual or potential number of competitors are likely to create serious competitive concerns.[9] This should have been a central theme of the new Guidelines; but instead, they largely ignore the harms that result from merger-induced changes to market

---

[4] Open Markets & Am. Econ. Liberties Project, Comment Letter No. 31 on #798: Draft Vertical Merger Guidelines [hereinafter "Draft VMGs"], Matter No. P810034 at 15 (quoting Fiona Scott Morton) ("[S]mall competitors might "not have a lot of share, but that is where the competition is coming from. That 99 percent guy is afraid the [little] epsilon is going to become one and attract all the teenagers and there is going to be a flip"), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/comment_to_ftc-doj_re_vertical_merger_guidelines.pdf.

[5] James Pethokoukis, *America suffering from 'economic calcification' – JP Morgan*, AM. ENTERPRISE INST. (Sept. 2, 2014), https://www.aei.org/economics/america-suffering-from-economic-calcification-jp-morgan/.

[6] Tom Linton and Bindiya Vakil, *Coronavirus Is Proving We Need More Resilient Supply Chains*, HARVARD BUS. REVIEW (Mar. 5, 2020), https://hbr.org/2020/03/coronavirus-is-proving-that-we-need-more-resilient-supply-chains.

[7] Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1974 (2018).

[8] U.S. DEP'T OF JUST. & THE FED. TRADE COMM'N, VERTICAL MERGER GUIDELINES at 2 (released June 30, 2020).

[9] John E. Kwoka, *Non-Incumbent Competition: Mergers Involving Constraining and Prospective Competitors*, 25 CASE W. RES. L. REV. 173, 192–96 (2001).

structures. In reality, these structural effects are often a primary source of harm.[10] Their absence from the Guidelines is a fatal flaw.

Entry Suppression

Among the many structural effects that the Vertical Merger Guidelines fail to adequately address, I am particularly concerned about their silence on the ways in which vertical mergers suppress entry. Entry suppression extends beyond direct barriers to new competitors and includes the indirect disincentives that dissuade people from starting new businesses. At a time when small businesses are facing extinction due to the economic fallout of the pandemic, new business formation must be top of mind for every government agency that shapes economic policy.[11] Unfortunately, the Vertical Merger Guidelines dramatically miss the mark.[12] They problematically push the evaluation of entry to the discussion in the Horizontal Merger Guidelines, disregarding the distinct considerations that merit increased scrutiny in the vertical merger context. Moreover, the discussions of related topics such as raising rivals' costs, input foreclosure, and two-stage entry do not rigorously analyze and detail how these issues might specifically or disproportionately impact prospective new entrants.

Diminished access to capital

A vertical merger may reduce the ability of new entrants to attract the financing necessary to enter the market and effectively compete. Eliminating a potential customer from the market can dampen future sales forecasts for would-be entrants, and with that, the appetite for investing in new entry.[13] Investors are unlikely to allocate capital to firms that stand no chance of gaining any market share. Investment in new entrants may also dry up or become cost-prohibitive when a

---

[10] For example, the Campaign for Family Farms and the Environment stated in their comment that "[t]he issue of consolidation in agriculture markets is at the center of most of the challenges [their] members face as they struggle to maintain economically viable farming operations." The Campaign for Family Farms and the Environment, Comment Letter No. 51 on #798: Draft VMGs, Matter No. P810034 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger guidelines/cffe_vertical_merger_guideline_comment.pdf.

[11] Heather Long, *More than 100,000 small businesses have closed forever as the nation's pandemic toll escalates*, WAPO (May 12, 2020), https://www.washingtonpost.com/business/2020/05/12/small-business-used-define-americas-economy-pandemic-could-end-that-forever/; *see also* Annie Lowrey, *The Small-Business Die-Off Is Here*, THE ATLANTIC (May 4, 2020), https://www.theatlantic.com/ideas/archive/2020/05/bridge-post-pandemic-world-already-collapsing/611089/.

[12] *See* Int'l Center for Law & Economics, Comment Letter No. 24 on #798: Draft VMGs, Matter No. P810034 at 15 (Feb. 2020) ("[T]he Commission must . . . assess the extent to which a vertical merger may raise barriers to entry, a criterion that is also found in the 1984 DOJ non horizontal merger guidelines but is strangely missing from the DOJ/FTC draft guidelines").

[13] Mitchell L. Stoltz, Electronic Frontier Foundation, Comment Letter No. 67 on #798: Draft VMGs, Matter No. P810034 at 3 (Feb. 24, 2020) (noting that "[t]he market for high-tech startup capital is… being directed towards growing the incumbents while diminishing competition. This effect transcends individual product and geographic markets"), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/eff_comments_on_draft_vertical_merger_guidelines_022620.pdf; *see also* Dissenting Statement of Fed. Trade Comm'r Rohit Chopra, In the Matter of Fresenius Medical Care AG & Co. KGaA and NxStage Medical, Inc., FTC File No. 171-0227 (Feb. 19, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455733/171_0227_fresenius_nxstage_chopra_statement_2-19-19.pdf.

large or dominant firm enters a new market, as investors take stock of the overwhelming advantage afforded by its size and resources.

Conflicted gatekeepers
A vertical merger may allow a company to seize gatekeeper control of the market in which it participates. This creates a conflict of interest that gives the merged firm both the motive and the means to deter new entry. Investors gravitate toward companies that can extract rents from participants across a sector, so when a market participant vertically merges with a firm that controls a bottleneck, new entrants face dim prospects. There are myriad avenues through which such gatekeeper control can suppress entry and blunt competitive intensity. In digital markets, a platform company can impose arbitrary technical specifications that stifle disruptive innovation, require market participants to use the platform's proprietary systems and pay for the privilege, levy taxes on disruptors that the platform's own competitive offerings do not incur, or otherwise condition access to the market on any number of one-sided, onerous contract terms.

This problem is not unique to digital markets. The reality is that when gatekeepers participate in the markets they control, they have the incentive and ability to inflict harm to competition. Indeed, commenters provide a wide array of examples – from healthcare[14] to food[15] to media,[16] music,[17] and live entertainment[18] – where that harm has materialized because of the

[14] Thomas E. Menighan, Am. Phar, Assoc., Comment Letter No. 61 on #798: Draft VMGs, Matter No. P810034 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/apha_comments_-_ftc.pdf; Alliance for Pharm. Compounding et al., Comment Letter No. 46 on #798: Draft VMGs, Matter No. P810034 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/02-26-20_joint_pharmacy_stakeholder_comments_-_ftc_doj_draft_vertical_merger_guidelines.pdf.
[15] Darin Von Ruden, Wisconsin Farmers Union, Comment Letter No. 49 on #798: Draft VMGs, Matter No. P810034 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/wfu_comments_on_vertical_merger_guidelines.pdf; Roger Johnson, Nat'l Farmers Union, Comment Letter No. 34 on #798: Draft VMGs, Matter No. P810034 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/02_26_20_nfu_comments_on_doj_ftc_draft_vertical_merger_guidelines.pdf; Dale McCall, Rocky Mountain Farmers Union, Comment Letter No. 33 on #798: Draft VMGs, Matter No. P810034 (Feb. 26, 2020), https://www.ftc.gov/policy/public-comments/draft-vertical-merger-guidelines; Doug Sombke, South Dakota Farmers Union, Comment Letter No. 64 on #798: Draft VMGs, Matter No. P810034 (Feb. 26, 2020), https://www.ftc.gov/policy/public-comments/draft-vertical-merger-guidelines; Mark Watne, North Dakota Farmers Union, Comment Letter No. 63 on #798: Draft VMGs (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/ndfu_comments_on_draft_vertical_merger_guidelines_022620.pdf; The Campaign for Family Farms and the Environment, *supra* note 10.
[16] Laura Blum-Smith & Stephen Michael Benavides, Writers Guild of Am. West, Comment Letter No. 60 on #798: Draft VMGs, Matter No. P810034 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/wgaw_comment_on_draft_vertical_merger_guidelines_2262020.pdf; Comm. Workers of Am. et al., Comment Letter No. 30 on #798: Draft VMGs, Matter No. P810034 (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/labor_unions_comment_to_draft_2020_vertical_merger_guidelines.pdf.
[17] Dr. Richard James Burgess, Am. Assoc. of Independent Music, Comment Letter No. 69 on #798 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/a2im_comments_on_draft_vertical_merger_guidelines_022620.pdf.
[18] Center for Democracy & Tech., Comment Letter No. 19 on #798: Draft VMGs, Matter No. P810034 (Feb. 24, 2020), https://www.ftc.gov/policy/public-comments/draft-vertical-merger-guidelines; Open Markets & Am. Econ. Liberties Project, *supra* note 4.

government's permissive vertical merger enforcement regime. The conflicts of interest created by vertical mergers are largely ignored in the Guidelines, which continue to champion the reigning theory that prioritizes cost savings over ease of entry.[19]

Insurmountable disadvantages
A dominant company that enters a new market by way of a vertical merger can create insurmountable disadvantages for other potential entrants into that market.[20] The resources, relationships, and other capabilities that dominant companies bring to bear when competing in a new market dramatically increase entry requirements. This goes well beyond the two-stage entry discussion in the Vertical Merger Guidelines, particularly with respect to digital markets.

Digital markets are often "winner take all" due to network effects, the self-reinforcing advantages of data, and other market characteristics. Companies that succeed in capturing winner-take-all markets have durable dominance that can be leveraged to dictate the terms of – or even block – entry in the other markets in which they participate.[21] For example, these dominant firms can use the rents they collect in a concentrated market to subsidize their activities in new markets. They can integrate acquired products into an existing suite or leverage their participation in multi-sided markets in ways that require a minimum viability that is nearly impossible to achieve.

In the data economy, vertical mergers can allow dominant firms to integrate and enhance data inventories and collection capabilities in ways that new entrants cannot replicate. The dynamism of data-based markets means that products that might initially appear unrelated could quickly become related or relevant in unanticipated ways.[22] Many commenters suggested that the agencies adopt a presumption against vertical transactions by dominant platforms based on these market realities.[23] Yet, the Guidelines do not even address these digital issues, let alone include any such presumption.

---

[19] Khan, *supra* note 3 at 976 - 77.

[20] *See* Nicholas Economides et al., Comment Letter No. 14 on #798: Draft VMGs, Matter No. P810034 at 4 -5 (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg14_economides_comment.pdf.

[21] Open Markets & Am. Econ. Liberties Project, *supra* note 4 at 14 -15 ("In markets defined by network effects and vulnerable to monopolistic control... [a] new firm can quickly attract users in one market (for example, photo sharing) and, on the strength of this user base, enter an adjacent market (for instance, general social media). Under these circumstances, vertical mergers can combine the traditional risks of vertical mergers with the added concern about tipping and nascent competitors. In the presence of network effects, dominant firms have powerful motivations to buy out and neutralize emerging competitors").

[22] *See* Comm. Workers of Am. et al., *supra* note 16 at 4 ("Network effects are particularly strong in data-heavy markets like ecommerce, search, and social media. And, once data has been collected in one market, it can be leveraged for advantage even in an apparently unrelated market. Data shared vertically on a supply chain can be used to inform product development and improvement, but can also facilitate market foreclosure to rivals, appropriation of intellectual property, and price discrimination").

[23] *See* Jonathan B. Baker et al., Comment Letter No. 21 on #798: Draft VMGs, Matter No. P810034 at 24 (Feb. 24, 2020) ("[T]he presumption [of competitive harm] is important because firms participating in vertically-adjacent or complementary markets are often potential entrants, so the presumption would reach nascent threats to dominance created by potential entrants that would be eliminated by the acquisition. The presumption also recognizes that a dominant platform's market power would give it the ability to substantially disadvantage firms in adjacent markets by choosing not to interoperate"), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg21_baker_rose_salop_scott_morton_comments.pdf.

Increased customer-acquisition costs
Vertical mergers can significantly increase the cost of acquiring new customers. High customer-acquisition costs are a key metric that can deter investment in new businesses. The Vertical Merger Guidelines do not adequately address the ways that a vertical transaction, particularly those involving dominant platforms, may make it difficult, expensive, or otherwise unappealing to switch to a new entrant. The switching costs created by referrals, bundling, cross-product subsidization, below-market or zero-cost pricing, early termination charges, exclusive add-on deals, and other unfair advantages of vertical integration can obstruct new entry and should have received due consideration in the Guidelines.

Market Realities

Beyond the failure to capture the wide range of structural market changes that can harm competition, the theoretical models in the Vertical Merger Guidelines are based on an antiquated view of the economy that has little basis in modern market realities.[24] The Guidelines' continued reliance on these unproven theories reflects a lack of humility as to their efficacy.[25] And it comes despite numerous public comments that cast serious doubts about the accuracy of the theoretical predictions and expressed concerns about the significant weight that they are afforded.[26] In addition to their general inability to predict changes in merger-induced entry and exit, existing models struggle to capture how vertical mergers reduce resilience to economic shocks and increase the likelihood of shortages and outages. The Guidelines should have clearly acknowledged the limited utility and application of these economic models, especially when there has been little recent effort by the agencies to look back and test previous assumptions against real-world results.

Contested economic theories
The theories advanced in the Vertical Merger Guidelines on the procompetitive benefits of efficiencies are of special concern, given the lack of evidence that such benefits have come to pass in the real world. One of the more contentious theories is that "vertical mergers often benefit consumers through the elimination of double marginalization, which tends to lessen the risks of competitive harm."[27] This theory presumes that vertical mergers produce cost savings that are then passed on to customers through price decreases.

[24] Burgess, *supra* note 17 at 3 ("The [VMGs] rest on theoretical assumptions that companies will behave in ways that simply increase profits, but the rise of financialization, and the shift towards an emphasis on returns for Wall Street or private equity has upended many of the old assumptions about what animates decisionmaking").
[25] Sanjukta Paul & Marshall Steinbaum, Comment Letter No. 3 on #798: Draft VMGs, Matter No. P810034 at 2 (Feb. 2020) ("Little systematic effort has been made to study the effects of vertical mergers. Instead, the draft guidelines rely on theory in place of evidence, an approach that has led antitrust jurisprudence and enforcement astray in the past"), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger guidelines/vmg3_proposed_vertical_merger_guidelines_comment_final_2_2020.pdf.
[26] There were 74 public comments submitted by a diverse set of stakeholders. Unfortunately, the Guidelines do not include any supplemental analysis of the comments that articulate more specifically how the final version reflects these submissions.
[27] VERTICAL MERGER GUIDELINES, *supra* note 8 at 2.

Many commenters contested the elimination of double marginalization theory, calling it "controversial,"[28] "speculative," and "unproven," and suggesting that it "relies on a vertically integrated company to act in a way that defies reason."[29] These commenters noted that "in the case of significant market power and high entry barriers, efficiencies and the ability to eliminate margins could easily become the economic profit of a monopoly firm with an incentive to line the pockets of executives and investors."[30] Even those supportive of the theory raised a number of concerns about its treatment within the Guidelines.[31] Others raised concerns that the undue consideration of the theory will "weaken enforcement," give defendants legal avenues to exploit, and "reduce the transparency and predictability that the guidelines are intended to promote."[32] Commenters also cited studies showing that "few, if any, promised efficiencies from mergers in fact materialize" and suggested that "merger policy should seek to minimize and constrain efficiencies defenses, rather than expand and invite them" as these guidelines appear to do.[33] I agree.

Evidence of real-world harms

While the guidelines cite no empirical evidence that theoretical benefits have been realized, the public comments provide plenty of evidence that the predictions produced by economic models have performed poorly against real-world merger outcomes.[34] Commenters in response to the draft noted a number of instances where merged firms took actions that deviated significantly from pre-merger promises.[35] AT&T claimed that the efficiencies produced by its merger with DirecTV in 2015 would incentivize the deployment of new rural wireless broadband service to 13 million households by the end of 2019. But so far the company has deployed the service to fewer than 3 million households.[36] Meanwhile, AT&T has reportedly given DirecTV preferential treatment over third-party content providers.[37] Both AT&T-Time Warner and Comcast-NBCUniversal have imposed data caps that limited their customers' use of the internet, "despite

[28] Diana L. Moss, Am. Antitrust Inst., Comment Letter No. 28 on #798: Draft VMGs, Matter No. P810034 at 7 (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/aai_comments_draft_vm_guidelines_f.pdf.

[29] *See* Comment of the Am. Econ. Liberties Project et al., Comment Letter No. 32 on #798: Draft VMGs, Matter No. P810034 at 2 (Feb. 25, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/02252020_-_draft_vertical_merger_guidelines_comment_.pdf.

[30] *Id.* at 4.

[31] *See* Baker et al., *supra* note 23 at 34; *see also* Steven C. Salop, Comment Letter No. 74 on #798: Draft VMGs, Matter No. P810034 at 18 (Mar. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/salop_suggested_vertical_merger_guidelines.pdf.

[32] Diana L. Moss, *supra* note 28 at 7.

[33] Paul & Steinbaum, *supra* note 25 at 2.

[34] Blum-Smith & Benavides, *supra* note 16 at 6.

[35] Commenters note, for example, that when AT&T acquired Time Warner's television networks and the Warner Bros. film and TV studio in 2016, the company claimed that the merger would lead to the elimination of double marginalization and price decreases. Instead, fewer than a month after the merger, AT&T began repeatedly hiking prices on its products, and inflicted a variety of non-price harms on affected markets. *See* Charlotte Slaiman & Joshua Stager, Public Knowledge & Open Tech. Inst., Comment Letter No. 66 on #798: Draft VMGs, Matter No. P810034 at 8-9 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/pk_oti_comments_on_draft_vertical_merger_guidelines_022620.pdf; *see also* Center for Democracy & Tech, *supra* note 18 at 1.

[36] *Id.*

[37] *Id.*

a drastic reduction in marginal costs" and other alleged cost savings achieved through their respective vertical mergers.[38]

Commenters provided a variety of other real-world competition harms resulting from vertical mergers and vertical integration. In many of these instances, the harm inflicted related to choice, quality, and likelihood of new entry, rather than short-term price effects – a common problem with the current suite of economic models in use today. For example, grocery retailers have begun creating their own supply chains for certain agricultural products, giving them the ability to exclude competitors.[39] After Walmart built its own dairy processing plant in Indiana, its previous supplier Dean Foods had to declare bankruptcy and canceled over 100 contracts with farmer-suppliers, forcing many out of business.[40] The vertical merger between pharmacy giant CVS and the big health insurance firm Aetna has forced health care providers to close their doors as CVS announced its intention "to significantly integrate Aetna insureds into CVS Minute Clinics."[41] According to the AIDS Healthcare Foundation, these minute clinics "replace fundamental elements of the patient-physician relationship with 'cookie cutter' treatment," a cost-savings approach that can be dangerous for people with special conditions.[42]

Other important omissions

The Vertical Merger Guidelines ignore a whole host of other important issues raised by commenters. Critically, the Guidelines do not address in detail the labor competition issues that vertical transactions create.[43] They also do not touch on the perils associated with private equity involvement in vertical mergers, including their long-term viability as robust competitors and their under-the-radar regional roll-up strategies. And the Guidelines do not define or provide metrics for non-price effects like innovation and quality. As a result, these effects are likely to continue to be undercounted or overlooked while unproven, but measurable, predictions about prices are given significant weight.

The Guideline's silence on these issues is concerning. This disregard, combined with the lack of structural analysis and the absence of real-world data about the accuracy of modeled predictions, helps sustain support for an overly permissive status quo approach. If the agencies don't look for harms, they can claim these harms don't exist. Failure to fully account for all the competitive effects has led to behavioral remedies that do very little to stop the anticompetitive conduct

---

[38] Stoltz, *supra* note 13 at 4.

[39] Von Ruden, *supra* note 15 at 1.

[40] Ben Gotschall, Organization for Competitive Markets, Comment Letter No. 39 on #798: Draft VMGs, Matter No. P810034 at 4 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/ocm_public_comments_on_doj_and_ftc_draft_vertical_merger_guidelines.pdf.

[41] Laura Boudreau, AIDS Healthcare Foundation, Comment Letter No. 52 on #798: Draft VMGs, Matter No. P810034 at 4-6 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/ftc_doj_vergical_merger_guidelines_comments_ahf_2-26-20.pdf; *see also* B. Douglas Hoey, National Community Pharm. Assoc., Comment Letter No. 11 on #798: Draft VMGs, Matter No. P810034 (Feb. 18, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg11_ncpa_comment.pdf.

[42] *Id*.

[43] As noted by the Writers Guild of America West, "[n]o merger has ever been blocked on the grounds of reduced labor market competition, and the FTC… has never even challenged a merger over such concerns. As a result of this neglect, wages are stagnant and workers change jobs at lower rates, while employers capture ever greater surplus from employees and enjoy record profits." Blum-Smith & Benavides, *supra* note 16 at 9. *See also.* Comm. Workers of Am. et al., *supra* note 22.

vertical mergers facilitate. After all, it is difficult to stop abusive behavior when the market is structured to produce it. We need to start recognizing the inherent inability to resolve the harms to competition that some vertical mergers impose. I believe rigorous, empirical, structural analysis would lead the agencies to challenge significantly more vertical transactions instead of attempting to remedy them.

Conclusion

Since the publication of the last iteration of the Vertical Merger Guidelines a generation ago, we have learned a great deal about the incentives of firms and the individuals operating them, as well as how our global capital markets shape those incentives. We have also experienced – and are currently witnessing – how diminished firm entry can reduce dynamism, innovation, and resilience.

I appreciate that the Federal Trade Commission and the U.S. Department of Justice rescinded the old, outdated 1984 Guidelines. I welcome the sentiment from my colleagues that they are likely to challenge more vertical mergers that might have otherwise not drawn scrutiny. However, for new Guidelines to gain acceptance by courts and the public, they must reflect the limitations of old approaches and economic learning of the last generation. If not, they will not stand the test of time.

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary

September 15, 2021

2020 guidance withdrawn to prevent industry and judicial reliance on unsound economic theories; FTC to work with DOJ to update merger guidance

Share This Page

FOR RELEASE

TAGS: Bureau of Competition | Bureau of Consumer Protection | Bureau of Economics | Office of Policy Planning | Office of International Affairs | Competition | Consumer Protection | Merger | Vertical

The Federal Trade Commission voted to withdraw its approval of the Vertical Merger Guidelines, issued jointly with the Department of Justice (DOJ), and the FTC's Vertical Merger Commentary. The guidance documents, which were published in 2020, include unsound economic theories that are unsupported by the law or market realities. The FTC is withdrawing its approval in order to prevent industry or judicial reliance on a flawed approach. In voting to withdraw, the FTC reaffirmed its commitment to working closely with the DOJ to review and update the agencies' merger guidance.

The withdrawn Vertical Merger Guidelines set out analytical techniques and enforcement policies for non-horizontal mergers, while the associated commentary had summarized a selection of prior investigations that largely utilized that framework. The guidelines noted several ways vertical mergers can harm competition, which the statement by the FTC majority recognizes provided valuable analysis.

The statement by the FTC majority, however, notes that the 2020 Vertical Merger Guidelines had improperly contravened the Clayton Act's language with its approach to efficiencies, which are not recognized by the statute as a defense to an unlawful merger. The majority statement explains that the guidelines adopted a particularly flawed economic theory regarding purported pro-competitive benefits of mergers, despite having no basis of support in the law or market reality. The majority noted that because the Vertical Merger Guidelines were adopted in 2020, they had yet to have a significant impact and that acting swiftly was paramount to preventing judicial reliance on this flawed discussion.

Going forward, the FTC will work with the DOJ to update merger guidance to better-reflect market realities. The FTC majority statement lays out several areas for consideration in that review. First, the FTC intends to explore ways to provide clear guidance on the characteristics of transactions that are likely unlawful. Second, the FTC will look at ways to provide guidance on ineffective remedies, based on an evaluation of past remedy practices and any evidence that past remedies may not have fully restored competition. Finally, the agency will look to expand on the harms identified in the 2020 Vertical Merger Guidelines to consider various features of modern firms, including in digital markets, and impacts of mergers on labor markets.

The Commission vote to rescind the policy statement was 3-2, with the majority issuing a separate statement and Commissioners Noah Joshua Phillips and Christine S. Wilson issuing a separate dissenting statement.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

Contact Information

MEDIA CONTACT:

UNITED STATES OF AMERICA

Federal Trade Commission

WASHINGTON, D.C. 20580

**Statement of Chair Lina M. Khan,
Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the
Withdrawal of the Vertical Merger Guidelines
Commission File No. P810034**

September 15, 2021

Section 7 of the Clayton Act prohibits mergers and acquisitions "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[1] Mergers or agreements to merge can also violate the prohibitions on restraints of trade, monopolization, or unfair methods of competition.[2] Despite these laws, over the past several decades the country has seen increasing levels of consolidation across the economy[3]—much of it via merger[4]—and a reduction in new firm formation.[5] That consolidation has led to a corresponding lessening of competition reflected in growing mark-ups and shrinking wages.[6]

In light of these developments, the Federal Trade Commission and the Department of Justice are reviewing their approach to enforcing the antitrust laws' prohibition of anticompetitive mergers.[7] As an immediate step, the FTC is withdrawing its approval of the

---

[1] 15 U.S.C. § 18.
[2] *Id.* §§ 1-2, 45.
[3] FACT SHEET: Executive Order on Promoting Competition in the American Economy (July 9, 2021) ("For decades, corporate consolidation has been accelerating. In over 75% of U.S. industries, a smaller number of large companies now control more of the business than they did twenty years ago."), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.
[4] *See* Craig Doidge et al., *Eclipse of the Public Corporation or Eclipse of the Public Markets?*, at 4 (Nat'l Bureau of Econ. Research, Working Paper No. 24265; 2018) (the number of publicly traded firms has declined by nearly 50% from its mid-1990's peak, with 61% of firms delisting due to merger activity), https://www.nber.org/papers/w24265.
[5] *See* Econ. Innovation Group, Dynamism in Retreat: Consequences for Regions, Markets, and Workers, at 7 (Feb. 2017), https://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf; Ian Hathaway & Robert E. Litan, The Brookings Inst., Declining Business Dynamism in the United States: A Look at States and Metros, at 1 (May 2014), https://www.brookings.edu/wpcontent/uploads/2016/06/declining_business_dynamism_hathaway_litan.pdf; Stacy Mitchell, Inst. for Local Self-Reliance, Monopoly Power and the Decline of Small Business: The Case for Restoring America's Once Robust Antitrust Policies (Aug. 2016), https://ilsr.org/wpcontent/uploads/2018/03/MonopolyPower-SmallBusiness.pdf.
[6] FACT SHEET: Executive Order on Promoting Competition in the American Economy (July 9, 2021) ("[A] lack of competition drives up prices for consumers. As fewer large players have controlled more of the market, mark-ups (charges over cost) have tripled." The fact sheet also points out that "research shows that industry consolidation is decreasing advertised wages by as much as 17%."), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.
[7] Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines (July 9, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/statement-ftc-chair-lina-khan-antitrust-division-acting-assistant.

Vertical Merger Guidelines issued in 2020 ("2020 VMGs") to prevent further industry or judicial reliance on certain flawed provisions. In particular, the 2020 VMGs' flawed discussion of the purported procompetitive benefits (i.e., efficiencies) of vertical mergers, especially its treatment of the elimination of double marginalization ("EDM")[8], could become difficult to correct if relied on by courts.

The 2020 VMGs represent a substantial improvement over the 1984 guidelines that they replaced and address important principles such as raising rivals' costs, foreclosure, and misuse of competitively sensitive information. Going forward, the FTC intends to work with the Department of Justice to issue updated merger guidance. This update will provide an opportunity to build on the positive steps that were taken in the 2020 VMGs. In particular, our review will enable consideration of key economic evidence that has been developed about the impact of market structure on the likely competitive effects of a merger.[9] It will also provide an opportunity to directly analyze mergers affecting critical areas of our modern economy, such as digital gatekeepers and labor markets.

Until new guidance is issued, the FTC will analyze mergers in accordance with its statutory mandate, which does not presume efficiencies for any category of mergers. In any merger, the FTC will consider all relevant facts, including but not limited to market structure, to determine whether a merger may lessen competition or tend to create a monopoly.

I. BACKGROUND

The 2020 VMGs were the first update to the FTC's and Department of Justice's published guidance on vertical mergers since 1984. The 1984 vertical merger guidelines no longer reflected agency practice or modern economics, and their withdrawal in early 2020 was a key step toward bringing antitrust enforcement in line with current economic learning and market realities.[10] The agencies proposed new guidelines and solicited public comment after withdrawing the 1984 guidelines. The proposed guidelines were substantially revised in response to the comments that were received and were published on June 30, 2020. The FTC issued additional commentary based on the 2020 VMGs in December 2020.

---

[8] The 2020 Guidelines do not refer to EDM as an "efficiency." *See* 2020 VMGs, at 11. Instead, they note that EDM creates an incentive for the merged firm to lower prices. *Id.* at 12. We refer to EDM as an efficiency here because, like other efficiencies, when it exists it is a merger-related change in the market that may theoretically incentivize the merged firm to lower prices. Like all other forms of efficiency, EDM is simply not relevant to the legality of a merger if it does not result in the preservation of competition in the post-merger market, with the assessment of competition not limited to price.

[9] *See, e.g.*, Serge Moresi & Steven C. Salop, *vGUPPI: Scoring Unilateral Pricing Incentives in Vertical Mergers*, 79 ANTITRUST L.J. 185 (2013) (analyzing the incentives created by vertical mergers to increase prices); Marissa Beck & Fiona M. Scott Morton, *Evaluating the Evidence on Vertical Mergers*, 59 REV. IND. ORG. 273 (2021) (compiling studies of the impact of vertical mergers in various industries and observing that half find competitive harm).

[10] Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1983 (2018) (noting that "[t]he 1984 Non-Horizontal Guidelines are out-of-date" and compiling citations).

II. THE 2020 VMGS' FOCUS ON EDM IS INCONSISTENT WITH THE STATUTORY TEXT AND MARKET REALITIES.

The Clayton Act prohibits any merger or acquisition that "may" substantially lessen competition in any line of commerce or activity affecting commerce. This is a broad mandate aimed at prohibiting mergers even when they do not constitute monopolization and even when their tendency to lessen competition is not certain.[11] The statute does not distinguish between "horizontal" and "vertical" mergers, nor does it contain exceptions for mergers that lessen competition but also create some form of efficiency.[12] Accordingly, even if a merger does create efficiencies, the statute provides no basis for permitting the merger if it nevertheless lessens competition.[13] Consistent with the statutory language and the Supreme Court's holdings, virtually no cases have relied on an efficiencies defense to permit a merger where that merger might have lessened competition.[14] Cases treating efficiencies that might lower prices as potentially offsetting a merger's lessening of competition generally followed the lead of the DOJ's 1982 and 1984 Guidelines, which suggested that approach.[15]

The 2020 VMGs contravene the text of the statute, devoting a whole section to the discussion of procompetitive effects, or efficiencies, of vertical mergers.[16] 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.[17] Yet

[11] Open Markets Inst. et al., Comment Letter No. 31 on #798: Draft Vertical Merger Guidelines ("Draft VMGs"), Matter No. P810034 at 4 (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/comment_to_ftc-doj_re_vertical_merger_guidelines.pdf.

[12] *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962), *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967); *U.S. v Phila. Nat'l Bank*, 374 U.S. 321, 371 (1963); *FTC v. Penn State Hershey Medical Center*, 838 F.3d 327, 347-48 (3d Cir. 2016) (discussing an efficiencies defense and noting that the Supreme Court has "cast doubt on its availability"); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65, 134 (1982).

[13] *See, e.g.*, *Saint Alphonsus Medical Center-Nampa v. St. Luke's*, 778 F.3d 775, 790 (9th Cir. 2015) ("We remain skeptical about the efficiencies defense in general and about its scope in particular."); *U.S. v. Anthem, Inc.*, 855 F. 3d 345, 353, 355 (D.C. Cir. 2017) (observing that "it is not at all clear that [efficiencies] offer a viable legal defense to illegality under Section 7" but considering claimed efficiencies in assessing the merger's impact on competition). There is also significant debate as to what types of "efficiencies" should be cognizable under the antitrust laws. *See, e.g., id.* at 369 (Millet, concurring) (rejecting a claimed efficiency because "securing a product at a lower cost due to increased bargaining power is not a procompetitive efficiency when doing so simply transfers income from supplier to purchaser without any resource savings").

[14] *See* Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 704 (2017) ("efficiency claims … are often raised but almost never found to justify a merger that has been shown to be prima facie unlawful. The decisions that credit claimed efficiencies as justification typically also find that the government failed to make out its prima facie case against the merger.").

[15] *See, e.g.*, *United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, 1289 (N.D. Ill. 1989) (considering efficiency argument based on the DOJ Merger Guidelines, but rejecting it as factually unsupported), *aff'd*, 898 F.2d 1278 (7th Cir. 1990).

[16] *See* 2020 VMGs, at 11 (explaining under the heading "procompetitive effects" that vertical mergers may give rise to "efficiencies that benefit competition and consumers").

[17] Moreover, in many cases the predicted efficiencies simply never materialize. For example, AT&T claimed that it would be incentivized by the cost savings of its merger with DirecTV to deploy broadband to more than 13 million households by 2019, but so far has only deployed broadband to 3 million households. *See* Charlotte Slaiman & Joshua Stager, Public Knowledge & Open Tech. Inst., Comment Letter No. 66 on #798: Draft VMGs, at 8-9 (Feb.

under the statute, efficiencies are only relevant insofar as they shed light on the level of post-merger competition, which must be considered across many dimensions—price, quality, innovation, variety, service, and more.[18]

The VMGs' emphasis on a non-statutory efficiency defense leads to their most significant flaw—their treatment of the elimination of double marginalization (EDM). The VMGs identify EDM as the principal reason to treat vertical mergers distinctly from horizontal mergers,[19] claim that EDM "often" causes vertical mergers to benefit consumers, and suggest the agencies will proactively evaluate its impact even when not substantiated by the parties.[20] EDM is cited as a reason to discount both a merger's impact on pricing power[21] and the likelihood of coordination among the remaining firms.[22]

The VMGs' reliance on EDM is theoretically and factually misplaced. It is theoretically flawed because the economic model predicting EDM is limited to very specific factual scenarios: mergers that involve one single-product monopoly buying another single-product monopoly in the same supply chain, where both charge monopoly prices pre-merger and the product from one firm is used as an input by the other in a fixed-proportion production process.[23] Yet outside this limited context, economic theory does not predict that EDM will create downward pricing pressure.[24]

Empirical evidence suggests that we should be highly skeptical that EDM will even be realized—let alone passed on to end-users.[25] In many cases, vertical integration does not even

---

26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/pk_oti_comments_on_draft_vertical_merger_guidelines_022620.pdf.

[18] *Saint Alphonsus Medical Center-Nampa v. St. Luke's*, 778 F.3d 775, 790 (9th Cir. 2015) ("The [Clayton] Act focuses on 'competition,' so any defense must demonstrate that the prima facie case portrays inaccurately the merger's probable effects on competition. In other words, a successful efficiencies defense requires proof that a merger is not, despite the existence of a prima facie case, anticompetitive.").

[19] *See* 2020 VMGs, at 2 ("Vertical mergers, however, also raise distinct considerations [from horizontal mergers], which these Guidelines address. For example, vertical mergers often benefit consumers through the elimination of double marginalization, which tends to lessen the risks of competitive harm.").

[20] *See id.* ('vertical mergers often benefit consumers through the elimination of double marginalization, which tends to lessen the risks of competitive harm"); *see also id.*at 11-12 (suggesting that EDM will be considered by the agencies "independently" even if the merging parties do not provide substantiation).

[21] *Id.* at 5 ("The elimination of double marginalization, for example, can confer on the merged firm an incentive to set lower downstream prices.").

[22] *Id.* at 11 ("a vertical merger's elimination of double marginalization (see Section 6) may increase the merged firm's incentive to cheat on a tacit agreement, thereby reducing the risk of coordinated effects.").

[23] John Kwoka & Margaret Slade, *Second Thoughts on Double Marginalization*, 34 ANTITRUST 51 (2020).

[24] *Id.* at 55 ("the classic EDM model is based on a long list of assumptions that do not necessarily hold").

[25] Jonathan B. Baker et al., Comment Letter No. 21 on #798, at 32-34 (Feb. 24, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/vmg21_baker_rose_salop_scott_morton_comments.pdf; John Kwoka & Margaret Slade, *supra* note 23, at 56; Alliance for Pharm. Compounding et al., Comment Letter No. 46 on #798, at 2 (Feb. 26, 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/02-26-20_joint_pharmacy_stakeholder_comments_-_ftc_doj_draft_vertical_merger_guidelines.pdf (citing FTC analysis and other analysis of vertical healthcare consolidation leading to price increases); *see also* Salop, *supra* note 10, at 1970-71("Claims that EDM must lead to lower downstream prices are overstated for several reasons.").

prompt firms to provide the upstream input to its own downstream division.[26] Studies of mergers between hospitals and physician groups—which have led to significant concentration in many areas[27]—suggest these vertical mergers have not achieved theorized efficiencies. Instead, they find that vertical consolidation has increased physician costs, hospital prices, and per capita medical spending, with larger effects in more concentrated markets.[28] Nor have these cost increases been associated with improved medical care.[29] Similarly, when AT&T acquired Direct TV, it successfully argued to the FCC that the merger would lead to downward pricing pressure due to EDM.[30] Yet shortly after the merger, AT&T began raising prices instead.[31]

Withdrawing from the VMGs reflects the FTC's view that it is inappropriate for the Commission's analysis of whether a transaction may lead to a substantial lessening of competition to assume that EDM is likely to exist.

III. THE FTC'S REVIEW OF ITS GUIDELINES WILL CONSIDER MARKET STRUCTURE, REMEDIES, AND ADDITIONAL MECHANISMS OF HARM.

A. The FTC will assess potential market structure-based presumptions for non-horizontal mergers.[32]

Antitrust law, as understood by both the FTC and courts, has long recognized that certain familiar practices have such a clear tendency to harm competition that they should be presumptively or even *per se* illegal. Identifying certain practices as presumptively illegal gives clear guidance to businesses and streamlines enforcement to curb the worst abuses. Moreover, bright-line rules focus judicial attention on readily observable market characteristics rather than complex economic modeling and self-interested testimony about future business plans. The FTC has reviewed many vertical mergers, providing a significant body of learning that could likewise identify common characteristics of mergers that are presumptively anticompetitive.

[26] Baker et al., *supra* note 25, at 18-20 ("evidence from a large data base of vertically integrated firms indicates there were no internal input transfers from the upstream division to the downstream division in about half of all the vertically-integrated firms studied" (citing Enghin Atalay et al., *Vertical Integration and Input Flows*, 104 AM. ECON. REV. 1120, 1127 (2014)).

[27] Thomas L. Greaney, *The New Health Care Merger Wave: Does the "Vertical, Good" Maxim Apply?* 46 J. L. MED. & ETHICS 918, 922 (2018).

[28] *Id*.

[29] *Id*.

[30] Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, Mem. Op. and Order, MB Docket No. 14-90, ¶¶ 120-126 (July 28, 2015).

[31] Philip Dampier, *AT&T Gets Stingy with DirecTV Promotions for Existing Customers; $100+ for TV-Only Service*, STOP THE CAP! (Jan. 27, 2016), https://stopthecap.com/2016/01/27/att-gets-stingy-with-directvpromotions-for-existing-customers-some-now-pay-100-for-tv-only-service/; Amit Chowdhry, *AT&T to Increase Grandfathered Unlimited Data Plans from $30 to $35*, FORBES (Dec. 2, 2015), https://www.forbes.com/sites/amitchowdhry/2015/12/02/att-to-increase-grandfathered-unlimited-dataplans-from-30-to-35/#151b004272a4; *How a DirecTV bill really works in 2016*, 404 TECHSUPPORT (June 6, 2016), https://www.404techsupport.com/2016/06/29/directv-bill-2016/.

[32] Salop, *supra* note 10, at 1972 (advocating analysis of individual foreclosure theories in vertical merger enforcement, but also noting that "For the type of markets that are normally analyzed in antitrust, the competitive harms from vertical mergers are just as intrinsic as are harms from horizontal mergers.").

Market structure screens have been used for decades by agencies when assessing whether horizontal mergers merit a presumption of anticompetitive effects.[33] Since the 1980s, however, vertical mergers have not been subject to similar screens that use readily-observable market features. This distinct analytical approach to horizontal and vertical mergers is not justified: vertical mergers involving concentrated markets likewise have a structural tendency to harm competition.[34] Commenters suggested numerous candidate screens that pick out mergers deserving of additional focus—or a presumption of illegality—based on a variety of market characteristics.[35] In reviewing our approach to merger analysis, we will seek to identify objective factors that presumptively indicate that a merger is likely to reduce competition.

The 2020 VMGs focus exclusively on the merged firm's incentives to engage in certain general types of practices, such as foreclosing rivals, raising rivals' costs, or misuse of competitively sensitive information. These are all important mechanisms by which vertical mergers can lessen competition. However, the FTC's ability to conduct the analyses contemplated by the VMGs in an individual case depends not only on the availability of adequate data, but also on the FTC's ability to predict in advance all the specific tactics the merged firm might use to disadvantage its competitors with its newfound resources.[36] Identifying and analyzing individual exclusionary tactics is challenging even when considering only current market conditions, given that "'[a]nticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties."[37] It is even more challenging when we know that the affected market will change over time, meaning that the specific costs and benefits of exercising the merged firm's increased market power using a given tactic will vary. Indeed, the fundamental difficulty of predicting all possible forms of exclusionary conduct in advance is one of the reasons why the agencies have traditionally preferred structural to behavioral remedies.[38]

Accordingly, where we have evidence that a particular market structure tends to lessen competition, seeking instead to predict which specific mechanism will lead to that lessening of

---

[33] Different types of market structure screens have been proposed to identify mergers more likely to have anticompetitive effects. *See, e.g.*, Baker et al., *supra* note 25, at 18-20. Policymakers have long recognized the potential for vertical integration to create conflicts of interest and extend dominance, and in part for those reasons have prohibited such integration in a variety of industries. *See* Lina M. Khan, *Separating Platforms and Commerce*, 119 COLUMBIA L. REV. 973, 1052 (2019).

[34] Salop, *supra* note 10, at 1973 ("Consider first the well-understood and accepted notion that there is inherent upward pricing pressure from horizontal mergers in differentiated products markets, even without coordination. In fact, the same inherent upward pricing pressure occurs for vertical mergers in similar market structures.").

[35] Jonathan B. Baker et al., *Five Principles for Vertical Merger Enforcement Policy*, 33 ANTITRUST 12, 19 (2019) (proposing five circumstances that should give rise to a presumption of anticompetitive effects for vertical mergers).

[36] *See, e.g.*, Salop, *supra* note 10, at 1979 (advocating use of numerous quantitative analyses of a vertical merger's likely effects, but also noting that "[a]ll these quantitative methodologies also are limited because they generally focus only on a subset of the possible harms that are easiest to quantify with available data. . .").

[37] *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998).

[38] DEP'T OF JUST., MERGER REMEDIES MANUAL, at 4 (Sept. 2020) (conduct remedies "require the merged firm to ignore the profit-maximizing incentives inherent in its integrated structure. Moreover, the longer a conduct remedy is in effect, the less likely it will be well-tailored to remedy the competitive harm in light of changing market conditions. Conduct remedies typically are difficult to craft and enforce. For these reasons, conduct remedies are inappropriate except in very narrow circumstances"), https://www.justice.gov/atr/page/file/1312416/download; DEP'T OF JUST., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES, at 7-8 (Oct. 2004), https://www.justice.gov/atr/page/file/1175136/download.

competition in a specific case may come at great expense with no improvement in our predictive accuracy. The FTC will therefore explore clear and administrable guidance on the characteristics of transactions that are likely unlawful. Such guidance should provide market participants with clear notice, reduce burdens on antitrust enforcers, and aid judges by allowing them to focus on observable facts that tend to predict anticompetitive effects rather than on complex and speculative claims. Use of such screens can streamline enforcement in cases where economic learning suggests the merger may substantially lessen competition, and developing these screens will be a key goal of future guidance.

B. The FTC will assess appropriate remedies for non-horizontal mergers.

Going forward, it will be critical for the FTC to evaluate past remedy practices and engage with evidence that its remedies may not have fully restored competition.[39] The FTC's 2017 merger retrospective is part of a tradition of self-reflection at the FTC, and the FTC will continue to scrutinize its past enforcement actions on an ongoing basis. Providing clear guidance on when remedies are unlikely to be effective will help identify scenarios where a challenge is more likely than settlement. Identifying such scenarios may deter such mergers and avoid the wasted resources associated with their attempt.

C. The FTC will assess prevalent harms that may result from non-horizontal mergers.

The 2020 VMGs identified several harms that can arise from non-horizontal mergers, including the potential for foreclosure, raising rivals' costs, increased entry barriers, and misuse of competitively sensitive information. They did not purport to be exhaustive,[40] and no list of potential harms could have been. Our merger policy review will expand on the work done in 2020 to consider various features that often characterize firms in the modern economy, including in digital markets. We will also look to provide guidance on how the FTC will analyze a merger's impact on labor markets.

Digital platforms are an increasingly significant part of the economy. The five largest firms in the United States by market capitalization[41] all operate digital platforms characterized by significant network externalities, and collectively they have made hundreds of acquisitions, including hundreds of acquisitions that fell below the HSR reporting thresholds.[42] It is critical

---

[39] *See, e.g.*, JOHN E. KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (MIT Press, 1st ed. 2015); Fernando Luco & Guillermo Marshall, *Vertical Integration with Multi-Product Firms: When Eliminating Double Marginalization May Hurt Consumers* 1, 15 (Oct. 20, 2017) (unpublished manuscript), http://www.ftc.gov/system/files/documents/public_events/1208143/luco_marshall.pdf (offering evidence that Coca-Cola and PepsiCo bottler acquisitions raised prices of Dr. Pepper Snapple products, while reducing prices of Coca-Cola and PepsiCo products).

[40] 2020 VMGs, at 4 ("These effects do not exhaust the types of possible unilateral effects."); *id.* at 10 ("The theories of harm discussed … are not exhaustive, but rather are illustrations of the manner in which a merger may lessen competition due to coordinated effects.").

[41] The five firms are: Apple, Microsoft, Alphabet (Google), Amazon, and Facebook. *See Largest American companies by market capitalization*, COMPANIESMARKETCAP.COM, https://companiesmarketcap.com/usa/largest-companies-in-the-usa-by-market-cap/ (last visited Sept. 14, 2021).

[42] *See* FED. TRADE COMM'N, NON-HSR REPORTED ACQUISITIONS BY SELECT TECHNOLOGY PLATFORMS, 2010-2019: AN FTC STUDY (Sept. 2021); *see also* MAJORITY STAFF REP. AND RECOMMENDATIONS OF THE SUBCOMM. ON

that the FTC establish a framework for merger analysis that accounts for features specific to digital markets, including characteristics that can enable dominant firms to capture markets and dissuade entry,[43] as well as non-price effects.[44] For example, markets with network effects can create a strong incentive to acquire or exclude nascent competitors, a tendency that should be considered when dominant platforms acquire start-ups.[45] Additionally, the fact that digital markets may enable firms to engage in myriad forms of non-price discrimination—for example, thorough degrading interoperability, reneging on access policies, or gaming algorithms—means that revised guidelines should pay greater attention to the broader set of tactics that firms may use to raise rivals' costs,[46] as well as the impact of an acquisition on competitors' access to capital.[47]

Finally, a process to revise the guidelines should consider harms in labor markets, a topic not previously addressed in merger guidelines.[48] Section 7 prohibits mergers that will lessen competition "in any line of commerce or in any activity affecting commerce," which extends beyond the scope of the products and services sold by the merging parties to include other markets affected, such as labor markets. Because labor market analysis in merger review would be novel, the FTC, merging parties, and courts would benefit from a clear framework for evaluating these common issues.

IV. LOOKING AHEAD

The FTC will work with the Department of Justice to seek input and review evidence on the effectiveness of prior enforcement practices. It is critical that our enforcement program comprehensively captures the relevant harms that may arise from transactions, uses our

ANTITRUST, COMMERCIAL, AND ADMIN. LAW OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, at 406 – 431 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

[43] Salop, *supra* note 10, at 1984 (recommending a revision to the 1984 guidelines in which "Enforcement should pay special attention to acquisitions by leading firms, particularly in oligopoly or dominant firm markets subject to network effects or economies of scale. This would include acquisitions of firms that may become significant potential competitors").

[44] The VMGs correctly acknowledge that non-price elements of competition such as product quality and innovation must be considered, but did not provide a framework for how these non-price factors would be assessed, instead highlighting quantitative models of price effects. 2020 VMGs, at 4 (noting that rivals may be harmed if the merged firm lowers the quality of goods sold to those rivals); *id.* at 6 (noting the use of merger simulation to predict price increases).

[45] Salop, *supra* note 10, at 1989 ("the existence of substantial economies of scale and demand-side network effects can lead to severe incumbency advantages, high barriers to entry, and incentives to use vertical mergers to decrease the likelihood of entry."); *see also* Baker et al., *supra* note 25, at 18-20 (proposing a presumption of anticompetitive effects for vertical mergers involving dominant platforms). Platform issues are present in many markets, not just digital ones, including healthcare markets (e.g., insurance networks, pharmacy benefits manager networks), payments, and many others. *See* NON-HSR REPORTED ACQUISITIONS BY SELECT TECHNOLOGY PLATFORMS, 2010-2019: AN FTC STUDY.

[46] The 2020 VMGs recognized that a merged firm may have an incentive to raise rivals' costs and that it may do so by degrading quality, but this topic is worth significant additional attention. 2020 VMGs, at 4.

[47] Indeed, some venture capitalists refer to a "kill zone": an area where firms that might compete with extremely large companies cannot obtain funding. Sai Krishna Kamepalli et al., *Kill Zone* (Becker Friedman Inst., Working Paper No. 2020- 19), https://ssrn.com/abstract=3555915.

[48] Jose Azar et al., *Labor Market Concentration*, 56 J. OF HUM. RESOURCES 1, 5 (2020).

substantial experience to identify appropriate bright-line screens for unlawful mergers, and carefully and continuously reviews empirical learning. Based on that review, the FTC will issue updated guidelines or rules to ensure our merger analysis aligns with market realities. In the interim, the Commission will rely on its statutory authority to apply existing laws when assessing proposed transactions.

***

Office of Commissioner
Rohit Chopra

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

PREPARED REMARKS OF COMMISSIONER ROHIT CHOPRA

Regarding the Motion to Rescind the 2020 FTC-DOJ Vertical Merger Guidelines

September 15, 2021

One of the ways that the FTC can regain credibility is to be more analytically rigorous and draw upon a richer set of quantitative and qualitative data to better inform our decisions, rather than relying on discredited theoretical models about the economy. Last year, FTC Commissioners voted 3-2 to implement new Vertical Merger Guidelines. Although we received public comments highlighting the competitive dangers of vertical mergers and advances in our understanding of their effects, the Guidelines we issued relied on a series of unproven or disproven assumptions, giving a blueprint to companies seeking to engage in an illegal vertical merger. Issuing these guidelines was actually worse than doing nothing at all.

From agriculture to automobiles, COVID-19 has provided us with real-world examples of how excessive concentration and bottlenecks can be detrimental to families, businesses, and our national resilience.

One of the effects we are seeing of the growing concentration in our economy is supply shortages. Since the pandemic began, we have seen shortages of critical goods and manufacturing inputs, affecting vast segments of the economy. These shortages are not merely inconvenient—they are slowing the economic recovery from the pandemic. The Federal Reserve Board reports that economic growth has been frustrated by supply chain disruptions. Automobile sales are down, for example, because car makers can't buy microchips.1 And businesses report "widespread concern about ongoing supply disruptions and resource shortages."2 Small businesses are particularly harmed by these shortages, since dominant firms have the power to demand that their suppliers fill their orders first.

Unfortunately, merger analysis has increasingly come to focus on efficiencies. Efficiencies sound good—nobody wants to be inefficient—and companies seeking to avoid prosecution for illegal mergers constantly stress them. But what do we mean by the term? In some instances, it means cost cutting that reduces productive capacity and resilience.

For example, cost cuts sometimes come through the "rationalization" of so-called "excess" capacity. In plain language, sometimes a firm shuts down a production line. But what makes that capacity "excess"? The competitiveness of the market is a key factor. For a firm in a competitive

[1] Fed. Rsvr. Bd., The Beige Book (Sept. 8, 2021), https://www.federalreserve.gov/monetarypolicy/files/BeigeBook_20210908.pdf.
[2] *Id.*

market, “excess” capacity is an actually opportunity and an incentive to compete for business from new customers. For a dominant firm, however, there are few new customers to win, and no short-term incentive to maintain that extra capacity—so it gets cut. But markets change. Demand may quickly increase, or one competitor may be suddenly taken offline—perhaps its raw materials are wedged in the Suez Canal. The competitive market is resilient. All those competitors who had incentives to maintain the capacity to win more business can step up to meet the demand shock. But the dominant firm, having spent years “rationalizing” production, cannot.

Today, we are voting to withdraw the vertical merger guidelines. Vertical integration, as we all recognize, can lead to foreclosure of rivals and increased barriers to entry. When old rivals are pushed out and new rivals are kept out, you get rising concentration—potentially in two markets. In any type of merger that we might challenge, the result is less competition, less diversity of options, and less resilience.

Going forward, we need to take a hard look at our approach to efficiencies in merger review. We cannot ignore situations where firms in many sectors are becoming too big to fail, and their short-term cost-cutting measures create a risk of widespread shortages and outages. And we certainly shouldn’t trade off the many benefits of a competitive market—including supply chain resilience—for a theoretical short-term price cut.

I look forward to a broad examination of our failed policies of the past, and instead move toward a more rigorous analysis of business realities to chart a new path forward. Thank you, Madam Chair.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement

September 15, 2021

Today the FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them, with no explanation and no sound basis of which we are aware. In the past two months, the FTC has withdrawn just as many bipartisan policies.[1] Now, the partisan majority will rescind the 2020 Vertical Merger Guidelines issued jointly by the FTC and the Antitrust Division ("2020 Guidelines") and the Commentary on Vertical Merger Enforcement ("Commentary"),[2] with the minimum notice required by law, virtually no public input, and no analysis or guidance.

Sowing confusion regarding the legality of vertical mergers is particularly troublesome at this time, given American businesses' ongoing attempts to shore up supply chain vulnerabilities exposed during the COVID-19 pandemic. Today's action, together with other recent attacks on the Hart-Scott-Rodino merger review process,[3] threatens to chill legitimate merger activity and undermine attempts to rebuild our economy in the wake of the pandemic.

---

[1] Noah Joshua Phillips & Christine S. Wilson, Comm'rs, Fed. Trade Comm'n, Dissenting Statement on the Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf; Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, Dissenting Statement Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf; Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Oral Remarks Regarding Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf.

[2] U.S. Dep't of Just. & Fed. Trade Comm'n, Vertical Merger Guidelines (hereinafter "VMGs") (June 30, 2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf; Fed. Trade Comm'n, Commentary on Vertical Merger Enforcement (Dec. 20, 2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commissions-commentary-vertical-merger-enforcement/p180101verticalmergercommentary_1.pdf.

[3] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Statement Regarding the Announcement of Pre-Consummation Warning Letters (Aug. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf; Noah Joshua Phillips & Christine S. Wilson, Comm'rs, Fed. Trade

We believe that American consumers, businesses, and taxpayers deserve better. For these reasons, we dissent.

The Majority's Decision Will Chill Procompetitive Deals and Hurt Consumers

Section 7 of the Clayton Act, the main U.S. law governing mergers, bars transactions where "the effect may be substantially to lessen competition".[4] Vertical mergers are *not* mergers of competitors. Rather, they combine firms that are in a buyer-seller relationship.[5] Suppose a company that specializes in manufacturing only smartphones merges with a company that specializes in manufacturing only smartphone chips, some of which it was selling to the smartphone manufacturer. That is a vertical merger. It does not directly eliminate competition, as the companies were not competing (or about to compete) with each other before they merged.

Vertical integration is a common "make or buy" phenomenon similar to choices that consumers make daily—it's one way that companies grow. When considering what to have for dinner, a consumer may choose to outsource food preparation by eating at a restaurant or getting take-out; alternatively, he may rely on groceries in his refrigerator and pantry to make dinner himself. When discovering a leak in her home, a consumer can outsource the repairs by hiring a plumber; alternatively, a handy consumer may fix the leak herself.

One immediate and positive effect of a vertical merger is that transactions (*e.g.,* chip sales) that were occurring at arm's length in the market now take place within the merged firm. As a consequence, the merged firm is no longer paying a markup on the product it is now supplying to itself (*e.g.,* smartphone chips), a phenomenon that economists call the "elimination of double marginalization".[6] The merged firm benefits from a lower manufacturing cost for each unit it produces (*e.g.,* each smartphone), allowing it to compete more aggressively by lowering its price and selling more units, and leaving consumers better off. Vertical mergers can also increase efficiency and competitiveness in other ways, like saving the substantial time and money that often go into finding reliable trading partners, negotiating terms of sale, coordinating R&D and product design, and writing contracts that cover multiple contingencies but can never capture them all. Take Disney's 2006 acquisition of Pixar. Prior to the merger, Disney was partially financing and distributing Pixar's films; but once combined, Pixar revitalized Disney's animation department, while Disney used its resources to expand Pixar's production, resulting in several beloved movies.[7]

Comm'n, Statement Regarding the Indefinite Suspension of Early Terminations (Feb. 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf.

[4] 15 U.S.C. § 18.

[5] Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Closing Remarks at FTC Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law, Hearings on Competition and Consumer Protection in the 21st Century (hereinafter "Vertical Merger Hearing") at 360, https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18_0.pdf.

[6] As the 2020 VMGs correctly point out, "[t]he elimination of double marginalization is not a production, research and development, or procurement efficiency; it arises directly from the alignment of economic incentives between the merging firms." *See also* Roger D. Blair, Christine S. Wilson, et. al, *Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff & Thinking Holistically About Efficiencies*, 27 Geo. Mason L. Rev. 761 (2020).

[7] Brooks Barnes, *Disney and Pixar: The Power of the Prenup*, NY TIMES (June 1, 2008), https://www.nytimes.com/2008/06/01/business/media/01pixar.html

If you or your children watched a Pixar film on Disney+ during the pandemic, you benefited directly from a vertical integration.

Not all vertical mergers are benign. Some may harm competition and consumers. The 2020 Guidelines describe how such harm can occur and the framework that the FTC and DOJ have developed, over decades of experience, to analyze both the anti- and procompetitive effects of vertical mergers.[8] Contrary to decades of established case law, the Majority claim that the 2020 Guidelines "contravene the text of the statute" by recognizing the "procompetitive effects, or efficiencies, of vertical mergers."[9] The Majority commits two flaws in its analysis. First, they conflate procompetitive effects of a merger with merger efficiencies.[10] Second, they ignore the burden shifting framework adopted by the circuit courts recognizing that procompetitive effects may render a competition-eliminating merger procompetitive on the whole.[11] Similarly, a successful efficiency defense, *i.e.,* that the proposed merger's efficiencies would likely offset the merger's potential harm to consumers, is sufficient to save a merger. That said, Guidelines have long counseled skepticism, which is routinely applied. But the fact remains that vertical mergers are different animals from mergers of competitors, changing incentives in ways that are, on the whole, more likely to improve efficiency, bolster competition, and benefit consumers.[12] As such,

[8] Indeed, staff's careful application of that framework to the evidence in the Illumina/Grail investigation led us to support challenging that vertical merger.

[9] 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).

[10] VMGs ("The elimination of double marginalization is not a production, research and development, or procurement efficiency; it arises directly from the alignment of economic incentives between the merging firms. Since the same source drives any incentive to foreclose or raise rivals' costs, the evidence needed to assess those competitive harms overlaps substantially with that needed to evaluate the procompetitive benefits likely to result from the elimination of double marginalization.").

[11] *See* Otto Bock HealthCare North America, Inc., 2019 WL 5957363, at *33-35 (F.T.C. Nov. 1, 2019) (opinion authored by Comm'r Rohit Chopra); United States v. AT&T, Inc., 310 F. Supp. 3d 161 (D.D.C. 2018); FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001); United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990); ProMedica Health Sys. v. FTC, 749 F.3d 559, 571 (6th Cir. 2014); FTC v. H.J. Heinz Co., 246 F.3d 708, 720-22 (D.C. Cir. 2001); FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054-55 (8th Cir. 1999); FTC v. Univ. Health, Inc., 938 F.2d 1206, 1222–24 (11th Cir. 1991).

[12] *See* Michael H. Riordan & Steven C. Salop, Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment, 63 ANTITRUST L.J. 943, 944 (1995) (agreeing with other commentators that "efficiency benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset potential competitive harms in many cases"); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, at 5-9 (filed Sept. 6, 2018); Francine Lafontaine & Margaret Slade, Vertical Integration and Firm Boundaries: The Evidence, 45 J. ECON. LIT. 629, 680 (2007) (conducting a broad study of past vertical integrations and concluding "even in industries that are highly concentrated . . . , the net effect of vertical integration appears to be positive in many instances"); Cooper, Froeb, O'Brien, & Vita, supra note 20, at 658 ("Most studies find evidence that vertical restraints/vertical integration are procompetitive" and "[t]his efficiency often is plausibly attributable to the elimination of double-markups or other cost savings."); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, at 5-9 (filed Sept. 6, 2018) (summarizing the available empirical studies and concluding that either nine or ten of the eleven studies "indicated vertical integration resulted in positive welfare changes" or "no change" in welfare); David Reiffen and Michael Vita, Is There New Thinking on Vertical Mergers? A Comment, 63 ANTITRUST L.J. 917 (1995) (arguing the economics suggests the vast majority of vertical mergers are efficiency-enhancing); Michael H. Riordan & Steven C. Salop, Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment, 63 ANTITRUST L.J. 943, 944 (1995) (agreeing with Reiffen and Vita that "efficiency

they require an approach that fully accounts for their good as well as their bad effects. Anything less will hurt consumers, not help them.

The Majority Discards Transparency in Favor of Uncertainty

The 2020 Guidelines marked an important development in U.S. merger enforcement and provided needed transparency into the agencies' evaluation of vertical (and other non-horizontal) mergers. They are well founded, based on accepted economic principles, reflect precedent from courts and the agencies, and were the result of robust public comment.

The 2020 Guidelines incorporate the federal antitrust agencies' accumulated knowledge from nearly four decades of experience investigating and challenging anticompetitive non-horizontal mergers, as well as economic analysis on the potential harms and benefits of these types of mergers. By laying out the analytic framework the agencies use to evaluate non-horizontal mergers, the 2020 Guidelines are a useful guidepost for businesses that seek to ensure their conduct is lawful.

The 2020 Guidelines also benefitted from well-informed, substantial, and valuable public input in response to the draft Vertical Merger Guidelines released for comment on January 10, 2020,[13] the FTC's Competition and Consumer Protection Hearings for the 21st Century,[14] and a public workshop the FTC and Department of Justice hosted on March 11, 2020.[15] The Majority discards the 2020 Guidelines today with *zero* public input.

While the 2020 Guidelines reflect the agencies' current enforcement practices and policy, the Commentary provides a historical description of the Commission's analysis in non-horizontal merger cases. This document promotes agency transparency and facilitates the predictability, credibility, and integrity of the Commission's merger review process. Withdrawing the 2020 Guidelines and Commentary leaves the business community without clarity as to how we will carry out vertical merger enforcement. Our colleagues have yet to articulate *any* new proposals or guidance for a new approach to vertical merger enforcement. We do not know whether the Majority intends to issue new guidance. We can only hope that they propose a path forward and will take into account and grapple with sound law and the economics in doing so.

---

benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset potential competitive harms in many cases").

[13] *See* 74 Public Comments submitted regarding Draft Vertical Merger Guidelines, https://www.ftc.gov/policy/public-comments/draft-vertical-merger-guidelines.

[14] Vertical Merger Hearing.

[15] Fed. Trade Comm'n and Dep't of Just. Workshop on Draft Vertical Merger Guidelines (March 11, 2020), https://www.justice.gov/atr/public-workshops-draft-vertical-merger-guidelines#information.

The Majority's decision to foster uncertainty at this time is particularly pernicious. The COVID-19 pandemic exposed supply chain vulnerabilities in many sectors of the American economy.[16] Impacted businesses are now attempting to adapt.[17] Some of these businesses seek to bring in-house supply chain functions upstream or downstream from their operations – in other words, they seek to engage in vertical mergers. Other impacted businesses may enter into new contracting arrangements. The uncertainty imposed on businesses – by today's action regarding vertical mergers and recent Commission actions regarding contracting[18] – threatens to slow unnecessarily the American economy's recovery by denying law-abiding businesses the guidance they need to know what actions are permissible as they try to respond to supply shortages.

The Majority's decision to withdraw the Vertical Merger Guidelines also adds to the divide between enforcement at the FTC and the Department of Justice. There have long been concerns about different procedures at the agencies and perceived differences in the standards for an injunction, leading to repeated calls to modify the procedures for the FTC's merger enforcement program.[19] More recently the concerns have led members of Congress to discuss transferring the FTC's competition authority to DOJ.[20] Unless the DOJ similarly eschews the 2020 Guidelines, a new schism will appear.

The Majority Prefers Unchecked Regulatory Power Over Guidance

The uncertainty the Majority creates today is particularly troubling in light of the administration's promises to increase merger enforcement,[21] and to impose punitive penalties on parties proposing

---

[16] *See* Juliana Kaplan & Grace Kay, *Can't find chicken wings, diapers, or a new car? Here's a list of all the shortages hitting the reopening economy,* Insider (May 25, 2021), https://www.businessinsider.com/why-supply-shortages-economy-inventory-chips-lumber-cars-toilet-paper-2021-5.

[17] *See*, *e.g.*, Julia Horowitz, *How the pandemic turned humble shipping containers into the hottest items on the planet*, CNN.com (Sept. 8, 2021), https://www.cnn.com/2021/09/08/business/shipping-containers/index.html; Costas Paris, *Shipping Options Dry Up as Businesses Try to Rebuild from Pandemic*, Wall Street Journal (Sept. 12, 2021), https://www.wsj.com/articles/shipping-options-dry-up-as-businesses-try-to-rebuild-from-pandemic-11631439002?st=8wumh3fsb5i4qyp&reflink=article_email_share (describing that WalMart and Home Depot are chartering own ships to move imports from Asia).

[18] Phillips & Wilson *supra* note 1; FTC Press Release, *FTC Extends Deadline for Comments on Workshop Addressing Non-Compete Clauses in Employment Contracts* (Jan. 28, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-extends-deadline-comments-workshop-addressing-non-compete.

[19] *See* SMARTER Act, S. 4876, 116th Cong. (2020).

[20] *See* One Agency Act, S. 633, 117th Cong. § 4 (2021). *See also* The House Judiciary Republican Agenda for Taking on Big Tech (July 6, 2021), https://republicans-judiciary.house.gov/wp-content/uploads/2021/07/2021-07-06-The-House-Judiciary-Republican-Agenda-for-Taking-on-Big-Tech.pdf ("The current system of splitting antitrust enforcement between the Department of Justice and the Federal Trade Commission is inefficient and counterproductive. The arbitrary division of labor empowers radical Biden bureaucrats at the expense of Americans. This proposal will consolidate antitrust enforcement within the Department of Justice so that it is more effective and accountable.").

[21] *See* Exec Order No. 14036, *Promoting Competition in the American Economy*, 86 Fed. Reg. 36987 (July 9, 2021); Lina M. Khan, Chair, Fed. Trade Comm'n, Remarks on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591506/remarks_of_chair_khan_on_the_withdrawal_of_the_statement_of_enforcement_principles_re_umc_under.pdf.

mergers that the Majority believes are anticompetitive.[22] The majority could have waited to rescind the 2020 Guidelines until they had something with which to replace it. It appears they prefer sowing uncertainly in the market and arrogating unbridled authority to condemn mergers without reference to law, agency practice, economics, or market realities. The public and Congress should be alarmed by the majority's repeated withdrawal of existing guidance and transparency in favor of an amorphous bureaucratic fog that will provide cover for those who seek to politicize antitrust.

***

We lament the majority's continued rejection of administrable, predictable, and credible merger enforcement. Going forward, we fear consumers will lose the benefits of competition from vertical integration, and honest businesses will lose clarity regarding the boundaries of lawful conduct.

---

[22] *See* Letter from Lina M. Khan, Chair, Fed. Trade Comm'n, to Brian Deese, Director, Nat'l Econ. Council (Aug. 25, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Director-Deese-National-Economic-Council.pdf; Lina M. Khan, Rohit Chopra, & Rebecca Kelly Slaughter, Chair & Comm'rs, Fed. Trade Comm'n, Statement on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf.

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Wednesday, September 15, 2021

Justice Department Issues Statement on the Vertical Merger Guidelines

Acting Assistant Attorney General Richard A. Powers of the Justice Department's Antitrust Division issued the following statement today after the Federal Trade Commission (FTC) voted to withdraw from the 2020 Vertical Merger Guidelines, which had been issued jointly with, and remain in place at, the Department of Justice:

"The Department of Justice is conducting a careful review of the Horizontal Merger Guidelines and the Vertical Merger Guidelines to ensure they are appropriately skeptical of harmful mergers. Both documents are designed to provide increased transparency and guidance to the public on how the department makes law enforcement decisions. The department's review has already identified several aspects of the guidelines that deserve close scrutiny, and we will work closely with the FTC to update them as appropriate.

"The department continues to collaborate with the FTC on a robust public engagement process to seek comment on ways the Vertical Merger Guidelines could be improved. Public comment, which has not yet been sought on the substantial changes made to the published version of the Vertical Merger Guidelines, will be helpful in considering a range of questions, including the following areas that staff has identified warrant consideration:

1. Whether the Vertical Merger Guidelines create confusion as to the merging parties' burden to establish that the elimination of double marginalization is verifiable, merger specific and will likely be passed through to consumers.
2. Whether the Vertical Merger Guidelines unduly emphasize the quantification of price effects, which is not the only means to determine that a vertical merger is unlawful.[1]
3. Whether the Vertical Merger Guidelines appropriately account for the traditional burden shifting framework applied by U.S. courts in their review of mergers.[2] For example, some have suggested that descriptions of how the department may consider offsetting incentives in determining the net effect of a transaction suggests a deviation from the prevailing legal framework in which the department may establish in court a *prima facie* case based on evidence of harm alone.[3]
4. Whether the Vertical Merger Guidelines should more fully explain, as some have suggested would be appropriate, the range of circumstances that can lead to a concern that a merger may have anticompetitive effects.[4]
5. Whether the Vertical Merger Guidelines would benefit from further elaboration of the circumstances in which mergers raise concerns of harm related to the evasion of regulation.

"The Justice Department recognizes the substantial benefit of providing transparency on these and all of the other issues touched on by the Vertical Merger Guidelines, and will work closely with the FTC as this process continues."

[1] *See United States v. AT&T, Inc.*, 916 F.3d 1029, 1045 (2019) ("Preliminarily, the court does not hold that quantitative evidence of price increase is required in order to prevail on a Section 7 challenge. Vertical mergers can create harms beyond higher prices for consumers, including decreased product quality and reduced innovation.")

[2] *See United States v. Baker Hughes*, 908 F.2d 981, 982-83 (D.C. Cir. 1990) (cited in *AT&T*, 916 F.3d at 1032).

[3] *See* Carl Shapiro, *Vertical Mergers and Input Foreclosure Lessons from the AT&T/Time Warner Case*, 59 Rev. of Indus. Org. 303 (2021) (noting risks associated with requiring quantification of net harm as part of the government's *prima facie* case, and benefits of the sequencing in the *Baker Hughes* framework in the context of vertical mergers).

[4] *See* Steven S. Salop, *The 2020 Vertical Merger Guidelines: A Suggested Revision*, Geo. L. Fac. Publications & Other Works (2021), *available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3839768* .

Topic(s):
Antitrust

Press Release Number:
21-873

Component(s):
Antitrust Division

Updated September 15, 2021

Vertical Foreclosure/Raising Rivals' Costs

General Electric/Avio

GE to Acquire Aviation Business of Avio S.p.A

December 21, 2012

FAIRFIELD, CT (USA) and MILAN (Italy) -- GE announced today that it has agreed to purchase the aviation business of Avio S.p.A., an Italy-based manufacturer of aviation propulsion components and systems for civil and military aircraft, for $4.3 billion U.S. (€3.3 billion).

The announcement was made today in Milan, Italy, by David Joyce, president and CEO of GE Aviation, and Nani Beccalli, president and CEO of GE Europe.

GE plans to acquire Avio's aviation business from Cinven, a leading European private equity firm that has owned Avio since 2006, and Finmeccanica, the Italian aerospace group. The transaction is subject to regulatory and governmental approvals. GE will not be purchasing Avio's space unit.

The acquisition of Avio's aviation business, which provides components for GE Aviation and other engine companies, would further GE's participation in jet propulsion, one of the most attractive sectors of the aviation industry.

Avio will strengthen GE's global supply chain capabilities as its engine production rates continue to rise to meet growing customer demand. Avio and its customers will benefit from GE's planned investment in expanding Avio's products and services. Additionally, GE sees excellent opportunity in the acquisition of Avio related to margin expansion.

Founded in 1908 and headquartered in Turin, Italy, Avio operates in four continents and employs about 5,300 people, 4,500 of whom are in Italy, including approximately 800 in the space unit. In the jet propulsion industry, Avio is a provider of low-pressure turbine systems, accessory gearboxes, geared systems, combustors and other components. Avio's 2011 revenues in the aviation sector were €1.7 billion ($2.4 billion U.S. dollars) with more than 50 percent of that revenue derived from components for GE and GE joint venture engines.

The purchase price to be paid by GE for Avio's aviation business represents a multiple of approximately 8.5x based on 2012 estimated earnings before interest, taxes, depreciation and amortization.

Avio has supplied components to GE Aviation since 1984 and has content on engines ranging from the large GE90 and GEnx turbofan engines for the commercial aircraft sector, to the smaller CT7/T700 turboshaft engine family for civil and military helicopters. These GE engines are among the best-selling in aviation and are expected to provide a profitable, long-term revenue stream for the company.

This acquisition will create additional opportunities to offer Avio's products and services beyond the aviation industry. GE plans to pursue new opportunities for Avio in power-generation, oil, and marine products. For example, Avio's capabilities in transmission systems present potential growth opportunities in multiple sectors.

"We look forward to Avio joining the GE family," said David Joyce, president and CEO of GE Aviation. "We have worked closely with Avio for decades, and we anticipate a bright future together. This acquisition is a great strategic fit with our existing portfolio. Avio has technologies, capabilities and outstanding engineers to help grow our business. GE is an excellent corporate citizen in Italy, and we are very excited to grow the relationship."

"The deal with General Electric is a recognition of Avio's competencies, technologies and growth record," said Francesco Caio, CEO of Avio. "It lays the foundations for the next phase of development for our company and will enable our teams and plants to become centers of excellence in transmissions and turbines for one of the leading companies in this field. This will open up many new opportunities for our people, our research centres and manufacturing in Italy. Our space division, which will not see a change of ownership in the short term, enters a new phase. Cinven and Finmeccanica will work together to establish the most appropriate set of industrial alliances to ensure long-term competitiveness and compliance with national and European interests."

GE, parent company to GE Aviation, already has a significant presence in Italy with more than 7,000 employees in seven GE businesses at more than 20 locations in-country, including a research and development center and learning center. Almost 20 years ago, GE acquired Nuovo Pignone in Florence, which has been transformed into the global headquarters of GE Oil & Gas.

GE Aviation, an operating unit of GE (NYSE: GE), is a leading provider of jet, turboshaft, and turboprop engines, components and integrated systems for commercial, military, business and general aviation aircraft. GE Aviation has a global service network to support these offerings.

Contact Information

If you are a member of the press and have additional questions, please contact us by e-mail (mailto:aviation.gemediarelations@ge.com).

Share this

Social

(https://twitter.com/GEAviation)

(https://www.youtube.com/user/GEAviation)

(https://www.linkedin.com/company/geaviation)

(https://plus.google.com/+GEAviation1)

(https://instagram.com/geaviation/)

Privacy (http://www.ge.com/privacy)

Terms (http://www.ge.com/terms)

Contact (/support/contact)

Accessibility (http://www.ge.com/accessibility)

Cookies (http://info.evidon.com/pub_info/5704?v=1)

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

General Electric Agrees to Settlement with FTC That Allows the Purchase of Avio's Aviation Business

Settlement Protects Competition in Market for Engines for Airbus's A320neo Aircraft

Share This Page

FOR RELEASE

July 19, 2013

TAGS: Transportation | Bureau of Competition | Competition | Merger

A proposed settlement would prevent General Electric Company (GE) from interfering with the development of a key engine component designed by Italy's Avio S.p.A. (Avio) for rival aircraft engine manufacturer Pratt & Whitney, resolving Federal Trade Commission charges that GE's proposed $4.3 billion acquisition of Avio's aviation business would be anticompetitive.

GE, based in Fairfield, Connecticut, proposes to acquire the AeroEngine division of Avio, which is headquartered in Torino, Italy. GE -- through CFM International, its joint venture with France's Snecma S.A. -- and Pratt & Whitney are the only two firms that manufacture engines for Airbus's A320neo aircraft. Avio currently designs a critical component -- the accessory gearbox or AGB -- for Pratt & Whitney's PW1100G engine. Pratt & Whitney has no viable alternatives to Avio for development of the AGB for the PW1100G engine.

The FTC's complaint alleges that GE's acquisition of Avio would substantially lessen competition, giving GE the ability and incentive to disrupt the design and certification of Avio's AGB for the PW1100G engine used on A320neo aircraft. This would diminish competition in the sale of engines for the A320neo, which would result in higher prices, reduced quality, and engine delivery delays for A320neo customers.

The proposed order settling the FTC's charges builds on a commercial agreement GE, Avio, and Pratt & Whitney recently negotiated, as well as Pratt & Whitney's original contract with Avio. Portions of these two contracts relating to the design and development of Avio's AGB and related parts for the PW1100G engine are incorporated into the proposed order, and a breach by the combined firm of those aspects of the relevant agreements would violate the FTC's consent agreement.

In addition, the proposed order prohibits GE from interfering with Avio staffing decisions as they relate to its work on the AGB for the PW1100G engine and allows Pratt & Whitney to have representatives on-site at the GE/Avio facility. If Pratt & Whitney terminates its agreement with Avio post-merger, GE must provide transitional services to help Pratt & Whitney manufacture AGBs and related parts for its PW1100G engine. The proposed order also prevents GE from accessing Pratt & Whitney's proprietary information about the AGB that is shared with Avio. Finally, the proposed order allows the Commission to appoint a monitor to oversee GE's compliance with its obligations.

FTC staff worked closely with the European Commission throughout the investigation. The FTC and the EC investigated in parallel how GE's acquisition of Avio would change its commercial relationships with GE's rival aircraft engine manufacturers. Both agencies recognize that the commercial agreement GE entered with Pratt & Whitney during the course of the investigation creates protections for future competition. Once GE and Pratt & Whitney reached their private agreement, the EC closed its investigation without taking additional action regarding the proposed merger's impact on commercial aircraft engine competition.

The Commission vote to accept the consent agreement package containing the proposed consent order for public comment was 3-0-1, with Commissioner Joshua D. Wright recused. The FTC will publish a description of the consent agreement package in the Federal Register shortly. The agreement will be subject to public comment for 30 days, beginning today and continuing through August 19, 2013, after which the Commission will decide whether to make the proposed consent order final. Interested parties can submit written comments electronically or in paper form by following the instructions in the "Invitation To Comment" part of the "Supplementary Information" section.

Comments in paper form should be mailed or delivered to: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex D), 600 Pennsylvania Avenue, N.W., Washington, DC 20580. The FTC is requesting that any comment filed in paper form near the end of the public comment period be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions. Comments also can be submitted electronically.

NOTE: The Commission issues an administrative complaint when it has "reason to believe" that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of up to $16,000.

The FTC's Bureau of Competition works with the Bureau of Economics to investigate alleged anticompetitive business practices and, when appropriate, recommends that the Commission take law enforcement action. To inform the Bureau about particular business practices, call 202-326-3300, send an e-mail to antitrust{at}ftc{dot}gov, or write to the Office of Policy and Coordination, Bureau of Competition, Federal Trade Commission, 601 New Jersey Ave., N.W., Room 7117, Washington, DC 20001. To learn more about the Bureau of Competition, read Competition Counts. Like the FTC on Facebook, follow us on Twitter, and subscribe to press releases for the latest FTC news and resources.

Contact Information

MEDIA CONTACT:
Mitchell J. Katz,
Office of Public Affairs
202-326-2161

STAFF CONTACT:
Stephen W. Rodger,
Bureau of Competition
202-326-3643

(FTC File No. 131-0069)

ftc.gov

131 0069

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS:	**Edith Ramirez, Chairwoman** **Julie Brill** **Maureen K. Ohlhausen** **Joshua D. Wright**

In the Matter of **GENERAL ELECTRIC COMPANY,** **a corporation.**	)	**Docket No. C-4411**

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act ("FTC Act"), and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent General Electric Company ("GE"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the aviation business of Avio S.p.A. ("Avio"), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent GE is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its executive office and principal place of business located at 3135 Easton Turnpike, Fairfield, Connecticut 06828.

2. Respondent is engaged in, among other things, the design and manufacture of jet engines and other equipment for commercial and military aircraft. Respondent has a 50% interest in CFM International ("CFM"), which is a joint venture with Snecma S.A. of France.

3. Respondent is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE ACQUIRED COMPANY

4. Avio is a corporation organized, existing, and doing business under and by virtue of the laws of Italy, with its headquarters at Via I Maggio, 99, 10040, Rivalta Di Torino, Torino, Italy.

5. Avio's AeroEngine division, among other things, designs and manufactures component parts and electrical systems for civil and military engines.

6. Avio is, and at all times relevant herein has been, engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce, as "commerce" is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

7. Pursuant to an Agreement dated December 21, 2012 (the "Agreement"), GE proposes to acquire Avio's aviation business for approximately $4.3 billion (the "Acquisition").

IV. RELEVANT MARKET

8. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are (1) accessory gearboxes ("AGBs") for Pratt & Whitney's PW1100G engine that will power the Airbus S.A.S. ("Airbus") A320neo aircraft, and (2) engines that compete for placement on the A320neo aircraft.

a. AGBs use the mechanical power of the engine shaft to power various accessory systems on the engine and the aircraft, including oil and hydraulic pumps and electrical generators. AGBs are specifically designed for the requirements of individual engine platforms, which vary considerably between different engines and aircraft. Because each AGB for a given engine platform is unique, and cannot be substituted for another AGB from a different engine platform, Pratt & Whitney could not substitute AGBs made for other engines in response to a small but significant and non-transitory increase in price. Thus, the AGB designed for the PW1100G engine constitutes its own relevant product market.

b. Aircraft engines are engineered specifically for the thrust requirements and mission profile of the aircraft on which they are installed. Purchasers of aircraft engines cannot substitute engines which do not meet the specific requirements of the relevant aircraft platform, or which have not been certified by aviation authorities for use on that aircraft. A320neo purchasers could not substitute other engines in the face of a small but significant and non-transitory increase in price for current engines offered to power the A320neo. Thus, the aircraft engines chosen by Airbus for, and certified for use on, the A320neo constitute their own relevant product market.

9. For the purposes of this Complaint, the relevant geographic market in which to analyze the effects of the transaction is the entire world. Engine components such as AGBs are sold to engine manufacturers located across the globe, and those engine manufacturers then sell to aircraft manufacturers that are also located in various parts of the world. Aircraft manufacturers do not significantly alter aircraft features for specific national markets, and aircraft customers are located throughout the world.

V. STRUCTURE OF THE MARKETS

10. Avio currently has sole design responsibility for the AGB on the Pratt & Whitney PW1100G engine, which will be one of two engines available on the A320neo aircraft. Design efforts for the PW1100G AGB have been underway for some time, but further development and testing remains before the engine will be certified by aviation authorities for use on the aircraft. While other component suppliers may be capable of designing AGBs for large commercial aircraft generally, they do not serve as acceptable substitutes for Avio on the PW1100G, because switching component manufacturers at this stage in development would be cost prohibitive. Additionally, the time required for another component supplier to re-design the AGB would require a delay of up to several years in the certification of both the PW1100G engine and the Airbus A320neo aircraft.

11. In the market for engines powering the Airbus A320neo aircraft, only Pratt & Whitney's PW1100G engine and CFM's Leap 1-A engine, in which GE has a 50% interest, compete head-to-head for sales. Other aircraft engine manufacturers do not currently manufacture engines for the A320neo and could not do so or obtain certification within the timeframe necessary to become a viable substitute for the current engine options on the A320neo platform. The market for engines on the A320neo is highly concentrated, and likely to remain so for the foreseeable future. Pratt & Whitney and CFM each have won roughly half of the A320neo orders placed to date for which the customer has selected an engine.

VI. ENTRY CONDITIONS

12. Sufficient and timely entry into the market for AGBs for the PW1100G on the A320neo aircraft is unlikely to deter or counteract any anticompetitive effects created by the proposed transaction. AGB design and development for large commercial aircraft like the A320neo requires significant experience and resources, and it would take several years for a third-party supplier to develop AGBs for the PW1100G, which would be insufficient to prevent any potential anticompetitive effects of the proposed acquisition. Given the experience and knowledge of the Avio design team and the complexity of transferring the in-progress design work, Pratt & Whitney would unlikely be able to take over the AGB development without incurring significant delays in engine certification and delivery.

13. Sufficient and timely entry into the market for engines powering the A320neo is also unlikely to deter or counter any anticompetitive effects arising from the proposed transaction. The initial design and production of an aircraft engine requires many years and a large financial investment, and must be followed by a long certification process by aviation authorities throughout the world.

VII. EFFECTS OF THE ACQUISITION

14. The effects of the Acquisition, if consummated, may be to substantially lessen competition and tend to create a monopoly in the market for aircraft engines for the Airbus A320neo in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by providing GE with the ability and incentive to profitably disrupt the design and certification of the AGB for the Pratt & Whitney PW1100G engine, which would provide GE market power and the ability and incentive to raise prices, reduce quality, or delay delivery of engines to A320neo customers.

VIII. VIOLATIONS CHARGED

15. The Agreement described in Paragraph 7 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

16. The Acquisition described in Paragraph 7, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of August, 2013, issues its Complaint against said Respondent.

By the Commission, Commissioner Wright not participating.

Donald S. Clark
Secretary

respondents for each survey (about 20 per Reserve Bank); occasionally state and local government officials are called, in which case there are far fewer respondents. It is necessary to conduct these surveys to provide timely information to the members of the Board and to the presidents of the Reserve Banks. Usually, these surveys are conducted by Reserve Bank staff economists telephoning or emailing purchasing managers, economists, or other knowledgeable individuals at selected, relevant businesses. Reserve Bank staff may also use online survey tools to collect responses to the survey. The frequency and content of the questions, as well as the entities contacted, vary depending on developments in the economy. Second, economists at the Board survey business contacts by telephone, inquiring about current business conditions. Board economists conduct these surveys as economic conditions require, with approximately ten respondents for each survey.

Current actions: The Federal Reserve proposes to increase the permitted number of respondents from 240 to 2,400, for the Reserve Bank surveys. This increase would allow (but not require) Reserve Banks to survey an average of 200 respondents per District instead of 20, providing better representation and more complete coverage of the developments within each District. The Reserve Banks have recently increased the number of businesses surveyed to better assess local markets (especially with respect to issues of broad applicability). The Board part of the survey would remain unchanged.

Board of Governors of the Federal Reserve System, July 23, 2013.

Robert de V. Frierson,

Secretary of the Board.

[FR Doc. 2013–17961 Filed 7–25–13; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

[File No. 131 0069]

General Electric Company; Analysis of Proposed Agreement Containing Consent Order To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before August 19, 2013.

ADDRESSES: Interested parties may file a comment at *https://ftcpublic.commentworks.com/ftc/geavioconsent* online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write ''General Electric, File No. 131 0069'' on your comment and file your comment online at *https://ftcpublic.commentworks.com/ftc/geavioconsent*, by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex D), 600 Pennsylvania Avenue NW, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Stephen W. Rodger (202–326–3643), FTC, Bureau of Competition, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for July 19, 2013), on the World Wide Web, at *http://www.ftc.gov/os/actions.shtm*. A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue NW, Washington, DC 20580, either in person or by calling (202) 326–2222.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before August 19, 2013. Write AGeneral Electric, File No. 131 0069'' on your comment. Your comment B including your name and your state B will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm*. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any A[t]rade secret or any commercial or financial information which * * * is privileged or confidential,'' as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[1] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/geavioconsent* by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home*. you also may file a comment through that Web site.

If you file your comment on paper, write AGeneral Electric, File No. 131 0069'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary,

[1] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

Room H–113 (Annex D), 600 Pennsylvania Avenue NW, Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before August 19, 2013. You can find more information, including routine uses permitted by the Privacy Act, in the Commission=s privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

Analysis of Agreement Containing Consent Order To Aid Public Comment

I. Introduction

The Federal Trade Commission (''Commission'') has accepted, subject to final approval, an Agreement Containing Consent Order (''Consent Agreement'') with General Electric Company (''GE''), which is designed to remedy the anticompetitive effects of its proposed acquisition of the aviation business of Avio S.p.A. (''Avio''). Under the terms of the proposed Consent Agreement, GE would be required, among other things, to avoid interference with Avio's design and development work on a critical engine component—the accessory gearbox (''AGB'')—on the Pratt & Whitney PW1100G engine for the Airbus S.A.S. (''Airbus'') A320neo aircraft. GE and Pratt & Whitney are the only manufacturers of engines for the A320neo, and compete head-to-head for sales of engines to purchasers of that aircraft.

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make final the accompanying Decision and Order (''Order'').

Pursuant to an Agreement dated December 21, 2012, GE proposes to acquire Avio's aviation business for approximately $4.3 billion. The Commission's Complaint alleges that the proposed acquisition is in violation of Section 5 of the FTC Act, as amended, 15 U.S.C 45, and that the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, by lessening the competition in the worldwide market for engine sales on the A320neo aircraft. That is because the acquisition would provide GE with the ability and incentive to disrupt the design and certification of the AGB for the Pratt & Whitney PW1100G engine, which in turn would provide GE with market power in the market for engines for the A320neo aircraft, allowing it to raise prices, reduce quality, or delay delivery of engines to A320neo customers. The proposed Consent Agreement will remedy the alleged violations by eliminating GE's ability and incentive to engage in such anticompetitive conduct post-merger.

II. The Parties

GE, headquartered in Connecticut, is one of the world's largest companies, with business segments serving a wide variety of industries throughout the globe. GE's aviation segment, among other things, designs and manufactures jet engines for commercial and military aircraft. GE sells narrow-body commercial aircraft engines through its 50% stake in CFM International (''CFM''), a joint venture with the French engine manufacturer Snecma S.A.

Avio is headquartered in Torino, Italy, and is an important designer and manufacturer of component parts for civil and military aircraft engines. Avio provides, among other things, structural parts, gearboxes, and electrical systems for aircraft engines. Avio is currently the sole designer of the AGB on the Pratt & Whitney PW1100G engine.

III. The Products and Structure of the Markets

AGBs use the mechanical power of the rotating turbine shaft in a jet engine to power various accessory systems needed by the engine and the aircraft, including oil and hydraulic pumps and electrical systems. Although AGBs on different aircraft engines perform similar functions, AGBs are designed for the specific engine in which it will be used to account for the shape of that engine, the position of the AGB in the engine, and the configuration and specifications of the various accessory systems the gearbox will power. Because AGBs require significant cost and time to develop, and because the aircraft engine—with its AGB—must be tested extensively and certified for flight by aviation authorities before it can be put into service, an engine manufacturer cannot quickly or easily replace an engine's AGB if it encounters difficulties with its component supplier.

Avio has the sole design responsibility for the AGB on the forthcoming Pratt & Whitney PW1100G engine, which will be one of two engines available on the Airbus A320neo aircraft. While Avio is in the advanced stages of designing this AGB, further development and testing must be completed before the AGB and the PW1100G engine will be certified for use by aviation authorities. Beyond that, further design work may be necessary even after the AGB and engine receive certification. Pratt & Whitney has no viable alternative to continuing to work with Avio to develop the AGB for the PW1100G, even after its rival engine manufacturer, GE, acquires Avio.

Aircraft engines provide the thrust necessary for flight and must be specifically engineered for the requirements and mission profile of the aircraft on which they are to be installed. When designing a new airplane, an aircraft manufacturer typically approaches engine manufacturers as potential suppliers and selects one or more to provide engines for the aircraft under development. These engines become customers' only options for that aircraft platform. Airbus chose to work with only Pratt & Whitney and CFM to develop engines for the A320neo platform. Aside from the PW1100G, the only other engine available for the Airbus A320neo is the CFM Leap 1–A engine, in which GE has a 50% interest. These two engines compete for sales on the A320neo aircraft platform, and because other engine manufacturers could not design, or attain certification for, an alternate A320neo engine within several years, purchasers of this aircraft do not have other viable substitutes for these engines.

The relevant geographic market in which to analyze the effects of the proposed transaction is the entire world. Engine component developers located around the world supply components to engine manufacturers who are also located worldwide. The aircraft manufacturers themselves are located across the globe, sell to customers worldwide, and do not significantly alter aircraft features for specific national markets.

IV. Entry

Entry into the relevant markets would not be timely, likely, or sufficient in magnitude to deter or counteract the anticompetitive effects likely to result from the proposed transaction. AGB design for large commercial aircraft like the A320neo requires significant experience and resources, and it would take several years for a third-party provider to complete the development process and begin supplying AGBs for the PW1100G. This delay would make such third-party entry insufficient to prevent any potential anticompetitive effects from the proposed transaction. Similarly, entry into the market for engines powering the A320neo is also unlikely to deter or counter the anticompetitive effects of the proposed transaction. The design and production of an aircraft engine, along with the necessary certification of that engine on the aircraft platform, takes many years and a large financial investment.

V. Effects of the Acquisition

The proposed transaction, if consummated, would provide GE with both the ability and the incentive to disrupt the design and certification of the Avio-supplied AGB for the Pratt & Whitney PW1100G engine. A delay in the development of the PW1100G engine would substantially increase GE's market power for the sale of engines for the A320neo, as it manufactures the only other engine option for that aircraft. In response to such a delay, a significant number of Pratt &Whitney customers would likely switch to the CFM Leap 1–A, and GE would likely use its increased market power to raise price, reduce quality, or delay delivery of engines to customers of the A320neo aircraft.

VI. The Consent Agreement

The proposed Consent Agreement remedies the acquisition's likely anticompetitive effects by removing GE's ability and incentive to disrupt Avio's AGB work during the design, certification, and initial production ramp-up phase. The proposed Consent Agreement incorporates portions of a recent commercial agreement between GE, Avio, and Pratt & Whitney and Pratt & Whitney's original contract with Avio that relate to the design and development of the AGB and related parts for the PW1100G. A breach by GE of these aspects of these agreements therefore would constitute a violation of the Consent Agreement.

The Consent Agreement further requires GE not to interfere with Avio staffing decisions as they relate to work on the AGB for the PW1100G. It allows Pratt & Whitney to have a technical representative and a customer representative on-site at GE/Avio's facility to observe work on the PW1100G AGB. In addition, should Pratt & Whitney terminate its agreement with Avio, GE will be required to provide certain transition services, including licenses to intellectual property and access to specialized Avio tools, to help Pratt & Whitney or a third-party supplier produce AGBs and related parts for the PW1100G. The Consent Agreement also contains a firewall provision that limits GE's access, through Avio, to Pratt & Whitney's proprietary information relating to the AGB. Finally, the Consent Agreement allows for the appointment of an FTC-approved monitor to oversee GE's compliance with its obligations under the Consent Agreement.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement, and it is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

By direction of the Commission, Commissioner Wright recused.

Donald S. Clark

Secretary.

[FR Doc. 2013–17947 Filed 7–25–13; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[OMB Control No. 9000–0090; Docket 2012–0076; Sequence 71]

Federal Acquisition Regulation; Information Collection; Rights in Data and Copyrights

AGENCY: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice of request for public comments regarding an extension to an existing OMB clearance.

SUMMARY: Under the provisions of the Paperwork Reduction Act, the Regulatory Secretariat will be submitting to the Office of Management and Budget (OMB) a request to review and approve an extension of a previously approved information collection requirement concerning rights in data and copyrights.

DATES: Submit comments on or before September 24, 2013.

ADDRESSES: Submit comments identified by Information Collection 9000–0090, Rights in Data and Copyrights, by any of the following methods:

- Regulations.gov: *http://www.regulations.gov.*

Submit comments via the Federal eRulemaking portal by searching the OMB control number. Select the link ''Submit a Comment'' that corresponds with ''Information Collection 9000–0090, Rights in Data and Copyrights''. Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''Information Collection 9000–0090, Rights in Data and Copyrights'' on your attached document.

- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat (MVCB), 1800 F Street NW., Washington, DC 20405. ATTN: Hada Flowers/IC 9000–0090, Rights in Data and Copyrights.

Instructions: Please submit comments only and cite Information Collection 9000–0090, Rights in Data and Copyrights, in all correspondence related to this collection. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Ms. Marissa Petrusek, Procurement Analyst, Contract Policy Branch, GSA (202) 501–0136 or email *marissa.petrusek@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Purpose

Subpart 27.4, Rights in Data and Copyrights is a regulation which concerns the rights of the Government and contractors with whom the Government contracts, regarding the use, reproduction, and disclosure of information developed under such contracts. The delineation of such rights is necessary in order to protect the contractor's rights to not disclose proprietary data and to ensure that data developed with public funds is available to the public. The specific clauses associated with this information collection are as follows:

(1) FAR 52.227–15, Representation of Limited Rights Data and Restricted Computer Software. This clauses is included in solicitations if the contracting officer requires an offeror to state whether limited rights data or restricted computer software are likely to be used in meeting the requirements. FAR 52.227–15 requires the contractor to identify whether data proposed for fulfilling the requirements is limited to data rights or restricted software. If the government does not receive unlimited rights, the contractor must provide a list of the data not covered. This

AT&T-DirecTV/Time Warner

EX-99.1 4 d268996dex991.htm EX-99.1

Exhibit 99.1

AT&T TO ACQUIRE TIME WARNER

- **New company with complementary strengths to lead the next wave of innovation in converging media and communications industry**
  - Combination unlike any other — the world's best premium content with the networks to deliver it to every screen, however customers want it
  - The future of video is mobile and the future of mobile is video
  - Time Warner is a global leader in creating premium content, has the largest film/TV studio in world and an unrivaled library of entertainment
  - AT&T has unmatched direct-to-customer distribution across TV, mobile and broadband in the U.S., mobile in Mexico and TV in Latin America.
- **Combined company positioned to create new customer choices — from content creation and distribution to a mobile-first experience that's personal and social**
  - Goal is to give customers unmatched choice, quality, value and experiences that will define the future of media and communications
  - Customer insights across TV, mobile and broadband will allow new company to: offer more relevant and valuable addressable advertising; innovate with ad-supported content models; better inform content creation; and make OTT and TV Everywhere products smarter and more personalized
- **Acquisition provides significant financial benefits**
  - Accretive to AT&T in the first year after close on adjusted EPS & free cash flow per share basis
  - Improves AT&T's dividend coverage
  - Improves AT&T's revenue and earnings growth profile
  - Diversifies AT&T's revenue mix and lowers capital intensity
  - Committed to strong balance sheet and maintaining investment-grade credit metrics
- **Delivers significant benefits for customers**
  - Stronger competitive alternative to cable & other video providers
  - Provides better value, more choices, enhanced customer experience for over-the-top and mobile viewing
  - More innovation with ad-supported models that shift more cost of content creation from customers to advertisers

DALLAS and NEW YORK CITY, Oct. 22, 2016 — AT&T Inc. (NYSE:T) and Time Warner Inc. (NYSE:TWX) today announced they have entered into a definitive agreement under which AT&T will acquire Time Warner in a stock-and-cash transaction valued at $107.50 per share. The agreement has been approved unanimously by the boards of directors of both companies.

The deal combines Time Warner's vast library of content and ability to create new premium content that connects with audiences around the world, with AT&T's extensive customer relationships, world's largest pay TV subscriber base and leading scale in TV, mobile and broadband distribution.

"This is a perfect match of two companies with complementary strengths who can bring a fresh approach to how the media and communications industry works for customers, content creators, distributors and advertisers," said Randall Stephenson, AT&T chairman and CEO. "Premium content always wins. It has been true on the big screen, the TV screen and now it's proving true on the mobile screen. We'll have the world's best premium content with the networks to deliver it to every screen. A big customer pain point is paying for content once but not being able to access it on any device, anywhere. Our goal is to solve that. We intend to give customers unmatched choice, quality, value and experiences that will define the future of media and communications.

"With great content, you can build truly differentiated video services, whether it's traditional TV, OTT or mobile. Our TV, mobile and broadband distribution and direct customer relationships provide unique insights from which we can offer addressable advertising and better tailor content," Stephenson said. "It's an integrated approach and we believe it's the model that wins over time.

"Time Warner's leadership, creative talent and content are second to none. Combine that with 100 million plus customers who subscribe to our TV, mobile and broadband services – and you have something really special," said Stephenson. "It's a great fit, and it creates immediate and long-term value for our shareholders."

Time Warner Chairman and CEO Jeff Bewkes said, "This is a great day for Time Warner and its shareholders. Combining with AT&T dramatically accelerates our ability to deliver our great brands and premium content to consumers on a multiplatform basis and to capitalize on the tremendous opportunities created by the growing demand for video content. That's been one of our most important strategic priorities and we're already making great progress — both in partnership with our distributors, and on our own by connecting directly with consumers. Joining forces with AT&T will allow us to innovate even more quickly and create more value for consumers along with all our distribution and marketing partners, and allow us to build on a track record of creative and financial excellence that is second to none in our industry. In fact, when we announce our 3Q earnings, we will report revenue and operating income growth at each of our divisions, as well as double-digit earnings growth.

Bewkes continued, “This is a natural fit between two companies with great legacies of innovation that have shaped the modern media and communications landscape, and my senior management team and I are looking forward to working closely with Randall and our new colleagues as we begin to capture the tremendous opportunities this creates to make our content even more powerful, engaging and valuable for global audiences.”

Time Warner is a global leader in media and entertainment with a great portfolio of content creation and aggregation, and iconic brands across video programming and TV/film production. Each of Time Warner’s three divisions is an industry leader: Turner consists of U.S. and international basic cable networks, including TNT, TBS, CNN and Cartoon Network/Adult Swim, and has sports right that include the National Basketball Association, NCAA Men’s Championship Basketball Tournament, and Major League Baseball; HBO, which consists of domestic premium pay television and streaming services (HBO Now, HBO Go) featuring such original series as Game of Thrones, VEEP, and Silicon Valley, as well as international premium & basic pay television and streaming services; and Warner Bros. Entertainment, which consists of television, feature film, home video and videogame production and distribution. Film franchises include Harry Potter, DC Entertainment, and LEGO; TV series produced include The Big Bang Theory, The Voice, and Gotham. Time Warner also has invested in over-the-top and digital media properties such as Bleacher Report, Hulu and Machinima.

Customer Benefits

The new company will deliver what customers want — enhanced access to premium content on all their devices, new choices for mobile and streaming video services and a stronger competitive alternative to cable TV companies.

With a mobile network that covers more than 315 million people in the United States, the combined company will strive to become the first U.S. mobile provider to compete nationwide with cable companies in the provision of bundled mobile broadband and video. It will disrupt the traditional entertainment model and push the boundaries on mobile content availability for the benefit of customers. And it will deliver more innovation with new forms of original content built for mobile and social, which builds on Time Warner’s HBO Now and the upcoming launch of AT&T’s OTT offering DIRECTV NOW.

Owning content will help AT&T innovate on new advertising options, which, combined with subscriptions, will help pay for the cost of content creation. This two-sided business model — advertising- and subscription-based — gives customers the largest amount of premium content at the best value.

Summary Terms of Transaction

Time Warner shareholders will receive $107.50 per share under the terms of the merger, comprised of $53.75 per share in cash and $53.75 per share in AT&T stock. The stock portion will be subject to a collar such that Time Warner shareholders will receive 1.437 AT&T shares if AT&T's average stock price is below $37.411 at closing and 1.3 AT&T shares if AT&T's average stock price is above $41.349 at closing.

This purchase price implies a total equity value of $85.4 billion and a total transaction value of $108.7 billion, including Time Warner's net debt. Post-transaction, Time Warner shareholders will own between 14.4% and 15.7% of AT&T shares on a fully-diluted basis based on the number of AT&T shares outstanding today.

The cash portion of the purchase price will be financed with new debt and cash on AT&T's balance sheet. AT&T has an 18-month commitment for an unsecured bridge term facility for $40 billion.

Transaction Will Result in Significant Financial Benefits

AT&T expects the deal to be accretive in the first year after close on both an adjusted EPS and free cash flow per share basis.

AT&T expects $1 billion in annual run rate cost synergies within 3 years of the deal closing. The expected cost synergies are primarily driven by corporate and procurement expenditures. In addition, over time, AT&T expects to achieve incremental revenue opportunities that neither company could obtain on a standalone basis.

Given the structure of this transaction, which includes AT&T stock consideration as part of the deal, AT&T expects to continue to maintain a strong balance sheet following the transaction close and is committed to maintaining strong investment-grade credit metrics.

By the end of the first year after close, AT&T expects net debt to adjusted EBITDA to be in the 2.5x range.

Additionally, AT&T expects the deal to improve its dividend coverage and enhance its revenue and earnings growth profile.

Time Warner provides AT&T with significant diversification benefits:

- Diversified revenue mix — Time Warner will represent about 15% of the combined company's revenues, offering diversification from content and from outside the United States, including Latin America, where Time Warner owns a majority stake in HBO Latin America, an OTT service available in 24 countries, and AT&T is the leading pay TV distributor.

- Lower capital intensity — Time Warner's business requires little in capital expenditures, which helps balance the higher capital intensity of AT&T's existing business.
- Regulation — Time Warner's business is lightly regulated compared to much of AT&T's existing operations.

The merger is subject to approval by Time Warner Inc. shareholders and review by the U.S. Department of Justice. AT&T and Time Warner are currently determining which FCC licenses, if any, will be transferred to AT&T in connection with the transaction. To the extent that one or more licenses are to be transferred, those transfers are subject to FCC review. The transaction is expected to close before year-end 2017.

Conference Call/Webcast

On Monday, October 24, at 8:30 am ET, AT&T and Time Warner will host a webcast presentation to discuss the transaction and AT&T's 3Q earnings. Links to the webcast and accompanying documents will be available on both AT&T's and Time Warner's Investor Relations websites. AT&T has cancelled its previously scheduled call to discuss earnings, which had been set for Tuesday, October 25.

About AT&T

AT&T Inc. (NYSE:T) helps millions around the globe connect with leading entertainment, mobile, high-speed Internet and voice services. We're the world's largest provider of pay TV. We have TV customers in the U.S. and 11 Latin American countries. We offer the best global coverage of any U.S. mobile provider*. And we help businesses worldwide serve their customers better with our mobility and highly secure cloud solutions.

About Time Warner Inc.

Time Warner Inc. (NYSE:TWX) is a global leader in media and entertainment with a great portfolio of content creation and aggregation, and iconic brands across video programming and TV/film production. Each of Time Warner's three divisions is an industry leader: Turner consists of U.S. and international basic cable networks, including TNT, TBS, CNN and Cartoon Network/Adult Swim, and has sports right that include to National Basketball Association, NCAA Men's Championship Basketball Tournament, and Major League Baseball; HBO, which consists of domestic premium pay television and streaming services (HBO Now, HBO Go) featuring such original series as Game of Thrones, VEEP, and Silicon Valley, as well as international premium & basic pay television and streaming services; and Warner Brothers, which consists of television, feature film, home video and videogame production and distribution. Film franchises include Harry Potter, DC Entertainment, and LEGO; TV series produced include The Big Bang Theory, The Voice, and Gotham. West also has invested in over-the-top and digital media properties such as Bleacher Report, Hulu and Machinima.

Cautionary Language Concerning Forward-Looking Statements

Information set forth in this communication, including financial estimates and statements as to the expected timing, completion and effects of the proposed merger between AT&T and Time Warner, constitute forward-looking statements within the meaning of the safe harbor provisions of the Private Securities Litigation Reform Act of 1995. These estimates and statements are subject to risks and uncertainties, and actual results might differ materially. Such estimates and statements include, but are not limited to, statements about the benefits of the merger, including future financial and operating results, the combined company's plans, objectives, expectations and intentions, and other statements that are not historical facts. Such statements are based upon the current beliefs and expectations of the management of AT&T and Time Warner and are subject to significant risks and uncertainties outside of our control.

Among the risks and uncertainties that could cause actual results to differ from those described in the forward-looking statements are the following: (1) the occurrence of any event, change or other circumstances that could give rise to the termination of the merger agreement, (2) the risk that TIME WARNER stockholders may not adopt the merger agreement, (3) the risk that the necessary regulatory approvals may not be obtained or may be obtained subject to conditions that are not anticipated, (4) risks that any of the closing conditions to the proposed merger may not be satisfied in a timely manner, (5) risks related to disruption of management time from ongoing business operations due to the proposed merger, (6) failure to realize the benefits expected from the proposed merger and (7) the effect of the announcement of the proposed merger on the ability of TIME WARNER and AT&T to retain customers and retain and hire key personnel and maintain relationships with their suppliers, and on their operating results and businesses generally. Discussions of additional risks and uncertainties are contained in AT&T's and TIME WARNER's filings with the Securities and Exchange Commission. Neither AT&T nor TIME WARNER is under any obligation, and each expressly disclaim any obligation, to update, alter, or otherwise revise any forward-looking statements, whether written or oral, that may be made from time to time, whether as a result of new information, future events, or otherwise. Persons reading this announcement are cautioned not to place undue reliance on these forward-looking statements which speak only as of the date hereof.

Additional Information and Where to Find It

This communication does not constitute an offer to sell or the solicitation of an offer to buy any securities or a solicitation of any vote or approval. This communication may be deemed to be solicitation material in respect of the proposed merger between AT&T and TIME WARNER. In connection with the proposed merger, AT&T intends to file a registration statement on Form S-4, containing a proxy statement/prospectus with the Securities and Exchange Commission ("SEC"). STOCKHOLDERS OF TIME WARNER ARE URGED TO READ ALL RELEVANT DOCUMENTS FILED WITH THE SEC, INCLUDING THE PROXY STATEMENT/PROSPECTUS, BECAUSE THEY WILL CONTAIN IMPORTANT INFORMATION ABOUT THE PROPOSED MERGER. Investors and security holders will be able to obtain copies of the proxy statement/prospectus as well as other filings containing information about AT&T and TIME WARNER, without charge, at the SEC's website, http://www.sec.gov. Copies of documents filed with the SEC by AT&T will be made available free of charge on AT&T's Investor Relations Website. Copies of documents filed with the SEC by TIME WARNER will be made available free of charge on TIME WARNER's Investor Relations Website.

Participants in Solicitation

AT&T and its directors and executive officers, and TIME WARNER and its directors and executive officers, may be deemed to be participants in the solicitation of proxies from the holders of TIME WARNER common stock in respect to the proposed merger. Information about the directors and executive officers of AT&T is set forth in the proxy statement for AT&T's 2016 Annual Meeting of Stockholders, which was filed with the SEC on March 11, 2016. Information about the directors and executive officers of TIME WARNER is set forth in the proxy statement for TIME WARNER's 2016 Annual Meeting of Stockholders, which was filed with the SEC on May 19, 2016. Investors may obtain additional information regarding the interest of such participants by reading the proxy statement/prospectus regarding the proposed merger when it becomes available.

For more information, contact:

AT&T
Brad Burns
brad.burns@att.com
214.757.7520

Fletcher Cook
fletcher.cook@att.com
214.757.7629

Time Warner
Keith Cocozza
Keith.cocozza@timewarner.com
212.484.7482

Filed by AT&T Inc.
Pursuant to Rule 425 under the Securities Act of 1933
and deemed filed pursuant to Rule 14a–12
of the Securities Exchange Act of 1934
Subject Company: Time Warner Inc.
Commission File No.: 1-15062

AT&T Statement on TWX-TWC Confusion

AT&T has announced its intention to acquire Time Warner Inc., a global leader in media and entertainment with a great portfolio of content creation and aggregation, and iconic brands across video programming and TV/film production. Time Warner is the owner of HBO, CNN, TBS, TNT and Warner Bros. The deal combines Time Warner's vast library of content and ability to create new premium content that connects with audiences around the world, with AT&T's extensive customer relationships, world's largest pay TV subscriber base and leading scale in TV, mobile and broadband distribution.

Time Warner Inc. should not be confused with Time Warner Cable, which is a distinct, independent company owned by Charter Communications. In 2008, Time Warner and Time Warner Cable announced a complete legal and structural separation of the companies. That separation was completed in 2009, and the companies have been completely separate and independent entities ever since.

Cautionary Language Concerning Forward-Looking Statements

Information set forth in this communication, including financial estimates and statements as to the expected timing, completion and effects of the proposed merger between AT&T and Time Warner, constitute forward-looking statements within the meaning of the safe harbor provisions of the Private Securities Litigation Reform Act of 1995 and the rules, regulations and releases of the Securities and Exchange Commission. These forward-looking statements are subject to risks and uncertainties, and actual results might differ materially from those discussed in, or implied by, the forward-looking statements. Such forward-looking statements include, but are not limited to, statements about the benefits of the merger, including future financial and operating results, the combined company's plans, objectives, expectations and intentions, and other statements that are not historical facts. Such statements are based upon the current beliefs and expectations of the management of AT&T and Time Warner and are subject to significant risks and uncertainties outside of our control.

Among the risks and uncertainties that could cause actual results to differ from those described in the forward-looking statements are the following: (1) the occurrence of any event, change or other circumstances that could give rise to the termination of the merger agreement, (2) the risk that Time Warner stockholders may not adopt the merger agreement, (3) the risk that the necessary regulatory approvals may not be obtained or may be obtained subject to conditions that are not anticipated, (4) risks that any of the closing conditions to the proposed merger may not be satisfied in a timely manner, (5) risks related to disruption of management time from ongoing business operations due to the proposed merger, (6) failure to realize the benefits expected from the proposed merger and (7) the effect of the announcement of the proposed merger on the ability of Time Warner and AT&T to retain customers and retain and hire key personnel and maintain relationships with their suppliers, and on their operating results and businesses generally. Discussions of additional risks and uncertainties are and will be contained in

AT&T's and Time Warner's filings with the Securities and Exchange Commission. Neither AT&T nor Time Warner is under any obligation, and each expressly disclaim any obligation, to update, alter, or otherwise revise any forward-looking statements, whether written or oral, that may be made from time to time, whether as a result of new information, future events, or otherwise. Persons reading this communication are cautioned not to place undue reliance on these forward-looking statements which speak only as of the date hereof.

No Offer or Solicitation

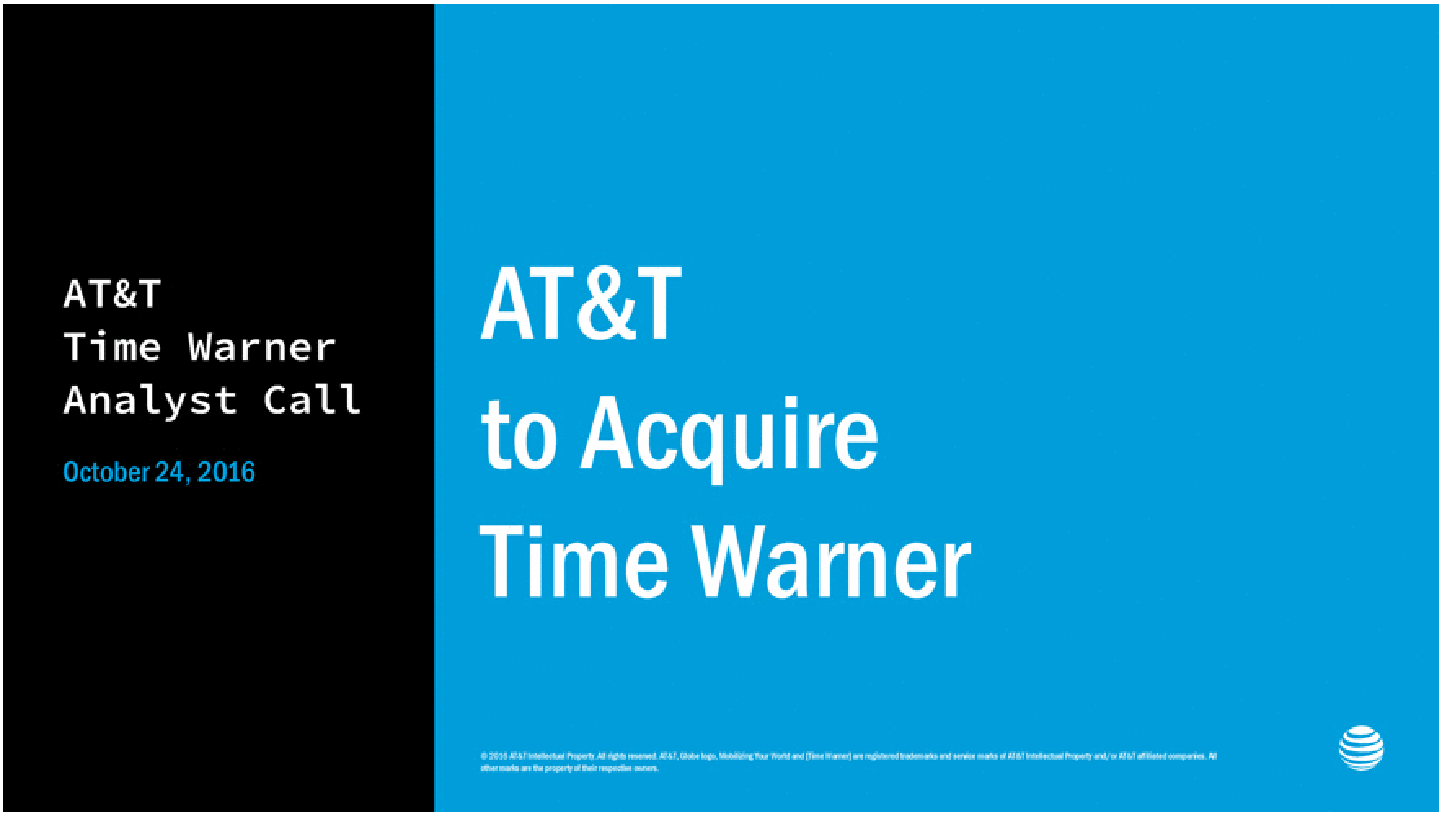
This communication does not constitute an offer to sell or the solicitation of an offer to buy any securities or a solicitation of any vote or approval, nor shall there be any sale of securities in any jurisdiction in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such jurisdiction. No offer of securities shall be made except by means of a prospectus meeting the requirements of Section 10 of the Securities Act of 1933, as amended.

Additional Information and Where to Find It

In connection with the proposed merger, AT&T intends to file a registration statement on Form S-4, containing a proxy statement/prospectus with the Securities and Exchange Commission ("SEC"). AT&T and Time Warner will make the proxy statement/prospectus available to their respective stockholders and AT&T and Time Warner will file other documents regarding the proposed merger with the SEC. This communication is not intended to be, and is not, a substitute for such filings or for any other document that AT&T or Time Warner may file with the SEC in connection with the proposed merger. STOCKHOLDERS OF TIME WARNER ARE URGED TO READ ALL RELEVANT DOCUMENTS FILED WITH THE SEC, INCLUDING THE REGISTRATION STATEMENT AND THE PROXY STATEMENT/PROSPECTUS CAREFULLY WHEN THEY BECOME AVAILABLE, BECAUSE THEY WILL CONTAIN IMPORTANT INFORMATION ABOUT AT&T, TIME WARNER AND THE PROPOSED MERGER. Investors and security holders will be able to obtain copies of the proxy statement/prospectus as well as other filings containing information about AT&T and Time Warner once they become available, without charge, at the SEC's website, http://www.sec.gov. Copies of documents filed with the SEC by AT&T will be made available free of charge on AT&T's investor relations website at http://phx.corporate-ir.net/phoenix.zhtml?c=113088&p=irol-sec. Copies of documents filed with the SEC by Time Warner will be made available free of charge on Time Warner's investor relations website at http://ir.timewarner.com/phoenix.zhtml?c=70972&p=irol-sec.

Participants in Solicitation

AT&T, Time Warner and certain of their respective directors and executive officers and other members of management and employees may be deemed to be participants in the solicitation of proxies from the holders of Time Warner common stock in respect to the proposed merger. Information about the directors and executive officers of AT&T is set forth in the proxy statement for AT&T's 2016 Annual Meeting of Stockholders, which was filed with the SEC on March 11, 2016. Information about the directors and executive officers of Time Warner is set forth in the proxy statement for Time Warner's 2016 Annual Meeting of Stockholders, which was filed with the SEC on May 19, 2016. Investors may obtain additional information regarding the interest of such participants by reading the proxy statement/prospectus regarding the proposed merger when it becomes available and other relevant materials filed with the SEC. These documents will be available free of charge from the sources indicated above.



AT&T
Time Warner
Analyst Call
October 24, 2016
AT&T
to Acquire
Time Warner
© 2016 AT&T Intellectual Property. All rights reserved. AT&T, Globe logo, Mobilizing Your World and [Time Warner] are registered trademarks and service marks of AT&T Intellectual Property and/or AT&T affiliated companies. All other marks are the property of their respective owners.

AT&T
Time Warner
Analyst Call

October 24, 2016

Call Participants

Randall Stephenson
Chairman & CEO, AT&T, Inc.

Jeff Bewkes
Chairman and CEO, Time Warner, Inc.

John Stephens
AT&T Senior Executive Vice President and CFO

David McAtee
AT&T Senior Executive Vice President and General Counsel

Cautionary Language Concerning Forward-Looking Statements

Information set forth in this communication, including financial estimates and statements as to the expected timing, completion and effects of the proposed merger between AT&T and Time Warner, constitute forward-looking statements within the meaning of the safe harbor provisions of the Private Securities Litigation Reform Act of 1995. These estimates and statements are subject to risks and uncertainties, and actual results might differ materially. Such estimates and statements include, but are not limited to, statements about the benefits of the merger, including future financial and operating results, the combined company's plans, objectives, expectations and intentions, and other statements that are not historical facts. Such statements are based upon the current beliefs and expectations of the management of AT&T and Time Warner and are subject to significant risks and uncertainties outside of our control.

Among the risks and uncertainties that could cause actual results to differ from those described in the forward-looking statements are the following: (1) the occurrence of any event, change or other circumstances that could give rise to the termination of the merger agreement, (2) the risk that Time Warner stockholders may not adopt the merger agreement, (3) the risk that the necessary regulatory approvals may not be obtained or may be obtained subject to conditions that are not anticipated, (4) risks that any of the closing conditions to the proposed merger may not be satisfied in a timely manner, (5) risks related to disruption of management time from ongoing business operations due to the proposed merger, (6) failure to realize the benefits expected from the proposed merger and (7) the effect of the announcement of the proposed merger on the ability of Time Warner and AT&T to retain customers and retain and hire key personnel and maintain relationships with their suppliers, and on their operating results and businesses generally. Discussions of additional risks and uncertainties are contained in AT&T's and Time Warner's filings with the Securities and Exchange Commission. Neither AT&T nor Time Warner is under any obligation, and each expressly disclaim any obligation, to update, alter, or otherwise revise any forward-looking statements, whether written or oral, that may be made from time to time, whether as a result of new information, future events, or otherwise. Persons reading this announcement are cautioned not to place undue reliance on these forward-looking statements which speak only as of the date hereof.

Cautionary Language Concerning Forward-Looking Statements

Additional Information and Where to Find It

This communication does not constitute an offer to sell or the solicitation of an offer to buy any securities or a solicitation of any vote or approval. This communication may be deemed to be solicitation material in respect of the proposed merger between AT&T and Time Warner.

In connection with the proposed merger, AT&T intends to file a registration statement on Form S-4, containing a proxy statement/prospectus with the Securities and Exchange Commission ("SEC"). STOCKHOLDERS OF Time Warner ARE URGED TO READ ALL RELEVANT DOCUMENTS FILED WITH THE SEC, INCLUDING THE PROXY STATEMENT/PROSPECTUS, BECAUSE THEY WILL CONTAIN IMPORTANT INFORMATION ABOUT THE PROPOSED MERGER. Investors and security holders will be able to obtain copies of the proxy statement/prospectus as well as other filings containing information about AT&T and Time Warner, without charge, at the SEC's website, http://www.sec.gov. Copies of documents filed with the SEC by AT&T will be made available free of charge on AT&T's investor relations website. Copies of documents filed with the SEC by Time Warner will be made available free of charge on Time Warner's investor relations website.

Participants in Solicitation

AT&T and its directors and executive officers, and Time Warner and its directors and executive officers, may be deemed to be participants in the solicitation of proxies from the holders of Time Warner common stock in respect of the proposed merger. Information about the directors and executive officers of AT&T is set forth in the proxy statement for AT&T's 2016 Annual Meeting of Stockholders, which was filed with the SEC on March 11, 2016. Information about the directors and executive officers of Time Warner is set forth in the proxy statement for Time Warner's 2016 Annual Meeting of Stockholders, which was filed with the SEC on April 29, 2016. Investors may obtain additional information regarding the interest of such participants by reading the proxy statement/prospectus regarding the proposed merger when it becomes available.

AT&T & Time Warner

A Compelling Combination

TimeWarner

Best Premium Content +
Best Scale in Distribution, Customers

Best in class assets in converging media & communications industry	Vertically integrated company with best content & distribution across mobile, TV, broadband	Scale in content creation, aggregation, distribution & customer data	Combination is significantly enhanced by the market environment

"Premium content always wins – on the big screen, the TV screen and now on the mobile screen."

AT&T & Time Warner

A Leader in Premium Content

- Global pure-play video content company with iconic brands
- Industry-leading scale with top basic and premium networks
  - 3 of the top 5 basic cable networks; #1 network among millennials
  - Premium sports rights
  - World's #1 premium cable network
- Largest film and TV studio with leading franchises, production scale and content library

AT&T

TimeWarner

Unmatched distribution platforms and customer relationships

- Nationwide mobile – 133 million subscribers *(144 million worldwide)*
- Nationwide video – 25 million subscribers *(~45 million worldwide[1])*
- 60 million broadband customer locations *(~16 million subscribers)*
- 88,000 North American retail points of sale

Robust viewership insights for targeted advertising and content creation

- Data-informed content creation
- Innovate with new subscription and ad models

Strong management team, world class creative talent and relationships

[1] *Includes Sky Mexico*

Transaction Summary

TimeWarner — 2015 Financial Results
$28.1B revenue

Turner — Valuable portfolio of network and digital assets
$10.6B revenue

HBO — Worldwide leader in premium content
$5.6B revenue

WB — World's largest film and television studio
$13.0B revenue

Consideration and valuation

- AT&T to acquire Time Warner for $107.50 per share
  - 50% AT&T stock; 50% cash
  - Stock consideration subject to collar

Financial impact

- Accretive to margins, adjusted EPS and free cash flow
- Improves FCF dividend coverage
- Enhanced and diversified revenue and earnings growth profile
- Commitment to preserve strong balance sheet and investment grade credit metrics

Approvals required

- Time Warner stockholders
- Regulatory approvals in U.S., E.U. and various countries abroad
- Expect to close before year-end 2017

Significant Value for Time Warner Stockholders

Transaction creates immediate and long-term value

36% premium to Time Warner closing share price of $79.24 on October 19, 2016

Attractive consideration mix

- 50% cash and 50% stock
- ~15% pro forma ownership in a leading integrated media and communications company

Provides unmatched distribution capabilities to deliver our great content across any platform

Accelerates the ability to innovate and offer a better consumer experience

Significantly advances our direct-to-consumer efforts and our ability to develop new video offerings

Deal Summary and Financial Expectations

Equity Value at $107.50 per share	$85.4
Time Warner Net Debt [1]	$21.0
Transaction Value	**$106.4**
New AT&T Equity *(1.1 billion shares)*	$42.7
New Debt Issued[2] *(net of TWX cash)*	$39.2
Time Warner Debt *(gross)*	$24.5
Total Consideration	**$106.4**
Current AT&T shares out	6.1 B
Post-Closing AT&T shares out	7.2 B

[1] Projected at 12/31/17
[2] Includes estimated transaction costs

Funding considerations

- Financing in place; $40B bridge loan
- Committed to strong balance sheet and investment grade credit metrics
- Strong deleveraging potential given attractive FCF attributes
- Pro forma leverage approximately 2.5x by end of year 1, returning to historical target range by end of year 4

Robust combination benefits

- Annual synergy potential in the $1 billion range; cost-focused
- Vertical integration of content and distribution drives innovation and investments
- Enhanced value proposition for advertisers
- Diversified and enhanced revenue growth profile
  - 15% from content with lighter-touch regulation
  - New geographies and customer base
- Strong cash flow growth and lower capital intensity provides investment flexibility

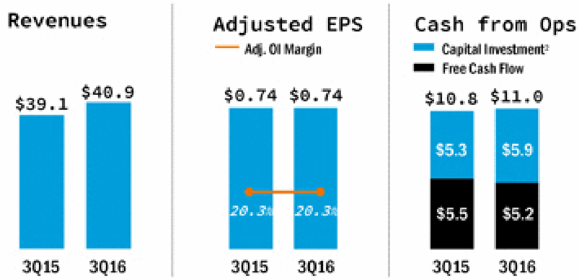
Favorable financial impact

- Accretive to adjusted EPS within 12 months
- Accretive to free cash flow per share within 12 months; improves FCF dividend coverage
  - Recently announced 33rd consecutive dividend increase
- Continued financial strength with over $60 billion in EBITDA

AT&T 3Q16 Results

AT&T - 3Q16 Financial Summary

$ in billions, except EPS



	3Q15	3Q16
Reported EPS	$0.50	$0.54
Adjustments:		
Amortization of intangibles	$0.13	$0.14
Merger, integration and other[1]	$0.11	$0.06
Adjusted EPS	$0.74	$0.74

Consolidated revenues of $40.9 billion, up 4.6%; down slightly on comparable basis

- Growth in video and IP services

Net income continues to grow

- Adjusted EPS of $0.74 for the quarter; up nearly 4% year to date
- Adjusted operating margins stable

Cash from operations of $11 billion in quarter, $29.2 billion year to date, up 9.4%

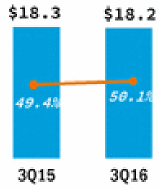
- Free cash flow of $5.2 billion, $13.3 billion year to date
- Capital investment of $5.9 billion; $16.2 billion year to date
- Dividends of $3 billion per quarter
  - 67% free cash flow dividend coverage year to date

[1]3Q16 includes merger-related items for DIRECTV ($0.02), Mexico/Other wireless ($0.01) and ($0.03) employee separation charges.
[2]3Q16 includes $87 million capital purchases in Mexico with favorable vendor payment terms.

AT&T - 3Q16 Operational Results

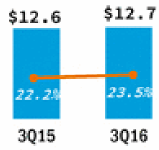
Revenue[1] — EBITDA Margin[2]
$ in billions

U.S. Wireless



- Record EBITDA service margin of 50.1%, with stable revenue and ARPU
- Strong postpaid churn improvement
- Continued prepaid subscriber and revenue growth
- 1.5 million U.S. net adds; 2.3 million in North America
  - 212,000 U.S. postpaid net adds
  - 304,000 U.S. prepaid net adds

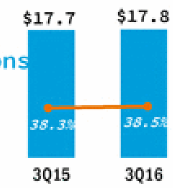
Entertainment Group



- Revenues up 1% on comparable basis, with growth in video and IP services offsetting legacy revenue declines
- Continued margin expansion, with content savings on track
- Stable TV and broadband net subscriber base, led by
  - 323,000 DIRECTV® net adds, with about 70% transitioning from U-verse®
  - 156,000 IP broadband net adds

Business Solutions

International



- Wireless drives revenue growth, with increases in all retail segments
- Strategic service revenues up $240 million, or 9% year over year
- Continued solid margins

- 10.7 million wireless subscribers in Mexico; 769,000 branded net adds
- LatAm revenues of $1.3 billion; continued profitability and free cash flow

[1] Adjusted to include prior period DIRECTV revenues on a comparable basis. [2] Wireless presented on EBITDA Service Margin basis.

AT&T - 3Q16 Summary

Growing earnings with stable margins

Net income growth with cash from operations up 9.4% year to date

Best-ever wireless EBITDA margins with low postpaid churn

Expanding smartphone base and 1.5 million U.S. net adds; 4.7 million net adds year to date

Stable video and broadband subscribers as shift to DIRECTV continues

Growing margins with expanding integrated services base; double-digit AdWorks growth; DIRECTV Now SM launch

4G LTE deployment in Mexico ahead of plan

4G LTE deployed to 74 million POPs; 10.7 million subscribers with 2 million added year to date

2016 guidance on track

Adjusted earnings growth in mid-single digits, stable consolidated margins with free cash flow dividend coverage of 67% year to date

Q&A

Boilerplate omitted

Filed by AT&T Inc.
Pursuant to Rule 425 under the Securities Act of 1933
and deemed filed pursuant to Rule 14a-12
of the Securities Exchange Act of 1934
Subject Company: Time Warner Inc.
Commission File No.: 1-15062

The following was provided in response to inquiries directed to the Company's Investor Relations Department:

Please attribute to David McAtee, AT&T senior executive vice president and general counsel:

"We look forward to discussing the many benefits of this transaction with our regulators. In the modern history of the media and the Internet, the U.S. government has always approved vertical mergers like ours, because they benefit consumers, strengthen competition, and, in our case, encourage innovation and investment."

Cautionary Language Concerning Forward-Looking Statements

Information set forth in this communication, including financial estimates and statements as to the expected timing, completion and effects of the proposed merger between AT&T and Time Warner, constitute forward-looking statements within the meaning of the safe harbor provisions of the Private Securities Litigation Reform Act of 1995 and the rules, regulations and releases of the Securities and Exchange Commission. These forward-looking statements are subject to risks and uncertainties, and actual results might differ materially from those discussed in, or implied by, the forward-looking statements. Such forward-looking statements include, but are not limited to, statements about the benefits of the merger, including future financial and operating results, the combined company's plans, objectives, expectations and intentions, and other statements that are not historical facts. Such statements are based upon the current beliefs and expectations of the management of AT&T and Time Warner and are subject to significant risks and uncertainties outside of our control.

Among the risks and uncertainties that could cause actual results to differ from those described in the forward-looking statements are the following: (1) the occurrence of any event, change or other circumstances that could give rise to the termination of the merger agreement, (2) the risk that Time Warner stockholders may not adopt the merger agreement, (3) the risk that the necessary regulatory approvals may not be obtained or may be obtained subject to conditions that are not anticipated, (4) risks that any of the closing conditions to the proposed merger may not be satisfied in a timely manner, (5) risks related to disruption of management time from ongoing business operations due to the proposed merger, (6) failure to realize the benefits expected from the proposed merger and (7) the effect of the announcement of the proposed merger on the ability of Time Warner and AT&T to retain customers and retain and hire key personnel and maintain relationships with their suppliers, and on their operating results and businesses generally. Discussions of additional risks and uncertainties are and will be contained in AT&T's and Time Warner's filings with the Securities and Exchange Commission. Neither AT&T nor Time Warner is under any obligation, and each expressly disclaim any obligation, to update, alter, or otherwise revise any forward-looking statements, whether written or oral, that may be made from time to time, whether as a result of new information, future events, or otherwise. Persons reading this communication are cautioned not to place undue reliance on these forward-looking statements which speak only as of the date hereof.

No Offer or Solicitation

This communication does not constitute an offer to sell or the solicitation of an offer to buy any securities or a solicitation of any vote or approval, nor shall there be any sale of securities in any jurisdiction in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such jurisdiction. No offer of securities shall be made except by means of a prospectus meeting the requirements of Section 10 of the Securities Act of 1933, as amended.

Additional Information and Where to Find It

In connection with the proposed merger, AT&T intends to file a registration statement on Form S-4, containing a proxy statement/prospectus with the Securities and Exchange Commission ("SEC"). AT&T and Time Warner will make the proxy statement/prospectus available to their respective stockholders and AT&T and Time Warner will file other documents regarding the proposed merger with the SEC. This communication is not intended to be, and is not, a substitute for such filings or for any other document that AT&T or Time Warner may file with the SEC in connection with the proposed merger. STOCKHOLDERS OF TIME WARNER ARE URGED TO READ ALL RELEVANT DOCUMENTS FILED WITH THE SEC, INCLUDING THE REGISTRATION STATEMENT AND THE PROXY STATEMENT/PROSPECTUS CAREFULLY WHEN THEY BECOME AVAILABLE, BECAUSE THEY WILL CONTAIN IMPORTANT INFORMATION ABOUT AT&T, TIME WARNER AND THE PROPOSED MERGER. Investors and security holders will be able to obtain copies of the proxy statement/prospectus as well as other filings containing information about AT&T and Time Warner once they become available, without charge, at the SEC's website, http://www.sec.gov. Copies of documents filed with the SEC by AT&T will be made available free of charge on AT&T's investor relations website at http://phx.corporate-ir.net/phoenix.zhtml?c=113088&p=irol-sec. Copies of documents filed with the SEC by Time Warner will be made available free of charge on Time Warner's investor relations website at http://ir.timewarner.com/phoenix.zhtml?c=70972&p=irol-sec.

Participants in Solicitation

AT&T, Time Warner and certain of their respective directors and executive officers and other members of management and employees may be deemed to be participants in the solicitation of proxies from the holders of Time Warner common stock in respect to the proposed merger. Information about the directors and executive officers of AT&T is set forth in the proxy statement for AT&T's 2016 Annual Meeting of Stockholders, which was filed with the SEC on March 11, 2016. Information about the directors and executive officers of Time Warner is set forth in the proxy statement for Time Warner's 2016 Annual Meeting of Stockholders, which was filed with the SEC on May 19, 2016. Investors may obtain additional information regarding the interest of such participants by reading the proxy statement/prospectus regarding the proposed merger when it becomes available and other relevant materials filed with the SEC. These documents will be available free of charge from the sources indicated above.

United States Senate
WASHINGTON, DC 20510

June 21, 2017

The Honorable Jeff Sessions
Attorney General
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Sessions:

We are writing to urge the Department of Justice (DOJ) to closely scrutinize AT&T's proposed acquisition of Time Warner. We have strong concerns that the combined company's unmatched control of popular content and the distribution of that content will lead to higher prices, fewer choices, and poorer quality services for Americans – substantial harms that cannot be remedied with unreliable, unenforceable, and time-limited behavioral conditions. Our constituents face significant and growing costs for telecommunications services.[1] Before initiating the next big wave of media consolidation, you must consider how the $85 billion deal will impact Americans' wallets, as well as their access to a wide-range of news and entertainment programming. Should you determine that the substantial harms to competition and consumers arising from the transaction outweigh the purported benefits, you should reject the proposed acquisition.

I. THE PROPOSED DEAL WOULD SUBSTANTIALLY LESSEN COMPETITION, RESULTING IN FEWER CHOICES AND HIGHER PRICES FOR CONSUMERS.

As the largest pay-TV provider in the nation, after acquiring DIRECTV in 2015, and the second largest mobile broadband provider, AT&T is one of the nation's leading distributors of content, with 135 million wireless subscribers and 25.5 million pay-TV subscribers.[2] Time Warner is one of the nation's largest media companies and owns high-rated programming, including HBO, TNT, TBS, CNN, and Warner Bros. Combining these behemoths would create a mega media conglomerate with both the incentive and the ability to favor its own content over that of other entertainment companies and to restrict competing video distributors from accessing that content, harming its competitors and ultimately consumers. While the companies have suggested that the proposed deal will result in certain consumer benefits, they have thus far failed to demonstrate that these purported benefits are either merger-specific or sufficient to outweigh the substantial harms of the deal.

[1] The average American household, which has two cell phones, one landline, and a video-internet bundle, spends approximately $2,700 per year on these services. Mark Cooper, *Overcharged and Underserved: How a Tight Oligopoly on Steroids Undermines Competition and Harms Consumers in Digital Communications Markets* (Consumer Federation of America & Public Knowledge 2016).

[2] AT&T, Inc., *Investor Briefing*, Q4 2016, 4, 13 (Jan. 25, 2017).

A. AT&T-Time Warner could favor its own programming and unfairly discriminate against that of other TV and entertainment companies.

A combined AT&T-Time Warner would have both the ability and the incentive to increase viewership of its newly acquired content by restricting AT&T subscribers' access to other content or otherwise prioritizing its own. From forcing its customers to buy bigger bundles of Time Warner's programming to foreclosing rival content creators' access to AT&T customers, AT&T-Time Warner could engage in a wide variety of behaviors that would harm competition in the media market.

i. *Premium Channels Market*

AT&T-Time Warner could prioritize Time Warner content, including HBO, over HBO's competitors in the premium channels market, such as Starz and Showtime. While premium channels are working to reach subscribers through over the top (OTT) services, many Americans still access premium channels by selecting them when they purchase or update their pay-TV service, such as AT&T-owned DIRECTV. Because AT&T-Time Warner would have an incentive to drive subscribers to HBO, the combined company could choose to not market, market less vigorously, or otherwise harm its premium channel competitors during the DIRECTV sign-up process, which AT&T controls. As a result, Starz and Showtime could face a significant decrease in new subscriptions from AT&T-DIRECTV subscribers, which would limit their power in the premium channels market and leave room for HBO to dominate, ultimately restricting consumers' choice. And as AT&T-Time Warner is further enriched by HBO's dominance of the premium channels market, it will have greater ability to raise HBO prices for its own AT&T-DIRECTV subscribers, as well as for competing distributors. It could also use this bargaining leverage to negotiate lower payments for inputs, such as the creative talent necessary to produce high-quality programming.

ii. *Net Neutrality*

AT&T-Time Warner could also expand its discriminatory treatment of content under its Sponsored Data zero-rating program, whereby AT&T offers its wireless customers access to certain sites or services without such data usage counting towards their monthly data cap. Zero-rating programs can be anticompetitive if providers offer special treatment of certain content without meaningfully offering the same treatment to other content creators. AT&T currently only offers its customers zero-rated treatment of its own DIRECTV OTT product, DIRECTV Now, although the company claims that participation in the program is offered at a similar rate to other interested content providers.[3] However, that suggestion ignores the reality that the cost of participation has a different financial impact on AT&T-owned DIRECTV than on competing streaming services, because AT&T is merely paying itself that price and shifting the supposed costs from one subsidiary to another.[4] If competitors to DIRECTV Now, including more

[3] AT&T, Inc., White Paper on Sponsored Data 3 (Nov. 21, 2016).

[4] In December of last year, the Federal Communications Commission (FCC) found that in order for DIRECTV Now competitors to participate in the Sponsored Data program they would have to pay AT&T a rate so high "that it would make it very difficult, if not infeasible, to offer a competitively-priced service" while AT&T would incur no such cost by zero-rating its own DIRECTV Now service. Ultimately, the FCC determined the program was anticompetitive, anti-consumer, and violated the principles of net neutrality. Letter from Jon Wilkins, Wireless

traditional streaming services like Netflix and Amazon Prime, as well as newer live TV OTT services like Sling TV and Sony VUE, choose to pay for equal treatment, they would be forced to raise their monthly user rates to make up for the cost of participation, thus forcing their users to foot the bill for the AT&T subscribers' data.

Should a combined AT&T-Time Warner expand its Sponsored Data program and zero-rate Time Warner content, these anticompetitive problems would be exacerbated. By offering popular HBO programming "free" from data charges under an arbitrarily low data cap, AT&T could capture subscribers from competing wireless providers, and DIRECTV Now could capture users from competing streaming services that can't financially justify participation in the Sponsored Data program. Ultimately, AT&T could expand its power in both the mobile broadband and OTT markets and foreclose competition from OTT startups that can't afford to compete on such discriminatory terms.

Furthermore, the combined AT&T-Time Warner would have the incentive to engage in anticompetitive behavior that would violate the principles of net neutrality in a wide variety of ways. For example, the combined company could expand its use of significantly lower data caps and additional fees on its subscribers who use competing streaming services as their primary source of television – a practice that AT&T is already known for aggressively employing.[5] It could also create discriminatory charges to disadvantage content companies that compete with Time Warner for providing sufficient internet bandwidth to enable high-quality video distribution. These practices would leave AT&T subscribers paying extra for streaming services that compete with DIRECTV Now and may ultimately result in fewer options for OTT programming.

iii. *Free Flow of Information*

Finally, allowing one giant company like a combined AT&T-Time Warner to control the content available to Americans would threaten the basic principles of our democracy, especially given Time Warner's ownership of key information sources like CNN. With both the incentive and the ability to direct consumers to Time Warner-owned content, AT&T-Time Warner could restrict its subscribers' access to alternative viewpoints, such as those offered by competing news outlets like Fox, MSNBC, or Breitbart. As a result, the free flow of information that our democracy relies on would be stymied.

B. AT&T-Time Warner could restrict other video distributors' ability to offer Time Warner content.

A combined AT&T-Time Warner would also have both the ability and the incentive to restrict its competitors in the video distribution market, including both traditional pay-TV providers and OTT services, from offering Time Warner's highly desirable content. As AT&T-

---

Telecomm. Bureau Chief, Fed. Commc'n Comm'n, to Robert W. Quinn, Senior Executive Vice President, AT&T, Inc. (Dec. 1, 2016) *available* at https://cdn3.vox-cdn.com/uploads/chorus_asset/file/7575775/Letter_to_R._Quinn_12.1.16.0.pdf.

[5] Letter from Harold Feld, Legal Director, Public Knowledge, & Sascha Meinrath, Director, New America Foundation's Open Technology Initiative, to Sharon Gillet, Chief Wireline Competition Bureau, Fed. Commc'n Comm'n (May 6, 2011) *available* at https://www.publicknowledge.org/documents/letter-to-fcc-on-att-data-caps.

Time Warner restricts access to or raises the prices for its content, competition in the already highly concentrated pay-TV market will decrease even more, and consumers will face fewer options and higher prices for video services.

i. *Over the Top Market*

Any efforts by a combined AT&T-Time Warner to restrict access to its content could have a significant impact on the growing, but fragile, OTT market. With control of both the DIRECTV and Time Warner content and apps, and in order to favor DIRECTV, AT&T-Time Warner could withhold access entirely or substantially raise prices of its programming for competing distribution platforms, such as Roku and Amazon Fire, as well as OTT services like Hulu, Netflix, and Sling TV. Start-ups could be foreclosed from entering the OTT market altogether. As Americans switch to AT&T for lower-priced access to Time Warner content, the combined company would have less incentive to innovate and develop new offerings of their own, and consumers, who face increasingly high cable bills, will have fewer options if they cut the cord.

ii. *Traditional Pay-TV Providers*

With ownership of Time Warner's content, the combined company would also gain substantial bargaining leverage when negotiating content carriage with traditional pay-TV providers, including Comcast, Charter, and DISH, as well as smaller cable providers that already have limited negotiating power. AT&T-Time Warner could raise rates for Time Warner programming, which would ultimately be passed on to its competitors' subscribers. It could also more aggressively pursue anticompetitive bundling strategies, forcing competing providers, as well as their subscribers, to accept more of Time Warner's content than they may desire in order to access popular networks like HBO or CNN. AT&T-Time Warner could use such tactics to ultimately expand its power in the pay-TV market. And if competing distributors are forced to pay more for Time Warner content, they will have less buying power to support independent programmers, and consumers will have less access to a wide range of entertainment and news programming.

iii. *AT&T-Time Warner's National Footprint*

AT&T and Time Warner have repeatedly stated that the combined company would have no incentive to restrict or foreclose access to its newly acquired content,[6] but we question the credibility of this claim. We agree that under normal circumstances, merging video distributors and content creators would maintain an incentive to maximize viewership of their jointly controlled programming. In the case of Comcast-NBCUniversal, for example, the combined company has some incentive to seek carriage of its content by rival distributors because of the

---

[6] Letter from Timothy P. McKone, Exec. Vice President, AT&T, Inc., & Steve Vest, Senior Vice President, Time Warner, Inc., to Senators Franken, Brown, Wyden, Warren, Murray, Cantwell, Blumenthal, Markey, Sander, Leahy, Booker, Durbin, & Merkley *available* at
https://www.franken.senate.gov/files/documents/170217ATTTimeWarnerResponse.pdf.Letter from Timothy P.; *Examining the Competitive Impact of the AT&T-Time Warner Transaction Before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights of the S. Comm.* On the Judiciary, 114th Cong. (2016) (statement of Randall Stephenson, Chairman, CEO, & President, AT&T).

limits of Comcast's distribution footprint. But AT&T's reach is far greater: DIRECTV's nationwide satellite service coupled with AT&T's nationwide wireless footprint would ensure that Time Warner content could pass through nearly every home in America even if the combined company decided to offer it exclusively and deny it entirely to rival distributors. While restricting competitors' access to its content may reduce Time Warner viewership initially, any short term losses in viewership could be recouped in the form of higher prices for Time Warner content among its competitors and its own customers or through increased power in the pay-TV market.

C. The companies have failed to demonstrate that the efficiencies arising from the deal are merger-specific or sufficient to outweigh the substantial harms to competition and consumers caused by the deal.

AT&T and Time Warner have suggested that the proposed deal will result in a number of benefits, but they have thus far failed to demonstrate that the purported benefits either are merger-specific or would outweigh the substantial harms described above. In particular, the companies have highlighted the reduction of "bargaining friction" that they say the deal will allow.[7] Through the elimination of certain negotiations between AT&T and Time Warner, the companies suggest that the deal will allow them to "generate additional innovative ways for consumers to experience video anywhere and anytime, with greater levels of customization and interactivity", including interactive methods of viewing live events, more relevant advertising in video services, and social media sharing opportunities.[8] It is currently unclear, however, why the proposed transaction – as opposed to a contract between the two companies in their current capacities – is necessary to achieve such goals. As demonstrated by AT&T's current offering of free HBO as part of its Unlimited Plus wireless plan, the companies already enjoy a strong working relationship – one where contract negotiations have thus far not prevented them from collaborating in mobile video distribution.

Furthermore, while the companies assure us that the proposed innovations will result in "better value" for consumers, they are silent with respect to whether a reduction in bargaining friction will be passed on to consumers in the form of lower prices for video services. As customers of both AT&T and competing video distributors face higher prices and fewer choices for programming as a result of this deal, we believe that any proposed benefits should speak to how those harms would be counteracted by lower prices for other content or services.

II. BEHAVIORAL CONDITIONS ARE INSUFFICIENT TO ADDRESS THE SUBSTANTIAL HARMS THAT THE PROPOSED DEAL WOULD CAUSE.

In 2011, the Antitrust Division recognized that "conduct remedies can be an effective method for dealing with competition concerns raised by vertical mergers," but it also warned that "no matter what type of conduct remedy is considered, however, a remedy is not effective if it

[7] Letter from Timothy P. McKone & Steve Vest to Senators Franken, Brown, Wyden, Warren, Murray, Cantwell, Blumenthal, Markey, Sander, Leahy, Booker, Durbin, & Merkley, *supra* note 6.
[8] *Id.*

cannot be enforced."[9] After reviewing conditions placed on the Comcast-NBCUniversal deal, we believe that the demonstrated lack of enforceability and reliability of such conditions have rendered them insufficient as remedies for deals of this nature. Furthermore, we are strongly concerned about how such conditions would be enforced given the lack of oversight of the deal by the Federal Communications Commission (FCC) and the uncertainty surrounding the future of the Open Internet Order.

While the individual facts of each proposed deal require separate analysis, analogous past deals should provide insight into whether behavioral conditions are successful in remedying competitive harms that these deals pose. Like the deal at issue today, Comcast's 2011 acquisition of NBCUniversal raised concerns that the combined company would have strong incentives to favor its own programming over others and restrict its competitors in the pay-TV market from accessing its programming. Acknowledging these concerns, the DOJ and FCC imposed a number of behavioral conditions on that deal – conditions that Comcast-NBCUniversal has since been accused of repeatedly violating.[10] Enforcement of the conditions proved to be an expensive and lengthy process, allowing Comcast's anticompetitive behavior to persist largely unchecked.

AT&T itself has a similarly troubling track record when it comes to compliance with its past promises. Almost immediately after acquiring DIRECTV in 2015, the company hiked prices and cited rising programming costs as a factor, despite having told regulators that the merger would help it keep those programming costs in check.[11] There have also been accusations that AT&T has failed to meet commitments it made to meet broadband deployment goals when it combined BellSouth, Cingular Wireless, and the legacy AT&T long distance company to form the current company over a decade ago.[12] And most recently, DOJ sued DIRECTV when the pay-TV provider "orchestrated a series of information exchanges with direct competitors that ultimately made consumers less likely to be able to watch their hometown team."[13] AT&T's history of going back on its public promises and engaging in anticompetitive behavior demonstrates that the company cannot be relied on to abide by any commitments made in furtherance of its proposal.

---

[9] Jon Sallet, Deputy Assistant Att'y Gen., Dep't of Justice, Remarks at the American Bar Association Fall Forum: The Interesting Case of the Vertical Merger (Nov. 17, 2016).

[10] Comcast favored its own programming by keeping its newly acquired MSNBC and CNBC in a TV channel lineup "neighborhood" of news networks while relegating Bloomberg News to an undesirable location. The FCC sanctioned Comcast for failing to deliver on promises regarding affordable standalone broadband offerings. It was also accused of violating its commitments on local news, racial diversity in programming, and online video distribution. *See* Eriq Gardner, *FCC Orders Comcast to Put Bloomberg TV Alongside Other News Channels*, Hollywood Reporter, Sep. 27, 2013, *available* at http://www.hollywoodreporter.com/thr-esq/fcc-orders-comcast-put-bloomberg-638226; Cynthia Littleton, *Byron Allen Accuses Comcast, FCC of Violating NBCUniversal Merger Conditions*, Variety, Mar. 28, 2016, *available* at http://variety.com/2016/tv/news/byron-allen-fcc-discrimination-petition-1201740110/.

[11] Karl Bode, *Now Merged, AT&T and DirecTV Raise TV Rates in Perfect Unison*, DSLREPORTS, Dec. 17, 2015, *available* at https://www.dslreports.com/shownews/Now-Merged-ATT-and-DirecTV-Raise-TV-Rates-in-Perfect-Unison-135907.

[12] *Many Rural AT&T Customers Still Lack High-Speed Internet Despite Merger Promise*, HUFFINGTON POST, Nov. 18, 2012, available at http://www.huffingtonpost.com/2012/11/18/rural-att-customers-merger-Internet_n_1914508.html.

[13] David Lieberman, *Justice Department Settles Suit Over DirecTV's Effort To Keep Dodgers Games Dark – Update*, Deadline, Mar. 23, 2017, *available* at http://deadline.com/2017/03/justice-department-sues-directv-conspiracy-keep-los-angeles-dodgers-games-dark-1201846950/.

Finally, we question how the DOJ will enforce many of the potential behavioral conditions that could be placed on the deal without the assistance of the FCC. AT&T and Time Warner have suggested that one major consumer benefit of the acquisition is that it will strengthen their incentives to invest in the deployment of wireless broadband.[14] It is unclear, however, how this benefit would counteract the harms to competition created by this deal, and how the DOJ would hold a communications provider accountable for such a commitment should the Department make it legally binding. Therefore, we question whether it is appropriate for the Antitrust Division to consider these stated benefits of the deal – and whether they outweigh the substantial harms – if there is no way to ensure that the combined company actually acts to achieve such benefits.

In sum, while we cannot possibly predict all the harms that could arise from this deal, we maintain that AT&T's proposed acquisition of Time Warner would result in higher prices, fewer choices, and worse service for consumers – consequences that we believe cannot be remedied by unenforceable behavioral conditions. As the DOJ finalizes its review of the transaction, we call on you to defend American competition and innovation and ensure that Americans have open and affordable access to communications services, as well as a wide range of programming. We hope you'll take a stand for U.S. consumers and businesses and closely scrutinize the transaction. Should you determine that the substantial harms arising from the transaction outweigh the purported benefits, we urge you to reject it. As always, thank you for your attention to this matter.

Sincerely,

Al Franken
United States Senator

Edward J. Markey
United States Senator

Elizabeth Warren
United States Senator

Ron Wyden
United States Senator

[14] Letter from Timothy P. McKone & Steve Vest to Senators Franken, Brown, Wyden, Warren, Murray, Cantwell, Blumenthal, Markey, Sander, Leahy, Booker, Durbin, & Merkley, *supra* note 6.

Richard Blumenthal
United States Senator

Jeffrey A. Merkley
United States Senator

Bernard Sanders
United States Senator

Maria Cantwell
United States Senator

Sherrod Brown
United States Senator

Tammy Baldwin
United States Senator

Cory A. Booker
United States Senator

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE Monday, November 20, 2017

Justice Department Challenges AT&T/Directv’s Acquisition of Time Warner

Merger Would Harm Competition, Resulting in Higher Bills and Less Innovation for Millions of American Consumers

The United States Department of Justice today filed a civil antitrust lawsuit to block AT&T/DirecTV’s proposed acquisition of Time Warner Inc. The $108 billion acquisition would substantially lessen competition, resulting in higher prices and less innovation for millions of Americans.

The combination of AT&T/DirecTV’s vast video distribution infrastructure and Time Warner’s popular television programming would be one of the largest mergers in American history. Time Warner’s network offerings include TBS, TNT, CNN, Cartoon Network, HBO and Cinemax, and its programming includes Game of Thrones, NCAA’s March Madness, and substantial numbers of MLB and NBA regular season and playoff games.

According to the complaint, which was filed in the United States District Court for the District of Columbia, the combined company would use its control over Time Warner’s valuable and highly popular networks to hinder its rivals by forcing them to pay hundreds of millions of dollars more per year for the right to distribute those networks. The combined company would also use its increased power to slow the industry’s transition to new and exciting video distribution models that provide greater choice for consumers, resulting in fewer innovative offerings and higher bills for American families.

As AT&T itself has expressly acknowledged, distributors with control over popular programming “have the incentive and ability to use . . . that control as a weapon to hinder competition.” And, as DirecTV itself has explained, such vertically integrated programmers “can much more credibly threaten to withhold programming from rival [distributors]” and can “use such threats to demand higher prices and more favorable terms.” This merger would create just such a vertically integrated programmer and cause precisely such harms to competition.

“This merger would greatly harm American consumers. It would mean higher monthly television bills and fewer of the new, emerging innovative options that consumers are beginning to enjoy,” said Assistant Attorney General Makan Delrahim of the Department’s Antitrust Division. “AT&T/DirecTV’s combination with Time Warner is unlawful, and absent an adequate remedy that would fully prevent the harms this merger would cause, the only appropriate action for the Department of Justice is to seek an injunction from a federal judge blocking the entire transaction.”

"The merger would also enable the merged company to impede disruptive competition from online video distributors, competition that has allowed consumers greater choices at cheaper prices," Delrahim further explained. As noted in the complaint, AT&T/DirecTV describes the traditional, big bundle pay-TV model as a "cash cow" and "the golden goose." If permitted to merge, AT&T/DirecTV/Time Warner would have the incentive and ability to charge more for Time Warner's popular networks and take other actions to discourage future competitors from entering the marketplace altogether. For example, the merged firm would likely use its control of Time Warner's programming, which is important for emerging online video distributors, to hinder those innovative distributors. Indeed, a senior Time Warner executive has stated that they have leverage over an online video distributor, whose offering would be "[expletive] without Turner." That leverage would only increase if the merger were allowed to proceed.

AT&T Inc. is a Delaware corporation headquartered in Dallas, Texas. In 2016, the company posted revenues of more than $163 billion dollars, making it the largest telecommunications company in the world. AT&T is also the country's largest Multichannel Video Programming Distributor (MVPD), with more than 25 million subscribers. It has three pay-TV offerings: (1) DirecTV, a satellite-based product with almost 21 million subscribers that it acquired through a merger in 2015; (2) U-Verse, a product which uses the local AT&T fiber optic and copper network and has almost 4 million subscribers; and (3) DirecTV Now, its new online video product with almost 800,000 subscribers. It descends from the AT&T that was established in the nineteenth century and which maintained a monopoly in the provision of local telephone services until 1982, when it agreed to divest the portions of its business relating to local telephone services to settle an antitrust lawsuit filed by the Department of Justice. In 2011, AT&T attempted to purchase T-Mobile, but abandoned the transaction after the Department of Justice filed suit alleging that the merger violated the antitrust laws.

Time Warner, Inc. is a Delaware corporation headquartered in New York, New York. In 2016, its posted revenue was $29.3 billion. As of 2016, according to Time Warner, its most popular networks reach over 90 million households—of the nearly 100 million households that subscribe to traditional subscription television.

Attachment(s):
Download The Complaint

Topic(s):
Antitrust

Component(s):
Antitrust Division

Press Release Number:
17-1316

Updated November 20, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
450 Fifth Street, NW
Washington, DC 20530;

Plaintiff,

v.

AT&T INC.
208 South Akard Street,
Dallas, TX 75202;

DIRECTV GROUP HOLDINGS, LLC
2260 E. Imperial Hwy,
El Segundo, CA 90245; and

TIME WARNER INC.
One Time Warner Center,
New York, NY 10019;

Defendants.

COMPLAINT

AT&T/DirecTV is the nation's largest distributor of traditional subscription television. Time Warner owns many of the country's top TV networks, including TNT, TBS, CNN, and HBO. In this proposed $108 billion transaction—one of the largest in American history—AT&T seeks to acquire control of Time Warner and its popular TV programming. As AT&T has expressly recognized, however, distributors that control popular programming "have the incentive and ability to use (and indeed have used whenever and wherever they can) that control as a weapon to hinder competition." Specifically, as DirecTV has explained, such vertically integrated programmers "can much more credibly threaten to withhold programming from rival [distributors]" and can "use such threats to demand higher prices and more favorable terms." Accordingly, were this merger allowed to proceed, the newly combined firm likely would—just as AT&T/DirecTV has already predicted—use its control of Time Warner's popular programming as a weapon to harm competition. AT&T/DirecTV would hinder its rivals by forcing them to pay hundreds of millions of dollars more per year for Time Warner's networks, and it would use its increased power to slow the industry's transition to new and exciting video distribution models that provide greater choice for consumers. The proposed merger would result in fewer innovative offerings and higher bills for American families.

For these reasons and those set forth below, the United States of America brings this civil action to prevent AT&T from acquiring Time Warner in a transaction whose effect "may be substantially to lessen competition" in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

I. INTRODUCTION

1. American consumers have few options for traditional subscription television. For the nearly one hundred million American households that pay a monthly bill to traditional video distributors (cable, satellite, and telephone companies), this means paying higher prices year after year and waiting on hold to hear why a service technician is running late or why their monthly bill has skyrocketed.[1] For traditional video distributors, this lack of competition means huge profit margins. Indeed, AT&T/DirecTV describes the traditional pay-TV model as a "cash cow" and "the golden goose."

---

[1] Indeed, the Federal Trade Commission sued DirecTV for deceptively advertising its rates and misleading consumers about the cost of its satellite television services and cancellation fees by not clearly disclosing that the cost of the package will increase by up to $45 more per month in the second year, and that early cancellation fees of up to $480 apply if consumers cancel the package before the end of the two-year period. *See FTC v. DirecTV LLC,* N.D. Cal., case number 4:15-cv-01129 (March 11, 2015).

2. In many industries, online distribution has enhanced consumer welfare by enabling disruptive entry. In an effort to challenge the traditional subscription television model, online video distributors are emerging and increasingly are a welcome option for consumers. Some consumers subscribe to an online video service like Netflix or Amazon Prime, often in addition to their traditional TV subscription. And a small but growing minority of consumers are replacing their traditional television subscription altogether with new choices of online services like Sling TV, which generally offer American consumers packages with fewer channels than a typical cable or satellite bundle, but at more affordable prices and without long-term commitments. As these online services improve and expand, they bring increasing competition to traditional video distributors—competition that benefits consumers, but which AT&T/DirecTV fears will disrupt the industry and deteriorate its high profit margins.

3. If allowed to proceed, this merger will harm consumers by substantially lessening competition among traditional video distributors and slowing emerging online competition. After the merger, the merged company would have the power to make its video distributor rivals less competitive by raising their costs, resulting in even higher monthly bills for American families. The merger also would enable the merged firm to hinder the growth of online distributors that it views as a threat to the traditional pay-TV model. As AT&T/DirecTV's strategic merger documents state, after the merger, disruption need not occur immediately—the merged firm can "operate [its] pay-TV business as a 'cash cow' while slowly pivoting to new models."

4. *First*, the merger would result in higher prices for consumers of traditional subscription television because it would give the merged company the power to raise the prices that competing video distributors pay to it for Time Warner's popular TV networks for no reason

other than that those networks would now be owned by AT&T/DirecTV. Time Warner's networks are some of the most valuable in the country. As Time Warner has told its shareholders, its Turner networks include three of the top five basic cable networks; Turner also has one of the top news networks. And HBO is the "[w]orld's leading premium pay TV brand." Time Warner's networks own the rights to hit shows such as *Game of Thrones*, as well as the current and future rights to "marquee sports programming," including NCAA March Madness, substantial numbers of regular season and playoff games of Major League Baseball and the NBA, as well as the PGA Championship. AT&T has concluded that Time Warner's networks have "world-class ability to attract and sustain audiences with premium content." Because these popular networks drive ratings and attract customers, video distributors consider it extremely important to carry them. As Time Warner stated in its Annual Report for 2016, its most popular Turner networks reach over 91 million households—of the nearly 100 million households with traditional video distribution subscriptions. Time Warner's own internal documents note the "high proportion of 'must carry' networks" in its Turner portfolio, which "are a critical component of the basic cable bundle."

5. Nonetheless, there is currently a limit to what video distributors will agree to pay Time Warner for its Turner networks. If, in negotiations, Time Warner seeks too high a price for the Turner TV networks, the video distributor across the table may walk away. Without a deal, Time Warner loses monthly payments from the video distributor and advertising revenue—and gains nothing in return. This merger, if allowed, would change that. After the merger, if the merged company raised prices of the Turner networks to the video distributor and no deal were reached, resulting in a blackout of such networks, the merged company would still lose monthly payments and advertising revenue from the video distributor with whom it could not reach a

deal, but, importantly, it would now get an offsetting benefit. Because the video distributor walking away from a deal with the merged company would lose access to Turner's popular programming, some of the video distributor's valuable customers would be dissatisfied and switch to a competing video distributor. Some of those departing customers would sign up with AT&T/DirecTV, bringing with them significant new profits for the merged company. This improvement in Time Warner's best alternative to a deal resulting from the proposed merger—and therefore in its negotiating leverage—would give the merged firm the ability to credibly demand higher prices than it otherwise would.

6. The merger would thus substantially lessen competition by giving the merged company the additional leverage to charge its rival video distributors higher prices for its networks than Time Warner's current market power would otherwise allow, making those distributors less able to compete effectively with the merged company. This harm to competition is based on a well-accepted understanding within the industry. Indeed, tellingly, both AT&T and DirecTV have recognized in public filings and internal documents that video distributors that own popular programming have the power and the incentive to harm competition. Congress also expressed such a concern by recognizing that "[v]ertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."[2]

7. Because video distributors aim to cover programming cost increases by raising the prices they charge their customers, the higher prices video distributors would pay for Turner TV networks as a result of this merger would directly hit the pocketbooks of American consumers. The merger would also give the merged firm the incentive and ability to use its

[2] Cable and Television and Consumer Protection Act of 1992, P.L. 102-385 § 2(a)(5).

control of HBO—which rival video distributors have used to attract customers—to lessen competition among video distributors. In sum, as DirecTV itself has explained: "[V]ertical integration of programming and distribution can, if left unchecked, give the integrated entity the incentive and ability to gain an unfair advantage over its rivals. This ultimately results in higher prices and lower quality service for consumers."

8. *Second*, the merger would enable the merged company to impede disruptive competition from online video distributors—competition that has allowed consumers greater choices at cheaper prices. Although it has concluded that "[t]raditional Pay-TV will be a cash cow business to AT&T for many years to come," AT&T/DirecTV fears future "disruption" from emerging competitors. Consumers are beginning to see new video distribution offerings. For example, online distributors like Sling TV offer less expensive alternatives to traditional subscription television that do not require yearly contracts or cable set top boxes, but this merger would impede that innovation. AT&T/DirecTV perceives online video distribution as an attack on its business that could, in its own words, "deteriorate[] the value of the bundle." Accordingly, AT&T/DirecTV intends to "work to make [online video services] less attractive." AT&T/DirecTV executives have concluded that the "runway" for the decline of traditional pay-TV "may be longer than some think given the economics of the space," and that it is "upon us to utilize our assets to extend that runway." This merger would give the merged firm key, valuable assets, empowering it to do just that.

9. Time Warner's Turner networks are extremely important for many emerging video distributors—its own analysis ranks those networks as tied for second behind only Disney in their ability to attract customers to emerging platforms. Turner benefits from the traditional pay-TV model but has also, previous to the announcement of this merger, secured a position for

its networks as “anchor tenants” for virtual MVPDs, which are growing competitors to AT&T/DirecTV. After the merger, the merged firm would likely use Turner’s important programming to hinder these online video distributors—for example, the merged firm would have the incentive and ability to charge more for Turner’s popular networks and take other actions to impede entrants that might otherwise threaten the merged firm’s high profit, big-bundle, traditional pay-TV model. The merger would also make oligopolistic coordination more likely. For example, the merger would align the structures of the two largest traditional video distributors, who would have the incentive and ability to coordinate to impede competition from innovative online rivals and result in higher prices. In short, the merger would help the merged firm’s bottom line by extending the life of the old pay-TV model, but harm consumers who are eager for new innovative options.

10. Section 7 of the Clayton Act prohibits mergers if “the effect of such acquisition may be substantially to lessen competition.” This includes vertical mergers, as Congress made plain in the 1950 amendments to the Clayton Act. A vertical merger may violate the antitrust laws where the merging parties would—by means of their control of an input that their competitors need—have the incentive and ability to substantially lessen competition by withholding or raising the price for that input. The competitive conditions in this industry and specific facts of this vertical merger make it unusually problematic. It is well-recognized within the industry that popular programming is something traditional video distributors need to compete effectively. AT&T itself has previously stated that access to some of the most popular television programming is “critical to preserve and promote competition and diversity in the distribution of video programming.” This merger would give the combined firm control over AT&T/DirecTV’s massive video, wireless, and internet distribution network as well as Time

Warner's popular and valuable TV networks and studio. It would give the merged firm the power to make its current and potential rivals less competitive. The effect of the merger would likely be substantially to lessen competition. It would violate the antitrust laws and therefore should be enjoined.

II. INDUSTRY BACKGROUND

11. Popular television shows like *The Big Bang Theory* generally travel through three layers of production and distribution: A studio like Warner Bros. creates the show; a programmer like Turner or a broadcaster like CBS purchases the right to include the show on one of its networks; and a video distributor like AT&T/DirecTV or Comcast purchases the right to include the network in one or more packages that it sells to customers.

A. Programmers bargain with video distributors to have their networks carried.

12. Programmers make money by licensing their networks to video distributors and by selling air time for advertisements shown on their networks. Accordingly, programmers generally seek to have their networks carried by many video distributors. They typically reach multi-year agreements under which video distributors pay programmers monthly, per-subscriber license or "affiliate" fees for a bundle of networks owned by the programmer.

13. Programmers' arms-length negotiations with video distributors involve a give and take based on the relative bargaining leverage of the parties, which is informed by the options available to each party in the event a deal is not reached.

14. Video distributors make money by receiving monthly subscriber fees from their customers and need to carry popular programming to attract those customers. So programmers with popular networks that carry hit shows and live sports have more bargaining leverage with video distributors than do programmers with less popular networks. Programmers also gain

revenue through advertising, the price of which is typically based on the number of consumers watching their networks. Video distributors with large numbers of subscribers generally have more bargaining leverage and often pay programmers less per subscriber to carry their networks than do video distributors with fewer subscribers.

B. Video distributors include traditional MVPDs, virtual MVPDs, and SVODs.

15. MVPDs. Multichannel video programming distributors (or "MVPDs") include cable companies such as Comcast, satellite broadcasters such as DirecTV, and offerings from telephone companies such as AT&T's U-Verse. They pay license fees to carry the programmers' networks, which the MVPDs generally bundle into different packages to sell to consumers. For example, AT&T/DirecTV's recent offerings include both a high-priced "premier" bundle including 325 channels for $125 per month for the first twelve months and a lower-priced "select" bundle with 150 channels for $50 per month for the first twelve months.

16. Virtual MVPDs. Virtual MVPDs employ a similar business model to traditional MVPDs but deliver their channels to consumers over the internet. Some virtual MVPDs offer so-called "skinny bundles"—cheaper packages with fewer channels than an MVPD would typically offer. For example, Sling TV currently offers a package of 30 channels for $20 a month. They also generally require less equipment—no need for a cable set-top box or a satellite dish—and do not require a long-term contract.

17. SVODs. Subscription video on demand services (or "SVODs") like Netflix and Amazon Prime similarly offer their programming online, but they generally do not offer live programming. Rather, consumers using an SVOD generally can choose to watch the TV shows or movies in the SVOD's catalogue "on demand," i.e., at any time upon their request. SVODs in some instances create their own TV shows, but they most commonly purchase the rights to

previously aired television shows and films from studios such as Warner Bros. Unlike MVPDs and virtual MVPDs, however, SVODs typically do not carry live sports programming or live news telecasts.

C. Sports programming is increasingly valuable to MVPDs and virtual MPVDs.

18. Due in part to the emergence of SVODs, which offer television shows and movies but generally do not offer live sports (or news) programming, the ability to offer live programming is becoming increasingly important to MVPDs and virtual MVPDs. The value of live sports programming in particular is enhanced by the fact that viewers are more likely to watch it live and not skip through commercials, and it is a limited resource that—due to existing, exclusive, long-running contracts—generally will not become available again for purchase by programmers for several years. As a Time Warner document explains: "Across the industry, most of the remaining top sports rights are locked up into the next decade."

19. AT&T's internal documents acknowledge that programmers with live sports events "have leverage to command affiliate fees beyond their viewership shares." Similarly, discussing its sports programming, which includes long-term contracts to host critical portions of important events from MLB (through 2021), NBA (through 2025), and NCAA March Madness (through 2032), Time Warner concluded in a report to its Board of Directors: "[T]hese sports rights provide us with the base of **must-watch** content that should enable us to achieve our targeted **rate increases**." (Emphasis added.)

III. DEFENDANTS AND THE PROPOSED MERGER

20. AT&T is the world's largest telecommunications company. It is a Delaware corporation headquartered in Dallas, Texas. AT&T was established in 1885 and in 1899 became the parent of The Bell Telephone Company, which Alexander Graham Bell founded in 1877.

AT&T maintained a monopoly in the provision of local telephone services until 1982, when it agreed to divest the portions of its business relating to local telephone services to settle an antitrust lawsuit filed by the Department of Justice. Pursuant to that settlement, SBC Communications Inc. was spun-off from AT&T on January 1, 1984. In 2005, one of SBC Communications' subsidiaries merged with AT&T, and in connection with the merger the name of the company was changed to AT&T, Inc. In 2009, AT&T agreed to pay more than $2 million to settle a claim that it had violated a consent decree and court order related to its 2007 acquisition of Dobson Communications Corp. In 2011, AT&T attempted to purchase T-Mobile, but abandoned the transaction after the Department of Justice filed suit alleging that the merger violated the antitrust laws.

21. Today, AT&T is the country's second largest wireless telephone company, third largest home internet provider, and one of the largest providers of landline telephone services. It is also the country's largest MVPD, with more than 25 million subscribers. It has three MVPD offerings: (1) DirecTV, a satellite-based product with almost 21 million subscribers that it acquired through a merger in 2015; (2) U-Verse, a product which uses the local AT&T fiber optic and copper network and has almost 4 million subscribers; and (3) DirecTV Now, its new online video product (virtual MVPD) with almost 800,000 subscribers.

22. DirecTV is a subsidiary of AT&T. It is a Delaware corporation, with its headquarters in El Segundo, California. As noted above, it has almost 21 million subscribers to its satellite-based MVPD product, which is offered nationwide. Earlier this year, DirecTV agreed to certain conditions to settle an antitrust lawsuit filed by the Department of Justice, which alleged that DirecTV acted as the ringleader of illegal information-sharing agreements

with three of its rival competitors to obtain bargaining leverage in negotiations to carry the Los Angeles Dodgers' cable sports channel.

23. Time Warner, Inc. is a Delaware corporation headquartered in New York, New York. It is a media company with essentially three business units: (1) Turner Broadcasting System, Inc., whose most popular networks include TNT, TBS, CNN, and Cartoon Network; (2) Warner Bros. Entertainment, Inc., which is one of the country's major television and movie studios; and (3) the Home Box Office, Inc. (HBO) premium network, which also owns Cinemax, and in total has almost 50 million subscribers (the vast majority of whom access HBO through an MVPD).

24. The Turner networks—with their mix of live sports, live news, and entertainment content—are consistently highly rated and highly compensated, and have market power. As Time Warner has stated, its most popular Turner networks reach more than 91 million households—of the nearly 100 million households that subscribe to traditional subscription television. AT&T has described Turner programming as including "'must have' premium sports rights," and Turner has significantly and consistently increased the prices it charges MVPDs for its networks each of the last three years. There are few equally important and popular substitutes for these networks, and they are sufficiently unique and attractive that video distributors that do not carry them risk losing a substantial number of current and potential subscribers to rival MVPDs and virtual MVPDs that do.

25. HBO is the "World's #1 premium cable network," and also has market power. HBO is the "[b]est brand name, most recognized" premium network with the "[o]verall best collection of content." AT&T's own "[p]remium network affiliate revenue [is] dominated by HBO," which "earns more than 50% of all premium network affiliate revenue." HBO is also a

"[p]roven acquisition driver." HBO markets itself to MVPDs as playing "a key role in attracting and retaining" subscribers, stating that its "effectiveness in driving sales of other products is well established."

26. On October 22, 2016, AT&T agreed to purchase Time Warner. Including debt, the transaction is valued at $108 billion. Tellingly, among the rationales for a vertical merger set forth in AT&T's strategic merger documents are:

- "Improved positioning vis-à-vis cable rivals and [online] players";
- "Support margins via vertical integration"; and
- "Advantage ability to shape future of video ecosystem."

IV. RELEVANT MARKETS

27. This merger would substantially lessen competition among all distributors of professionally produced, full-length video programming subscription services to residential customers in the United States. As a result, consumers in relevant local geographic markets throughout the country in this "All Video Distribution" product market—which includes MVPDs, virtual MVPDs, and SVODs—would see higher monthly TV bills and less innovative TV offerings. If one company owned all video distributors in a geographic market, it would profitably raise prices significantly on at least one product. The All Video Distribution market constitutes a relevant antitrust product market and line of commerce under Section 7 of the Clayton Act.

28. The distribution of video programming by MVPDs and virtual MVPDs also constitutes a relevant antitrust product market and line of commerce under Section 7 of the Clayton Act. This "Multichannel Video Distribution" market is a submarket within the broader All Video Distribution product market. The video distribution industry and American consumers

recognize this submarket, whose participants charge different prices and serve different customer needs than do distributors of other video programming. If one company owned all MVPDs and virtual MVPDs in a geographic market, it would profitably raise prices significantly on at least one product. AT&T/DirecTV is the largest participant in this product market in the United States. It has nationwide presence and has a large market share in many regions across the country. For example, AT&T/DirecTV has more than 40 percent of MVPD subscribers in at least 18 local Designated Market Areas.

29. The relevant product markets in which to evaluate this merger are the sale of subscription video programming in the All Video Distribution and Multichannel Video Distribution product markets, and the relevant geographic markets are local geographic markets across the country. Consumers seeking to purchase video distribution services must choose from among those providers that can offer such services directly to their home. Direct broadcast satellite providers, such as DirecTV, can serve customers almost anywhere in the United States. In addition, online video distributors are available to any consumer with high-speed internet service, such as broadband, sufficient to deliver video of an acceptable quality. By contrast, traditional wireline distributors, such as cable (e.g., Comcast, Cox, and Charter) and telephone companies (e.g., AT&T and Verizon), serve only those particular geographic areas where they have deployed network facilities. A customer cannot purchase video distribution services from a wireline distributor that does not operate network facilities that can connect to that customer's home. For example, a customer within a Cox cable franchise area typically cannot purchase video distribution service from Comcast.

30. Because consumers within a local area have the same options available to them for video programming, it is appropriate to treat such similarly situated consumers the same and

aggregate them into local geographic markets. For example, a cable service area that only offers consumers a choice among three options (a cable company and two satellite companies) would be a local market. If a cable service area overlapped with the area in which a telephone company offers video distribution services (such as AT&T's U-Verse offering), that area of overlap would be a local market in which consumers are offered a choice among four options: a cable company, a telephone company and two satellite companies. Using available data generally allows measurement of these local markets by zip code.

V. ANTICOMPETITIVE EFFECTS

31. The proposed merger would substantially lessen competition and harm consumers in these local geographic markets in both the All Video Distribution and the Multichannel Video Distribution product markets. Both AT&T/DirecTV's video distribution services and Time Warner's TV networks are available nationwide, so the harm would occur throughout the country. In both relevant product markets, the merger would give the merged company the market power to weaken competing distributors' ability to compete by raising their costs, would allow the merged company to impede emerging and growing rivals, and, furthermore, would result in increased likelihood of oligopolistic coordination.

A. The merger would give the merged company the power to lessen competition and harm consumers in the Multichannel Video Distribution and the All Video Distribution markets by increasing the prices its rival MVPDs and virtual MVPDs pay for Turner's networks and impeding their use of HBO to attract customers.

32. Losing even a modest number of customers can have a major financial impact on an MVPD. The margins these video distributors earn from their customers are significant, and it is expensive and difficult for these distributors to obtain new customers or win back prior customers once they have cancelled their subscription or switched to a competitor.

33. Accordingly, when an MVPD considers the price it is willing to pay a programmer to carry its networks, it generally takes into account the extent of potential subscriber losses if it did not carry those networks. In fact, before negotiating with programmers for their networks, and to better understand their best alternative option if negotiations break down, MVPDs have conducted analyses to determine the percentage of likely subscriber loss that would occur if they did not carry the particular networks for which they are bargaining (a "blackout"). These analyses have concluded that, for certain popular networks, the subscriber loss rate would be significant and the subscriber losses would continue over time if the video distributor continued not to carry the networks at issue. That such subscriber losses can be a significant concern for an MVPD is confirmed by DirecTV's analysis of a potential blackout with a different substantial programmer. In a December 2014 presentation prepared for the Board of Directors, DirecTV's Economic Impact Study estimated that subscriber losses from a blackout of a particular programmer's channels would cost it $10.5 billion over 6 years.

34. In the event an MVPD or virtual MVPD does not carry a group of popular networks, most customers who leave that distributor in response to that blackout will look elsewhere for a comparable video distributor that still offers those networks. Because AT&T/DirecTV has an MVPD that it offers throughout the United States, it stands to gain a significant number of new customers in the event a rival MVPD or virtual MVPD is foreclosed from carrying certain popular networks that the merged company continues to carry—i.e., a blackout.

35. Accordingly, were this merger to go forward, the merged company could "more credibly threaten to withhold" Turner's popular programming—including the hit shows and live sporting events carried by TNT, TBS, and Cartoon Network—as leverage in its negotiations with

MVPDs and virtual MVPDs. In a given negotiation, both the merged company and a rival MVPD—for example, a cable company—know that if the merged company were to walk away from the bargaining table and the Turner networks were to go dark on that cable company's offerings, a significant number of the cable company's customers would cancel their subscriptions, and the cable company would gain fewer new subscribers during the blackout. In fact, MVPDs have done studies to determine the subscriber loss that would occur if they did not have the popular networks Time Warner owns. Unsurprisingly, given the popularity of Turner's networks—which carry hit shows and important live sports events—these studies confirm that the anticipated subscriber loss rate is likely to be significant. In addition, because the merged company would know beforehand that the rival MVPD would soon lack Turner programming, the merged company would be in a particularly strong position, as a result of the merger, to target the rival MVPD's customers with advertisements and telephone calls urging them to subscribe to AT&T/DirecTV's television offerings.

36. The merged company's bargaining leverage as a seller of programming would thus increase, and not through the offering of lower prices or a superior product or service offering, but directly because of this proposed merger. Competing MVPDs and virtual MVPDs would thus recognize that it will make financial sense to pay the merged firm a higher price for Turner networks than it would prior to the merger, rather than risk losing valuable customers. And the merged company would know that it can extract higher rates for Turner's networks because, if no deal were reached, the merged firm would capture a significant number of the customers who would depart the competing MVPD or virtual MVPD's service, and it would have an improved chance to sign up new customers since one rival would lack Turner's highly popular programming. These new customers bring with them significant margins that would

reduce the losses the merged company would sustain when the rival MVPD or virtual MVPD no longer distributes Turner programming. As DirecTV has explained, control of programming by a distributor creates "the ability to extract higher rates for years going forward based on the threat of such [subscriber] switching." The merger would thus create a company that has the incentive and ability to weaken its video distributor competitors by charging them higher prices for Turner's networks, resulting in a substantial lessening of competition.

37. The manner in which this merger would likely result in a substantial lessening of competition is based on a well-accepted understanding within the industry. Indeed, both AT&T and DirecTV have previously explicitly stated that MVPDs that control popular networks and sports programming have precisely this incentive and ability to harm competition. With respect to a similar, but smaller, purchase of a programmer by a distributor (the Comcast acquisition of NBCU), DirecTV stated that "a standard bargaining model can be used to determin[e] the likely increase in price that would result from vertical integration." Here, an estimate of the price increases the merged company can impose on its competitors as a result of the effects of this merger and due to its increased bargaining leverage can be calculated by taking into account: (1) how many customers competing distributors would lose or fail to add without Turner programming (their subscriber loss rate); (2) the percentage of those departing customers that would likely become subscribers of the merged company (the diversion rate); and (3) how much AT&T/DirecTV profits from its customers (its margins).

38. Following this merger, using a bargaining model similar to the one previously endorsed by DirecTV, the eventual price increases to the merged firm's competitors for Turner networks due to the merged company's increased power would likely be at least hundreds of millions of dollars. Because video distributors pass through most of their cost increases to their

customers, these increased costs would likely result in higher monthly bills for consumers. But whether the effect of these increased costs for rival video distributors results in higher prices or a form of reduced service, the effect would be to substantially lessen competition by rendering these competitors less able to compete effectively with the merged company. As a result of the merger, the merged company would also have the power to raise its own prices relative to what it could have, had the merger not reduced competition from competing MVPDs.

39. In addition, the merger would likely give the merged firm the incentive and ability to use its control of HBO to substantially lessen competition. Due to its strong brand and consumer recognition and demand, MVPDs (including AT&T/DirecTV) today use HBO as a tool to entice new customers and to dissuade unhappy customers from leaving and switching to a rival MVPD. Other premium channels, like Starz or Showtime, are not adequate alternatives to HBO for MVPDs seeking to attract or retain customers with premium content. When used in this way, HBO can increase competition. After the merger, however, the merged firm would have the incentive and ability, through contractual restrictions, to impede rival MVPDs from using HBO to compete against AT&T/DirecTV, thereby reducing competition among MVPDs. In addition, after the merger, the combined firm would have additional leverage when it is negotiating with rival MVPDs over HBO.

B. The merger would give the merged company the ability to impede and slow innovation by hindering emerging online competitors and would increase the likelihood of oligopolistic coordination.

40. The entry and growth of online video services promise to bring substantial benefits to consumers. But as the nation’s largest provider of traditional pay-TV, AT&T/DirecTV views these services as a threat. As a result of this merger, the merged firm would have the increased market power to counter that threat and slow the emerging competition

AT&T/DirecTV would otherwise face in the All Video Distribution and Multichannel Video Distribution markets. For example, after the merger, AT&T/DirecTV would have an increased ability to charge virtual MVPDs higher prices for Turner's and HBO's important and popular programming and could very well withhold that programming entirely from some virtual MVPDs, leading to even more severe effects on competition. Without the Turner networks, even virtual MVPDs such as Sling TV, which to date has been the most successful virtual MVPD competing with traditional MVPDs, may not continue to be the competitive force they are today. Turner knows this. Its CEO has stated that it has "leverage" over Dish, whose online Sling TV service "is shit without Turner."

41. In addition, the merger would increase the likelihood and effect of oligopolistic coordination, particularly among certain vertically integrated MVPDs. AT&T itself has noted the high levels of concentration within the pay-TV industry and their stabilizing effect. In a presentation prepared for a meeting with Time Warner executives related to this merger, AT&T noted that, after the merger, the merged company and just three other companies would control a large portion of all three levels of the industry: television studio revenue, network revenue, and distribution revenue. AT&T went on to explain that—given these high levels of concentration—its "Core Belief #1" is that, notwithstanding the emergence of online video distributors, "[t]he economic incentives of major pay-TV players will encourage **stability** as the ecosystem evolves." (Emphasis added.) This "stability" comes at the cost of competition that benefits consumers in the All Video Distribution and Multichannel Video Distribution markets. In addition, the nature of the subscription television industry, including the widespread use of most favored nations (MFN) clauses between video distributors and programmers, facilitates

coordination. Moreover, after the merger, AT&T/DirecTV and Comcast/NBCU,[3] which together have almost half of the country's MVPD customers, would have an increased incentive and ability to harm competition by impeding emerging online competitors that they consider a threat, and increasing the prices for the networks they own.

VI. ABSENCE OF COUNTERVAILING FACTORS

42. The proposed merger would be unlikely to generate verifiable, merger-specific efficiencies in the relevant markets sufficient to reverse or outweigh the anticompetitive effects that are likely to occur.

43. Entry of new video programming distributors in the relevant markets is unlikely to prevent or remedy the proposed merger's anticompetitive effects.

VII. VIOLATIONS ALLEGED

44. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. § 25, to prevent and restrain the Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18. The effect of the proposed merger would be likely to lessen competition substantially in interstate trade and commerce in both the All Video Distribution product market and the Multichannel Video Distribution product market in numerous relevant local geographic markets throughout the country, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

45. AT&T, DirecTV, and Time Warner are engaged in, and their activities substantially affect, interstate commerce. AT&T and DirecTV buy and distribute video programming in interstate commerce. Time Warner sells and distributes video programming that

[3] Although Comcast/NBCU is currently subject to conditions that were imposed by the Department and the FCC as a result of their respective reviews of the merger between that video distributor and programmer, the FCC's conditions expire on January 20, 2018 and the DOJ consent decree expires on September 1, 2018. *See Comcast-NBCU Order*, 26 FCC Rcd 4238 at ¶ XX (2011); Comcast/NBCUniversal Modified Final Judgment at ¶ XI (2013).

is purchased and consumed in interstate commerce. The Court has subject-matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain the Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

46. This Court has personal jurisdiction over each Defendant under Section 12 of the Clayton Act, 15 U.S.C. § 22. AT&T and Time Warner both transact business in this district.

47. Venue is proper in this District under Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(b)(1) and (c). Defendants AT&T and Time Warner transact business and are found within the District of Columbia.

VIII. REQUESTED RELIEF

48. Plaintiff requests that:

a. the proposed acquisition be adjudged to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. AT&T and Time Warner be permanently enjoined from carrying out the proposed merger and related transactions; carrying out any other agreement, understanding, or plan by which AT&T would acquire control over Time Warner or any of its assets; or merging;

c. the Plaintiff be awarded costs of this action; and

d. the Plaintiff receives such other and further relief as the case requires and the Court deems just and proper.

Dated: November 20, 2017

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

MAKAN DELRAHIM
Assistant Attorney General for Antitrust

ANDREW C. FINCH
Principal Deputy Assistant Attorney General

DONALD G. KEMPF, JR.
Deputy Assistant Attorney General for Litigation

BERNARD A. NIGRO, JR.
(D.C. Bar #412357)
Deputy Assistant Attorney General

PATRICIA A. BRINK
Director of Civil Enforcement

BRYSON L. BACHMAN (D.C. Bar #988125)
Senior Counsel to the Assistant Attorney General

SCOTT SCHEELE (D.C. Bar #429061)
Chief, Telecommunications and Broadband Section

JARED A. HUGHES
Assistant Chief, Telecommunications and Broadband Section

CRAIG W. CONRATH
ERIC D. WELSH (D.C. Bar #998618)
SHOBITHA BHAT
ALEXIS K. BROWN-REILLY (D.C. Bar #1000424)
DYLAN M. CARSON (D.C. Bar #465151)
ALVIN H. CHU
ROBERT DRABA (D.C. Bar #496815)
ELIZABETH A. GUDIS
JUSTIN T. HEIPP (D.C. Bar #1017304)
ELIZABETH S. JENSEN
MATTHEW JONES (D.C. Bar #1006602)
MELANIE M. KISER
KATHRYN B. KUSHNER
DAVID B. LAWRENCE
DAPHNE LIN
CERIN M. LINDGRENSAVAGE
MICHELLE LIVINGSTON
BRENT E. MARSHALL
ERICA MINTZER (D.C. Bar #450997)
SARAH OLDFIELD
LAWRENCE REICHER
LAUREN G.S. RIKER
LISA SCANLON
PETER SCHWINGLER
DAVID J. SHAW (D.C. Bar #996525)
MATTHEW SIEGEL
CURTIS STRONG (D.C. Bar #1005093)
FREDERICK S. YOUNG (D.C. Bar #421285)
RACHEL L. ZWOLINSKI (D.C. Bar #495445)

United States Department of Justice
Antitrust Division
Telecommunications and Broadband Section
450 Fifth Street, N.W., Suite 7000
Washington, DC 20530
Telephone: (202) 514-5621
Facsimile: (202) 514-6381

Newsroom

LATEST NEWS

AT&T Statement on Latest Developments in Proposed Acquisition of Time Warner, Inc.

OUR COMPANY / Dallas, Texas, 17 hours ago

The following is attributed to David R. McAtee II, Senior Executive Vice President and General Counsel, AT&T Inc.:

“Today’s DOJ lawsuit is a radical and inexplicable departure from decades of antitrust precedent. Vertical mergers like this one are routinely approved because they benefit consumers without removing any competitor from the market. We see no legitimate reason for our merger to be treated differently."

“Our merger combines Time Warner’s content and talent with AT&T’s TV, wireless and broadband distribution platforms. The result will help make television more affordable, innovative, interactive and mobile. Fortunately, the Department of Justice doesn’t have the final say in this matter. Rather, it bears the burden of proving to the U.S. District Court that the transaction violates the law. We are confident that the Court will reject the Government’s claims and permit this merger under longstanding legal precedent.”

***About AT&T**

AT&T Inc. (NYSE:T) is a holding company. AT&T products and services are provided or offered by subsidiaries and affiliates of AT&T Inc. under the AT&T brand and not by AT&T Inc. Additional information about AT&T Inc. is available at about.att.com.

MORE IN OUR COMPANY

Stevie® Awards Honor 5 AT&T Women Leaders

Learn about Notables like Carmelo Anthony and Bernie..

AT&T Offers Customers Unlimited Connectivity in Areas..

AT&T Customers Can Text to Donate to Help Las Vegas..

DOJ: Vertical Merger Precedent

The last time the DOJ tried a vertical merger case, Jimmy Carter was President – and the DOJ lost

United States v. Hammermill Paper Co., 429 F. Supp. 1271 (W.D. Pa. 1977)

- The DOJ attempted to block a merger between a manufacturer of paper and two paper wholesalers. The Court rejected the government's case and found the merger lawful.
- That court's reasoning supports this merger too:
    - The companies had a historic policy of wide distribution
    - There was no evidence that the companies merged to foreclose rivals
    - There was no evidence that earlier mergers led to foreclosure
    - Foreclosure would not be profitable because of the market structure

The last time the DOJ blocked a vertical merger in court, Richard Nixon was President

Ford Motor Co. v. United States, 405 U.S. 562 (1972)

- Ford was a classic "old economy" case involving static technologies, high concentration levels and barriers to entry. The merger combined one of only two independent spark plug manufacturers (Autolite) with the number two auto manufacturer (Ford). Both companies had market power.
- In contrast, AT&T and Time Warner are both in wildly competitive, fluid and innovative industries with new entrants on a daily basis. Neither company has market power.
    - Collectively, Time Warner's basic and premium cable networks command less than 10% of 24-hour broadcast TV and cable viewership, and an even smaller proportion of the broader video landscape including Netflix, Hulu, Amazon and other internet-based services.

The DOJ has approved hundreds of vertical mergers

COMCAST – NBC UNIVERSAL
ORACLE – Sun microsystems
Google – doubleclick by Google
Disney – PIXAR
ticketmaster – LIVE NATION

The DOJ approved a large vertical media merger in 2011

- Just six years ago, DOJ approved a vertical merger between Comcast (a content distributor) and NBCUniversal (a content creator).
- The AT&T/Time Warner merger is even easier to approve because:
    - Comcast and other cable companies, not AT&T, are by far the leading providers of pay-TV services in nearly all localities;
    - Time Warner has no programming comparable to NBC's broadcast networks;
    - OTT services like Netflix, Amazon and Hulu have exploded since the Comcast/NBCU deal. Programming and distribution are more competitive today than ever before.

The vertical merger recently mentioned by the DOJ is not "precedent"

- The DOJ did not sue to block the Lam Research/KLA-Tencor merger.
    - After consent negotiations broke down, the parties chose to walk away from the deal.
    - The parties did not even complete the DOJ's second request for information, so they did not reach the point where they could close or where the DOJ would sue.
- Voluntary abandonment is not "precedent." No court decided anything, because there was no case.
- Vertical mergers raise competitive concerns only where the merging parties dominate both upstream and downstream markets. Lam/KLA-Tencor was such a merger; AT&T/Time Warner is plainly not.
- The market for equipment used to manufacture semiconductors bears no resemblance to the uniquely dynamic and highly-competitive marketplace for video programming and distribution.
- In all the other recent mergers cited by the DOJ, the mergers closed. The mergers were not blocked.

The Government's Lawsuit

Background

- AT&T and Time Warner announced their intention to merge over a year ago *(Oct. 22, 2016)*.
- Since then, 18 other countries and jurisdictions have approved the merger.
- Approval by the U.S. Department of Justice (DOJ) is the only remaining regulatory hurdle to closing the transaction.

What Happens Next

- The DOJ's lawsuit is not the final say on the matter. Rather, the DOJ now has the burden of proving in court that the merger violates the law.
- AT&T and Time Warner will ask the Court to schedule a hearing on the DOJ's claims as soon as possible.
- After considering all of the evidence presented at the hearing, the Court will determine if the government has met its burden to prove its case under the law.

The Government's Lawsuit is Inexplicable

- The DOJ has not successfully blocked a vertical merger in court in nearly 50 years.
- The last time the DOJ blocked a vertical merger in court, Nixon was President.
- The last time the DOJ took a vertical merger case to trial was in the Carter administration, and the DOJ lost.
- Since then the DOJ has approved hundreds of vertical mergers.

AT&T will Win in Court

- This is a vertical merger between two companies who do not compete with each other and operate in highly competitive markets.
  - Time Warner creates content, movies and TV shows — e.g., CNN, TNT, TBS and HBO.
  - AT&T distributes content through mobile phones, the internet and satellites.
  - The critical and uncontested fact is that this merger neither eliminates any competitor nor increases concentration in any market.
  - Under established antitrust principles and well-accepted empirical analysis, such vertical integration virtually always benefits consumers.
- This merger will benefit consumers by:
  - Creating more competition in the evolving, multi-faceted entertainment industry.
  - Giving consumers more choice and value—not less—in how they get their favorite content.
  - Making entertainment more innovative, interactive and mobile.
  - In short, Time Warner content will be distributed in more ways and to more places and people, not less.
- The DOJ approved a similar vertical merger between Comcast/NBCUniversal in 2011. The AT&T/Time Warner merger presents a much *easier* case for approval because:
  - Comcast and other cable companies control the lion's share of pay-TV subscriptions in the localities where they operate;

  - Comcast/NBCUniversal controls one of the Big Four broadcast networks (NBC). Time Warner lacks anything comparable; and,
  - Online streaming services like Netflix, Amazon and Hulu have exploded in popularity since the Comcast/NBCU deal was approved in 2011.

- Against this backdrop, there is no realistic possibility that AT&T's acquisition of Time Warner's modest portion of a rapidly-expanding content universe could possibly slow innovation or lead to higher consumer prices.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. AT&T INC., *et al.*, Defendants.	)	Civil Case No. 17-2511 (RJL)

FILED
JUN 12 2018
Clerk, U.S. District & Bankruptcy
Courts for the District of Columbia

h

MEMORANDUM OPINION
(June 12, 2018)

If there ever were an antitrust case where the parties had a dramatically different assessment of the current state of the relevant market and a fundamentally different vision of its future development, this is the one. Small wonder it had to go to trial!

On November 20, 2017, the U.S. Department of Justice's Antitrust Division brought this suit, on behalf of the United States of America ("the Government" or "the plaintiff"), to block the merger of AT&T Inc. ("AT&T") and Time Warner Inc. ("Time Warner") as a violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The Government claims, in essence, that permitting AT&T to acquire Time Warner is likely to substantially lessen competition in the video programming and distribution market nationwide by enabling AT&T to use Time Warner's "must have" television content to either raise its rivals' video programming costs or, by way of a "blackout," drive those same rivals' customers to its subsidiary, DirecTV. Thus, according to the Government, consumers nationwide will be harmed by increased prices for access to Turner networks, notwithstanding the

Government's concession that this vertical merger would result in hundreds of millions of dollars in annual cost savings to AT&T's customers and notwithstanding the fact that (unlike in "horizontal" mergers) no competitor will be eliminated by the merger's proposed vertical integration.

Not surprisingly, the defendants, AT&T, Time Warner, and DirecTV, strongly disagree. Their vision couldn't be more different. The video programming and distribution market, they point out, has been, and is, in the middle of a revolution where high-speed internet access has facilitated a "veritable explosion" of new, innovative video content and advertising offerings over the past five years. Trial Tr. ("Tr.") 1397:1-4 (Montemagno (Charter)). Vertically integrated entities like Netflix, Hulu, and Amazon have achieved remarkable success in creating and providing affordable, on-demand video content directly to viewers over the internet. Meanwhile, web giants Facebook and Google have developed new ways to use data to create effective – and lucrative – digital advertisements tailored to the individual consumer.

As a result of these "tectonic changes" brought on by the proliferation of high-speed internet access, video programmers such as Time Warner and video distributors such as AT&T find themselves facing two stark realities: declining video subscriptions and flatlining television advertising revenues. *Id.* at 3079:18 (Bewkes (Time Warner)). Indeed, cost-conscious consumers increasingly choose to "cut" or "shave" the cord, abandoning their traditional cable- or satellite- TV packages for cheaper content alternatives available over the internet. At the same time, Facebook's and Google's dominant digital advertising platforms have surpassed television advertising in revenue. Watching vertically integrated, data-informed entities thrive as television subscriptions and advertising revenues declined, AT&T and Time Warner concluded that each had a problem that the other could solve: Time Warner could provide AT&T with the ability to experiment with and develop innovative video content and advertising offerings for AT&T's many video and wireless customers, and AT&T could afford Time Warner access to customer relationships and valuable data about its programming. Together, AT&T and Time Warner concluded that both companies could stop "chasing taillights" and catch up with the competition. 2/16/18 Hr'g Tr. 34:16 [Dkt # 67]. Those were the circumstances that drove AT&T, a distributor of content, and Time Warner, a content creator and programmer, to announce their historic $108 billion merger in October 2016 (the "proposed merger" or "challenged merger"). Those are the circumstances that cause them to claim today that their merger will increase not only innovation, but competition in this marketplace for years to come.

Section 7 of the Clayton Act assigns this Court the "uncertain task" of weighing the parties' competing visions of the future of the relevant market and the challenged merger's place within it. *United States v. Baker Hughes Inc.*, 908 F.2d 981, 991 (D.C. Cir. 1990). Nothing less than a comprehensive inquiry into future competitive conditions in that market is expected. And the Government has the burden of proof to demonstrate that the merger is likely to lessen competition substantially in that uncertain future.

Since announcing the transaction in late October 2016, defendants have delayed closing on the merger agreement for about 18 months as a result of the Government's investigation and suit. The deal is now set to expire if not consummated on or before June 21, 2018 – a turn of events that would require AT&T to pay Time Warner a "break-up fee" of $500 million. The parties have engaged in a highly accelerated discovery schedule to prepare themselves to try this case in March and April of this year. The trial itself lasted nearly six weeks. Both sides put on a case-in-chief and the Government put on a rebuttal case as well. At the conclusion of the trial, I advised the parties I would issue a ruling, if not an opinion, no later than June 12, 2018 so that the losing side would have the agreed-upon time remaining to pursue its appellate rights *before* the merger or the $500 million break-up fee went into effect.

The following is the Court's Opinion. Initially, I provide context for this suit by reviewing the background of the video programming and distribution industry, the proposed merger, and the procedural history of this case. Thereafter, I discuss the legal standards governing a suit under Section 7 of the Clayton Act, emphasizing in particular the considerations at play in evaluating vertical mergers. With that in place, I next analyze each of the Government's three theories of harm to competition, balancing, as appropriate, the conceded proconsumer benefits of the merger with the consumer harms alleged and the evidence offered to support them. Ultimately, I conclude that the Government has failed to meet its burden to establish that the proposed "transaction is likely to lessen competition substantially." *Baker Hughes*, 908 F.2d at 985.

As such, based on that conclusion, and for all the reasons set forth in greater detail in this Opinion, the Court **DENIES** the Government's request to enjoin the proposed merger.

TABLE OF CONTENTS

BACKGROUND

I. The Video Programming and Distribution Industry[1]

The structure of the video programming and distribution industry generally resembles the "three-stage chain of production comprised of manufacturers, wholesalers, and retailers that typifies the distribution of many, if not most, physical goods in the U.S. economy." Christopher S. Yoo, *Vertical Integration and Media Regulation in the New Economy*, 19 Yale J. Reg. 171, 220 (2002). Here, that three-stage chain of production and distribution involves "content creation, content aggregation, and content distribution." Proposed Findings of Fact of the United States ("Gov't PFOF") ¶ 8 [Dkt. # 128].[2]

Television content begins at the manufacturing level. Although video programming is often created by studios (such as Time Warner's Warner Bros.), some networks or distributors "produce content for themselves" or, in the case of live sporting events, license the rights to broadcast the events from the various sports leagues. *See* Tr. 80:12-16 (Fenwick (Cox)). At the second level, programmers (such as Time Warner's Turner or Home Box Office ("HBO")) aggregate content into a network or network group and then

[1] For consistency throughout this Opinion, I will use the phrase "video programming and distribution industry" to include creation, packaging, and distribution of professionally produced video content. Of particular relevance here, the Court's definition of "video programming and distribution industry" encompasses programmers such as Turner; traditional multichannel video programming distributors ("MVPDs") such as cable and satellite companies; virtual multichannel video programming distributors ("virtual MVPDs" or "vMVPDs") such as DirecTV Now and DISH's Sling; and subscription video on demand services ("SVODs") such as Netflix, Hulu, and Amazon Prime. By contrast, I use the phrase "pay-TV" to refer only to the packaging and delivery of linear – or "live" – television content. That phrase encompasses only MVPDs and virtual MVPDs.

[2] Many materials before the Court contain confidential business information or other proprietary data; such submissions were typically filed under seal with an accompanying redacted version accessible to the public. The Court has made great effort to refrain from quoting or otherwise including confidential business information in this Opinion, opting instead to refer generally to the exhibits or information filed under seal.

license those networks to video distributors, like AT&T's DirecTV. *See, e.g.*, *id.* at 80:4-9; Plaintiff's Exhibit ("PX") 456-4 to 10. At the third level, distributors bundle and distribute networks to their subscribers. Tr. 80:4-9 (Fenwick (Cox)).

Some subscription-based video programming services are "vertically integrated," meaning, in this context, that those services create or aggregate their content offerings and then distribute those offerings directly to consumers. *Id.* at 3081:18-25 (Bewkes (Time Warner)); *see* Defs.' Proposed Findings of Fact ("Defs.' PFOF") ¶ 12 [Dkt. # 120]. Examples of those services include Netflix, Hulu, and Amazon Prime. Tr. 3155:22-23 (Bewkes (Time Warner)). Traditional video programmers, such as Turner, generally lack such "soup to nuts" integration of content creation and distribution; they are instead reliant upon video distributors to deliver their content offerings to consumers. *Id.* at 3388:6-7 (Stephenson (AT&T)); *see id.* at 485:1-486:6, 612:17-20 (Martin (Turner)). Because the Government's claims center on the proposed combination of Time Warner's video programming with AT&T's video distribution, my background review focuses on those facets of the video programming and distribution industry.

A. Video Programing and Distribution

1. Programmers

Traditional programmers, such as Turner, acquire and aggregate video content. *Id.* at 80:4-16 (Fenwick (Cox)). Generally, programmers do not offer their content directly to consumers. *See, e.g., id.* at 485:1-486:6, 612:1-20 (Martin (Turner)). Instead, they package video content into networks – in Turner's case, networks such as TNT, TBS, and CNN – and then license the rights to display those networks to video distributors. PX459-18; Tr.

80:6-9 (Fenwick (Cox)). As such, Turner and its programming competitors may be thought of as content "wholesaler[s]" in that they are typically reliant upon third-party video distributors to get their offerings to consumers in the downstream market. Tr. 612:3-4, 17-20 (Martin (Turner)).

Most programmers make money in two primary ways, and Turner is no exception. *First*, programmers receive payments from distributors, known as "affiliate fees," in exchange for granting distributors the rights to display the programmers' content. *See, e.g.*, *id.* at 604:21-23, 610:20-23. Affiliate fees are memorialized in affiliate agreements, which specify the "net effective rate" a programmer charges for a network on a per-subscriber, per-month basis. *Id.* at 987:5-17 (Breland (Turner)). Rates typically increase year-over-year, pursuant to what are called "escalator" clauses. *Id.* at 91:6-10 (Fenwick (Cox)); *id.* at 2728:19-23 (Katz). Affiliate fees have been "going up" over the past decade industrywide, due at least in part to rising costs of making "higher quality" content. Tr. 2562:9-2563:25 (Carlton); *cf. id.* at 1495:12-16 (Sutton (HBO)) ("So the cost it takes to make shows, shows like the shows we make, has escalated significantly."). Affiliate fees vary, however, based on the size of the distributor; specifically, in order to incentivize and reward wide distribution, programmers typically provide distributors with "volume discounts" on affiliate fees, meaning that the more subscribers a distributor has, the more a programmer's net effective rates will decline. *See, e.g.*, *id.* at 987:25-988:13 (Breland (Turner)) (explaining variance in rates between "small," "medium," and "large" MVPDs and virtual MVPDs); *id.* at 2911:21-23 (Holanda (RCN)) (describing "volume discounts" of larger distributors); PX127-2 (showing rate differentials).

Second, and as any television viewer can attest, programmers sell advertising slots on their networks to advertisers. *See* Tr. 3179:23-3181:6 (Bewkes (Time Warner)). For decades, television advertising has followed the same playbook. *See id.* at 3086:9-10. During each hour of television, there are roughly eighteen minutes of advertisements. *See id.* at 609:23-610:4 (Martin (Turner)). Distributors sell advertisements for only two of those minutes; the programmer sells ads for the remaining sixteen minutes. *See id.* Advertising fees vary by the channel and the time of day an ad airs. *Id.* at 625:4-11. As with affiliate fees, the broader a program's audience, the more advertising revenue for Turner: as Chairman and CEO John Martin explained with regard to Turner's advertising strategy, "our goal is to have our networks in front of as many eyeballs as possible." *Id.* at 605:7-8.

The classic model of television advertising is limited in two ways. First, in deciding the placement of commercials to be seen by a wide audience, programmers generally must rely on general demographic data, such as age range, about the typical audience for a given program. *See id.* at 625:4-6. Second, and as a result, programmers have no choice but to saturate all viewers of a program with the same, undifferentiated ads – despite knowing that the selected ad will be of little interest to some number of those viewers. *See id.* at 3087:1-8 (Bewkes (Time Warner)).

In the past, Turner's total revenues have been split roughly equally between affiliate fee revenues and advertising revenues. *See id.* at 3088:10-12; PX456-8. For present purposes, however, the key point is this: both the affiliate fee and advertising revenue streams depend upon broad distribution of programmers' networks to consumers. *See, e.g.*, Tr. 604:17-18 (Martin (Turner)) ("I believe that distribution is the most important variable for success for any programmer."); *id.* at 3078:17-20 (Bewkes (Time Warner)) ("Q: What are the key drivers of the Turner business? A: Well, the Turner business, first, we need to get it on every distribution platform so that we can have subscriber fees and advertising revenues."). For that reason, Turner executives aim to "achieve wide distribution" of their networks. Post-Trial Brief of the United States ("Gov't Post-Tr. Br.") 6 [Dkt. # 126]; *see also, e.g.*, Tr. 3120:3-7 (Bewkes (Time Warner)); ("So we try everything to stay on all of our channels, Turner, HBO, everything, to keep them on there. And that's very important to us. If they're not on there, we're not only losing the subscriber fees; we're losing the advertising revenues."); *cf. id.* at 90:1-2 (Fenwick (Cox)) ("We are dealing with network groups where their goal [is] a hundred percent distribution.").

2. Distributors

Today, there are three categories of key players in the distribution of professionally produced video content: (1) "traditional" multichannel video programming distributors ("MVPDs"); (2) "virtual" MVPDs; and (3) subscription video on demand services ("SVODs"). *See* Tr. 485:1-487:13 (Martin (Turner)); Gov't PFOF ¶¶ 9, 14, 19.

First, there are traditional MVPDs. Those distributors include direct broadcast satellite providers, such as DISH or AT&T's DirecTV; cable television providers, such as Comcast,[3] Charter Communications ("Charter"), or Cox Communications ("Cox");

[3] In 2009, Comcast announced its intent to acquire ownership of NBCUniversal ("NBCU"), a media and entertainment company that owns the NBC and Telemundo networks as well as Universal Pictures and Universal Studios. *See* Compl. ¶¶ 16-17, *United States v. Comcast Corp.*, 808 F. Supp. 2d 145 (D.D.C. 2011) (No. 11-cv-106) [Dkt. # 1]. Although the Government, through the Antitrust Division, filed an action

"overbuilders," such as RCN; or "telcos," such as AT&T's U-verse or Verizon Fios. *See* Gov't PFOF ¶¶ 9, 43-45; Defs.' PFOF ¶ 34. All of those services offer live – or "linear" – television content as well as libraries of licensed content available for viewing on demand, typically in exchange for a monthly subscription fee. *See* Tr. 81:1-82:8 (Fenwick (Cox)); *id.* at 471:12-16, 638:16-22 (Martin (Turner)); *id.* at 1185:22-1186:1 (Warren (Turner)). Satellite distributors such as DirecTV and DISH operate nationally, whereas cable companies, telcos, and overbuilders distribute video content regionally; in any given local area, however, the incumbent cable operator is typically the dominant MVPD. *See id.* at 408:1-3 (Schlichting (DISH)). Consumers' choices of traditional MVPDs are therefore dictated by geography. *See id.* at 2187:3-23 (Shapiro); Gov't PFOF ¶¶ 43-46. Consumers often subscribe to traditional MVPDs as part of a "bundle" of various services, which may include, for example, a single price offering for cable, wireless internet, and home or mobile phone services. *See* Tr. 2784:21-25 (Rossi). Of the approximately 90 million

claiming that the transaction would violate Section 7 of the Clayton Act – an action, as fortune would have it, also assigned to this Court – the Government also urged me to approve the transaction pursuant to a final judgment containing various "remedies" that it represented would "diminish[] Comcast's ability to use [NBCU's] programming to harm competition." Competitive Impact Statement 3, 7, *Comcast Corp.*, 808 F. Supp. 2d 145 [Dkt. # 4]. Those remedies related to procedures set forth in a related FCC order governing the transaction, including, as especially relevant here, requirements that Comcast-NBCU: 1) submit to "baseball style arbitration," at the distributor's option, in the event the parties were unable to reach a carriage agreement, 7/27/11 Hr'g Tr. 7:4-7 [Dkt. # 38], and 2) "continue to provide" video programming to the distributor "pursuant to the terms of any existing agreement until the arbitration is completed," Competitive Impact Statement Ex. A, at 24, *Comcast Corp.*, 808 F. Supp. 2d 145 [Dkt. # 4-1]. At a hearing to discuss the proposed final judgment, counsel for the Government asserted that, "especially in cases of vertical mergers, conduct remedies" such as the ones proposed "can be a very useful tool to address the competitive problems while preserving competition and allowing efficiencies" that "may result from the transaction." 7/27/11 Hr'g Tr. 15:16-21. Ultimately, I approved the Government's proposed final judgment with a few modifications to allow me to better monitor the implementation of the remedies imposed as part of the judgment. *See generally Comcast Corp.*, 808 F. Supp. 2d 145. The transaction proceeded and today Comcast-NBCU operates as a "vertically integrated" programmer and distributor. *See* Tr. 882:14-16 (Rigdon (Comcast)).

American households that still receive television content from providers in the pay-TV industry, a substantial majority do so through traditional MVPDs. *See* Gov't PFOF ¶¶ 9, 13. That number is steadily declining, however, as consumers shift towards lower-cost virtual MVPDs or SVODs. *See* Tr. 3450:7-14 (Stephenson (AT&T)); *id.* at 3157:5-13 (Bewkes (Time Warner)).

Second, there are virtual MVPDs, which began to arrive in the marketplace in early 2015. *See id.* at 235:18-22 (Schlichting (DISH)). Like traditional MVPDs, virtual MVPDs distribute linear channels and on-demand content to subscribers for a subscription fee; unlike traditional MVPDs, virtual MVPDs offer their services over the internet, rather than through proprietary infrastructure such as satellite networks or cable lines. Gov't PFOF ¶¶ 14, 15. Because they offer their services over the internet, virtual MVPDs offer service nationwide, either via the web or mobile apps. *See* PX8-18. Examples of virtual MVPDs include DirecTV Now, DISH's Sling, Sony's Playstation Vue, Hulu Live, Google's YouTube TV, FuboTV, and Philo. *See id.* at 18-19; Defs.' PFOF ¶ 8. As their names suggest, some virtual MVPDs are associated with companies that operate traditional MVPDs. Each virtual MVPD competes with traditional MVPDs for subscribers and, increasingly, virtual MVPDs are gaining market share on traditional MVPDs due in part to their ease of use and lower-cost offerings. *See, e.g.*, Tr. 448:24-449:2 (Schlichting (DISH)); *id.* at 607:17-20 (Martin (Turner)); *id.* at 1829:3-12 (Merrill (AT&T)). Therefore, despite their relatively recent vintage, virtual MVPDs already have millions of subscribers. *See id.* at 2019:20-2020:18 (Bond (NBCU)).

Third, there are SVODs, a category that includes Netflix, Hulu, and Amazon Prime. SVODs generally do not offer live, linear programming such as live sporting events or live news. *See id.* at 487:1-16 (Martin (Turner)). Instead, they have large libraries of original and acquired content, accessible by a viewer on demand at any time. *See id.* at 486:12-17. The leading SVODs are vertically integrated and invest *billions* of dollars in creating original programming. *See id.* at 3081:13-25 (Bewkes (Time Warner)); *id.* at 3388:8-9 (Stephenson (AT&T)). By way of example, Netflix *alone* spends more on content than all of Time Warner. *See id.* at 2456:13-14 (Carlton); *see also id.* at 1053:2-7 (Breland (Turner)) (Netflix will spend "almost $8 billion" on content "[t]his year"). As with virtual MVPDs, SVODs offer low-cost subscription plans as compared to traditional MVPDs and continue to gain market share in the video programming and distribution industry. Indeed, while traditional MVPDs are losing subscribers at a steady clip, Netflix added 2 million subscribers in the last quarter alone. *See id.* at 3450:11-12 (Stephenson (AT&T)).

3. <u>Affiliate Negotiations and "Blackouts"</u>

As previously discussed, the schemes under which programmers extend licensing rights to MVPDs and virtual MVPDs are governed by detailed contracts known as affiliate agreements. *See* PX456-8; Tr. 80:4-9 (Fenwick (Cox)); *id.* at 485:1-486:6 (Martin (Turner)). Those agreements describe the precise rights granted by the programmer, and contain numerous terms and conditions. *See, e.g.*, PX409. Although the "rate" or payment amount is an important feature of any affiliate agreement, Tr. 90:5-10 (Fenwick (Cox)), "these deals are complicated" and "start with a hundred plus open issues," *id.* at 459:24-25. (Schlichting (DISH)); *see also id.* at 1690:23-25 (York (AT&T)) ("There's literally hundreds of items that go on kind of a priority list on what's the right deal."). Those issues can include digital rights, "windows" (*i.e.*, limitations on when certain content can be aired), "TV Everywhere" rights (*i.e.*, the rights for subscribers to access content away from home on an authorized device), volume discounts, and penetration rate requirements, among others. *See, e.g.*, *id.* at 90:5-14, 101:19-23 (Fenwick (Cox)); Gov't PFOF ¶¶ 11, 105; PX409-14. At least in the case of Turner, affiliate agreements also include most-favored-nation ("MFN") clauses, which generally require the programmer to extend to the distributor certain types of terms given to another distributor. *See* Tr. 1024:6-14 (Breland (Turner)) (describing MFNs). Affiliate agreements run "between five and eight years on average." *Id.* at 87:9-11 (Fenwick (Cox)).

Because wide distribution maximizes programmers' two income streams – affiliate fees and advertising revenue – programmers like Turner bargain for terms aimed at promoting that distribution. To start, Turner seeks to license "every network" it owns. *Id.* at 606:6-8 (Martin (Turner)).[4] In addition, Turner negotiates for guarantees of particular "penetration rates" – the percentage of a given distributor's subscribers who receive a given channel. *Id.* at 1023:10-16 (Breland (Turner)).

Given the duration of the contract and the rights at issue, a single affiliate agreement can dictate the transfer of upwards of a billion dollars between programmer and distributor.

[4] That said, in the case of DISH's virtual MVPD, Sling, Turner did license only its "core" networks – CNN, TBS, TNT, and Cartoon Network. *See* Tr. 236:23-24 (Schlichting (DISH)). As Time Warner CEO Jeff Bewkes testified, because 85 to 90% of Turner's revenue comes from four networks, Turner is well situated to offer skinnier bundles. *See id.* at 3126:22-3127:3 (Bewkes (Time Warner)); *see also id.* at 584:18-24 (Martin (Turner)) (same). By contrast, NBCU's revenues are spread more evenly across its more than one-dozen networks. *See id.* at 3127:6 (Bewkes (Time Warner)).

See, e.g., PX144-21, 48. It is thus no surprise that witnesses described affiliate agreement negotiations as "very tough" and "intense and aggressive." Tr. 1022:25-1023:2 (Breland (Turner)); *id.* at 3251:24-25 (Stankey (AT&T)); *see also* Gov't PFOF ¶ 104. Although the negotiations themselves typically last several months, closing a deal often "come[s] down to the last day and sometimes the last handful of minutes." Tr. 1093:14-16 (Breland (Turner)); *see also id.* at 87:14-19 (Fenwick (Cox)). Negotiations involving programmers with multiple networks, such as Turner, are particularly "time consuming." *Id.* at 87:17 (Fenwick (Cox)).

Affiliate negotiations are also idiosyncratic, varying from programmer to programmer and distributor to distributor. The Government's chief economic expert, Professor Carl Shapiro, recognized as much at trial. Noting that "bargaining is a dark art in many ways," Professor Shapiro acknowledged that negotiations may turn on myriad "unpredictable factors," including the "personalities" at the table and other "hairy stuff." *Id.* at 2213:12, 2294:18-2295:6 (Shapiro). This dynamic flows from the "multitude" of considerations that inform each negotiation. *Id.* at 1690:15 (York (AT&T)). With so many factors and priorities, and with such high stakes, it should be no surprise that terms and conditions vary across affiliate agreements. *See, e.g.*, *id.* at 1681:16-17 ("[W]e do hundreds of deals, and we have hundreds of flavors of most favored nations."). In short, as Professor Shapiro explained, "the real world is messy and it's imperfect." *Id.* at 2210:22-23 (Shapiro).

Sometimes, negotiations between programmers and distributors reach an impasse. If a negotiation is ultimately unsuccessful, the distributor will lose the rights to display the programmer's content to its customers – a situation known in the industry as a programming "blackout," or "going dark." *See id.* at 129:4-9 (Fenwick (Cox)). Blackouts have negative consequences for programmers and distributors alike. On the programming side, a blackout causes a programmer to suffer immediate (and unrecoverable) losses of both advertising and affiliate fee revenue. *See, e.g.*, *id.* at 1094:21-1096:18 (Breland (Turner)). On the distributor side, a blackout may lead a distributor to lose subscribers or may prevent the distributor from attracting new subscribers. *See* Gov't PFOF ¶ 119; *see also, e.g.*, *id.* at 864:12-23 (Rigdon (Comcast)); *id.* at 1348:3-7 (Montemagno (Charter)) (discussing PX373). Because blackouts are almost always negative events for both programmers and distributors, "at the end of the day . . . [t]here's no benefit for anyone to walk away" without an affiliate agreement. Tr. 89:23-90:4 (Fenwick (Cox)). Therefore, bargains between programmers and distributors are almost always struck in order to avoid long-term blackouts. *See id.* at 138:13-15; *id.* at 1027:4-7 (Breland (Turner)); *id.* at 1359:14-15 (Montemagno (Charter)); *id.* at 3124:4-7 (Bewkes (Time Warner)).

That is not to say, however, that blackouts are irrelevant to the negotiating dynamic. Rather, in what can best be thought of as an elaborate and stylized Kabuki dance, the evidence shows that "almost every negotiation" involves both programmers and distributors threatening blackouts, especially when one side is seen as demanding terms that are out of line with the market. *Id.* at 1026:17-20 (Breland (Turner)); *cf. id.* at 376:22-377:11 (Schlichting (DISH)). To better understand how to assign the "right value" to a particular deal, programmers and distributors might perform "drop" or "go dark" analyses to estimate the potential impact of a blackout on the programmer's advertising or affiliate fee revenues or on the distributor's customer base. *Id.* at 1343:11-16 (Montemagno (Charter)); *see also id.* at 1348:3-10 (discussing PX373); *id.* at 862:19-863:3 (Rigdon (Comcast)); *id.* at 1029:10-1030:11 (Breland (Turner)) (discussing PX144).

Nevertheless, given the negative consequences for both sides from a blackout, "the reality" is that "virtually every" bargaining impasse between a programmer and distributor "is resolved after requiring either no blackout or a short-term blackout." *Id.* at 2396:1-5 (Shapiro). Indeed, in recent memory, Turner networks have been blacked out only twice, both for roughly one-month periods. *See id.* at 2357:15-23; Defs.' PFOF ¶¶ 139-143. Permanent blackouts, the evidence shows, are a vanishingly rare occurrence; the record indicates that Turner has *never* engaged in a long-term blackout with a distributor. *See* Tr. 2394:8-11 (Shapiro) (acknowledging that "in the real world there has never been a permanent blackout of the Turner networks").

B. Industry Trends

In recent years, traditional programmers, including Turner, and MVPDs, including DirecTV, have been faced with a number of interrelated industry trends that are particularly relevant to the challenged merger. I will review three of those trends in turn.

1. <u>Rise and Innovation of Over-the-Top, Vertically Integrated Video Content Services</u>

Traditional programmers and distributors are experiencing increased competition from innovative, over-the-top content services, including virtual MVPDs and SVODs. *See infra* p. 24 n.5. Those web-based companies are harnessing the power of the internet and data to provide lower-cost, better-tailored programming content directly to consumers. The dramatic growth of the leading SVODs in particular, including Netflix, Hulu, and Amazon Prime, can be traced in part to the value conferred by vertical integration – that is, to having content creation and aggregation as well as content distribution under the same roof. *See, e.g.*, Tr. 3080:8-3085:21 (Bewkes (Time Warner)).

As relevant to the video programming and distribution market, vertical integration provides two notable advantages to content services. First, vertical integration reduces the "bargaining friction" inherent in the arm's-length affiliate negotiations that govern the exchange of rights between traditional programmers and distributors. *See, e.g.*, *id.* at 3104:18-3107:13; *id.* at 1684:25-1685:13 (York (AT&T)). As numerous witnesses discussed, bargaining friction refers to the difficulty inherent in assigning value to and negotiating over new, innovative content rights, like "TV Everywhere," download rights, and "4K" high resolution. *See id.* at 1685:22-1686:7, 1688:6-13 (York (AT&T)); *id.* at 3104:18-25 (Bewkes (Time Warner)); *id.* at 3222:4-3223:2 (Stankey (AT&T)). AT&T executive Daniel York testified, for example, that DirecTV has attempted, with limited success (and considerable delay), to obtain such rights from programmers through arm's length-negotiations. *See id.* at 1685:24-1686:22 (York (AT&T)). RCN CEO Jim Holanda joined York in discussing the way in which bargaining friction hindered RCN's negotiations over TV Everywhere rights. *See id.* at 2968:25-2971:14 (Holanda (RCN)). Further, DirecTV Now's affiliate agreements require it to restrict the number of viewers who can stream or access programs simultaneously on its platform. *See id.* at 1687:10-14 (York (AT&T)). And when DirecTV floated the concept of "DirecTV mobile" – a pay-TV subscription exclusively for mobile devices – that was "dead on arrival." *Id.* at

1687:15-25. By contrast, with control over the creation and use of large amounts of original content, SVODs have driven much of the recent innovation in the video programming and distribution industry. *See id.* at 1685:7-13; *id.* at 639:1-8 (Martin (Turner)). These companies have, for example, developed download rights, allowing users to view their content anywhere without wireless access. *See id.* at 1688:16-18 (York (AT&T)).

Second, and relatedly, SVODs' ability to distribute their content directly to consumers over the internet gives them superior access to customer data. SVODs are able to use that customer data to inform their strategy and improve the customer's experience in a number of ways. *See id.* at 3081:21-25 (Bewkes (Time Warner)); *see also id.* at 3388:6-3389:8 (Stephenson (AT&T)). SVODs can use data about viewing habits to determine what programs are popular, and create more of that type of content. *See id.* at 2452:21-2453:3 (Carlton); *id.* at 3245:16-20 (Stankey (AT&T)). In addition, data informs marketing decisions, and allows SVODs to recommend content to users based on their revealed preferences, *i.e.*, the shows they have watched in the past. *See id.* at 3080:19-3081:12 (Bewkes (Time Warner)). Even more, data can inform scheduling choices, and enhance efforts at recapturing consumers who disconnect. *See id.* at 3245:16-20 (Stankey (AT&T)); *id.* at 3081:4-12 (Bewkes (Time Warner)). Finally, and as discussed in more detail below, to the extent SVODs incorporate advertising into their platforms, data allows those ads to be more targeted and thus more lucrative.

2. Declining MVPD Subscriptions Resulting from an Increasingly Competitive Industry Landscape

At trial, witness after witness acknowledged that MVPD subscriptions are on the decline. *See, e.g.*, *id.* at 633:5-15 (Martin (Turner)); *id.* at 891:18-22 (Rigdon (Comcast)); 2229:21-22 (Shapiro); 3369:13-16 (Stankey (AT&T)); *id.* at 3450:15-3451:1 (Stephenson (AT&T)); *see also* PX63-36. Those declines "started faster" than many in the industry anticipated. Tr. 3369:13-16 (Stankey (AT&T)) (discussing the "inflection change" where the "decline of the traditional pay-TV bundle started faster than [AT&T] assumed"). To illustrate, in 2016 AT&T's traditional MVPDs lost 133,000 customers; last year, DirecTV *alone* lost 1.2 million subscribers. *See id.* at 3004:6-8 (Christopher (AT&T)); *id.* at 3450:7-9 (Stephenson (AT&T)).

The decline in traditional MVPD subscriptions is just one symptom of the increasingly competitive nature of the video programming and distribution industry. Indeed, several witnesses testified that competition in the industry is more intense today than ever before. *See, e.g.*, *id.* at 1398:24-25 (Montemagno (Charter)) (video distribution business is "more competitive now than I've ever experienced in my career"); *id.* at 2134:1-3 (Sejen (Cable ONE)) ("Q: In your 31 years in the industry, have you ever seen it more competitive at the distribution level? A: No."); *id.* at 2950:2-6 (Holanda (RCN)) ("Q: And so in the course of this 30 years that you have been in the business, the video distribution market today is more competitive than at any point that you can recall, true? A: True."); *id.* at 3213:9 (Stankey (AT&T)) (competition in industry is "at an all-time high"); *id.* at

2476:1-9 (Carlton) ("new entrants" in market such as "Netflix" are "making the market more competitive").

More specifically, the decline of traditional MVPD subscriptions reflects the growing popularity of virtual MVPDs and SVODs. *See, e.g.*, PX153-3. On that score, two rising trends are worth noting: cord-cutting and cord-shaving. A household "cuts the cord" when it discontinues MVPD services altogether, whether traditional or virtual MVPDs. *See id.* at 605:23-606:4 (Martin (Turner)); *id.* at 2505:10-20 (Carlton). As Professor Carlton relayed, SNL Kagan estimates that roughly twenty percent of American households have cut the cord, discontinuing traditional MVPD services. *Id.* at 2505:12-20. This number, high as it is, continues to grow. *See id.* at 2466:4-10; *see also id.* at 891:18-22 (Rigdon (Comcast)); *cf. id.* at 2948:20-2949:3 (Holanda (RCN)). That said, those households have not exited the entertainment field altogether. *See id.* at 3450:2-6, 12-14 (Stephenson (AT&T)). Instead, many have gravitated to vertically integrated SVODs. *See* PX153-3; *see also* Tr. 3449:12-24, 3450:7-12 (Stephenson (AT&T)). Consumers, particularly young people, find SVODs attractive, with their improved user interfaces, premium content, and lower price points. *See, e.g.*, Tr. 639:1-8 (Martin (Turner)); *id.* at 3449:12-18 (Stankey (AT&T)). On a similar note, a household "shaves the cord" when it departs a traditional MVPD for one of the many virtual MVPDs, which, again, typically carry smaller bundles of networks at lower price points. Gov't PFOF ¶ 16; Defs.' PFOF ¶ 21. Many other consumers have shaved the cord, reducing, but not eliminating, their consumption of MVPD services. *See, e.g.*, Tr. 606:2-4 (Martin (Turner)). Consumers intent on shaving the cord have an increasing array of virtual MVPD services from which to choose – services that operate nationwide over the internet. *See id.* at 2949:15-18 (Holanda (RCN)). Consumers may choose to subscribe to a less expensive, "skinny bundle," *i.e.*, one with fewer networks, and then supplement that bundle with subscriptions to SVODs like Netflix and Hulu. *Cf. id.* at 2984:13-20 (SEALED); *id.* at 3506:24-3507:2 (Stephenson (AT&T)).

Of course, when a household departs a traditional MVPD, whether for an SVOD or a virtual MVPD, that subscriber loss affects the traditional MVPD in the form of lost margins on subscription fees. *See, e.g.*, PX456-56; Tr. 3450:7-14 (Stephenson (AT&T)); *id.* at 2219:13-21 (Shapiro). Such losses may also affect programmers in the form of declining affiliate fee revenues as well as stagnating or declining viewership. *See, e.g.*, *id.* at 3088:22-3089:1 (Bewkes (Time Warner)) (SVODs and other new competitors are "bleeding away our viewers"); PX153-3. Turner, for example, projects that its domestic subscription revenue growth will decrease to low single digits in each year from 2018 to 2022. *See* Tr. 647:3-11 (Martin (Turner)) (discussing Defendants' Exhibit ("DX") 781-21). Increased competition from SVODs also means that more original, high-quality programming is being produced – a trend that increases the costs of securing the talent and rights necessary to make such programming. *See id.* at 1494:15-21, 1495:12-16 (Sutton (HBO)) ("There was a time when very few people were making the kind of shows we make. Now, it seems that almost every week, there's an announcement of somebody else making it. . . . [A]s I've mentioned, Netflix; Hulu makes shows and so does Prime Video. . . . So the cost it takes to make shows, shows like the shows we make, has escalated significantly" because "more people are bidding for the talent involved."); PX153-6; *cf.*

Tr. 633:16-18 (Martin (Turner)) ("[T]he number of professionally produced television shows in the United States has doubled in the last five years alone.").[5]

It is therefore no surprise that programmers and distributors alike have noted the competitive threat posed by SVODs. After all, as Nobel laureate Bob Dylan correctly observed: "You don't need a weatherman to know which way the wind blows." *Subterranean Homesick Blues*. At trial, numerous witnesses from defendants testified that SVODs present a broad-range of competitive challenges. *See, e.g.*, Tr. 3088:22-3089:25 (Bewkes (Time Warner)) (over-the-top companies are "bleeding away our viewers, because they're offering competitive video that has these advantages, because they know what to put in front of you individually, and we don't"); *id.* at 3213:3-9, 3214:8-10 (Stankey (AT&T)) ("The time-and-attention competition now from the likes of Facebook, from the likes of Google, from the likes of Netflix . . . . I started asking myself, what should the business do to respond to the changing environment that we've heard about in this courtroom, the dawn of these new services coming from the likes [of] Netflix and Google?"). Third-party witnesses from AT&T's competitor distributors also testified to the role of SVODs in the increasingly competitive industry landscape. *See id.* at 860:24-861:9 (Rigdon (Comcast)) ("[A]n SVOD service like in Netflix provides a wide array of entertainment choices. So people have limited time in the day. So where they're going to

[5] Although the Government asserts that "consumers of Multichannel Video Distribution are largely insensitive to price changes" as reflected by their continued payment of increased subscription costs, Gov't PFOF ¶ 35, at trial there was near-uniform testimony that "consumers are up to here with subscription prices" and that "it's getting harder and harder" for distributors to pass their increased costs along, Tr. 3089:6-11 (Bewkes (Time Warner)); *id.* at 3446:1-4 (Stephenson (AT&T)). That consumers are at a "gag point" when it comes to traditional MVPD subscription costs is further illustrated by the continued *decline* in subscriptions nationally. *Id.* at 140:13-15 (Fenwick (Cox)); *id.* at 3450:7-9 (Stephenson (AT&T)).

spend their time for entertainment in that respect Netflix competes with traditional TV providers."); *id.* at 1395:12-21 (Montemagno (Charter)) (Charter's competitors include "the Googles and the Amazons and the Netflix"); *see also* DX921-35 (DISH "face[s] significant competition" from other companies, including, among others, "Netflix, Hulu, Apple, Amazon, Alphabet . . . .").[6]

3. Shift Toward Targeted, Digital Advertising

Finally, and again as a result of the rising influence of innovative, web-based competitors, the advertising landscape has shifted away from reliance on television advertising offered by programmers to highly-targeted digital advertising. *See* Tr. 3088:3-6 (Bewkes (Time Warner)) (noting that advertisers are shifting their "ad budgets, which

[6] In the face of all that, the Government continues to insist that SVODs are merely "complement[s]" or "adjunct[s]" to traditional MVPDs, rather than competitors of traditional MVPDs; a few of the Government's third-party competitor witnesses testified to the same. Gov't PFOF ¶ 36. I agree with defendants that the Government's arguments (and the corresponding witness testimony) on that score defy reality, as demonstrated by the evidence adduced at trial. The evidence clearly showed that the leading SVODs – as vertically-integrated entities that produce and distribute their own award-winning content – fiercely compete *both* with programmers such as Turner and HBO *and* with traditional MVPDs and virtual MVPDs. Indeed, industry data reflects that large percentages of MVPD customers have chosen to "cut the cord" and receive content exclusively from SVODs. *See supra* pp. 22-24.

To be sure, the Government contends that, notwithstanding the increasing prevalence of SVODs, "[e]ven programmers believe MVPDs are likely to remain highly profitable in the future." Gov't PFOF ¶ 13. That proposition rests on a document from May 2016. *Id.* (citing PX78). As the Court learned at trial, however, the industry has undergone significant changes since mid-2016, diminishing the persuasiveness of that statement and others like it. To take just one example, video programming margins are declining, a fact that presents an obvious threat to future MVPD profitability. Tr. 3853:18-19 (Shapiro) ("I think it is not disputed that the video margins are going down."). And while the Court accepts that traditional MVPDs continue to have a substantial subscriber base, and indeed may currently constitute a distinct submarket, *see infra* pp. 61-66, it is inescapable that SVODs have played a large role in causing the demand for and continued purchase of traditional MVPD subscriptions to "declin[e] at a rapid pace." Tr. 3450:7-3451:1 (Stephenson (AT&T)). To ignore those industry trends – trends that are transforming how consumers view video content and blurring the lines between programming, distribution, and web-based competitors – would be to ignore the Supreme Court's direction to examine this case with an eye toward the "structure, history, and probable future" of this fast-changing industry. *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 498 (1974) (internal quotation marks omitted). I, of course, cannot do that !

are finite, to the digital platforms at Google and Facebook" and "away from television advertising in general"); PX456-56 ("The advantages of digital advertising . . . have resulted in advertisers shifting more of their advertising budgets from traditional television advertising to digital advertising."). The share of U.S. spending on digital advertising exceeded spending on television advertising in 2016. *See* DX746A-2; Tr. 3092:15-19 (Bewkes (Time Warner)). Digital advertising revenue is expected to further eclipse television advertising revenue in the coming years. *See* Tr. 3092:22-3093:1 (Bewkes (Time Warner)).

Why the rush from television ads to digital ones? Simply put, digital ads are more efficient. Through their access to and use of consumer data, Google and Facebook are better able to discern the purchasing preferences and interests of individuals viewing particular online content. *See id. at* 623:2-13 (Martin (Turner)); *id.* at 3087:16-3088:2 (Bewkes (Time Warner)); *id.* at 3243:5-10 (Stankey (AT&T)). They can use that information to infer what types of ads would most interest those users. *See id.* at 3087:16-3088:2 (Bewkes (Time Warner)). And they can tailor digital advertisements to those users based on those preferences. *See id.* at 623:8-13 (Martin (Turner)). Best of all from an advertiser's perspective, Google, Facebook, and other entities engaged in digital advertising have confirmatory data that demonstrates whether particular ads were effective. *See id.* at 623:14-22.

Although traditional programmers like Turner maintain "massive inventories of advertising," they lack the type of fine-grained data necessary to generate targeted ads. *Id.* at 3392:10-13 (Stephenson (AT&T)). Under the "spray and pray" approach, programmers instead sell ads based on "broad demographic data" about the viewers of a particular program. *Id.* at 3760:20-24 (Athey). As a result, consumers regularly see ads for things that do not interest them, and advertisers pay to show ads that they know will be ineffective in motivating many in the audience. *See id.* at 3087:1-8 (Bewkes (Time Warner)). As Turner CEO John Martin put it, "there's been a long saying in the advertising industry where the advertiser would always say, I know I'm wasting half of my money, I just don't know which half." *Id.* at 685:20-23 (Martin (Turner)).

The shift toward digital advertising has been extremely profitable for the tech giants – Google and Facebook, in particular. Indeed, those two entities account for roughly 60% of U.S. digital advertising. *See id.* at 3746:16-22 (Athey). And they are growing at a rapid pace: Google's advertising revenue has "almost tripl[ed]" between 2012 and 2017, while Facebook's advertising revenue went from $4 to $40 billion in the same period. *Id.* at 3097:2-11 (Bewkes (Time Warner)) (discussing DXD122).

By contrast, the rise of digital advertising has been costly to Turner and other programmers that rely on television advertising as a major source of revenue. *See id.* at 3088:3-21; *cf.* PX456-25. In 2017, for example, Turner's advertising revenue *declined* by 2% relative to the previous year. *See* Defs.' PFOF ¶ 31 (citing PX456-65); Tr. 3097:14-20 (Bewkes (Time Warner)). In light of the dual-revenue-stream business model of programmers, witnesses testified that declines in television advertising revenue will produce a predictable result: it will place more pressure on affiliate fees, meaning that programmers will increase the fees charged for their content. *See, e.g.*, Tr. 3088:16-21 (Bewkes (Time Warner)). For that reason, Jeff Bewkes, CEO of Time Warner, explained that the explosion of digital advertising is "actually bad for" video distribution consumers, "because it means that the financial support for all this programming on all these different channels gets pushed over toward subscription prices. And that's a problem, because we think consumers are up to here with subscription prices." *Id.* at 3089:6-11.

II. The Parties and Proposed Merger

A. AT&T

AT&T is a "leading provider of communications and digital entertainment services in the United States and the world." PX455-7. As a distribution company, AT&T is in what its Chairman and CEO Randall Stephenson calls "the connectivity business." Tr. 3378:23-24 (Stephenson (AT&T)). Although originally known for its "voice telephone" service, AT&T also provides wireless service, broadband service, and pay-TV service to consumers. *See id.* at 3377:23-25, 3379:12-15. AT&T, however, does not create any significant television or movie content. *See id.* at 3245:24-25 (Stankey (AT&T)).

AT&T has two traditional MVPD products: DirecTV and U-verse. Defs.' PFOF ¶ 34. DirecTV, acquired by AT&T in 2015, is a "satellite-based MVPD service that operates by transmitting programming from satellites to rooftop dishes installed at the customers' homes." *Id.*; *see* Tr. 3206:21-22, 3207:21-23 (Stankey (AT&T)); PX455-11 to 12. U-verse, by contrast, is a "telco" MVPD service that operates "[o]ver the same line that [] deliver[s] your telephone service." *Id.* at 3384:1-2 (Stephenson (AT&T)); Defs.' PFOF ¶ 34. Between DirecTV and U-verse, AT&T has approximately 25 million video distribution subscribers today, making it the largest provider of traditional MVPD services. *See* PX455-11; Tr. 3384:13-14 (Stephenson (AT&T)).

Despite that substantial traditional MVPD subscriber base, AT&T witnesses testified that they believe the company's future lies in the use of online and mobile wireless connections to access premium video. As John Stankey, the AT&T executive who will be tasked with running Time Warner should the merger proceed, explained, AT&T acquired DirecTV in 2015 not in an effort to double down on the satellite business – a concededly mature and indeed declining asset – but to "pick up a lot of new customers that we could work on migrating" to new, innovative products necessary to compete in the future. Tr. 3207:18-3208:2, 3209:4-7 (Stankey (AT&T)). In late 2016, AT&T launched one such product, DirecTV Now. *See, e.g., id.* at 1824:23-24 (Merrill). DirecTV Now is a virtual MVPD and, as such, carries fewer channels than DirecTV or other traditional MVPDs; is offered at a lower price-point; and is delivered over the internet. *See id.* at 1825:1-3; *id.* at 3385:5-3386:10 (Stephenson (AT&T)). Today, and in large part due to significant promotional efforts and high-level support for the product's launch, DirecTV Now has grown to more than one million subscribers. *See id.* at 3386:2-3 (Stephenson (AT&T)); *id.* at 1825:12-1826:8, 1827:18-1828:2 (Merrill (AT&T)).

AT&T Chairman and CEO Randall Stephenson testified that DirecTV Now plays to AT&T's strong suit, namely its 100-million plus wireless subscriber base. *See id.* at 3379:19-20, 3385:9-14 (Stephenson (AT&T)). With customers increasingly turning to cell phone and mobile devices to access video content, fully "[h]alf of the volume on [AT&T's] network is video." *Id.* at 3382:5-6. Stankey noted that AT&T welcomes this trend, as it results in users purchasing larger data plans and acquiring more devices. *See id.* at 3254:15-22 (Stankey (AT&T)). AT&T's next major initiative, fifth generation or "5G" wireless, is calculated to increase video consumption even more. *See id.* at 3383:3-14 (Stephenson (AT&T)). As Stephenson explained to the Court, "[w]hat we're all working towards is creating [$]35 and $15 bundles. And that's where the world is moving . . . ." *Id.* at 3506:23-25. To that end, Stephenson continued, AT&T has plans to launch a new product called AT&T Watch, through which customers will be able to receive "real skinny bundle[s]" of programming for $15 per month or, in the case of "AT&T wireless unlimited customer[s,] . . . for free." *Id.* at 3434:12-3435:4.

B. Time Warner

Time Warner, by contrast, is in the entertainment business. It has three distinct units: Warner Bros., Turner, and HBO. *See* PX459-18 (Turner), -22 (HBO), -24 (Warner Bros.). Turner operates, among other things, ten linear cable networks that televise scheduled video programming around the clock. *See id.* at 18; Defs.' PFOF ¶ 7.[7] HBO is a premium, subscription-based video service that offers movie and television shows, including a significant amount of original content. *See* PX459-22. Unlike Turner, which collects both programming fees and advertising revenue, HBO relies solely on subscription payments to operate. *See id.* at 23; PX456-67; *compare* Tr. 604:21-23 (Martin (Turner)), *with id.* at 1450:12-17, 1493:15-17 (Sutton (HBO)). Warner Bros. operates a studio that creates movies, television programs, and other kinds of video content that are licensed both to Time Warner's other businesses and to third parties. *See* PX459-24.

[7] Those networks are TNT, TBS, CNN, CNN Español, CNN International, Cartoon Network/Adult Swim, TruTV, TCM, Boomerang, and HLN. *See* Defs.' PFOF ¶ 7.

The Government's claims in this case implicate Turner and HBO. Those business units are therefore discussed in more detail below.

1. Turner Networks

The Turner networks are central to the Government's primary theory of harm, and thus warrant the greatest attention here. Turner's business model is simple: distribute its content as broadly as possible in order to maximize the dual income streams of affiliate fees and advertising revenue. *See* Tr. 3078:17-20 (Bewkes (Time Warner)). Historically, Turner has relied on unaffiliated third parties to distribute its content to consumers. *See id.* at 485:1-18, 612:3-4 (Martin (Turner)). Those include traditional MVPDs, such as cable companies and satellite companies. *See id.* at 485:1-18. In recent years, Turner has distributed its content to consumers through virtual MVPDs as well. *See id.* at 485:19-486:6; Gov't Post-Tr. Br. 6.

Industry participants view Turner content as popular and valuable, primarily for Turner's broadcast rights to live sports and for CNN's live news. *See, e.g.*, Tr. 2112:24-2113:12 (Sejen (Cable ONE)) (agreeing that "sports programming" is "[t]he only thing that was unique" to TBS and TNT); *id.* at 245:7-23 (describing TBS and TNT's "important sports" and CNN's "news"). CNN is the second-rated news network, and a top-seven ranked network by viewership. PX8-35; Tr. 717:5-8 (Hinson (Cox)). In the sports domain, Turner has long-term contract rights to show portions of NCAA March Madness, the NBA Playoffs, and certain games of the Major League Baseball Playoffs. *See* PX8-35; Tr. 533:3-12 (Martin (Turner)); *see generally* Gov't PFOF ¶¶ 82-86, 88 (reviewing Turner's sports rights). TBS and TNT are "by far and away" the two most popular Turner networks due to their sports content. Tr. 471:17-20 (Martin (Turner)). Not surprisingly perhaps, TBS and TNT rank in the top ten most profitable cable networks. *Id.* at 471:21-24; *see also* Gov't PFOF ¶¶ 25, 27.

Reflecting that popularity, Turner enjoyed rate increases from every major MVPD in the last five years. *See* Tr. 998:20-22 (Breland (Turner)); *see also* Gov't PFOF ¶ 97. Turner executives testified that those rate hikes were due in part to a multi-year plan to "catch up" to competitors' price increases after years of below-market increases. Tr. 644:1-18 (Martin (Turner)). As such, Turner projects that its rate increases will slow to the low single digits from 2018 to 2022. *See id.* at 647:3-11 (discussing DX781). That slowing rate-increase trend is consistent with Turner's declining viewership numbers. *See id.* at 2458:5-8, 22-24 (Carlton); *see also* PX153-3 to -4; PX456-22. Turner networks account for only 8% of pay-TV viewership, down from 10% in 2011. *See* Tr. 2458:22-24 (Carlton) (discussing DXD109). When internet-based distribution is added to the mix, Turner's share shrinks to 6% of viewership for 2017. *See id.* at 2458:13-15.

The growth in digital advertising has also posed a particular challenge for Turner. Today, "advanced advertising" makes up less than 5% of Turner's ad revenue – and it shows. *Id.* at 680:4-7 (Martin (Turner)). Turner's ad revenues have flatlined. *See* PX456-65. This is because, as a "stuck in the middle wholesaler," Turner for the most part lacks customer relationships, which supply critical data concerning consumer preferences – data that can be used to tailor advertisements to the end user. *See* Tr. 641:13-25 (Martin (Turner)); *id.* at 3087:16-3088:2 (Bewkes (Time Warner)). Without such data, Turner cannot tailor ads to particular consumers, making its ads less valuable than those carried on Google or Facebook. *See id.* at 623:5-16 (Martin (Turner)); *cf. id.* at 3771:12-23 (Athey).

At trial, the Court learned that Turner has attempted workarounds to improve its data and sharpen its advertisements. Turner has tried, for example, to purchase data from third parties, but that data was not sufficiently granular. *See, e.g., id.* at 3100:2-4 (Bewkes (Time Warner)). Time Warner also considered buying technology companies, but concluded that the companies' data was insufficient, and came without any guarantee of long-term access. *See id.* 3102:9-3103:6. Finally, Turner has attempted to obtain rights to customer information through affiliate negotiations. *See id.* at 3100:16-22; *cf. id.* at 92:19-24 (Fenwick (Cox)). The record reflects, however, that such efforts generally have been unsuccessful due to the bargaining friction of hotly contested affiliate negotiations and the fact that distributors consider their customer data proprietary. *Id.* at 955:10-18 (SEALED); *cf. id.* at 1022:2-20 (Breland (Turner)); Defs.' PFOF ¶ 16.[8]

In an effort to break out of its "trapped wholesaler" role, Turner has made recent efforts to launch its own direct-to-consumer content offerings. The most notable of those offerings are Film Struck, Boomerang, and Bleacher Report Live. *See* Tr. 588:8-16, 666:10-12 (Martin (Turner)). FilmStruck, which allows viewers to access classic movies as well as independent films, has approximately 100,000 subscribers; Boomerang, which offers a library of children's content and cartoons, has around 150,000 subscribers. Defs.'

[8] Turner has been able to negotiate for the rights to *limited* data from Hulu's and YouTube's virtual MVPDs. *See* Gov't PFOF ¶ 336. As relevant here, however, that data relates only to the viewing patterns of those who view Time Warner content. That is a limited picture, as such data does not allow Turner to discern what its viewers are watching on competing channels, which could help develop a fuller picture of viewer preferences. Tr. 3101:13-22 (Bewkes (Time Warner)).

PFOF ¶ 15. Those figures are of course microscopic in comparison to Netflix's 125 million subscribers and Amazon's 100 million Prime subscribers with access to video content. *See* Tr. at 3099:6-12 (Bewkes (Time Warner)); *id.* at 3389:22-25 (Stephenson (AT&T)).[9]

2. <u>HBO</u>

HBO has a different business model than Turner. As a premium network, HBO offers high-quality programming that is supported by subscriber fees rather than advertising. Tr. 1450:12-17 (Sutton (HBO)); *see also* PX456-67. Indeed, HBO has no advertising inventory at all. *Id.* In addition, and unlike the Turner networks, which appear in base cable or satellite packages, HBO is typically an "add-on." *Id.* at 3073:14-15 (Bewkes (Time Warner)); *see id.* at 1451:16-18 (Sutton (HBO)).[10] HBO offers popular movies and television shows, including a significant amount of original content. *See* PX459-22.

Without advertising, HBO's business model is even more reliant on broad distribution: "the more, the better," according to Time Warner CEO Jeff Bewkes. Tr. 3070:3-8 (Bewkes (Time Warner)). HBO content reaches consumers in four ways: (i) through MVPDs; (ii) through virtual MVPDs; (iii) through SVODs; and (iv) through HBO's proprietary over-the-top product, HBO Now. *Id.* at 1494:1-8, 1451:13-23 (Sutton

---

[9] Turner's Lilliputian direct-to-consumer subscriber numbers, on their face, discredit the Government's assertion that "Turner is also not the 'trapped wholesaler' it claims to be." Gov't PFOF ¶ 30.

[10] The Government states that "pay-TV packages include linear TV programming, on-demand content, and typically premium channels *like HBO*." Gov't PFOF ¶ 12 (emphasis added). However, no matter how many premium channels "like HBO" may be available on such packages, HBO itself has historically had only a 30% national penetration rate. *See* Tr. 1529:16-17 (Patel (AT&T)); *id.* at 3073:22-23 (Bewkes (Time Warner)).

(HBO)). In each case, the end-customer accesses HBO by way of a distributor – even for HBO Now, which is sold by digital distributors like Apple and Amazon. *See id.* at 1491:6-11. As with Turner, the fact that HBO relies on third parties to distribute its programming means that Time Warner lacks critical data about the preferences and viewing habits of HBO's subscribers. *See id.* at 3084:14-24, 3098:13-16 (Bewkes (Time Warner)).

HBO faces an array of competitors in the field of premium content creation and programming. There are premium television networks, like Showtime, Starz, and Epix, and online offerings, such as Netflix, Amazon Prime, and Hulu. *See id.* at 1492:20-23 (Sutton (HBO)). What's more, Disney has launched, and Apple appears poised to launch, a premium, direct-to-consumer service. *See id.* at 1492:22-24; *id.* at 1396:21-25 (Montemagno (Charter)). All of those rivals feature high-quality, premium content, and thus compete directly with HBO. *See, e.g., id.* at 1494:16-23 (Sutton (HBO)). Indeed, Netflix's programming budget alone is more than twice the size of HBO's. *Id.* at 3099:13-15 (Bewkes (Time Warner)).

In this highly competitive environment, and lacking direct relationships with its viewers, HBO "[a]bsolutely" depends on MVPD promotions to maximize its distribution. *Id.* at 1496:16-17 (Sutton (HBO)); *cf. id.* at 1528:25-1529:4 (Patel (AT&T)). As HBO President Simon Sutton explained, "our whole business is relying on our affiliates to promote us. If we can't do that, then our entire business model is destroyed." *Id.* at 1508:14-16 (Sutton (HBO)). For that reason, HBO seeks to structure its affiliate agreements so as to "incent" distributors to maximize HBO's distribution. *Id.* at 1456:8-

10. Specifically, as distributors add HBO subscribers, "they generally pay less on the increment." *Id.* at 1455:18-19.

C. The Proposed Merger

On October 22, 2016, AT&T announced its plan to acquire Time Warner. Answer 18 [Dkt. # 20]. Inclusive of debt, the transaction is valued at approximately $108 billion. *Id.*

At trial, the evidence showed that defendants view the proposed merger as an essential response to the industry dynamics described above – that is, the increasing importance of web- and mobile-based content offerings; the explosion in targeted, digital advertising; and the limitations attendant with AT&T's and Time Warner's respective business models. *See generally* Defs.' PFOF ¶¶ 49-62 (discussing various proconsumer rationales for the proposed merger). The proposed merger would do so, defendants' executives asserted, through vertical integration of the companies' complementary assets: Time Warner's popular content and significant advertising inventory, and AT&T's consumer relationships, customer data, and large wireless business.

As a traditional programmer, Time Warner generally lacks access to valuable information about its viewers – it is, as mentioned, akin to a "stuck in the middle wholesaler." Tr. 641:13-25 (Martin (Turner)). That is because it is the video distributors – not Turner – that own the customer relationships and, therefore, the customer data. *See supra* pp. 20, 25-28. Although Time Warner has "massive inventories of advertising," it does not "know who the customer is. . . . They don't know who they are, they don't know what they're watching." *Id.* at 3392:10-13 (Stephenson (AT&T)). Without information about who its customers are and what their content preferences may be, Time Warner is disadvantaged vis-à-vis SVODs, such as Netflix, Hulu, and Amazon Prime, and web companies, such as Facebook and Google, when it comes to its ability to cater programming or advertisements to viewers. *See supra* pp. 20, 25-28. As AT&T CEO Randall Stephenson explained, without consumer relationships and access to data, Time Warner's "large load of advertising inventory [is] being under utilized." Tr. at 3394:1-2 (Stephenson (AT&T)); *see also id.* at 3771:12-23 (Athey) (confirming that AT&T's digital, data-driven advertising prices are 60% higher than Nielsen-based ads because the former have "finer demographics that are offered for targeting").

As a video distributor, AT&T generally lacks control over the video content it offers. *See id.* at 3219:1-3 (Stankey (AT&T)) ("What we don't have is, we didn't have programming. We didn't have the flexibility to change the product, and that's what the guys on the other side had."). AT&T also has access to only limited advertising inventory. *Cf. id.* at 3393:1-11 (Stephenson (AT&T)); *id.* at 609:23-610:4 (Martin (Turner)). When AT&T seeks to negotiate with programmers for rights to provide or experiment with innovative content offerings, it typically encounters significant bargaining friction that renders those efforts unsuccessful. *See supra* pp. 19-20.

By acquiring Time Warner, AT&T executives testified, the company will immediately gain access to high-quality content and an extensive advertising inventory. *See* Tr. 3408:3-10 (Stephenson (AT&T)). Using its wireless network, AT&T intends to distribute Time Warner content through mobile devices. With such strong industry tailwinds in favor of mobile video consumption, this strategy will increase viewership, making Time Warner content "worth far more." *Id.* at 3393:24-25; *cf.* 891:23-25 (Rigdon (Comcast)) (confirming "increasing trend in the consumption of video over mobile devices"). At the same time, AT&T will bring to bear its consumer relationships and data to begin to tailor Time Warner's advertising and increase its value. *See id.* at 3394:3-18 (Stephenson (AT&T)).

As the Government concedes, that access will inure right away to the benefit of AT&T's current video distribution subscribers. In particular, the Government's own expert predicts that, due to a standard benefit of vertical integration, AT&T's DirecTV and U-verse customers will pay a total of about $350 million less per year for their video distribution services. *See infra* pp. 66-68. AT&T executives testified about the other efficiencies that would redound to the benefit of AT&T subscribers should the merger be approved. Of most relevance here, with the Time Warner assets, and without the interference of bargaining friction, AT&T will be able to deliver content to its customers in more innovative ways. The merged entity could, for instance, gather and edit individual news clips from CNN throughout the day – all tailored to a given user's interests – and deliver that news to the wireless customer for viewing on his or her fifteen-minute break. *See* Tr. 3220:21-3221:9 (Stankey (AT&T)). According to AT&T executive John Stankey, that opportunity represents "a new customer at a new moment doing something that wasn't being done otherwise." *Id.* at 3221:13-14. Stankey testified that the absence of bargaining friction will also enable AT&T and Time Warner to pursue broader introduction of new technologies, such as "4K" high-resolution programming. *See id.* at 3222:4-22.

AT&T will also, with their customers' permission, use consumer data to develop targeted ads, thereby increasing the value of Time Warner's ad inventory. *See id.* at 3391:12-22, 3393:4-9 (Stephenson (AT&T)). AT&T witnesses testified that, in their view, the Time Warner ad inventory is of sufficient scale to warrant the development of a "programmatic advertising platform" through which AT&T can deploy its data to create a marketplace of data-informed advertising inventory for use by Time Warner and third-party programmers alike. *Id.* at 3243:14-3244:8 (Stankey (AT&T)). At the same time, new, tailored forms of mobile content delivery – like the CNN clips teased above – will create additional advertising opportunities. *See id.* at 3221:10-11. Those opportunities, Time Warner and AT&T witnesses testified, will lead to higher ad revenues that will alleviate pressure on the programming side and lower the price of video distribution to consumers. All of those steps, defendants asserted, will allow AT&T to imitate the highly successful, data-driven entities in the video programming and distribution and advertising markets.

In addition, ownership of Time Warner content will allow AT&T to more efficiently pursue what it sees as the future of the video programming and distribution industry: increased delivery of content via mobile devices, such as cell phones. *See id.* at 3381:24-3382:2, 3393:13-25 (Stephenson (AT&T)). AT&T's vast wireless business – a business that, if taken separately, "would be number 37 in the Fortune 500" – has over 100 million subscribers. *Id.* at 3379:20-24; *see id.* at 3208:21-23 (Stankey (AT&T)). AT&T executives testified about their vision for using those wireless connections to "transform the way we deliver video to customers, [to] make the video far more portable." *Id.* at 3208:20-22

(Stankey (AT&T)); *see id.* at 3393:13-25 (Stephenson (AT&T)). To sum it up, in the words of AT&T Chairman and CEO Randall Stephenson, defendants view the proposed merger as a "vision deal" reflecting a belief "that distribution of [Time Warner's] content to wireless will drive the value of the content up," and that "the ability to pair our data with [Time Warner's] advertising inventory will drive value." *Id.* at 3402:24-3403:6.

III. Procedural History

A. The Investigation

Following the announcement of the deal in October 2016, the Department of Justice's Antitrust Division conducted an investigation of the proposed merger's competitive effects. Defs.' PFOF ¶ 2. The investigation lasted more than one year. *Id.* During that investigatory phase, the Government took approximately 20 depositions and received roughly 25 *million* pages of documents. Despite the investigation's vast scale and obvious importance, defendants had scarce visibility into the process. They could not access the Government's materials during the course of the investigation. *See* 12/21/18 Hr'g Tr. 12:1-12 [Dkt. # 56]. Nor could they attend, let alone ask questions during, the depositions that took place during the investigation. *See id.*

B. Pretrial Proceedings

1. The Complaint

On November 20, 2017, the Government, acting through the Department of Justice, filed this lawsuit against AT&T, DirecTV, and Time Warner to enjoin the proposed merger under Section 7 of the Clayton Act, 15 U.S.C. § 18. *See* Compl. ¶ 48. Thirty-seven members of the Department of Justice, including Assistant Attorney General for Antitrust

Makan Delrahim, signed the Complaint. *Id.* at 23. In its prayer for relief, the Government asked that defendants AT&T and Time Warner "be permanently enjoined from carrying out the proposed merger and related transactions" or "carrying out any other agreement, understanding, or plan by which AT&T would acquire control over Time Warner or any of its assets; or merging." *Id.* ¶ 48.

2. Turner's Arbitration Commitment

About one week after the Government filed its Complaint, Turner sent a letter and an accompanying list of terms and conditions to approximately 1,000 video distributors. *See, e.g.*, PX490; PX491; Tr. 1181:11-16 (Warren (Turner)). In the letter, Turner represented that it was "irrevocably offering to you this agreement to engage in AAA arbitration, subject to the conditions below." PX490. "This agreement," the letter continued, "also provides you with the right to continued carriage of the Turner Networks . . . pending the arbitration in the event of a failure to agree upon renewal terms." *Id.* The agreement specifies that once arbitration is invoked by a distributor, Turner must continue to provide carriage on the same terms and conditions in effect at the expiration of its existing contract with the distributor, subject to the right to receive a "true-up" – make-up payments, in essence – based on the arbitrator's award. PX491-3 to -4, §§ B.1-.3. In other words, the commitment guarantees that no blackout of Turner content can occur once arbitration is invoked. *See, e.g.*, Tr. 2653:21-23 (Katz). The proposed arbitration agreement incorporates by reference the choice-of-law provisions in the underlying affiliate agreements. PX491-2, ¶ 7.

3. Pre-Discovery Timeline

Defendants filed their answer on November 28, 2017. *See generally* Answer. AT&T and Time Warner also announced that they had agreed to extend the merger agreement through April 22, 2018. *See* PX456-2. Defendants swiftly moved for a trial date and, along with the Government, for a protective order. *See* Defs.' Mot. to Set Trial Date [Dkt. # 22]; Defs.' Mot. to Enter Protective Order [Dkt. # 23]; Pl.'s Mot. to Enter Protective Order [Dkt. # 24]. On December 8, 2017, I issued a protective order governing the designation and use of confidential information. *See* Protective Order [Dkt. # 37]. On December 21, 2017, I issued a Case Management Order ("CMO") [Dkt. # 54] and Scheduling Order [Dkt. # 55], which, among other things, set the trial for March 19, 2018 and stated that there would be no dispositive motions. That same day, to allow for the possibility of the March 19, 2018 trial and the ruling to follow, AT&T and Time Warner extended yet again the drop-dead date of the merger from April 22, 2018 to June 21, 2018. *See* PX456-2. If the deal is not consummated by then, the merger agreement specifies that AT&T will be required to pay Time Warner a break-up fee of $500 million. *See* PX451-87. In the event of a favorable judgment, defendants agreed "not to consummate or otherwise complete the challenged acquisition until 12:01a.m. on the sixth calendar day following entry of such judgment." CMO ¶ 3.

4. Discovery

Given the stakes and the June 21, 2018 drop-dead merger deadline, the parties proceeded through discovery on an expedited basis. Fact discovery began in late December, and concluded in mid-February. The Government began producing third-party documents collected during the investigation to defendants before the New Year. The parties exchanged preliminary fact witness lists in early January, and final fact witness lists one month later. They spent the intervening time on a forced march of depositions. The exchange of initial expert reports took place in early February, with rebuttal reports due at the end of that month. Supplemental discovery closed on February 28, 2018, and expert discovery did so on March 9, 2018. The Scheduling Order set additional deadlines for pre-trial motions, *Daubert* motions, and pre-trial submission of final exhibit lists, just before the March 19 start date for trial.

I provided detailed prescriptions concerning discovery in this compressed time period. The CMO limited each side's final trial witness list to 30 fact witnesses. CMO ¶ 12. The Government and defendants each had a maximum of 15 interrogatories and seven requests for admission. *Id.* ¶ 14(d), (e). The CMO restricted each side to 150 hours of party-depositions, plus 100 hours of non-party depositions. *Id.* ¶ 16. The CMO did not preclude the taking of a deposition of someone already deposed during the investigation phase. *Id.* There were no limits on the number of requests for production. *Id.* ¶ 14(a).

The parties achieved herculean feats during that time. Beyond the 25 million pages of documents produced during the Government's investigation, an additional 7.5 million pages of documents were produced during discovery. 2/2/18 Hr'g Tr. 13:10-13 [Dkt. # 66]. Dozens of third parties received Rule 45 subpoenas. *See* 1/5/18 Hr'g Tr. 7:18-21 [Dkt. # 61]. The Government noticed more than 40 depositions of defendants' witnesses. *Id.* at 9:13-15.

5. Discovery Disputes

Rather than appointing a special master to handle discovery related issues, I relied upon the seasoned counsel on both sides of this case to work together to resolve discovery disputes as they arose. Although counsel generally were successful in doing so, two notable pre-trial issues were brought to this Court for resolution. The first, which arose in mid-January, concerned the disclosure of third-party data collected in prior Government investigations and still in the Government's possession. The second flash point, which took place closer to trial, involved discovery requests in support of defendants' selective prosecution claim.

In a January 18, 2018 letter and during a status hearing held the next day, defendants raised an issue related to the production of historical video programming pricing data in Government files – data that the Government had apparently obtained via prior merger investigations. *See* 1/19/18 Hr'g Tr. 6:14-9:23 [Dkt. # 63]. To that point, the Government had resisted defendants' production requests, arguing that the Antitrust Civil Process Act, 15 U.S.C. § 1313, required it to obtain consent from each of the third parties that originally had produced the information in question. *See id.* at 13:14-15. No third party had given consent, the Government continued; nor did those parties continue to possess some or all of the requested information due to the passage of time since those earlier investigations. *See id.* at 7:12-16, 8:17-20, 15:19-25.

Stuck in a seeming game of document "hot potato," defendants asked this Court to direct the Government to provide copies of the pricing data to the third parties that originally produced it. *Id.* at 16:11, 18:23-25. Such an order would in turn enable defendants to subpoena the information directly from the third parties. Following oral argument on the issue, I ordered the Government to seek consent from the relevant third parties and to produce the requested information to those third parties by a date certain. 1/22/18 Order [Dkt. # 62]. The Government complied with this Order and defendants apparently were able to obtain the pricing data at issue. 2/2/18 Hr'g Tr. 6:2-5.

The case sailed along until mid-February, when the parties raised an issue related to defendants' contemplated motion for discovery on their "selective enforcement" claim and their attendant inclusion of Assistant Attorney General Makan Delrahim on their trial witness list. The Court held a hearing and heard oral argument on that dispute. *See generally* 2/16/18 Hr'g Tr. [Dkt. # 67]. In that hearing, defendants made an oral motion to compel production of privilege logs relating to their selective enforcement defense. *See id.* at 22:17-23. The Government, for its part, made an oral motion to strike defendants' outstanding discovery and interrogatory requests for logs listing (i) all written communications about the proposed merger between the White House and the Attorney General's Office, (ii) all written communications about the White House's views of the proposed merger between the Attorney General's Office and the Antitrust Division, and (iii) all oral communications about the proposed merger between the White House and the Antitrust Division. *See id.* at 46:8-20, 54:13-55:14. During the hearing, defendants agreed to strike Mr. Delrahim from their witness list subject to the right to call him at trial for good cause. *Id.* at 36:17-37:4. A few days later, after considering the parties' arguments at the hearing, I issued a Memorandum Opinion denying defendants' oral motion to compel and granting the Government's oral motion to strike. 2/20/18 Mem. Op. & Order 6 [Dkt. # 68].

As set out more thoroughly in that opinion, I concluded that defendants had failed to meet the rigorous standard for obtaining discovery on their selective enforcement defense. *See id.* at 4.

6. Evidentiary Disputes

As with most trials featuring large volumes of documentary evidence, evidentiary issues were heavily litigated in this case. Indeed, I set aside the first two days of the trial to address evidentiary issues. Not surprisingly, each side vacillated between arguing for exclusion of documents as prejudicial or irrelevant, on the one hand, or for admission of documents because such concerns are inapplicable in bench trials, on the other. While keenly aware of the principles governing evidentiary rulings in bench trials, in this case, I did not have the luxury of blanketly admitting a mass of documentary evidence and sorting through it after trial.[11] The compressed timeline and novel, complicated nature of the case instead necessitated that I make individualized rulings on relevance and admissibility. *Cf.* Manual for Complex Litigation § 12.5.

For this reason, I generally instructed the parties to seek admission of documents through sponsoring witnesses, in order to facilitate determinations of relevancy or to establish the foundation necessary for nonhearsay or hearsay exceptions.[12] Witnesses

[11] Nor did defendants broadly stipulate to the admission of the Government's proffered documentary evidence, as defendants seem to have done in recent antitrust cases in our Circuit. The parties also did not introduce their experts' reports into evidence; instead, they rested on the experts' trial testimony.

[12] There was not a uniform rule mandating sponsorship of documents by witnesses. I took judicial notice, for example, of certain statements made by DirecTV and AT&T before the FCC without sponsoring witnesses. *See* Tr. 3966:5-3967:22. In the same way, I was mindful that some documents, such as a slide presentation known at trial as "version 41," would not constitute hearsay, as they were introduced to establish the intent of the parties, rather than for the truth of the matter asserted.

would be able to contextualize and explain the technical and lengthy documents at issue, which might otherwise be misunderstood or selectively cited in post-trial briefs. As such, I instructed the parties to introduce documents through sponsoring witnesses, recognizing that doing so would extend, somewhat, the length of the trial. In the end, the parties agreed to abide by that approach. *See, e.g.*, 3/19/18 Hr'g Tr. 6:17-22 (afternoon session) (Government agrees to "add[] some additional witness and [to] talk[] with the defendants about that with regard to sponsorship issues").[13]

C. The Trial

The trial began on March 19, 2018 and ended with closing arguments on April 30, 2018.[14] Over that period, there were 23 days of proceedings.

The Government called 20 fact witnesses and two expert witnesses in its case-in-chief. Of the fact witnesses, 11 were employees of defendants, and 9 were employees of third parties. The Government's chief economic expert was Professor Carl Shapiro. Professor Shapiro is a Ph.D. industrial economist who currently holds a professorship at the University of California, Berkeley. Professor Shapiro has served in various positions in the federal government, including most recently as Deputy Assistant Attorney General

---

[13] Negotiations between the parties further winnowed the evidentiary disputes. *See, e.g.*, 3/19/18 Hr'g Tr., PDF at p. 7 (morning session). The parties also heeded warnings from the Court during initial evidentiary hearings as to the likely inadmissibility of certain documents. For instance, after a warning as to the likely admissibility of newspaper clippings, defendants did not seek admission of those documents at trial. *See* 3/20/18 Hr'g Tr. 5:16-20 (afternoon session) (advising defendants that the Court "usually [does not] allow news articles [to be] introduced into evidence. I'll wait to see what you've got . . . but I'm giving you fair notice here").

[14] On March 9, 2018, the parties each filed a brief, laying out their theories of the case. [Dkt. ## 75, 76, 77]. On March 13, 2018, the parties filed a Statement of Evidentiary Objections under seal. [Dkt. # 86]. The same day, the parties filed a Joint Statement on the Burden of Proof at Trial, which set forth each side's views of the legal standards and burden of proof applicable to this case. [Dkt. # 87].

for Economics at the Antitrust Division in 2009 through 2011 and as a member of the President's Council of Economic Advisers in 2011 and 2012. He has testified in a number of antitrust matters, including several antitrust trials in our Circuit. The Government also called Professor John Hauser from the Massachusetts Institute of Technology to testify about a survey he designed and performed and on which the Government relies.

For their part, defendants called three expert and three fact witnesses. Chief among their experts was University of Chicago Professor Dennis Carlton, who provided rebuttal testimony to Professor Shapiro. Professor Carlton has served as an economics professor within the University of Chicago since 1976, teaching in the economics department, business school, and the law school. Like Professor Shapiro, Professor Carlton is a seasoned expert witness who himself has served as Deputy Assistant Attorney General for Economics at the Antitrust Division from 2006 to 2008. Defendants also called Professor Michael Katz from the Haas School of Business at the University of California, Berkeley, and Professor Peter Rossi from the UCLA's Anderson School of Management. Defendants called Professor Katz to testify about the effect of arbitration and the FCC's program access rules, and called Professor Rossi to testify about survey methods and to rebut testimony concerning surveys and studies on which the Government relied. As their fact witnesses, defendants called Jeff Bewkes, Chairman and CEO of Time Warner, and Randall Stephenson, Chairman and CEO of AT&T, to testify regarding their decision to merge. Defendants also called John Stankey, a senior executive at AT&T responsible for planning and integration of the proposed merger. Stankey, who will be running Time Warner should the merger be allowed to occur, testified about the rationale for the merger as well as the synergies and efficiencies that would result from the merger.

The Government's rebuttal case consisted of testimony from three experts. First, the Government called Ronald Quintero, an accounting and financial consultant, to testify as an expert witness on defendants' claims that the challenged merger will result in a number of procompetitive synergies. Next, the Government called Professor Susan Athey, an economics of technology professor at the Stanford Graduate School of Business, to testify regarding defendants' proffered "content intelligence" synergies. Finally, the Government closed out its rebuttal presentation by recalling Professor Shapiro to defend and further explain his case-in-chief testimony in the face of defendants' various criticisms.

To say the trial was well staffed would be an understatement. Thirty-two lawyers entered appearances for the Government, and 14 did so for defendants. Evidentiary disputes were handled on a case-by-case basis as issues arose. In order to accommodate the confidentiality interests of third parties, counsel agreed to craft their questions so as not to elicit sensitive business information, and, on three occasions, I had to close the courtroom to the public following factual proffers by the Government as to the need for doing so.[15] In total, I admitted into evidence over 3,000 pages of documents, broken up into over 120 exhibits. The trial transcript itself exceeds 4,300 pages in length.

[15] The Court explained to the parties that it appreciated both the public's interest in open judicial proceedings, and the importance to the Government's case of third-party testimony and the need to maintain confidentiality. Consistent with these competing interests, and applicable case law, the Court advised the parties that, when seeking to close the courtroom, they would first need to make a proffer explaining the necessity of doing so. *Cf.* 28 C.F.R. § 50.9 (2017) (reciting "the vital public interest in open judicial proceedings" and stating the policy that DOJ counsel "shall not move for or consent to closure of a

On May 3, 2018, a mere one week after the close of evidence, the parties filed their proposed Findings of Fact and Conclusions of Law, totaling nearly 400 pages in length, as well as briefs that synthesized their arguments. On the last day of trial, I advised the parties that it would issue a ruling by June 12, 2018 in order to avoid running afoul of the defendants' merger deadline of June 21, 2018 and to provide the losing party sufficient time to preserve its appellate rights.

IV. Legal Standard

A. The Clayton Act

The Government seeks to enjoin the proposed merger on the basis that it violates Section 7 of the Clayton Act, 15 U.S.C. § 18. *See id.* § 25 (authorizing United States to

---

proceeding" unless "[n]o reasonable alternative exists for protecting the interests at stake" and "[f]ailure to close the proceedings will produce . . . [a] substantial likelihood of denial of the right . . . to a fair trial").

In order to accommodate those confidentiality interests, counsel agreed to craft their questions so as not to elicit sensitive business information. *See* Tr. 692:14-16 ("[G]overnment's counsel has got this choreographed approach here to get this information from you under oath without revealing it to the public."); *see also, e.g.*, *id.* at 99:12-14 (SEALED). Counsel routinely asked witnesses to point to or confirm for the Court the contents of documents under seal. *See, e.g.*, *id.* at 119:1-21, 124:18-125:13 (Fenwick (Cox)); 535:11-22, 662:7-20 (Martin (Turner)); *id.* at 1095:19-1096:7 (Breland (Turner)); *id.* at 3011:9-21 (Christopher (AT&T)); *id.* at 3529:18-3530:10 (Quintero). Indeed, the Government succeeded in eliciting considerable testimony from a third-party witness – this time from AT&T's competitor, Cox – by way of a single exhibit. *See, e.g.*, *id.* at 689:18-20 (Hinson (Cox)) ("Your Honor, I'd like to mark Plaintiff's Exhibit, it's got some confidential information that Mr. Hinson can point to."); *see generally id.* at 692:25-708:14; *see also* PX523. In those instances, the Court, but not the public, had access to the referenced documents. In the same way, counsel asked witnesses to describe the contents at an appropriate level of generality. *See id.* at 259:11-13 (Schlichting (DISH)); *id.* at 1278:13-1279:21 (Bewley (Altman Vilandrie)).

Through skillful lines of inquiry and the use of exhibits and demonstratives, this approach resolved most confidentiality-based concerns. For several witnesses, the Government initially raised the possibility of going into closed session, before later declining to seek to do so. *See, e.g.*, Tr. 439:14-16 (SEALED). Other times, the Government elected to establish the factual proffer necessary to close the courtroom. To take one example of the way in which – when it chose to do so – the Government developed the need for closing the courtroom, Government counsel confirmed with NBCU's Madison Bond in open court that he felt constrained by confidentiality obligations with respect to at least six different items. *See, e.g.*, *id.* at 1992:2-1992:8; *id.* at 1993:24-1994:6 (Bond (NBCU)).

seek equitable relief to restrain a pending acquisition that violates Clayton Act). As relevant here, Section 7 "prohibits acquisitions, including mergers, 'where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition.'" *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001) (quoting 15 U.S.C. § 18). The Government "has the ultimate burden of proving a Section 7 violation by a preponderance of the evidence." *United States v. H & R Block, Inc.*, 833 F. Supp. 2d 36, 49 (D.D.C. 2011) (internal quotation marks omitted); *see also* Proposed Conclusions of Law of the United States ("Gov't PCOL") ¶ 24 [Dkt. # 127]. Accordingly, the Government's "failure of proof in any respect will mean the transaction should not be enjoined." *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 116 (D.D.C. 2004).

By using "the words 'may be substantially to lessen competition'" in Section 7, Congress indicated "that its concern was with probabilities, not certainties." *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1042 (D.C. Cir. 2008) (emphasis omitted) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)). Although certainty of harm is not necessary to prove a Section 7 violation, neither is the "mere possibility" of harm sufficient. *Heinz*, 246 F.3d at 713 (quoting S. Rep. No. 1775, at 6 (1950)); *see also Baker Hughes*, 908 F.2d at 984 ("Section 7 involves *probabilities*, not certainties or possibilities."). Rather, to grant injunctive relief under the Clayton Act, the Court *must* conclude that the Government has introduced evidence sufficient to show that the challenged "transaction is likely to lessen competition substantially." *Baker Hughes*, 908 F.2d at 985.[16] As part of satisfying that burden, Section 7 "demand[s] that a plaintiff demonstrate that the substantial lessening of competition will be 'sufficiently probable and imminent' to warrant relief." *Arch Coal*, 329 F. Supp. 2d at 115 (quoting *United States v. Marine Bancorporation*, 418 U.S. 602, 623 n.22 (1974)).

In assessing the Government's Section 7 case, the court must engage in a "'comprehensive inquiry' into the 'future competitive conditions in a given market,'" keeping in mind that "the Clayton Act protects 'competition,' rather than any particular

[16] It is undisputed that the Government has the burden of proving a Section 7 violation. The Government's view on what measure of proof that burden requires, however, has been somewhat of a moving target. In some instances, the Government mirrors defendants' position that Section 7 requires a showing that the challenged transaction is "likely" to harm competition; in others, the Government states that it must show a "reasonable probability" or "appreciable danger" of harm to prevail. *Compare* Compl. ¶ 44 ("The effect of the proposed merger would be likely to lessen competition substantially" in the relevant markets.), *and* Gov't PFOF 20 ("The proposed merger would likely substantially lessen competition" in the relevant markets.) (capitalization altered), *with* Gov't Post-Tr. Br. 13 (disputing that the "United States must show that harm is 'likely'"), *and* Gov't PCOL ¶ 5 & n.1 (reciting a purportedly more lenient "reasonable probability" standard). In the final analysis, each alternative formulation appears aimed at clarifying the central point that Section 7 does not require "certain" harm, but instead permits courts to use predictive judgment to "arrest anticompetitive tendencies in their 'incipiency.'" *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 171 (1964) (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 362 (1963) (internal quotation marks omitted)). Thus, it is not surprising that courts have used these terms interchangeably. *See, e.g.*, *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1389 (7th Cir. 1986) (noting that Section 7 requires "an appreciable danger" of anticompetitive consequences and concluding in same paragraph that Commission had adequately demonstrated that the "challenged acquisitions are likely to foster collusive practices, harmful to consumers"); *Anthem*, 236 F. Supp. 3d at 215 (citing with approval other court's use of "reasonably likely" formulation, later concluding that "[p]laintiffs have carried their burden to establish that the merger is likely to harm competition").

For present purposes, I need not further toil over discerning or articulating the daylight, if any, between "appreciable danger," "probable," "reasonably probable," and "likely" as used in the Section 7 context. That is because even assuming that the "reasonable probability" or "appreciable danger" formulations govern here and require more than a "mere possibility," but less than a "more likely than not" showing of harm, *but see Baker Hughes*, 908 F.2d at 991 (describing "the ultimate issue" in a Section 7 case as "whether [the proposed] transaction is *likely* to lessen competition substantially" (emphasis added)); *Anthem*, 236 F. Supp. 3d at 215 ("merger is likely to harm competition"); *United States v. Aetna, Inc.*, 240 F. Supp. 3d 1, 9 (D.D.C. 2017) ("the proposed merger is likely to substantially lessen competition"); *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 110 (D.D.C. 2016) ("proposed merger is likely to reduce competition"), my conclusions regarding the Government's failure of proof would remain unchanged for all of the reasons discussed below.

competitor." *United States v. Aetna*, 240 F. Supp. 3d 1, 18 (D.D.C. 2017) (quoting *Baker Hughes*, 908 F.2d at 988, 991 n.12). "[O]nly . . . 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." *United States v. General Dynamics Corp.*, 415 U.S. 486, 498 (1974) (quoting *Brown Shoe*, 370 U.S. at 322 n.38). "Hence, antitrust theory and speculation cannot trump facts"; the Government must make its case "on the basis of the record evidence relating to the market and its probable future." *Arch Coal*, 329 F. Supp. 2d at 116-117.

B. *Baker Hughes* Burden Shifting Framework

As the above discussion displays, Section 7 vests courts with the "uncertain task" of "making a prediction about the future." *Baker Hughes*, 908 F.2d at 991; *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 191 (D.D.C. 2017). To say the least: that is no easy assignment! In such a setting, and in the absence of a crystal ball, "allocation of the burdens of proof assumes particular importance." *Baker Hughes*, 908 F.2d at 991. To further assist courts in this prospective inquiry, our Circuit has set forth a burden shifting framework for use in determining whether a proposed transaction violates the Clayton Act. *See, e.g.*, *id.* at 982-83.

Under that framework, the Government must first establish its prima facie case by 1) identifying the relevant product and geographic market and 2) showing that the proposed merger is likely to "substantially lessen competition" in that market. *Id.* at 982, 991; *see also Arch Coal*, 329 F. Supp. 2d at 117; Gov't PCOL ¶ 24. If the Government satisfies its prima facie burden, the burden then shifts to defendants to "provide sufficient evidence that the prima facie case 'inaccurately predicts the relevant transaction's probable effect on future competition.'" *United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017) (quoting *Baker Hughes*, 908 F.2d at 991). One way defendants may do so is to offer evidence that "post-merger efficiencies will outweigh the merger's anticompetitive effects." *Heinz*, 246 F.3d at 721. If the defendants put forward sufficient evidence to rebut plaintiff's prima facie case, "the burden of producing additional evidence of anticompetitive effect shifts to the [government], and merges with the ultimate burden of persuasion, which remains with the [government] at all times." *Anthem*, 855 F.3d at 350 (quoting *Baker Hughes*, 908 F.2d at 983).[17]

---

[17] Defendants assert that the burden-shifting framework is inapplicable to vertical merger cases, where no market-concentration-based presumption of harm attaches. As such, defendants argue that the Government has the burden to account for all of defendants' proffered efficiencies as part of making its prima facie case. I am skeptical of this position, both as a matter of law and logic. *Cf. Heinz*, 246 F.3d at 720 (discussing "efficiencies defense" as a component of the defendants' case); 4A Areeda & Hovenkamp, *Antitrust Law* ¶ 970c. But given that the "ultimate burden" of proving a Section 7 violation rests with the plaintiff, *H & R Block, Inc.*, 833 F. Supp. 2d at 49, any debate over burden shifting "may be somewhat academic," as defense counsel conceded, 3/20/18 Hr'g Tr. 67:6-7 (morning session); *cf. Baker Hughes*, 908 F.2d at 991 (deeming "the distinction between" the "burden of production" and "the ultimate burden of persuasion" as "always an elusive distinction in practice"). That is especially so here, where, as will become evident, the Court's ruling does *not* turn on the efficiencies offered by defendants in their affirmative case, but rather on its conclusion that the *Government's* evidence, as "undermined and "discredit[ed]" by defendants' attacks, is insufficient to "show[] a probability of substantially lessened competition," and thus that the Government has "failed to carry its ultimate burden of persuasion." *Baker Hughes*, 908 F.2d at 983, 990-91.

I will nevertheless pause to mention briefly why I am confident that defendants will achieve considerable efficiencies beyond those conceded by the Government. At trial, defendants presented the Court with documentary and testimonial evidence concerning efficiencies likely to flow from the proposed merger. The efficiencies, defendants explain, come both on the "cost" side, and on the "revenue" side. By defendants' calculations, cost synergies will total $1.5 billion and revenue synergies $1 billion on an annual basis. *See* Tr. 3234:17-3235:14 (Stankey (AT&T)). On the cost side, AT&T's John Stankey testified that the marriage of AT&T and Time Warner will lead to the elimination of redundant positions in each company, achievement of certain economies of scale, and insourcing of services that the acquired entity currently acquires from vendors. *See id.* at 3235:22-3240:1. And on the revenue side, AT&T and Time Warner expect to see the gains in innovation – particularly by way of a new programmatic advertising platform – that motivated the merger in the first place. *See id.* at 3229:20-25, 3240:2-3246:9.

Putting aside the revenue synergies, which, by their nature, are more uncertain, I have a high degree of confidence that defendants will generate most, if not all, of the predicted $1.5 billion in annual cost

C. Antitrust Analysis of Vertical Mergers

In the typical horizontal merger case under Section 7, the Government's path to carrying its prima facie burden is clear: by putting forward statistics to show that the proposed "merger would produce a firm controlling an undue percentage share of the relevant market, and would result in a significant increase in the concentration of firms in that market," the Government triggers a "'presumption' that the merger will substantially lessen competition." *Heinz*, 246 F.3d at 715 (internal quotation marks and alterations omitted) (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 363 (1963)); *see also, e.g.*, *Anthem*, 236 F. Supp. 3d at 209; *Aetna*, 240 F. Supp. 3d at 43; *H & R Block, Inc.*, 833 F. Supp. 2d at 72.

In this case, however, the "familiar" horizontal merger playbook is of little use. *Baker Hughes*, 908 F.2d at 982. That is, of course, because the proposed transaction between AT&T and Time Warner is a vertical merger – *i.e.*, one that involves "firms that do not operate in the same market" and thus "produce[s] no immediate change in the level of concentration in any relevant market." Dept. of Justice & Fed. Trade Comm'n, Non-Horizontal Merger Guidelines § 4.0 (June 14, 1984) ("Non-Horizontal Merger

savings by 2021. *See id.* at 3234:13-20. AT&T derives its prediction through the same rigorous analytical process applied in each of its mergers. *See id.* at 3226:1-3229:3; *see also* DX658. Most recently, in the acquisition of DirecTV, AT&T exceeded cost synergy predictions, which now total $2 billion annually. Tr. 3229:4-8, 3369:21-3370:4 (Stankey (AT&T)). Indeed, it is uncontested that AT&T has a strong record of meeting similar cost synergy estimates in past mergers. *See id.* at 3229:2-3, 3229:9; *see also id.* at 3226:3-5. That "analogous past experience" serves to "substantiat[e]" defendants' "efficiency claims," leaving this Court with little doubt that AT&T will stay on its projected track. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (Aug. 19, 2010). Thus, while not necessary to my final judgment in this case, defendants have presented persuasive, probative evidence that the merger will produce even more efficiencies than those accounted for in this Opinion. As such, no further "troll[ing] the Internet" by Mr. Quintero would likely convince the Court otherwise! Tr. 3605:25 (Quintero).

Guidelines").[18] The parties therefore agree that in this case "there is no short-cut way to establish anticompetitive effects, as there is with horizontal mergers." Joint Statement on the Burden of Proof at Trial ("Joint Statement") 3 [Dkt. # 87]; *see* 4A Areeda & Hovenkamp, *Antitrust Law* ¶ 1000a ("[T]he basic economic reason for limiting horizontal mergers is well-founded and rather generally accepted: horizontal mergers increase market concentration, and high market concentration can substantially lessen competition among rivals, particularly with respect to price. Unfortunately, there is no comparable theoretical basis for dealing with vertical mergers.").

With no presumption of harm in play, the Government concedes that, to satisfy its burden here, it must make a "fact-specific" showing that the effect of the proposed merger "is likely to be anticompetitive." Joint Statement 3-4. Such a showing is "necessarily both highly complex" and "institution specific." David T. Scheffman & Richard S. Higgins, *Vertical Mergers: Theory and Policy*, 12 Geo. Mason L. Rev. 967, 967 (2004); *see also* Gov't PCOL ¶ 25 (collecting sources for proposition that "vertical mergers are judged on a case-by-case basis" based on consideration of "case-specific evidence of a danger of future competitive harm"). Of particular relevance here, the Government states that a vertical merger may "act as a clog on competition" by giving the merged firm "control of a competitively significant supplier." Gov't PCOL ¶ 46 (quoting *Brown Shoe*, 370 U.S. at 324). Such a situation would occur, the Government continues, if the merged firm were to

[18] Although the Guidelines are not binding on this Court, our Circuit has noted that they are "a helpful tool, in view of the many years of thoughtful analysis they represent, for analyzing proposed mergers." *Anthem*, 855 F. 3d at 349 (citing *Baker Hughes*, 908 F.2d at 985-86). As the Non-Horizontal Merger Guidelines make reference to concepts contained within the Horizontal Merger Guidelines, I will cite to both as appropriate.

withhold a source of supply from its rivals or otherwise foreclose access to the source "on competitive terms," such as by causing its rivals to "pay[] more to procure necessary inputs," which in turn could "harm[] competition and consumers." *Id.* ¶¶ 46, 57-58 (emphasis omitted) (quoting *Yankee Entm't & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d 657, 673 (S.D.N.Y. 2002); *Sprint Nextel Corp. v. AT&T, Inc.*, 821 F. Supp. 2d 308, 330 (D.D.C. 2011)).

Further complicating the Government's challenge is the recognition among academics, courts, and antitrust enforcement authorities alike that "many vertical mergers create vertical integration efficiencies between purchasers and sellers." Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 513, 519 (1995).[19] The proposed merger reflects that principle: the Government's chief economic expert, Professor Shapiro, predicts that the merger, if consummated, would lead to $352 million in annual cost savings on the part of AT&T's customers. *See* Tr. 2252:19-21 (Shapiro); *infra* pp. 66-68; *see also* Gov't PFOF ¶¶ 222-223 (EDM effect is "generally accepted as a potential procompetitive benefit resulting from vertical mergers").

As the Government also notes, the "principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively." Gov't PCOL

[19] *See also* Robert H. Bork, *The Antitrust Paradox* 227 (2d ed. 1993) ("Vertical mergers may cut sales and distribution costs, facilitate the flow of information between levels of the industry . . .[,] create economies of scale in management, and so on."); Ernest Gellhorn et al., *Antitrust Law and Economics* 411 (5th ed. 2004) (discussing the "[v]arious efficiency rationales" that "can motivate vertical mergers"); *cf. National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 840 (D.C. Cir. 2006) ("[V]ertical integration creates efficiencies for consumers.").

¶ 4 (quoting *Anthem*, 855 F.3d at 366 (emphasis and internal quotation marks omitted)); *see id.* ("Section 7 proscribes mergers with the potential to harm the competitive process, and thereby result in harm to consumers, including higher prices . . . ."). As such, any proper assessment of a proposed merger, Professor Shapiro testified, must consider both the positive and negative "impact[s] on consumers" by "balancing" the proconsumer, "positive elements" of the merger against the asserted anticompetitive harms. *See* Tr. 2182:12-20, 2253:4-5 (Shapiro); *see also id.* at 2461:22-2462:5 (Carlton) ("Well, Professor Shapiro is looking at the [e]ffects on consumer prices. That seems the right thing to do. . . .[W]e want to see what's going to be the result on the end price that consumers pay."); *cf.* Gov't PFOF ¶ 223 (discussing fact that Professor Shapiro accounted for EDM effects). In view of that "somewhat different" analysis applicable to vertical mergers, Tr. 2182:16-18 (Shapiro), it is perhaps little surprise that the Department of Justice's Non-Horizontal Merger Guidelines recognize that vertical mergers "are less likely than horizontal mergers to create competitive problems," Non-Horizontal Merger Guidelines § 4.

Given all of the competing considerations at play, "the analysis of vertical mergers" has been described as "much more complex than the analysis of horizontal mergers." Scheffman & Higgins, *Vertical Mergers*, 12 Geo. Mason L. Rev. at 967. Things are made more difficult still by the lack of modern judicial precedent involving vertical merger challenges – a dearth of authority that is unsurprising, considering that the Antitrust Division apparently has not tried a vertical merger case to decision in *four* decades! *See*

Defs.' Proposed Conclusions of Law ("Defs.' PCOL") ¶ 32 [Dkt. # 120]; 2/16/18 Hr'g Tr. 13:24-14:1.

To sum up, the Court accepts that vertical mergers "are not invariably innocuous," but instead can generate competitive harm "[i]n certain circumstances." Non-Horizontal Merger Guidelines §§ 4, 4.2; Gov't PCOL ¶ 22.[20] The case at hand therefore turns on whether, notwithstanding the proposed merger's conceded procompetitive effects, the Government has met its burden of proof of establishing, through "case-specific evidence," that the merger of AT&T and Time Warner, at this time and in this remarkably dynamic industry, is likely to substantially lessen competition in the manner it predicts. Gov't PCOL ¶ 25. Unfortunately for the Government, for the following reasons, it did not meet its burden.

ANALYSIS

The challenged vertical merger here would unite Time Warner, a creator and supplier of popular video content, with AT&T, a large downstream purchaser and distributor of video content. The Government concedes that the challenged merger, like most vertical mergers, will result in significant benefits to customers of the merged

[20] The Court therefore declines defendants' invitation to adopt either a per se rule or a presumption that would apply to most vertical mergers. *See* Pre-Tr. Br. of Defs. 29 [Dkt. # 77]. To be sure, the standard for which defendants advocate aligns with the views of a number of authorities, including judges from this Circuit. *See, e.g.*, Robert Bork, *The Antitrust Paradox* 245 ("[I]n the absence of a most unlikely proved predatory power and purpose, antitrust should never object to the verticality of any merger."); *Comcast Cable Comms., LLC v. FCC*, 717 F.3d 982, 990 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("[A]bsent market power, vertical integration and vertical contracts are *procompetitive*.") (citing Douglas H. Ginsburg, *Vertical Restraints: De Facto Legality Under the Rule of Reason*, 60 Antitrust L.J. 67, 76 (1991)). Tempting though it may be to agree with my appellate brethren, I need not, and will not, go that far to resolve this case.

company. Specifically, the Government's lead expert, Professor Carl Shapiro, estimates that the merger will cause AT&T to lower the price of DirecTV, resulting in $352 million in annual savings for DirecTV's customers. *See* Tr. 2252:19-20 (Shapiro).

Notwithstanding those conceded consumer benefits, the Government contends that the challenged merger is "likely to lessen competition substantially," *Baker Hughes*, 908 F.2d at 985, and thus should be enjoined under Section 7, *see* Compl. ¶ 10. The challenged merger would likely result in a substantial lessening of competition, according to the Government, in three "mutually reinforcing" ways. Gov't Post-Tr. Br. 7.

First and foremost, the Government argues that the challenged merger would enable Turner to charge AT&T's rival distributors – and ultimately consumers – higher prices for its content on account of its post-merger relationship with AT&T. *See, e.g.* Compl. ¶¶ 36-38; Gov't PFOF ¶¶ 226, 231-32; Gov't Post-Tr. Br. 1-2. *Second*, the Government contends that the challenged merger will substantially lessen competition by creating an increased risk that the merged firm will act, either unilaterally or in coordination with Comcast-NBCU, to thwart the rise of the lower-cost, consumer-friendly virtual MVPDs that are threatening the traditional pay-TV model. *See* Compl. ¶¶ 40-41; Gov't PFOF ¶ 278. *Finally*, the Government alleges that the merged entity could harm competition by preventing AT&T's rival distributors from using HBO as a promotional tool to attract and retain customers. *See* Compl. ¶ 39; Gov't PFOF ¶ 234.

In the remainder of this section, I will analyze each of those theories of harm to competition. Initially, I will set forth the relevant market definition, which incorporates the Government's proposed product and geographic markets. Next, I will discuss the conceded consumer benefits associated with the proposed merger. Mindful of those conceded benefits, and the need to balance them against the Government's allegations of consumer harm, I will then evaluate whether the Government has carried its burden to show a likelihood that the challenged merger will result in a substantial lessening of competition. For the reasons discussed in detail below, I have concluded that the answer to that question is no !

I. Market Definition

Typically, "[m]erger analysis starts with defining the relevant market" in which to assess the alleged anticompetitive harms. *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 24 (D.D.C. 2015) (citing *United States v. Marine Bancorporation*, 418 U.S. 602, 618 (1974)). The relevant market comprises two parts: a product market and a geographic market. *Anthem*, 236 F. Supp. 3d at 193. Here, the Government defines the primary relevant product market as the "Multichannel Video Distribution" market, and the relevant geographic markets as the approximately 1,200 local markets in which residents have access to video offerings from the same set of multichannel video programming distributors. Gov't PFOF ¶¶ 31, 38-41. Both of those proposed markets find support, the Government contends, in Professor Shapiro's expert analysis, *see* Tr. 2184:22-2188:4 (discussing hypothetical monopolist test, among other things), as well as the *Brown Shoe* "practical indicia," *see* 370 U.S. at 325 (listing "industry or public recognition of the submarket," "the product's peculiar characteristics and uses," and "distinct customers" and "distinct prices" of the product as relevant to product market determination); Gov't PFOF ¶¶ 32-36.

Horizontal merger cases often "to a great extent . . . hinge[] on" market definition because such definition affects the ultimate market concentration statistics associated with a proposed transaction. *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1073 (D.D.C. 1997). For that reason, market definition is often heavily contested in horizontal merger cases, turning on fine-grained economic analyses of "SSNIPs" and cross-elasticity of demand. *See, e.g.*, *Anthem*, 236 F. Supp. 3d at 193-198; *FTC v. Staples, Inc.*, 190 F. Supp. 3d 100, 116-127 (D.D.C. 2016); *Sysco Corp.*, 113 F. Supp. 3d at 24-48. Happily, I need not delve deeply into those concepts here. The proposed vertical merger, as discussed, does not "involve an increase in market concentration," and defendants, for all of their objections to the Government's case, have not meaningfully challenged the Government's proposed product or geographic markets. Joint Statement 3; *see* Tr. 2186:25-2187:2, 2188:2-4 (Shapiro). I will thus accept the Government's proposed product and geographic markets for purposes of this case, and briefly discuss the basics of those markets – as well as the role of the product market as it relates to my analysis of the Government's claims of harm – below.

Product Market. The Government's *primary* product market is the market for multichannel video distribution. Multichannel video distribution, as defined by the Government, involves the distribution of live, or "linear," video programming networks, as well as on-demand content, to subscribing consumers. Gov't PFOF ¶ 31; Trial Br. of the United States ("Gov't Pre-Tr. Br.") 22 [Dkt. # 76]. As relevant here, the sellers in that product market are: 1) MVPDs, including cable television providers, such as Comcast, Cox, and Charter; direct broadcast satellite providers, such as DirecTV and DISH, which operate nationally; telecommunications providers, or "telcos," such as Verizon Fios and

AT&T's U-verse; and overbuilders, such as RCN; and 2) virtual MVPDs, including Sony's Playstation Vue, Hulu Live, Google's YouTube TV, DirecTV Now, and DISH's Sling. As discussed, virtual MVPDs provide the same live-TV services as do traditional MVPDs, but do so over the internet rather than by way of a dedicated transmission path that they control. *See* Gov't PFOF ¶ 15. Although the majority of U.S. households (approximately 90 million) currently receive linear video programming through traditional MVPDs, *id.*, and a majority are likely to continue to do so, there is no debating that the number of MVPD subscribers is "declining unequivocally" as consumers increasingly turn to virtual MVPDs and SVODs for their video content needs. Tr. 3451:22-23 (Stephenson (AT&T)); *see id.* at 3449:12–3451:1 ("DirecTV lost 1.2 million subscribers in 2017. The whole system, pay TV, cable, satellite, lost 3 million."); *see also id.* at 2948:11-24 (Holanda (RCN)); PX455-136 to -137.

As the above discussion indicates, the Government's proposed product market focuses on the downstream distribution of live-TV content to consumers—a focus that excludes both the upstream programming market and the market for SVODs such as Netflix, Hulu, and Amazon Prime. *See, e.g.*, *id.* at 2184:22-2185:5 (Shapiro); *cf.* Gov't PCOL ¶ 38 (disputing need to "define an 'upstream' programming market").[21] That product market definition appears to reflect the Government's (and Professor Shapiro's) projections regarding where the challenged merger's ultimate "net harm" to consumers –

[21] The Government also asserts that a broader market of "All Video Distribution" – which includes SVODs in addition to MVPDs and virtual MVPDs – constitutes a relevant product market. *See* Gov't PFOF ¶ 37 (citing Tr. 2184:18-2185:17) (Shapiro). For simplicity's sake, this discussion mirrors the Government's focus on the multichannel video distribution market. *Cf.* Gov't Pre-Trial Br. 22.

i.e., the predicted increased costs to "multichannel video subscribers" – will result. *Cf.* Gov't PFOF ¶ 231. Importantly, however, accepting the Government's proposed product market does not mean that Turner's position in the upstream programming market is irrelevant to evaluating the Government's theories of harm in this case. Nor does it require this Court to ignore the rising role of SVODs in the broader multichannel video programming and distribution market. That is because the Government's proffered increased-leverage theory, not to mention its other theories of harm, incorporates those factors in at least three different ways.

First, as will become clear in the ensuing discussion, examining the importance of Turner's content to distributors in the upstream programming market is a necessary (but not sufficient) step in evaluating the Government's increased-leverage theory. *Cf.* Gov't PFOF ¶¶ 69-102 (proposing findings of fact to support assertion that the "merger would enable AT&T to harm competition because MVPDs and virtual MPVDs need Turner content to compete effectively"). *Second*, the bargaining model from which the Government's measures of consumer harm are derived itself accounts for the increasing role of SVODs and "cord cutting" in the market, as those trends affect the amount of benefits that AT&T could expect to receive under the Government's increased-leverage theory. *See, e.g.*, Tr. 2242:2-18 (Shapiro) (discussing role of "cord cutting" in calculating the bargaining model's "diversion rate" input); *id.* at 2504:11-2506:24 (Carlton) (explaining why cord cutting "matters a lot" to bargaining model). *Third* and finally, the Government has argued that certain documents reflect an intent on the part of defendants to use the proposed merger to act consistently with the Government's increased-leverage theory of harm, among other theories. *See* Gov't PCOL ¶ 51 (stating, in relation to "[d]efendants' internal documents," that "[e]vidence of anticompetitive intent can also form the basis of a court's prediction of harm"). To appropriately evaluate the strength of such evidence, however, I must be able to put it in the context of other documents and statements related to the various rationales for the proposed merger including, of most relevance here, defendants' asserted desire to compete with SVODs and other technology companies amid "the ongoing revolution in video programming and distribution." Defs.' PFOF ¶ 6; *see also* Tr. 3079:18-3080:2 (Bewkes (Time Warner)). Therefore, although the Government is of course correct that the refrain "'we are getting killed by new competition in different markets'" is no "defense to an illegal merger," Gov't Post-Tr. Br. 21, I simply cannot evaluate the Government's theories and predictions of harm, as presented by the Government at trial, without factoring in the dramatic changes that are transforming how consumers view video content.

Geographic Markets. The Government has identified over 1,100 local multichannel video distribution markets as the relevant geographic markets. *See* Gov't PFOF ¶ 41. These local markets, which the Government calls "Local Footprint Overlap Zones," represent each local geographic area in which "residents have access to video offerings from the same set of MVPD competitors." *Id.*; *see* Tr. 2187:3-25 (Shapiro). The localized geographic markets reflect the reality that, due to limitations of the physical transmission paths maintained by many of the providers in the multichannel video distribution market, the mix of MVPDs and virtual MVPDs available to a consumer varies based upon where that consumer lives. *See* Gov't PFOF ¶ 40. As such, the Government contends that the asserted "effects of the proposed merger" will vary depending "on the market shares of the various MVPDs and virtual MVPDs in [a] region," and that analyzing the local markets is therefore appropriate. *Id.* The Government has not relied upon harm in any particular local market as the basis for enjoining the merger, however. Instead, the Government's expert "aggregated" all of the alleged harms in the local markets in order to derive a total measure of nationwide economic harm. Gov't PFOF 13 ("Relevant downstream geographic markets are local, but they can be aggregated for analytical convenience."); *see* Tr. 2255:1-2256:15 (Shapiro) (providing aggregate estimates of consumer harm nationwide).

II. Conceded Consumer Benefits of Proposed Merger

Vertical mergers often generate efficiencies and other procompetitive effects. *See supra* pp. 53-57 & nn. 17, 19. The proposed merger is no exception. Indeed, the Government concedes that this case implicates one "standard benefit" associated with vertical mergers: the elimination of double marginalization ("EDM"). Tr. 2438:6 (Carlton); Gov't PFOF ¶ 222.

As relevant here (and at the risk of oversimplifying things), double marginalization refers to the situation in which two different firms in the same industry, but at different levels in the supply chain, each apply their own markups (reflecting their own margins) in pricing their products. *See* Tr. 2251:15-25 (Shapiro). Those "stacked" margins are both incorporated into the final price that consumers have to pay for the end product. *Id.* at 2251:24. By vertically integrating two such firms into one, the merged company is able to "shrink that total margin so there's one instead of two," leading to lower prices for consumers. *Id.* at 2252:1-3. EDM is, therefore, procompetitive.

In the context of a Time Warner and AT&T combination, EDM will play out as follows. Prior to the merger, AT&T must pay Time Warner a certain price to display Turner content to its DirecTV customers. *Id.* at 2251:19-25. The price that AT&T pays includes Time Warner's profit margin, that is, an amount over and above the marginal cost of the programming. *Id.* After the vertical integration of AT&T and Time Warner, however, AT&T will no longer need to pay Turner's profit margin to display Turner content. *See id.* at 2252:1-3; *id.* at 2438:9-15 (Carlton). In effect, that means that AT&T's marginal cost of licensing Turner content will be lower, which in turn renders distribution of Turner to its DirecTV customers more profitable. *Id.* at 2438:13-15 (Carlton). With its profits increased, AT&T would have the "incentive to get more customers and in particular AT&T's price, the DirecTV price will go down to consumers." *Id.* at 2438:16-18.

According to the Government's expert, Professor Shapiro, EDM would result in AT&T lowering the price for DirecTV by a "significant" amount: $1.20 per-subscriber, per-month. *Id.* at 2252:6-7 (Shapiro). All told, those savings to AT&T's customers add up to $352 million annually. *See id.* at 2252:19-21. Those savings, moreover, would begin flowing to AT&T's customers "pretty quickly" after consummation of the merger. *Id.* at 2446:4-5 (Carlton).

All sides agree that any proper antitrust analysis of the proposed merger must account for those "positive elements of the merger in terms of DirecTV, having lower costs." *Id.* at 2182:12-13 (Shapiro); *cf.* Gov't PFOF ¶¶ 222-23. In other words, to understand whether the proposed merger will harm consumers, Professor Shapiro explained, it is necessary to "balance" whether the Government's asserted harms outweigh the merger's conceded consumer benefits. Tr. 2180:24, 2181:1-6 (Shapiro); *see id.* at 2182:11-21 ("So I'm going to need to trade those off. This is somewhat different than horizontal merger analysis. We're talking about vertical merger analysis here."). With that important principle in mind, I will now examine whether the Government has met its burden under Section 7.

III. The Government Has Failed to Meet Its Burden to Show That the Proposed Merger Is Likely to Substantially Lessen Competition by Increasing Turner's Bargaining Leverage in Affiliate Negotiations

The Government's primary theory of harm to competition focuses on the challenged merger's integration of Turner's important video content – content that includes, among other things, the networks CNN, TNT, and TBS – with AT&T's video distributors, U-verse and DirecTV.[22] Specifically, the Government contends that, should the challenged merger proceed, Turner's relationship with AT&T will enable Turner to extract greater prices from AT&T's rival distributors for its "must-have" content than it could without the merger. *See, e.g.,* Compl. ¶¶ 31-38. The Government argues that distributors would then pass on those price increases to their subscribers, resulting in an increase of hundreds of millions of dollars in annual consumer payments. *Id.* ¶ 39; Gov't PFOF ¶¶ 231-232.

According to the Government, it carried its burden to support its increased-leverage theory of harm to competition by offering what it refers to as "real-world objective

[22] For purposes of this section, the Court at times refers to AT&T's collective distribution offerings as "DirecTV."

evidence" – namely, statements contained within defendants' prior regulatory filings and internal business documents as well as testimony from third-party competitor witnesses. Gov't PCOL ¶ 21. To further corroborate its increased-leverage theory and predict the consumer harm that would be generated, the Government also relied on testimony and economic modeling proffered by Professor Carl Shapiro. Professor Shapiro opined that a post-merger Turner would be able to extract greater affiliate fees from distributors due to increased bargaining leverage Turner would gain on account of its relationship with AT&T. Citing the results of his economic models, Professor Shapiro predicts that such increased leverage would lead to total, annual consumer harms that outweigh the conceded $352 million in annual cost savings that the proposed merger would generate for AT&T's customers. *See, e.g.*, Tr. 2253:4-15 (Shapiro).

Not surprisingly, the defendants vigorously disagree with the Government's increased-leverage theory of harm. To start, defendants argue that the Government has failed to put forward any "meaningful real-world evidence" to support the premise that a post-merger Turner would benefit from increased bargaining leverage with distributors on account of its relationship with AT&T. Defs.' PFOF ¶ 81. If anything, defendants argue, analysis of real-world pricing data demonstrates that prior instances of vertical integration in this industry have not produced the increased-leverage effects that the Government predicts. *Id.* ¶¶ 95-102. Defendants also challenge Professor Shapiro's testimony, arguing that it lacks sufficient basis in the facts of this industry and reflects results based on a model riddled with improper inputs and faulty assumptions. *Id.* ¶¶ 86-94, 105, 111-13, 188, 204.

In evaluating these competing contentions, the Court unfortunately does not have the luxury of looking to judicial precedents applying the increased-leverage theory in the context of a Section 7 challenge to a vertical merger. Indeed, the Government has not pointed to *any* prior trials in federal district court in which the Antitrust Division has successfully used this increased-leverage theory to block a proposed vertical merger as violative of Section 7. *Cf.* Tr. 2390:2-4 (Shapiro) (noting, with respect to proffered economic bargaining model, that "[w]hat's less common is to use it to evaluate a merger or a vertical merger especially"); Defs.' PCOL ¶ 32. Thus, in this matter of first impression, I must determine whether the evidence adduced at trial is sufficient to support the Government's assertion that Turner will likely gain increased bargaining leverage in affiliate negotiations on account of the proposed merger and, if so, whether any increased distributor or consumer costs stemming from the increased bargaining leverage will result in a substantial lessening of competition under Section 7.

Having heard and considered the evidence adduced at trial, I conclude that the Government has failed to clear the first hurdle of showing that the proposed merger is likely to increase Turner's bargaining leverage in affiliate negotiations; I thus need not consider the separate legal question of whether any effects associated with the Government's increased-leverage theory would result in a substantial lessening of competition for purposes of the Clayton Act's prohibitions.[23] Before explaining that conclusion, I need to

[23] On that score, defendants argue that "even taken at face value, the Government's projected price effects do not state a claim under the Clayton Act." Defs.' PCOL 159 (capitalization altered); *see also id.*¶¶ 31-33. In particular, defendants point out that the miniscule per-consumer price increases of approximately 27-cents per month relied on by the Government would not prevent AT&T's rival distributors from competing in the marketplace or otherwise "impair[] their ability to discipline" AT&T's

briefly review the basics of affiliate negotiations and the Government's increased-leverage theory of harm. With that background established, I will examine the evidence put forward by the Government to support its argument that the challenged merger would likely increase Turner's bargaining leverage with distributors and thereby enable it to secure greater affiliate fees than it could without the merger. Ultimately, as I will explain, the Government's proof at trial falls *far* short of establishing the validity of its increased-leverage theory.

A. Background of Increased-Leverage Theory of Harm

As previously discussed, the terms under which distributors may license and display programmers' content are set through a "very tough" series of affiliate negotiations. Tr. 1023:2 (Breland (Turner)); *see supra* pp. 14-18. As with any type of bargaining, each party to an affiliate negotiation attempts to take advantage of its points of leverage, and "reaching a deal in the end can come down to a battle of the competing bargaining leverages." Tr. 1025:20-22 (Breland (Turner)); Gov't PFOF ¶ 154. In the event an affiliate negotiation is unsuccessful, the distributor will lose the rights to display the programmer's content to its

---

prices; indeed, they claim that competition would be promoted by the challenged merger's conceded vertical integration effect of lowering AT&T's prices to its projected consumers. *Id.* ¶¶ 31-32; *cf. Comcast Cable Comms., LLC v. FCC*, 717 F.3d 982, 990 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("Vertical integration and vertical contracts become potentially problematic only when a firm has market power in the relevant market.").

For the reasons given by defendants, the Court harbors serious doubts that the Government's proffered affiliate fee increases to AT&T's rivals or the resulting 27-cent per-month subscriber cost increases would, if proven, constitute a "substantial lessening of competition" for purposes of Section 7. 15 U.S.C. § 18. As just noted, however, I need not rest this opinion on that legal conclusion. That is because, for all of the reasons provided in the section that follows, the Government has failed to carry its burden to put forward adequate evidence to show that there are likely to be *any* price increases (much less price increases that outweigh the conceded EDM benefits to consumers) either to AT&T's rival distributors or their subscribers under its increased-leverage theory.

customers. Such a situation is known in the industry as a programming "blackout," or "going dark." Tr. 129:4-9 (Fenwick (Cox)).

Blackouts have significant, if not "catastrophic," negative consequences for programmers – in the form of lost advertising and affiliate fee revenues. *Id.* at 1128:7-12 (Breland (Turner)); Defs.' PFOF ¶¶ 76-77. Distributors, for their part, may lose subscribers. *See generally, e.g.*, Tr. 2197:4-2198:2 (Shapiro). In "almost every negotiation," therefore, programmers and distributors threaten blackouts in an attempt to gain concessions. *Id.* at 1026:17-1027:3 (Breland (Turner)); *cf. id.* at 367:1-22, 376:22-377:11 (Schlichting (DISH)). Given that blackouts are negative events for both programmers and distributors, however, deals between programmers and distributors are invariably struck in order to avoid long-term blackouts. *See id.* at 138:13-15 (Fenwick (Cox)); *id.* at 1027:4-7 (Breland (Turner)); *id.* at 1359:14-15 (Montemagno (Charter)); *id.* at 3124:4-7 (Bewkes (Time Warner)). Indeed, when it comes to Turner, the record shows that there has *never* been a long-term blackout of the Turner networks. *See id.* at 2357:12-14 (Shapiro) ("Q: But to be sure there's never been a long-term blackout of Turner, right? A: No . . . ."); Defs.' PFOF ¶ 94. That fact is by no means lost on either side.

That background brings us to the Government's increased-leverage theory. Notably, under that theory, the Government does *not* allege that a post-merger Turner would be incentivized to start *actually* engaging in long-term blackouts with distributors. That is so, as Professor Shapiro concedes, because withholding Turner content would not be "profitable" to the merged entity given the attendant losses in significant advertising and affiliate fee revenues. *See* Tr. 2293:9-17 (Shapiro). In other words, and in contrast to a prevalent theory of vertical merger antitrust harm, Turner will not "foreclose" downstream distributors from accessing Turner content. *See id.* at 2218:15-16 ("This is not a foreclosure-withholding story."); *cf. Brown Shoe*, 370 U.S. at 323-24 (stating that "[t]he primary vice of a vertical merger or other arrangement tying a customer to a supplier is that, by foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may act as a clog on competition" (internal quotation marks omitted)).

Instead, the Government's increased-leverage theory of harm posits that Turner's bargaining position in affiliate negotiations would improve after the merger due to its relationship with AT&T. That is so, the Government argues, because Turner and its distributor counterparties would recognize that, should Turner fail to strike a deal and engage in a long-term blackout with a distributor, Turner would no longer face the mere downside of losing affiliate fees and advertising revenues. *See, e.g.*, Gov't Post-Tr. Br. 1-2. Rather, some of those losses would be offset, according to the Government, by new benefits to AT&T's video distribution companies via the following chain of events: 1) some of the rival distributor's customers would depart or fail to join the distributor due to the missing Turner content; 2) some portion of those lost customers would choose to sign up with AT&T's video distributors (which would have Turner); and 3) AT&T would profit from those gained subscribers. *See generally* Tr. 2197:15-2198:12 (Shapiro). As a result, the Government predicts that Turner's downside position in the event of a blackout would improve as a result of the proposed merger. That improved downside position, according to the Government, would in turn enable Turner to demand higher prices for its content in post-merger affiliate fee negotiations with distributors – price increases that would ultimately be passed on to consumers. *See* Compl. ¶ 38.

At trial, the Government relied on two primary categories of evidence to support its increased-leverage theory of harm. First, it offered so-called "real-world objective evidence" – namely, statements contained within defendants' prior regulatory filings and internal business documents as well as testimony from third-party competitor witnesses. Gov't PCOL 21. Second, the Government called an expert, Professor Carl Shapiro, to testify about its increased-leverage theory, which is based on an economic theory of bargaining known as the Nash bargaining theory, and to estimate the consumer harm associated with the increased-leverage theory. Gov't PFOF ¶ 201. For the following reasons, neither category of evidence was effective in proving the Government's increased-leverage theory. Accordingly, as to this theory, the Government has failed to meet its burden of proof to show that the merger is likely to result in a substantial lessening of competition.

B. The Government's So-Called "Real-World Objective Evidence" Is Insufficient to Support Its Increased-Leverage Theory of Harm

To support its increased-leverage theory of harm, the Government first points to various pieces of the so-called "real-world objective evidence" it offered at trial. Gov't PCOL 21. That evidence primarily consisted of defendants' ordinary course-of-business documents and excerpts of regulatory filings submitted by defendants in prior administrative proceedings, as well as the testimony of third-party witnesses from AT&T's rival distribution companies. Of particular importance here, the Government's so-called real-world evidence was directed at explaining and establishing two main concepts. First, the Government sought to establish the importance of Turner content to distributors and the resulting leverage Turner enjoys in affiliate fee negotiations. Second, the Government relied on this so-called "real-world objective evidence" to substantiate its prediction that Turner's leverage with distributors would *increase* as a result of Turner's post-merger relationship with AT&T. Neither, however, provided persuasive support for the Government's increased-leverage theory of harm. How so?

1. Evidence Regarding the Popularity of Turner Content Is of Limited Probative Value in Evaluating the Contention That Turner Will Gain Increased Leverage Due to the Proposed Merger

At trial, much time was spent debating the "must-have" status of Turner's programming content. According to the Government, distributors literally "'must have'" Turner's content in order "to compete effectively" in the video distribution industry. Gov't Post-Tr. Br. 4; *see also id.* at 6 ("Distributors don't just want this specific input to compete effectively, they truly need it."); Gov't PFOF 23 (similar). Defendants countered that the term "must have" is simply a marketing phrase used to mean "popular" and, similarly, that Turner content is not actually necessary to allow distributors to operate their businesses successfully. *See* Defs.' PFOF ¶ 179.

Based on the evidence, I agree with defendants that Turner's content is not *literally* "must have" in the sense that distributors cannot effectively compete without it. The evidence showed that distributors have successfully operated, and continue to operate, without the Turner networks or similar programming. *Cf.* Tr. 351:5-25 (Schlichting

(DISH)) (discussing fact that DISH's virtual MVPD, Sling, offers packages without broadcast stations and CBS); PX144-121 (listing "[p]ast [n]etwork [d]rops" by distributors). Indeed, Stefan Bewley, a consultant who generated a slide deck with recommendations for Charter's use in evaluating its relationships with programmers, indicated that "Charter would be better off and would save a lot of money [by] canceling Turner." Tr. 1336:10-12 (Bewley (Altman Vilandrie)). Sling President Warren Schlichting acknowledged DISH founder and chairman Charlie Ergen made similar statements to the investment community. *See, e.g.*, *id.* at 365:17-366:1 (Schlichting (DISH)) (conceding that Ergen stated in investor call that a Turner blackout would be "slightly cash positive for us from a cash-flow perspective").

I therefore give little credit to blanket statements by third-party competitor witnesses indicating that the entire "viability of [their] video model" could depend on whether they offer Turner programming. *Id.* at 128:21 (Fenwick (Cox)); *see also id.* at 697:2-19 (Hinson (Cox)) (claiming that, without Turner, Cox would lack "the ability to compete" and that their customers would "go somewhere else"). Such statements were largely unaccompanied by any sort of factual analyses or, worse, contradicted by real-world examples from the witnesses themselves. *See, e.g.*, *id.* at 128:22-129:20 (Fenwick (Cox)) (neither she nor others at Cox had done analysis of potential subscriber losses in Turner blackout); *id.* at 2947:1-13 (Holanda (RCN)) ("Q: And so today, you're not offering this Court any empirical data or any real-world evidence of subscriber losses if RCN didn't have Turner, right? A: No, not our company."). *Compare id.* at 242:14-15, 352:5-7 (Schlichting (DISH)) ("[I]f you don't have March Madness" games, half of which are carried by Turner, "you're not in the pay-TV business."), *and id.* at 245:14-15 ("Q: How about CNN, why is CNN must have? A: Well, imagine coming around to midterm elections without CNN, right."), *and id.* at 242:16-243:1 ("ABC, NBC, CBS, Fox and Time Warner are the five groups that you, you just, it's very hard to have a pay-TV service without them."), *with id.* at 352:1-19 (conceding that DISH's Sling does not carry CBS, which offers the other half of the March Madness games), *and id.* at 360:18-24, 388:10-389:5 (acknowledging that DISH went dark with CNN at time of 2014 midterm elections and suffered only negligible subscriber loss), *and id.* at 351:11-21 (admitting that Sling Orange package lacks all of the "broadcast stations [and] CBS").[24]

Nor does those witnesses' (or, for that matter, defendants') use of the term "must have" to describe Turner content change things. Indeed, the evidence indicated that the term "must have" is a marketing phrase used by virtually every programmer to suggest that its content is popular with viewers. *See, e.g., id.* at 549:19-20 (Martin (Turner)) ("'Must have' is another way of saying, we have popular programming."); *id.* at 899:13-16 (Rigdon (Comcast)) (agreeing that "must have is just a term of art that means something is popular"); *id.* at 1092:18-24 (Breland (Turner)) ("[M]ust have means it's popular I

[24] The "must have" status of Turner content also varies based on whether the content is available for viewing through other means, such as over the internet. Former Cable ONE negotiator Randy Sejen testified, for example, that subscriber losses from a blackout of Turner's live baseball content were mitigated by the fact that "consumers were able to wire around" the blackout by "accessing mlb.com if they needed to see a particular playoff game." Tr. 2117:21-2118:20 (Sejen (CABLE ONE)). Along those same lines, Sejen testified that the online availability of March Madness basketball games could potentially "address the sort of must-have nature" of that content. *See id.* at 2121:11-16, 2123:1-5. I received similar evidence indicating that the availability of HBO's content through online, direct-to-consumer platforms has lowered the value of HBO programming – and thus its leverage – in the eyes of distributors. *See, e.g.*, DX709.

don't in a literal sense mean that I must have this content or I can't be successful."); *id.* at 2130:23-2131:6 (Sejen (Cable ONE)) (agreeing that he would "expect to hear" all programmers pitch their content as "must-have" and that he would "kind of take that with a grain of salt").

That said, I do nonetheless accept the Government's contention that Turner has popular content – especially live sporting events and live news – and, as a result, enjoys bargaining leverage with distributors. *See* Gov't PFOF ¶¶ 70-102 (summarizing evidence regarding Turner's importance to distributors); *id.* ¶¶ 103-177 (summarizing evidence supporting proposition that "Turner's valuable content gives it leverage in negotiations" with distributors). Importantly, however, accepting that straightforward proposition – *i.e.*, that popular programmers such as Turner are able to demand more for their content than less popular programmers – does not prove that the challenged *merger* would harm competition pursuant to the Government's increased-leverage theory of harm. To prove its increased-leverage theory, in other words, it is not sufficient for the Government to put forward evidence that Turner has important content and thus bargaining leverage – that fact is true today, pre-merger. Rather, the Government's increased-leverage theory posits that Turner's pre-merger bargaining leverage would materially increase as a result of its post-merger relationship with AT&T and that, as a result, distributors would cede greater affiliate fees than they would absent the merger.

To support that contention at trial, the Government primarily relied on defendants' own statements and documents as well as testimony of third-party competitor witnesses, most (but not all) of whom expressed concern regarding the challenged merger's potential effects on their businesses. Neither category of evidence, however, is persuasive in proving that Turner's post-merger negotiating position would materially increase based on its ownership by AT&T.

2. Defendants' Own Statements and Documents Provide Little Support for the Contention That Turner Will Gain Increased Leverage Due to the Proposed Merger

According to the Government, defendants' own prior statements and ordinary course business documents "recognize that vertical integration poses a threat to competition" and, thus, provide convincing support for the Government's bargaining leverage claim. *See* Gov't PFOF ¶¶ 47-58. The Government points to statements made by defendants in the context of prior regulatory proceedings, and statements contained in internal documents such as slide decks and emails created by various individuals within the defendant companies. Neither category, however, was of any particular probative value. How so?

As a general matter, the Government is undoubtedly correct that "ordinary course-of-business documents, including those generated by the defendants," can be probative of whether a proposed merger is likely to result in competitive harm. Gov't PCOL ¶ 49. But as with any other piece of documentary evidence, assessing the probative value of defendants' own documents and statements requires an examination of the context, circumstances, and foundation of the proffered evidence. As such, with few exceptions, the Court denied the Government's requests to admit into evidence and cite in post-trial briefing a number of company documents for which there was no accompanying background or foundation testimony. *See supra* pp. 46-47 & nn. 11-13. With the benefit of foundational testimony, I have considered all of the documentary and testimonial evidence from defendants' files and witnesses upon which the Government relied at trial. Having done so, I nonetheless conclude that the proffered statements and documents admitted are of such marginal probative value that they cannot bear the weight the Government seeks to place on them.[25]

First, the Government argues that defendants' statements "made in external filings with governmental authorities" are evidence of defendants' "understanding of the anticompetitive effects that result from this transaction." Gov't PCOL ¶ 52. The statements in particular upon which the Government relies were made, either in comments or supporting expert reports filed by AT&T or DirecTV, in the course of the following FCC proceedings: 1) the 2010 review of the Comcast-NBCU merger, *see* PX1 (DirecTV); PX441 (DirecTV); 2) the 2012 proceeding to determine, *inter alia*, whether to allow one

[25] Before proceeding further, the Court notes a bit of confusion in the Government's position about the role of defendants' alleged "anticompetitive intent" in assessing the likely harms associated with the challenged merger. Gov't PCOL ¶ 51. In opening arguments, counsel for the Government stated, in reference to the predictive exercised called for by Section 7, that "courts don't focus on intent. What they focus on is effects, effects in the market." Tr. 10:15-16. But the Government's post-trial brief cites cases for the proposition that "[e]vidence of anticompetitive intent can also form the basis of a court's prediction of harm," while at the same time noting that "absence of evidence demonstrating anticompetitive intent . . . suggests nothing." Gov't PCOL ¶ 51 & n.12.

The Court need not toil to reconcile those positions or parse the state of our Circuit's current case law on the issue. *Compare Whole Foods Mkt.*, 548 F.3d at 1047 (Tatel, J., concurring in the judgment) ("[T]he Supreme Court has clearly said that 'evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger." (emphasis and internal quotation marks omitted) (quoting *Brown Shoe*, 370 U.S. at 329 n.48)), *with id.* at 1057 (Kavanaugh, J., dissenting) ("[I]ntent is not an element of a § 7 claim. . . ." (citing *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989)) ("Firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition.")). That is because, as discussed below, here there is nothing akin to the direct, anticompetitive intent evidence of the other cases cited by the Government in its post-trial brief.

of the FCC's program access rules to sunset, *see* PX2 (AT&T); PX442 (AT&T); PX443 (DirecTV); 3) the 2014 annual video competition proceeding, *see* PX444 (AT&T); and 4) the 2014 review of the AT&T-DirecTV merger, *see* PX467 (AT&T and DirecTV).[26] Not surprisingly, the Government contends that these prior statements show that defendants have previously recognized the validity of applying its increased-leverage theory to affiliate fee negotiations. *See, e.g.*, Gov't Post-Tr. Br. 2. But with that said: so what? Although I agree that a few of the proffered statements might be somewhat probative of the Government's increased-leverage theory, that limited probative value cannot, and does not, overcome the numerous insufficiencies with the Government's case discussed below.

In particular, in examining defendants' prior regulatory filing statements, I am mindful of the considerations discussed in the context of the third-party competitor testimony. *See infra* pp. 91-99. When AT&T and DirecTV made many of the proffered regulatory filings, they acted as competitors to (or customers of) distributors whose

[26] Just prior to the close of evidence, when the Government moved the Court to take judicial notice of certain enumerated regulatory filings, I noted that the materials filled a notebook that is about "4 inches thick of paper." Tr. 3942:4-5. Given the complex analyses and arguments contained within the voluminous filings, I noted that the Government was "at an absolute minimum . . . going to have to isolate and identify as to each document which statement or statements" it thought were relevant to the case for purposes of clearing Federal Rule of Evidence ("FRE") 403. *Id.* at 3943:23-3944:3. In response, counsel for the Government stated that the "memorandum that I handed up isolates and lists the specific statements, and I'm happy to limit to those that are identified on page 3 and 4." *Id.* at 3945:11-13. In its post-trial papers, the Government nonetheless appears to argue that the *entire* expert reports appended to the prior regulatory filings are admissible under FRE 801(d)(2) as adoptions of defendants. *See* Gov't PCOL ¶ 54 & n.13. That is largely beside the point, however. That is because the Court declines to admit those portions of the proffered expert reports and filings not "identified on page 3 and 4" of the Government's motion under FRE 403. *Id.* at 3945:11-13. In my judgment, evaluating the complicated, fact-specific arguments and analyses contained with those filings and reports would essentially require a trial within a trial (recall that not even the expert reports in *this case* were offered into evidence by the parties), the result of which would produce evidence that is only marginally probative for all of the reasons discussed below.

competitive positions would be affected by FCC review. For that reason alone, I am hesitant to assign any significant evidentiary value to those prior regulatory filings.

Finally, with respect to this particular categories of statements, I particularly decline to place much stock in the statements related to the sunsetting of the FCC's ban on exclusive contracting between certain programmers and distributors. *See, e.g.*, PX2, PX442. Many of those statements relate to the issue of withholding content – something the Government's own expert concedes would *not* occur as a result of the proposed merger. *Compare* PX2-4 ("[V]ertically integrated programmers continue to have the incentive and ability to use (and indeed have used whenever and wherever they can) that control as a weapon to hinder competition to their down-stream cable affiliates *by withholding popular programming from competing MVPDs*.") (emphasis added), *with* Tr. 2218:13-17 (Shapiro) ("I'm not saying that after the merger, Turner will deny its content to the other distributors. *This is not a foreclosure-withholding story*.") (emphasis added). Generic statements about "mushroom[ing]" bargaining power of all programmers are similarly unhelpful to evaluating the Government's particular claims in this case. PX444-3 to -4.

That brings us to select statements made by DirecTV or AT&T that relate to vertically integrated programmers' ability to raise content prices and the use of the Nash bargaining model to estimate increased affiliate fees. *See, e.g.*, PX1-17, -83 ("[V]ertical integration of programming and distribution can, if left unchecked, give the integrated entity the incentive and ability to gain an unfair advantage over its rivals."); PX441-5 (noting "voluminous economic and other evidence that the proposed transaction would enable Comcast to raise the prices paid by its MVPD rivals for NBCU programming");

PX443-79 ("[V]ertically integrated MVPDs have an incentive to charge higher license fees for programming that is particularly effective in gaining MVPD subscribers than do non-vertically integrated MVPDs."). According to the Government, those statements show that defendants recognize the validity of applying *this* bargaining model to estimate the impact of AT&T and Time Warner's vertical integration on affiliate fee negotiations. Please !

Generic statements that vertical integration "*can*" allow the integrated entity to gain an "unfair advantage over its rivals," PX1-17 (emphasis added), do not come close to answering the question before the Court in relation to the Government's increased-leverage theory: whether the Government has carried its Section 7 burden to show, through proof at trial, that Time Warner will gain increased bargaining leverage in affiliate negotiations on account of the proposed merger and, if so, whether that increased bargaining leverage would result in increased distributor or consumer costs that would constitute a substantial lessening of competition under Section 7. *Cf. In re Applications of Comcast Corp.*, 26 FCC Rcd. 4238 ¶ 24 (2011) (noting differences in FCC's "public interest" review and DOJ's burden for "block[ing] a transaction" under Section 7). Similarly, the arguments that the Comcast-NBCU merger would harm distributors or consumers (as well the projections of harm) were, of course, informed by the state of the market at the time of the proceeding and the particular inputs to the models presented to the FCC. *See, e.g.*, *id.* app. B (Technical Appendix) (setting out various formulae and inputs used to model potential economic harm). Given all that, defendants' specific predictions regarding the ability of a merged Comcast-NBCU to leverage price increases by threatening to withhold the particular programming at issue is not particularly probative of whether a merged AT&T-

Time Warner could do the same with its programming in today's more competitive marketplace. *Compare id.* ¶ 41 ("We do not determine at this time whether online video competes with MVPD services."), *with* Gov't PFOF ¶¶ 14-18 (detailing role of virtual MVPDs in "distribut[ing] linear channels and on demand content to subscribers over the internet"). Moreover, as discussed in more detail below, defendants' expert Professor Carlton concluded in an econometric analysis of content pricing following the Comcast-NBCU merger that, contrary to the predictions offered by competitors in the regulatory filings, the merger did *not* cause content prices to increase. *See infra* pp. 100-105.

That said, the Court agrees with the Government that the fact that defendants previously submitted expert reports or commentary sponsoring the use of the Nash bargaining model in the context of affiliate fee negotiations counts as a mark (albeit a faint one) against defendants' attempts to disavow the applicability of the Nash bargaining theory in this case. Unfortunately for the Government, however, my conclusion that the Government has failed to provide sufficient evidentiary support to show the Nash bargaining theory accurately reflects post-merger affiliate negotiations or the proffered bargaining model in this case does not turn on defendants' protestations that the theory is "preposterous," "ridiculous," or "absurd." Gov't PFOF ¶ 47 (quoting Tr. 50:18 (Defs.' Opening); *id.* at 3119:19-24 (Bewkes (Time Warner)); *id.* at 3430:1-11 (Stephenson (AT&T)). It rests instead on my evaluation of the shortcomings in the proffered third-party competitor testimony, *see infra* pp. 91-99; the testimony about the complex nature of these negotiations and the low likelihood of a long-term Turner blackout, *see infra* pp. 14-18, 115-117 & nn.34-36; and the fact that real-world pricing data and the experiences of individuals who have negotiated on behalf of vertically integrated entities all fail to support the Government's increased-leverage theory, *see infra* pp. 99-108. Therefore, even assigning *some* probative weight to the statements made by defendants in prior regulatory proceedings, those statements do not come close to providing a sufficient evidentiary basis to prove the viability of the Government's increased-leverage theory in this case.[27]

Second, to prove its increased-leverage theory, the Government relies upon random statements from defendants' "ordinary course" business documents, including employees'

[27] The Government takes its regulatory filings argument one step further in its post-trial briefing, asserting, for the first time, that defendants' prior regulatory statements should result in them being *judicially estopped* from denying basic predicates of the increased-leverage theory of harm. Gov't PCOL ¶¶ 74-75. To say the least, that argument is a stretch. As the Supreme Court has explained, the "equitable doctrine" of judicial estoppel may be "invoked by a court at its discretion" to guard against a party's "improper use of judicial machinery" to gain an "unfair advantage." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (internal quotation marks omitted). To appropriately apply judicial estoppel against a party, the "party's later position must be 'clearly inconsistent' with its earlier position"; courts also consider whether the party has "succeeded in persuading a court to accept that party's earlier position" or would "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* (internal quotation marks omitted).

Applying those factors, I easily conclude that estoppel is not appropriate here. To start, the cited prior regulatory comments are not "clearly inconsistent" with defendants' current positions: predicting that a different vertical transaction, made at an earlier time period and in a less-competitive market, will shift bargaining outcomes is *not* inconsistent with arguing that the Government has failed to carry its burden of proof to show at trial that a different transaction, proposed in the context of an even more competitive market, is likely to similarly shift outcomes (much less substantially lessen competition). *Maine*, 532 U.S. at 750; *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 586 (D.C. Cir. 2016) (declining to apply estoppel when party's position was not inconsistent). Although that consideration alone is fatal to the Government's estoppel argument, the Court further notes that the equities also weigh against applying estoppel here. The Government investigated the proposed merger for approximately one year before filing its suit. Disputes regarding the applicability of an increased-leverage theory as applied to the transaction have been front and center in the litigation, and were fully aired at trial. Given all that, I am hard pressed to understand how the Government would suffer an "unfair detriment" if defendants are not estopped; if anything, it would seem manifestly unfair to defendants to accept the Government's post-trial estoppel argument that much of the trial evidence can be ignored and indeed substituted with decades-old regulatory filings. Thus, even assuming that estoppel can be applied based on statements contained within *third-party* regulatory comments to prior administrative proceedings, *but see Abtew v. U.S. Dep't of Homeland Sec.*, 808 F.3d 895, 899-900 (D.C. Cir. 2015) ("[T]he rule of judicial estoppel 'generally prevents *a party* from prevailing in *one phase of a case* on an argument and then relying on a contradictory argument to prevail in *another phase*.'" (emphasis added) (quoting *Maine*, 532 U.S. at 749)), the Court declines the Government's last-minute invitation to estop defendants here.

emails and internal slide decks. Indeed, the Government even featured many such statements (or, more accurately, snippets of such statements) in its Complaint and pre-trial filings. However, as became clear at trial, when live witnesses take the stand a trial by slide deck leaves much to be desired !

Exemplary of this problem is a series of Government exhibits containing emails and drafts of slide decks generated prior to a merger integration meeting in 2017. *See* PX31; PX184; PX189; PX363. The Government has emphasized statements excerpted from those slide decks, contending before, during, and after trial that they highlight AT&T's "core belief" that the merger would help it preserve the role of "[t]raditional Pay-TV" as a "cash cow business to AT&T for many years to come" by ensuring "stability through the slow, structural decline of the industry." PX363-12 to -13; *see, e.g.*, Compl. ¶ 3 ("As AT&T/DirecTV's strategic merger documents state, after the merger, disruption need not occur immediately – the merged firm 'can operate [its] pay-TV business as a 'cash cow' while slowly pivoting to new models."); Gov't Pre-Tr. Br. 2-3 (same).

At trial, however, we learned that those statements were drafted by a lower-level AT&T employee who had nothing to do with the substance of the decision to acquire Time Warner, *see* Tr. 1777:16-1778:3 (Manty (AT&T)), and in any event, were contained in a preliminary draft and were subsequently removed or changed, *see id.* at 1732:25-1733:25. To be sure, Government counsel endeavored to characterize that subsequent change as a nefarious "sanitization" by lawyers; but testimony indicated that the "whole deck changed" as a result of the parlor room process and its attendant legal review. *See id.* at 1738:7-13, 1744:8-13. *Compare* PX363 (Apr. 8, 2017), *and* PX31 (Apr. 9, 2017), *with* PX189 (Apr.

18, 2017). In the final analysis, no upper-level AT&T witness testified to ever having viewed or otherwise relied on the draft statements. To say the least, their probative value was minimal.

As it turned out, much of the Government's proffered "ordinary course" evidence went the way of those draft slide deck statements. *Compare* Tr. 1713:20-23, 1714:3-6 (Gibson (AT&T)) (confirming that internal AT&T documents stated that "NBCU could become a more formidable negotiating power" and that "[c]ontent costs could increase" as a result of the expiration of the Comcast-NBCU consent decree) (internal quotation marks omitted), *with id.* at 1712:14, 25, 1714:1-2, 9-10 (testifying that the document in question represents a "draft understanding of some pretty complicated merger conditions" designed to "brainstorm the what-ifs" of what Comcast-NBCU "may be able to do" that the team "hadn't finished"), *and id.* at 1715:20-21, 1717:17-18 (email chain, PX11, contains "first very rough understanding of" Comcast-NBCU merger conditions by "individual who reported to me regarding merger conditions for the first time"). *See also id.* at 1770:25-1771:12, 1772:16-25 (Manty (AT&T)) (showing that PX184, although sent to two AT&T senior vice presidents in July 2016, was generated in 2014 by team of lower-level AT&T employees and consulting firm members). I need not recount all of the examples here. Suffice it to say that I find that the Government frequently "overemphasized the importance and relevance" of the excerpts from defendants' documents, given that many of them, the testimony revealed, contained "informal speculation" about "rationales for the merger" or were generated by individuals "who had no decision-making role or authority in relation to the merger." *H & R Block*, 833 F. Supp. 2d at 77 n.30; *cf.* Dep't of Justice & Fed. Trade

Comm'n, Horizontal Merger Guidelines § 2.2.1 (Aug. 19, 2010) ("Horizontal Merger Guidelines") ("The Agencies give careful consideration to the views of individuals whose responsibilities, expertise, and experience relating to the issues in question provide particular indicia of reliability.").

In a few instances, however, the Government sought to draw evidentiary support from some of AT&T CEO Randall Stephenson's own statements and notes. The Government pointed, for example, to an email that Stephenson sent upon being informed by Time Warner CEO Jeff Bewkes that "Time Warner had 'taken a 10% stake in Hulu' and that Hulu was going to launch a virtual MVPD." Gov't PFOF ¶ 51 (alteration omitted) (quoting PX47). In response to Bewkes' statement that he did not think the announcement would impact AT&T's relationship with Time Warner, Stephenson stated that it was "hard to imagine how it won't impact all of our relationships," continuing that AT&T is "trying to figure out how we navigate a very new world where you folks are going around us while trying to preserve the old revenue streams and business models from us." PX47. At trial, Stephenson testified that his email indicated his concern that DirecTV Now, the new virtual MVPD AT&T was "standing . . . up" at around that same time, would get the "same access" as one of its virtual competitors, Hulu. Tr. 3475:21-22, 3477:6-7. In this Court's view, expressing concern about how a rival virtual MVPD's relationship with Time Warner could affect AT&T's nascent DirecTV Now platform does little to prove how AT&T would likely behave in the event of a vertical integration.

The Government also relies on notes that Stephenson drafted to himself in preparation for an AT&T Board of Directors Meeting to discuss the merger. *See* Gov't

PFOF ¶ 52. In those notes, Stephenson listed the following as a discussion point: "How can you advantage your own distribution (TV, BB, Wireless) without harming TW position as a wide distributor of content to other SVOD, cable networks, and broadcast networks." DX609-8. The Government argues that this bullet point reflects "exactly the theory of the government's case: use content to advantage distribution." Tr. 3980:4-5 (Gov't Closing); *see also* Gov't PFOF ¶¶ 52-53. Not so. At trial, Stephenson testified credibly that the point of that note was to frame a discussion with his Board "that if there is a thought process that says we're going to use this content to enhance the distribution business, that means you're going to have to limit the distribution" and that "is counter is how you create value in one of these businesses." Tr. 3407:16-21. That testimony mirrors the contents of a letter sent by Stephenson to all AT&T officers shortly after the announcement of the proposed merger. In that letter, known among those in defendant companies as the "'Magna Carta'" of the merger, Stephenson writes "[t]o Time Warner employees: We will continue to distribute Time Warner content broadly across the industry. In fact, we want to extend its distribution deeper into mobile so all wireless companies become distribution points for Time Warner content." DX625-1; *see also* Tr. 3408:16-22 (Stephenson (AT&T)).

To be sure, the Government impugns Stephenson's explanation, calling it "curious" and credulity "strain[ing]" in light of the testimony given about the other notes on the same page. *See* Gov't PFOF ¶ 53; Tr. 3980:21, 3981:9 (Gov't Closing). But even should I fail to credit Stephenson's explanation about that particular pre-Board-meeting bullet point, the contents of that bullet point fail to meaningfully advance the Government's case. To start, as we learned at trial, there are a number of ways in which AT&T could "advantage [its] own distribution" through use of Time Warner content without acting in accordance with the Government's increased-leverage theory of anticompetitive harm. *See, e.g.*, Tr. 3220:21-3221:20 (re-stacking and re-editing personalized sets of CNN news clips for access on mobile devices); *id.* at 3222:4-22 (shooting, producing, and broadcasting live sporting events in 4K resolution); *id.* at 3223:13-3224:4 (integration of social media and multi-screen functionality with content).

In short, despite the Government's efforts to paint a contrary picture, this is not a case containing direct, probative evidence of anticompetitive intent on the part of high-level executives within the merging company. *Cf., e.g.*, *Whole Foods Mkt.*, 548 F.3d at 1044-45 (Tatel, J., concurring in the judgment) (discussing "Project Goldmine," as well as other merger-related documents, in which Whole Foods CEO stated, among other things, that company to be acquired is the "only existing . . . springboard for another player to get into this space" and that "[e]liminating" the company "means eliminating this threat forever, or almost forever"). Stephenson's statements and the Government's other proffered documentary evidence instead suggest, at the very most, that AT&T (or its third-party consultants) recognized that one *possibility* of uniting content and distribution would be to withhold or otherwise limit content from other distributors in an attempt to benefit AT&T's distribution platforms. But evidence indicating defendants' recognition that it could be possible to act in accordance with the Government's theories of harm is a far cry from evidence that the merged company is likely to do so (much less succeed in generating anticompetitive harms as a result). *Cf. Baker Hughes*, 908 F.2d at 984 ("Section 7 involves *probabilities*, not certainties or possibilities."). That is especially true when the

Government's documentary evidence is weighed against the considerable contrary evidence – including other evidence related to the motivation for the challenged merger – that came out at trial. *See, e.g.*, Defs.' PFOF ¶¶ 49-62 (collecting evidence regarding the proposed merger's ability to "enable the combined company to respond to the challenges posed by the current transformation of the video marketplace and, in so doing, bring better products and better value to consumers"); *see also supra* pp. 36-40. Thus, taking such documentary evidence for all it's worth, that evidence is only marginally probative of the viability of the Government's increased-leverage theory of harm.

3. <u>Third-Party Competitor Witness Testimony Provides Little Support for the Contention That Turner Will Gain Increased Leverage Due to the Proposed Merger</u>

In further support of its bargaining leverage claim, the Government called a number of third-party witnesses from AT&T's competitor video distribution companies to the stand. Although such companies are "customers" that purchase Turner content, Tr. 18:15 (Gov't Opening), all of them are also competitors of AT&T's video distribution services. *See, e.g.*, Tr. 82:7-8 (Fenwick (Cox)); *id.* at 263:19-24 (Schlichting (DISH)). Not surprisingly, most of the third-party competitor witnesses testified that they oppose the challenged merger for a number of reasons. According to the Government, that "direct industry evidence" supports its bargaining claim by describing "how the merger would increase Time Warner's leverage over distributors." Gov't Post-Tr. Br. 8. I disagree. For the reasons discussed below, the third-party competitor witness testimony fails to provide meaningful, reliable support for the Government's increased-leverage theory.

As has been observed in the context of other merger cases, I start by noting the difficulty of determining just how much weight to give the proffered third-party competitors' concerns about the challenged merger. On the one hand, such testimony can provide the Court with insight into the nature of the industry and a proposed transaction's potential effects in the market. *See* Gov't PCOL ¶¶ 48-49. On the other hand – and particularly in the context of a vertical merger case where, as here, upstream customers are downstream competitors – there is a threat that such testimony reflects self-interest rather than genuine concerns about harm to competition. *Cf. Arch Coal*, 329 F. Supp. 2d at 145 (citing 2A Areeda & Hovenkamp, *Antitrust Law* ¶ 538b, at 239 ("'subjective' testimony by customers" is "often unreliable")); Horizontal Merger Guidelines § 2.2.2 (noting possibility that customers may voice opposition to merger "for reasons unrelated to the antitrust issues raised by that merger"); Tr. 2462:14-23 (Carlton) (noting that a "rival doesn't want to see a transaction that makes it[s] competitor more efficient," even though such a result may be "good for consumer[s]"). As in any Section 7 case, however, the central issue here is whether the Government has proffered sufficient support for the anticompetitive effects it asserts; it is not about protecting AT&T's rivals from any and all competitive pressures they would experience should the merger go through. *Cf. Aetna*, 240 F. Supp. 3d at 18 ("[T]he Clayton Act protects 'competition,' rather than any particular competitor.") (citing *Baker Hughes*, 908 F.2d at 988, 991 n.12). Caution is therefore necessary in evaluating the probative value of the proffered third-party competitor testimony. *Cf.* Ken Heyer, *Predicting the Competitive Effects of Mergers by Listening to Customers*, 74 Antitrust L.J. 87, 127 (2007) ("In evaluating the likely competitive consequences of proposed mergers, competition authorities and courts properly weigh the totality of the evidence, refusing to take the views expressed by customers at face value and insisting that customer testimony be combined with economic evidence providing objective support for those views . . . .").

For starters, I would note that *not* all third-party witnesses provided testimony supportive of the Government's predictions that Turner's post-merger bargaining leverage would increase as a result of its relationship with AT&T. For example, when Comcast lead negotiator Gregory Rigdon was asked whether he believed the merger would increase Turner's bargaining leverage, he answered in the negative, noting that he didn't "have any reason to believe that it will impact my negotiations with Turner or HBO." Tr. 884:5-6 (Rigdon (Comcast)). Thus, the evidence indicates that AT&T's largest video distribution competitor – and thus a significant source of harm in Professor Shapiro's model, *see, e.g.*, *id.* at 2665:3-7 (Katz) – does not anticipate changing its negotiating strategy with respect to a post-merger Turner. Along those same lines, Randy Sejen, a recently-retired negotiator from Cable ONE, testified that when negotiating with a programmer, "it doesn't matter to us who owns the network." *Id.* at 2102:6-7 (Sejen (Cable ONE)). In short, the Government's third-party competitor witnesses were not consistently concerned regarding Turner's ability to demand increased affiliate fees post-merger.

It is the case, however, that other third-party competitor witnesses expressed "concern about the increased" bargaining leverage or other competitive gains on the part of Turner "that will result from the proposed transaction." *Arch Coal*, 329 F. Supp. 2d at 145. Their testimony, however, suffered from shortcomings that, when viewed in light of my fundamental concerns with crediting the "subjective views of customers in the market," *id.*, undermine the probative value of their evidence in supporting the Government's predictions of Turner's increased-bargaining leverage.

Much of the third-party competitor testimony I heard consisted of speculative concerns regarding how the witnesses thought Turner might act in negotiations after the merger. Some witnesses simply accepted key assumptions of the Government's increased-leverage theory without any supporting analysis or data. For example, testimony from the Government's lead-off witness, Cox negotiator Suzanne Fenwick, helps to illustrate both of those problems. When asked on direct examination about her views of the proposed merger, Fenwick stated that she is "very concerned" that, post-merger, Cox would be presented by Turner with "a horribly ugly deal and that when faced with that deal, we have to think about that if we do go dark, they have a benefit in picking up Cox customers" via DirecTV. Tr. 107:18-21 (Fenwick (Cox)). Fenwick continued that, as a result of that "benefit that is created in this merger that isn't there today," the negotiating "leverage changes" and that AT&T "has a different incentive now than they had before" – namely, the incentive to "pick up customers" lost by Cox in a Turner blackout. *Id.* at 107:12-14, 108:7-9, 148:1-2.

Fenwick's speculation about how Turner might act relies on certain key assumptions for which she had no factual basis. Indeed, the amount of customers that distributors would lose as a result of a Turner blackout (not to mention the resulting "benefit" to AT&T), is one of the central disputes in this case. Without offering any supporting analysis, Fenwick simply assumes those figures to be in line with the Government's predictions, a point highlighted by the following exchange during cross-examination:

> Q: So let's talk about that. How many customers are going to leave [Cox] even with the reduction in your price to your cable subscribers, how many?
>
> A: We don't know.
>
> Q: Have you tried to compute it?
>
> A: I have not.
>
> Q: You have no idea?
>
> A: We believe that it's a large number.
>
> Q: I know you believe that, but do you have any evidence, any information, any hard facts?
>
> A: I don't have a churn analysis for you, no.
>
> . . .
>
> Q: Do you think you had an obligation in giving testimony to oppose a merger of this importance that you would do some homework and run some numbers?
>
> A: No, we felt like our job was to point out how the leverage changes.
>
> Q: So you think you could just come in here and give your opinion that the leverage is going to change and you're going to lose all of these customers even though you have no idea how many customers you're going to lose and you've never done a single bit of quantitative analysis; is that true?
>
> A: Sure.

Id. at 141:1-142:5; *see also id.* at 147:22-148:10.

Testimony from other third-party witnesses suffered from similar problems. DISH Sling president Warren Schlichting testified that the merger would "kind of throw[] the card table up in the air" by placing Turner in a "win win" situation where they "can raise prices and make more money and make us less competitive, or they can raise, they can present onerous terms that we can't accept." *Id.* at 261:24-25, 262:8-22 (Schlichting (DISH)). That was so, according to Schlichting, because DISH would lose "a lot of subs" in the event of a Turner blackout and most of those lost subscribers "would accrue to [DirecTV's] benefit." *Id.* at 262:19-21. RCN CEO Jim Holanda testified that he feared his company would lose access to certain Time Warner programming rights, even though he had no "empirical data or any real-world evidence of subscriber losses if RCN didn't have Turner." *Id.* at 2947:10-13 (Holanda (RCN)). Just as with Fenwick's testimony, Schlichting's and Holanda's contentions about Turner's post-merger position – including the amount of subscribers they would lose and AT&T would gain – assume away many of the disputed issues in this case. *Cf. id.* at 404:22-405:3 (Schlichting (DISH)) ("Q: You don't have any calculations about how many subs DISH would lose or Sling would lose if there were a blackout let's say today. . . . A: No.").

Some third-party competitor testimony even contradicted the testimony of the Government's lead expert, Professor Carl Shapiro. *Cf. Staples*, 970 F. Supp. at 1085 (declining to "give . . . much weight" to party's testimony that was "contradicted by other evidence" submitted by the party). For example, Schlichting's testimony regarding Turner's increased post-merger leverage *assumes* that Turner would profit from, or at the very least would be willing to accept, a long-term blackout of DISH. *See, e.g.*, Tr. 263:10-12 (Schlichting (DISH)) (stating that Turner may be incentivized to blackout DISH because "it's always, it's more lucrative to take subs than it is to, you know, collect programming, programming fees"); *id.* at 264:6-8 ("Q: So you would expect to be more likely to go dark [with Turner] if the merger goes through? A: I would."). Tom Montemagno, a lead negotiator for Charter, testified similarly. He noted that his concern with the challenged merger is "mainly around what's going to happen with excessive price, pricing increases," and specifically, whether Charter will "lose access to critically important content that AT&T make take exclusive away from our customers and make it harder for [Charter] to compete." *Id.* at 1350:12-15, 1352:1-3 (Montemagno (Charter)). The assumptions reflected by that testimony – namely, that a post-merger Turner could and would go dark with DISH or Charter – run directly contrary to Professor Shapiro's testimony that a post-merger Turner would *not* be incentivized to blackout or otherwise withhold its content from distributors. *See id.* at 2293:3-4, 14-15 (Shapiro) (Turner will "continue to license Turner content" to distributors after the merger); *id.* at 2218:13-21 ("I'm not saying that after the merger, Turner will deny its content to the other distributors."). Indeed, when asked whether he was "aware" of Professor Shapiro's opinion that "it would not be profitable for the merged company to withhold the Turner Networks from DISH and other distributors," Schlichting admitted that he was not. *Id.* at 417:13-17, 418:15-16 (Schlichting (DISH)).

Other concerns raised by the third-party competitors were not particularly germane to the Government's Section 7 allegations in this case. Charter's Montemagno, for example, noted his concerns that the merger would harm Charter's competitive position due to the bundling of the Turner networks and the ability of DirecTV to use advertising to appeal to Charter's customers. *See id.* at 1405:13-18 (Montemagno (Charter)). On cross-examination, however, Montemagno conceded that "none of those issues are a result of this merger," but instead "all exist in the marketplace today." *Id.* at 1407:12-18; *see* *also id.* at 1407:19-23 ("Q: And AT&T, DirecTV, if it wanted to buy ads on Turner or anybody else in order to try to lure your customers away, they could do that today, they could do that yesterday, couldn't they? A: They can buy them yes."). Holanda grounded RCN's concerns about the challenged merger in a prior experience with Comcast-NBCU and negotiations over RCN's "broadcast basic" package. *Id.* at 2920:6-23, 2921:2-6 (Holanda (RCN)). But that experience is not especially probative of the Government's increased-leverage theory, given that the Turner networks do not include major broadcast programming and, in any event, that penetration rates exist in the pre-merger market. *See id.* at 2955:9-12.

Finally – and perhaps unsurprisingly given that a post-merger Turner, like a pre-merger Turner, would stand to suffer large losses in affiliate fee and advertising revenues in the event of a blackout – the record is barren of any contentions by the third-party competitors that they would actually give in to any price increases demanded by Turner as a result of its purported increase in post-merger leverage. Schlichting never testified, for instance, that DISH would in fact pay more to Turner for its content as a result of the merger, noting instead that "I don't think we've quite figured out what we would do" during post-merger negotiations with Turner. *Id.* at 264:11-12 (Schlichting (DISH)). The lack of real-world evidence that Turner would likely be successful in obtaining increased fees from virtually every distributor (as Professor Shapiro's model projects) due to its relationship with AT&T is yet another strike against the Government's increased-leverage theory of competitive harm. *Cf. Anthem*, 855 F.3d at 360 (describing as "farfetched" the assumption that contractual negotiations will lead to the same outcome "in every instance," especially in light of the fact that contracts at issue were "customized relationship-driven contracts" (internal quotation marks and alteration omitted)).

In the final analysis, the bulk of the third-party competitor testimony proffered by the Government was speculative, based on unproven assumptions, or unsupported – or even contradicted – by the Government's own evidence. Especially in view of the fact that the third-party competitor witnesses have an incentive to oppose a merger that would allow AT&T to increase innovation while lowering costs, such testimony falls far short of persuasively "show[ing] that this merger threatens" to harm competition by allowing Turner to wield increased bargaining leverage. Gov't Post-Tr. Br. 8.

4. Real-World Evidence Indicating That Prior Vertical Integration of Programmers and Distributors Has Not Affected Affiliate Fee Negotiations Undermines the Government's Increased-Leverage Theory of Harm

For the reasons discussed above, the Court is not convinced that the "real-world objective evidence" offered by the Government provides sufficient support for its increased-bargaining leverage claim. That conclusion is further bolstered by evidence relating to three prior instances of vertical integration in the video programming and distribution industry: 1) News Corp., a programmer, acquiring part of DirecTV in 2003 and then spinning it off in 2008; 2) the 2009 split of Time Warner, a programmer, from Time Warner Cable, a MVPD; and 3) the 2011 combination of Comcast, a distributor, and NBCU, a programmer. *See* Defs.' PFOF ¶ 96; Tr. 2440:4-8 (Carlton). According to defendants, the econometric analysis of their chief economic expert, Professor Dennis Carlton, and witness testimony both provide significant, real-world evidence indicating that, contrary to the Government's increased-leverage theory, those prior instances of vertical integration did not affect affiliate fee negotiations or content prices. For the following reasons, the Court agrees with defendants.

a. *Professor Carlton's Econometric Analyses of Prior Vertical Transactions Found No Statistically Significant Effects on Content Pricing*

When it comes to evaluating the antitrust implications of proposed mergers, both Professor Shapiro and Professor Carlton recognize that empirical analysis of prior, similar transactions can be "convincing evidence." Tr. 2526:13 (Carlton); *see id.* at 3885:25-3886:20 (Shapiro) (agreeing with the "general thrust" of statement that "compar[ing] the observed changes from completed mergers against premerger predictions" is the "most direct way" to gauge the "reliability of different methods of evaluating proposed mergers"); *cf.* Horizontal Merger Guidelines § 2.1.2 ("The Agencies look for historical events, or 'natural experiments,' that are informative regarding the competitive effects of the merger. For example, the Agencies may examine the impact of recent mergers, entry, expansion, or exit in the relevant market."). In this case, however, neither the Government nor Professor Shapiro presented original analysis of any prior vertical transactions in this industry. *See* Tr. 2337:11-13 (Shapiro) ("I did not end up doing my own separate analysis" of transactions analyzed by Professor Carlton.); *id.* at 2473:22-25 (Carlton) ("Professor Shapiro did no econometric analysis of any of the data as far as I can tell."); *see also* Defs.' PFOF ¶¶ 96, 99.[28]

[28] Indeed, when asked in discovery whether it had a position on whether these transactions affected content prices, the Government cited to one FCC study related to the News Corp.-DirecTV transaction and

Defendants, by contrast, did seek to analyze the available pricing data resulting from prior instances of vertical integration. Although they initially had trouble obtaining some of the relevant pricing data from the Government or third-parties, *see supra* pp. 44-45, they were eventually able to obtain the data after seeking relief from this Court, *see id.*; 1/22/18 Order. Defendants' lead economic expert, Professor Dennis Carlton, then analyzed that third-party pricing data, among other proprietary and public-source data in his possession, to test whether it is "true that content prices are higher on a network when it's sold by someone who's vertically integrated." Tr. 2470:10-12 (Carlton). Specifically, Professor Carlton performed a "regression analysis or an econometric analysis, which is a statistical attempt to answer the question precisely." *Id.* at 2473:1-2. In running his regressions, Professor Carlton used different "statistical techniques to analyze the problem in a variety of ways." *Id.* at 2473:7-8.

All of that analysis, Professor Carlton testified, generated "completely consistent" results across all three examples he considered: "There's absolutely no statistical basis to support the government's claim that vertical integration in this industry leads to higher content prices." *Id.* at 2473:13, 2440:13-15; *see id.* at 2470:13-17, 2476:22-24. The "bulk of the results," Professor Carlton explained, "show no statistically significant result at all," although "many do show a *decrease*" in content prices. *Id.* at 2477:7-12 (emphasis added). Moreover, Professor Carlton noted that his results are particularly "compelling" in light of

---

stated that, beyond that study, "the United States does not, at this time, have a position as to whether any prior vertical integration between a programmer and a distributor resulted in higher video programming fees" or "higher prices for consumers" than "would have prevailed absent the integration." DX893-28 to -29.

the fact that the industry, as reaffirmed by numerous witnesses at trial, is "more competitive" today than at the time of the prior transactions he analyzed. *Id.* at 2476:6-9; *see also id.* at 1398:24-25 (Montemagno (Charter)) (video distribution business is "more competitive now than I've ever experienced in my career"); *id.* at 2134:1-3 (Sejen (Cable ONE)) ("Q: In your 31 years in the industry, have you ever seen it more competitive at the distribution level? A: No."); *id.* at 2950:2-6 (Holanda (RCN)) ("Q: And so in the course of this 30 years that you have been in the business, the video distribution market today is more competitive than at any point that you can recall, true? A: True."); *id.* at 3213:9 (Stankey (AT&T)) (competition in industry is "at an all-time high"). In short, based on his analysis, Professor Carlton stated that there has been "nothing like" the price increases predicted by Professor Shapiro following prior instances of vertical integration of programmers and distributors. *Id.* at 2470:19-20 (Carlton).

Although the Government and Professor Shapiro sought to undermine the basis for Professor Carlton's conclusions at trial, those efforts were unavailing. Professor Shapiro, for his part, critiqued Professor Carlton for relying on faulty data and attempting to draw conclusions from prior transactions that are not comparable to the challenged merger. Focusing on Professor Carlton's reliance on SNL Kagan data, Professor Shapiro stated that such data is "pretty poor" because it relies on "public sources" and reports content costs "to all of the distributors on average." *Id.* at 3831:11-18 (Shapiro). Of course, Professor Carlton testified that he relied not only on SNL Kagan data, but also on data from third parties such as DirecTV, DISH, and Charter – all of which, when analyzed, showed no statistical pricing effects associated with the relevant prior instances of vertical integration.

Id. at 2470:4-12 (Carlton). Taking Professor Shapiro's critiques of the SNL Kagan data on their own terms, however, those critiques miss the mark. For one thing, even Professor Shapiro acknowledged that SNL Kagan data is "commonly used" by individuals in the industry. *Id.* at 3889:3 (Shapiro); *see also, e.g.*, *id.* at 1073:20-1074:4 (Breland (Turner)).[29] Moreover, it was SNL Kagan data that formed the basis of the only study of prior harm cited by the Government and Professor Shapiro. *Id.* at 3889:4-9 (Shapiro) (agreeing that FCC study that he "relied on" in his expert report was "based on Kagan data"); Gov't Post-Tr. Br. 16 (citing same FCC study); DX893-28 (Gov't answer to interrogatory, citing same FCC study); *see also* Tr. 2467:21-2468:9 (Carlton). For those reasons, Professor Shapiro's criticisms of defendants' prior transaction data does not, in this Court's view, detract from Professor Carlton's expert opinion that defendants' evidence related to the prior transactions is "especially probative" when considering the Government's claims of harm. *Id.* at 2475:21-22 (Carlton); *see id.* at 2441:13-20 ("Ignoring that evidence is a big mistake.").

Professor Shapiro and the Government also denounced Professor Carlton's analysis on the basis that the prior vertical transactions are not sufficiently similar to the challenged merger. They pointed out, for example, that two of the prior transactions involved regional cable distributors (Comcast and Time Warner Cable), whereas the challenged merger involves DirecTV, which operates nationally. Regional operation means, Professor Shapiro testified, that one would "not expect[] to see evidence of post-merger price

[29] One more witness testified to this fact in sealed testimony. Tr. 930:17-18 (SEALED).

increases beyond the overall industry increases" because "most of the MVPDs . . . don't compete with Comcast," for example. *Id.* at 2338:8-13 (Shapiro); *cf. id.* at 2558:18-2559:15 (Carlton). Professor Carlton explained, however, that the regional versus national distinction is "irrelevant" when it comes to his analysis of DirecTV and DISH prices; that is so, Professor Carlton stated, because those two satellite companies compete "everywhere" the regional cable companies operate and it is the "national share" that matters to Professor Shapiro's bargaining model. *Id.* at 2474:11-17, 2560:5-11 (Carlton). To the extent the Government is now arguing that one would not expect to see *any* increased-leverage harm due to Comcast's status as a regional distributor, I simply note that the Government argued to the contrary prior to this case. *See, generally, e.g.*, Compl., *Comcast Corp.*, 808 F. Supp. 2d 145 (No. 11-cv-106).

Finally, the Government and Professor Shapiro note that the prior vertical transactions all were "remediated" by regulatory or court-ordered conditions – conditions that will not apply to the challenged merger. Tr. 3830:20 (Shapiro). Professor Carlton agrees that, in theory, his study's conclusions would be affected if the conditions associated with the prior transactions were not "sufficiently similar" to those at issue here. *Id.* at 2558:12-15 (Carlton). I will thus briefly address Turner's 2017 arbitration offer and its relation to the conditions on the Comcast-NBCU transaction.

The arbitration proceedings envisioned by Turner's offer are similar in many of "the fundamental ways" to those blessed by the FCC, DOJ, and this Court in the Comcast-NBCU merger. Defs.' PFOF ¶ 214 (citing Tr. 2680:1-9 (Katz)); *see also id.* ¶ 225. Most notably, both arbitration arrangements are "baseball-style": each party puts forward a final offer before knowing about its counterparty's offer, and the arbitrator chooses between those two. Tr. 2680:1-9 (Katz). In addition, both sets of arbitration arrangements contain "standstill provisions," which prevent the blackout of content while the arbitration is pending. *Id.* They also both set out "fair market value" as the standard, and have similar discovery procedures. *Id.* at 2680:1-13. As Professor Katz testified, "the objective is the same. The overall structure the same. So they are similar overall." *Id.*; *see also id.* at 2958:12-16 (Holanda (RCN)). Given all of these similarities, I conclude that Professor Carlton's econometric analysis of the pricing effects of the Comcast-NBCU combination can be afforded probative weight in predicting the potential pricing effects of the challenged merger.[30]

To sum it up, neither the Government nor Professor Shapiro has given this Court an adequate basis to decline to credit Professor Carlton's econometric analysis. And that analysis, according to Professor Carlton, definitively shows that prior instances of vertical integration in the video programming and distribution industry have had no statistically significant effect on content prices.

[30] The parties spent a good deal of the trial debating the finer points of Turner's November 2017 arbitration offer, made shortly after the filing of the Complaint in this case. The Government asserts that the arbitration commitment must be ignored or, at the very least, must be proven binding and effective by defendants, while defendants describe its absence from Professor Shapiro's model as a critical weakness in the model's design and the Government's prima facie case. *Compare* Gov't Post-Tr. Br. 21-22, *with* Post-Trial Br. of Defs. ("Defs.' Post-Tr. Br.") 14. For purposes of this discussion, as explained below, I have confidence that Turner's arbitration offer will have real-world effect and, thus, that it is appropriate to consider Professor Carlton's econometric analysis of the Comcast-NBCU transaction. *See infra* n.51.

b. Executives from Vertically Integrated Programmers and Distributors Testified That Vertical Integration Does Not Affect Affiliate Fee Negotiations

Professor Carlton's analysis of prior vertical integration is further reinforced, defendants contend, by the consistent testimony of Comcast-NBCU and Time Warner executives that the integration of programming and distribution does not affect affiliate negotiations. I agree.

Defendants first point to the testimony from Madison Bond, who has served as a lead negotiator for NBCU during the past seven years when the company has been vertically integrated with Comcast. When questioned by defense counsel about his prior negotiations on behalf of NBCU, Bond testified that he "never once took into account the interest of Comcast cable in trying to negotiate a carriage agreement." Tr. 2014:22-24 (Bond (NBCU)). Consideration of potential Comcast gains during an NBCU blackout "doesn't factor at all" into his negotiations, Bond continued, nor has anyone from Comcast "ever asked" him "to think about that." *Id.* at 2015:1, 2015:10-12. Bond's statements were similar to testimony given by Comcast's chief negotiator, Greg Rigdon, who testified that he has never suggested, or seen a Comcast document suggesting, that NBC "should go dark on one of [Comcast's] competitors because then [Comcast] might pick up some subscribers" or that NBCU should "hold out for a little bit more in affiliate fees because that will harm" Comcast's competitors. *Id.* at 882:22-24, 883:1-11 (Rigdon (Comcast)).[31]

[31] In response, the Government asks this Court to ignore the import of that testimony from the Comcast and NBCU witnesses on the basis that the conditions governing the Comcast-NBCU transaction would have prevented any coordination between the programming and distribution components and thus rendered such conversations between the two pointless. *See* Gov't Post-Tr. Br. 19 n.14. Please! The Comcast and NBCU witnesses' testimony aligns with testimony from witnesses not subject to the FCC

Time Warner executives testified similarly about their time at the company when it was vertically integrated with Time Warner Cable. Recalling that period, Time Warner CEO Jeff Bewkes testified that he was not aware of any Time Warner negotiator "articulating this theory of added incentive or added ability to leverage a price increase" because Time Warner was "vertically integrated with Time Warner Cable." *Id.* at 3121:22-3122:8 (Bewkes (Time Warner)). Turner CEO John Martin, who served as CFO of Time Warner Cable at the time it was vertically integrated with Time Warner, testified along the same lines, as did Turner lead negotiators Coleman Breland and Richard Warren. *See id.* at 601:10-602:15 (Martin (Turner)) ("Q: Did you ever hear anyone say that Turner would have more leverage because Time Warner Cable and Turner were in the same family? A: No, I did not."); *id.* at 1129:6-12 (Breland (Turner)) ("I've been in Turner when we were a vertically integrated company and had a sister company called Time Warner Cable. And I can tell you at no time during my tenure there did anyone ask me to consider in my negotiations and how I dealt with other distributors the outcome and impact at Time Warner Cable . . . ."); *id.* at 1190:14-15 (Warren (Turner)) (noting, when asked about Government's increased-leverage theory, that "[w]e didn't do that when we were part of Time Warner Cable"). Martin also testified that Time Warner's content prices did not

---

order's conditions and is also entirely consistent, as subsequently discussed, *see infra* pp. 114-117, with the goal of companywide profit maximization. *See* Tr. 601:10-602:15 (Martin (Turner)); *id.* at 1129:6-12 (Breland (Turner)); *id.* at 1190:14-15 (Warren (Turner)); *cf. id.* at 2102:6-11 (Sejen (Cable ONE)) ("I mean, it doesn't matter to us who owns the network . . . . It really doesn't matter."). For that reason, among others, *see infra* nn. 34, 36, I decline the Government's invitation to disregard the Comcast and NBCU witnesses' testimony referenced in this section.

decrease following the spin-off of Time Warner Cable. *See id.* at 603:24-604:1 (Martin (Turner)).

The Government seems to believe that any "post-merger" testimony given by Time Warner executives should be "discount[ed]" as potentially biased because it was given by interested employees of a defendant company. Gov't PCOL ¶ 56. Poppycock ! The testimony at issue does not involve promises or speculations about the employees' future, post-merger behavior. Rather, it is testimony about what these executives previously experienced when working within a vertically integrated company. That testimony regarding executives' prior experiences in the industry is uniform among all testifying witnesses and unrebutted by the Government; moreover, it finds independent support in the analysis performed by Professor Carlton. For those reasons, I decline the Government's request to discount it.

To be sure, neither Professor Carlton's econometric analysis nor the testimony discussed above provides "perfect evidence" of what will happen as a result of the challenged merger. Tr. 2475:15-17 (Carlton). But when weighed against the relatively weak documentary and third-party testimonial evidence proffered by the Government in support of its increased-leverage theory, the real-world evidence indicating that vertical integration has not affected content prices or affiliate negotiations further undermines the persuasiveness of the Government's proof.

C. The Government's Expert Testimony Is Also Insufficient to Support Its Increased-Leverage Theory of Harm

In addition to offering the so-called "real-world objective evidence" set out above, the Government called noted antitrust economist, Professor Carl Shapiro, to testify in support of its increased-leverage theory. Professor Shapiro first discussed the academic underpinnings of the theory, explaining that it was grounded in an economic concept known as the Nash bargaining theory. Thereafter, Professor Shapiro opined that Turner's post-merger leverage would increase pursuant to those economic principles. In order to predict the increased distributor costs and consumer harms that would result from Turner's increased post-merger leverage, Professor Shapiro constructed economic models. Acknowledging that proper antitrust analysis of a proposed vertical merger requires balancing the merger's proconsumer benefits with its harms, *see supra* pp. 52-54, Professor Shapiro testified that the challenged merger would result in annual consumer cost increases that would far outweigh the $350 million in annual EDM savings he conceded the merger would generate. He thus concluded, based on his economic modeling, that the merger was likely to cause a substantial lessening of competition by increasing consumer costs as a result of Turner's increased bargaining leverage.

At trial, defendants mounted a series of attacks on Professor Shapiro's analysis. They challenged Professor Shapiro's threshold contention that the economic theory of Nash bargaining can accurately predict the dynamics and final fee structure of complex affiliate fee negotiations. They also asserted that the theory, as applied here, rests on improper assumptions – including the notion that Turner could gain increased leverage from threatening a long-term blackout – that negate its usefulness in evaluating the real-world effects of the proposed merger. Finally, defendants, both through their own experts and their examinations of industry witnesses, argue that Professor Shapiro's inputs are faulty, and note further that use of the proper inputs would cause the model to predict that the merger will have a net benefit to consumers rather than a net harm. As will become clear in the section that follows, I largely agree with defendants' various critiques of Professor Shapiro's testimony.

For starters, I couldn't help but notice that the more and more questions were raised during the trial about the reliability of Professor Shapiro's theory and model, the more the Government appeared to be minimizing the importance of his analysis. *Cf.* Defs.' Post-Tr. Br. 10 (noting Government's attempt to "retreat from the model" in its closing argument). Indeed, during its closing argument, the Government touched on Professor Shapiro's model relatively briefly, arguing that it simply "confirmed what the industry witnesses had already explained." Tr. 4000:5-6 (Gov't Closing). And the Government's post-trial filings, for their part, all but ask the Court to overlook any failings of the model, arguing that "Section 7 does not require any quantification of harm from a price increase" and that "it would be perverse to penalize a plaintiff that does provide a quantification of the potential price increase." Gov't PCOL ¶ 20; *see also* Gov't Post-Tr. Br. 15 ("[D]efendants' critique of Professor Shapiro's model misses the bigger picture: the model is but one part of Professor

Shapiro's opinion, and his opinion is one part of the United States' evidence.").[32] Go figure!

With that, I will now turn to my own evaluation of Professor Shapiro's expert testimony. First, I will explain why the evidence is insufficient to support Professor Shapiro's conclusion that this Nash bargaining theory will accurately predict an increase of Turner's post-merger bargaining leverage in affiliate fee negotiations with distributors. Second, I will examine Professor Shapiro's economic bargaining model, concluding that the evidence is also insufficient to support the input values upon which he relied to generate his predictions of harm.

1. The Evidence Is Insufficient to Support Professor Shapiro's Conclusion That the Merger Will Increase Turner's Bargaining Leverage and, in Turn, Affiliate Fees

Relying on a particular economic bargaining theory, Professor Shapiro opines that, due to its post-merger relationship with AT&T, Turner's leverage in affiliate negotiations

[32] To the extent the Government's increased-leverage theory now leans more heavily for support on the industry witness testimony and defendants' documents, as "framed" by Professor Shapiro's analysis more generally, Gov't Post-Tr. Br. 8, that shift in emphasis fails to salvage its claim given the independent problems with that so-called "real-world objective evidence" set out in the section above. *See supra* pp. 75-109; *cf.* Defs.' Post-Tr. Br. 10 ("But adding zero to zero is hardly a sound way to prove a price increase."). In the Court's view, however, it is worth noting that the Government's retreat from Professor Shapiro's model cannot be squared with Professor Shapiro's testimony (seemingly approved by the Government) that to perform a valid "vertical merger analysis" under the applicable "consumer welfare" standard, it is necessary to "balance" or "tradeoff" the merger's proconsumer benefits with any predicted consumer harms. *See* Tr. 2180:8-2181:8, 2182:7-21, 2253:4-5 (Shapiro). At trial, that "somewhat different" "balancing" analysis of the challenged vertical merger was enabled not by the testimony of the third-party competitors or defendants' documents and statements, but by the cost-benefit predictions Professor Shapiro generated through use of his models. *See id.* at 2182:17-18, 2252:19-2253:15. For that reason, asking the Government to provide sufficient support for the proffered bargaining model is not, as the Government seems to argue, penalizing them for failure to quantify the "specific *magnitude* of the potential harm," Gov't PCOL ¶ 16, but instead is simply part and parcel of what Professor Shapiro testified is necessary to determining *whether* the proposed vertical merger will harm consumers overall.

will increase due to a reduction in financial exposure in the event of a long-term blackout. Professor Shapiro in turn opines that, as such, a post-merger Turner would be able to secure greater affiliate fees from distributors.

It is beyond dispute that, to be probative in a particular case, expert testimony must incorporate assumptions that are "reasonable" in light of the record evidence. Joint Statement 8; *cf. Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict."). Hewing to that rule is especially important in Section 7 cases, where the Supreme Court's observation that "only" an "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" dictates that the disputes "must be resolved on the basis of record evidence relating to the market and its probable future." *General Dynamics*, 415 U.S. at 498 (internal quotation marks omitted); *Arch Coal*, 329 F. Supp. 2d at 116-117. "Hence," to borrow a line from one of my able colleagues, "antitrust theory and speculation cannot trump facts." *Arch Coal*, 329 F. Supp. 2d at 116; *accord* Gov't PCOL ¶ 22 n.6 (quoting Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 Yale L.J. 1962, 2018 (2018) ("[T]he direction of the net competitive effect is a question of fact, not theory. . . ."). That is true no matter whether the testimony relates to a theory that is considered "mainstream" or has been deemed applicable to different factual or economic scenarios in other proceedings.

Gov't PFOF ¶ 202; *cf.* Gov't Post-Tr. Br. 9.[33] Unfortunately for Professor Shapiro, the facts adduced at trial regarding the real-world operation of affiliate negotiations demonstrated that his testimony "rests on assumptions" that are "implausible and inconsistent with record evidence." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 n.19 (1986).

To start, various industry witnesses testified that the identity of a programmer's owner does not affect the negotiating dynamic. Indeed, this opinion by Professor Shapiro runs contrary to all of the real-world testimony during the trial from those who have actually negotiated on behalf of vertically integrated companies. While I need not repeat their testimony here, I would simply note that the witnesses consistently testified that they had *never* considered the identity of the programmer's owner in the course of affiliate fee negotiations. *See, e.g.*, Tr. 2014:22-2015:14 (Bond (NBCU)); *id.* at 882:22-24, 883:1-11 (Rigdon (Comcast)); *id.* at 3121:22-3122:8 (Bewkes (Time Warner)); *id.* at 601:10-602:15 (Martin (Turner)); *id.* at 1129:6-12 (Breland (Turner)); *id.* at 1190:14-15 (Warren

---

[33] On that score, it is notable that, although the Government states that its proffered bargaining model is "a standard model that is in economics textbooks and widely used by economists," Gov't PFOF ¶ 202, Professor Shapiro acknowledged that, with respect to the model, "[w]hat's less common is to use it to evaluate a merger or a vertical merger especially," Tr. 2390:2-3 (Shapiro).

To support Professor Shapiro's testimony regarding economic bargaining theory and his model, the Government contends that defendants' experts "endorsed" application of the model generally, but quibbled with the model's inputs. Gov't Post-Tr. Br. 2. That characterization is questionable, especially given Professor Carlton's extensive testimony about his conclusion that "the evidence provides no statistical support for the government's claim that prices will rise in this transaction" – statistical evidence that he considers more probative in analyzing the Government's increased-leverage theory than Professor's Shapiro's "quite . . . complicated economic model." Tr. 2439:19-25, 2441:25 (Carlton); *see id.* at 2439:22-2441:25. Nonetheless, it is of course the Government's burden – not defendants' – to sufficiently link its proffered expert testimony to the underlying facts in the industry. It is therefore no surprise that Professor Carlton spent most of his limited time on the stand discussing the econometric studies he performed, rather than cataloguing whether the facts adduced at trial support Professor Shapiro's testimony.

(Turner)). One was left to wonder why Professor Shapiro turned a blind eye to such extensive real-world experience? When I asked Professor Shapiro about the effect of that testimony on his analysis, the following exchange ensued:

> [A]: No, I am aware of that testimony. And so I think there's a very serious tension between that testimony and the working assumption for antitrust economists that Professor Carlton and I share; that the company after the merger will be run to maximize their joint profits.
>
> . . .
>
> [A]: So what I'm saying is that it will be in AT&T's interests to play this – to use this leverage in the negotiations. It will be in their interest –
>
> The Court: So that's an assumption that you're making?
>
> [A]: Yes, it is. Okay.
>
> The Court: But you don't have an independent basis of evidence for that?
>
> [A]: That is fair.
>
> The Court: That's an economist assumption?
>
> [A]: That is true. That is true.
>
> . . .
>
> [A]: Look, I think if you accept that, which, from my point of view, would not be in the combined interests of the new company. They would be leaving money on the table.
>
> The Court: Okay.
>
> [A]: If you accept that, then this bargaining leverage would not come into play.

Id. at 2199:22-2200:2, 2200:22-2201:7, 2202:6-12 (Shapiro).

The Court accepts Professor Shapiro's (and the Government's) argument that, generally, "a firm with multiple divisions will act to maximize profits across them." Gov't

Post-Tr. Br. 19; *see also* Tr. 2525:22-25 (Carlton). That profit-maximization premise is *not* inconsistent, however, with the witness testimony that the identity of a programmer's owner has not affected affiliate negotiations in real-world instances of vertical integration. Rather, as those witnesses indicated, vertically integrated corporations have previously determined that the best way to increase company wide profits is for the programming and distribution components to separately maximize their respective revenues. *See, e.g.*, Tr. 2015:16-19 (Bond (NBCU)) ("Q: And, in fact, what you were doing is trying to maximize the revenue of NBC as a programmer in those negotiations, correct? A: Yes, sir."); *see also id.* at 1129:17-18 (Breland (Turner)). In the case of programmers, that means pursuing deals "to be on all the platforms," rather than undertaking a "series of risks" to threaten a long-term blackout. *Id.* at 1129:17-22 (Breland (Turner)); *id.* at 3120:22 (Bewkes (Time Warner)). So understood, the consistent and, in this Court's judgment, credible, trial testimony is not in fact in "serious tension" with "economic logic" – just with Professor Shapiro's opinion that the identity of a programmer's owner influences negotiations ! *Id.* at 2199:22-2200:2 (Shapiro); Gov't Post-Tr. Br. 19.

Next, Professor Shapiro's opinion that Turner's post-merger relationship with AT&T will enable Turner to more credibly threaten a distributor with a long-term blackout in order to extract greater affiliate fees was severely undermined by defendants' evidence that such a blackout would be infeasible. *See id.* at 2195:4-7 (Shapiro) ("Q: Explain to His Honor why blackouts are relevant here for this discussion today. A: Well, even though they don't happen very much, that's the key to leverage, okay?"); *see also id.* at 2442:13-17 (Carlton). Indeed, the evidence showed that there has never been, and is likely never going to be, an actual long-term blackout of Turner content. *See id.* at 2218:13-23, 2357:12-14 (Shapiro). Numerous witnesses explained,[34] and Professor Shapiro acknowledged, that a long-term blackout of Turner content, even post-merger, would cause Turner to lose more in affiliate fee and advertising revenues than the merged entity would gain. *Cf. id.* at 2293:2-17. Given that, there is an insufficient evidentiary basis to support Professor Shapiro's contention that a post-merger Turner would, or even could, drive up prices by *threatening* distributors with long-term blackouts.[35]

[34] Witness after witness confirmed that blackouts – and the attendant loss of distribution – have "massive implications" for Turner. Tr. 1189:13-16 (Warren (Turner)); *see also, e.g.*, *id.* at 659:22 (Martin (Turner)) ("[I]t's very bad for business to go dark."); *id.* at 1128:7-1129:4 (Breland (Turner)) ("I lose money the minute I go dark. It can be catastrophic to my business . . . ."); *id.* at 3119:22-3120:22 (Bewkes (Time Warner)) ("So if our channels, any of them, are not in some distribution offering, that's catastrophic for us. We lose a lot of money. . . . Due to the size of most of our distributors, hundreds of millions of dollars."). During Turner's one-month blackout with DISH in 2014, for example, Turner lost "[n]orth of 30 million dollars" in subscriber fees and advertising revenue. *Id.* at 1115:2 (Breland (Turner)). In order to end the blackout, Turner agreed to a temporary affiliate agreement extension that released DISH from any obligation to pay $120 million in audit monies that Turner believed it was owed. *Id.* at 1118:15-19. Turner agreed to cede those funds, Turner executive Coleman Breland testified, because Turner was "bleeding" and "losing a tremendous amount of money" during the blackout. *Id.* at 1118:23-24. Given all that, it is perhaps unsurprising that, for all of the testimony about the "very intense and aggressive" nature of affiliate negotiations, *id.* at 3251:24-25 (Stankey (AT&T)), Professor Shapiro testified that Turner has *never* experienced a long-term blackout with a distributor, *see id.* at 2357:12-14 (Shapiro).

[35] To understand why, note that Professor Shapiro's opinion incorporates the "key" recognition that each side's bargaining leverage "is based on what would happen if there were no deal." Tr. 2193:16-18 (Shapiro). Simply stated, if a party's alternative to striking a deal improves, that party is more willing and able to push harder for a better deal because it faces less downside risk if the deal implodes. Professor Shapiro gave an example of negotiations between a seller and buyer of a used car; he noted that if the seller's next-best offer improves, he will be able to extract a higher price from the original buyer. *See id.* at 2213:2-10. The bargaining concept the example demonstrates, Professor Shapiro explained, is that "you have more leverage now because you have a better offer. And you will be more . . . willing to apply that leverage. And some of them are willing to walk away, if necessary. . . . [B]etter outside offers make one party stronger in those negotiations." *Id.* at 2213:13-20. Unlike the car seller, who might be "willing to walk away" and accept his alternative offer to sell the car for a gain, however, *id.* at 2213:15-16, the evidence at trial indicated that Turner would *not be willing* to accept the "catastrophic" affiliate fee and advertising losses associated with a long-term blackout, *id.* at 1128:10 (Breland (Turner)); *see supra* pp. 14-18.

It is worth emphasizing again that Professor Shapiro does *not* contend that Turner's economics are going to somehow flip after the merger – he acknowledged, for example, that Turner would lose over $100 million per month during a post-merger blackout with a large distributor. *Id.* at 2314:4-15; *see also id.* at 2293:3-15 (agreeing with defense counsel that Turner will "continue to license Turner content" to distributors because it would be "profitable" to do so). As a result, Professor Shapiro testified that Turner would not be incentivized to *actually* engage in a long-term blackout with a distributor:

> I should say – I think we skipped over it. I'm not saying that after the merger, Turner will deny its content to the other distributors. This is not a foreclosure-withholding story. . . . I considered whether there would be withholding. And that has been a concern in some private – prior vertical mergers. And I did not think that would happen.

Id. at 2218:13-21; *see id.* at 2443:12-15 (Carlton).

In view of that evidence on the prospects of a long-term blackout, the lynchpin of Professor Shapiro's testimony (and, accordingly the Government's increased-leverage theory) is the *assumption* that a post-merger Turner would gain increased leverage by wielding a blackout threat that will only be somewhat less incredible. That does not make sense as a matter of logic and, more importantly, that has not been supported by sufficient real-world evidence.[36]

---

[36] The Court finds Time Warner CEO Jeff Bewkes' response to a question regarding the increased-leverage theory to be particularly persuasive: "And the way I – I think it's best the way to understand it, is if we have a risk that a thousand-pound weight might fall on us – we hope it doesn't, but if that's always there, then if you said to me, well, don't worry; it might be a 950-pound weight instead of a thousand pounds, are you going to think about it differently, feel differently? Are you going to take more risk that any of that might happen to you? Absolutely not." Tr. 3120:23-3121:7 (Bewkes (Time Warner)). Although not controlling, the Court notes that some of Turner's lead negotiators credibly testified to similar effect. *See, e.g.*, *id.* at 1128:7-12 (Breland (Turner)) ("The concept that Turner would push" as though "going dark is good for us, I believe I've given examples today of why it's just the opposite. I lose money the minute I

2. The Evidence Is Insufficient to Support the Inputs and Assumptions Incorporated into Professor Shapiro's Bargaining Model

In order to measure the increased distributor and consumer costs associated with his prediction that Turner's post-merger bargaining leverage would increase, Professor Shapiro constructed a rather complex economic bargaining model.[37] That model seeks to quantify the benefits that AT&T would gain as a result of a long-term, post-merger blackout of the Turner content on AT&T's rival distributors. According to Professor Shapiro, those benefits correspond to the increased affiliate fees that AT&T's rival distributors will pay as a result of Turner's increased post-merger bargaining leverage.

---

go dark. . . ."); *id.* at 1190:14-17 (Warren (Turner)) (answering, when asked whether could gain leverage by "threatening to blackout distributors," that "I don't think that's a realistic perspective.").

On the stand, Professor Shapiro attempted to support his increased-leverage proposition by noting that programmers and distributors "think about what'll happen if there's a blackout" when formulating their negotiating strategy. *See id.* at 2193:23-2194:13 (Shapiro). The Government does the same in its post-trial filings. *See, e.g.*, Gov't PFOF ¶¶ 124-153 (collecting evidence to support proposition that "MVPDs have estimated their likely subscriber losses to inform their negotiating strategy"). The evidence showed that distributors engage in that exercise "with varying degrees of sophistication." *Id.* ¶ 124. With respect to companies that perform "go dark" analyses of the potential consequences of a blackout, the bulk of the evidence showed that negotiators relied on those analyses to get a general sense of "the value" of a programmer's content by measuring how many customers they would lose in the event of a blackout – customer losses that, notably, are not going to change as a result of the merger. *See* Tr. 935:12-16, 936:23 (SEALED); *see id.* at 1349:15-19 (Montemagno (Charter)) (reviewed the "high points" of the Altman Vilandrie go-dark analysis "[v]ery briefly"); *id.* at 1094:21-1095:1 (Breland (Turner)) (although "you never want to go dark if you are a programmer," preparing for a go dark scenario is "just prudent math"). Contrary to Professor Shapiro and the Government's arguments, such high-level evidence does not provide support for the more specific prediction that a marginal improvement in Turner's (still unprofitable) position in a blackout would meaningfully alter Turner's bargaining leverage.

In a similar way, the Government seeks to rely on the testimony of Turner executive Coleman Breland for the proposition that "Turner bargains over price down to hundredths of a penny," Gov't PFOF ¶ 108, and that Turner "almost went dark with Time Warner Cable over a single penny increase on one channel in 2012," *id.* ¶ 158. That account of Breland's testimony is "misleading at best." Defs.' PFOF 38 n.5. For the reasons set out in Defendants' proposed findings of fact, *see id.*, Breland's testimony does not bolster Professor Shapiro's model.

[37] Technically, Professor Shapiro used two models. He first used an economic bargaining model to generate predicted affiliate fee increases to distributors; then, he plugged those distributor cost increases into a separate merger simulation model to generate his estimates for consumer cost increases. *See* Tr. 2314:17-25 (Shapiro). As defendants' arguments focus on the design of Professor Shapiro's bargaining model rather than the merger simulation model, I will refer only to the bargaining model.

As Professor Shapiro explained at trial, his model relies on three primary inputs: 1) a figure for long-term subscriber loss, which is the total loss of subscribers a distributor would experience in the event of a long-term blackout of Turner content; 2) the diversion rate, which estimates the percentage of a distributor's lost subscribers that would sign up for AT&T's distribution services; and 3) AT&T margin data, from which Professor Shapiro calculates a measure of profits that AT&T would derive from subscribers it gains or maintains as a result of the hypothesized long-term Turner blackout. *See* Tr. 2217:15-24 (Shapiro). After selecting and entering values for those inputs and running his bargaining model, Professor Shapiro predicts that the challenged merger would lead to annual, net consumer harm ranging from \$286.5 million to \$561 million for the year 2016, with that range increasing in subsequent years. *See id.* at 2255:14-15, 3920:6-10; *id.* at 2256:16-20 (predicting \$436 million in net consumer harm for the year 2017 and \$571 million in net consumer harm for the year 2021). The low and high end of the ranges result from using different values – 9% and 14%, respectively – for the subscriber loss rate. *See id.* at 2239:3-7.

Of course, both 2016 and 2017 have passed with no merger. Thus, as Professor Shapiro concedes, his bargaining model does not "literally predict[] the price increases that will occur in negotiations in the real world." *Id.* at 2294:18-2295:1. Rather, Professor Shapiro testified that his model is designed to "evaluate the fundamental incentives and changes in the market created by the merger." *Id.* at 2209:11-12. For that reason, he stated that his model does not account for the existence of Turner's current affiliate agreements with distributors, which will "expire in time." *Id.* at 2209:13-14.

Defendants attack Professor Shapiro's bargaining model from all directions. Noting that models are "only as good as the inputs," *id.* at 2315:11, defendants argue that each of Professor Shapiro's three "very important" inputs lacks a sufficient basis in the trial evidence, *id.* at 2315:12. Defendants also argue that Professor Shapiro's model improperly assumes away Turner's current affiliate agreements – agreements that will serve to significantly constrain Turner's post-merger bargaining leverage for years .to come.[38] I agree with defendants, for the most part, that the inputs and assumptions of Professor Shapiro's model are not sufficiently grounded in the evidence – a fact that "undermine[s]" my "confidence in the reliability and factual credibility" of his projections. *Anthem*, 855 F.3d at 363. How so?

a. *The Evidence Is Insufficient to Support Professor Shapiro's Long-Term Subscriber Loss Rate*

In order for AT&T to benefit from a long-term Turner blackout with a rival distributor under the increased-leverage theory, a sufficient number of customers must

---

[38] Correcting for those faults, defendants argue, would cause Professor Shapiro's model to predict a net *benefit* to consumers on account of the merger. Specifically, Professor Carlton testified that when one updates or accounts for those four factors – the long-term subscriber loss rate, the diversion rate, the margin data, and the presence of contracts – Professor Shapiro's model generates an average 52-cent per-month, per-consumer benefit rather than an average 27-cent per-month, per-consumer harm. *See* Tr. 2516:2-6 (Carlton); *see also id.* at 2255:9-25 (Shapiro) (testifying about the "[p]redicted Turner monthly fee increases for consumers" reflected by PDX11, slide 11).

The large effects on the predicted net harm created by minor changes to Professor Shaprio's inputs raises a separate question regarding the model's sensitivity. As Professor Carlton noted, Professor Shapiro performed no "statistical tests" to demonstrate that the "tiny percentage" increases in harm predicted by his model are "any different from zero" statistically speaking. *Id.* at 2450:16-2451:12 (Carlton). Without such statistical testing, Professor Carlton testified, the predicted harms could fall within the range of zero "just because of normal fluctuations in how we estimate models in the perimeters [sic] of the model." *Id.* The fact that Professor Shapiro's model "cannot be proven to any statistical significance" provides this Court with additional cause to reject the model's conclusions as "persuasive" evidence. *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 161 (D.D.C. 2000).

actually depart or decline to join the rival distributor due to its failure to offer Turner content. Professor Shapiro refers to that measure of lost customers as the "long-term subscriber loss rate." At trial, Professor Shapiro testified that his model incorporates a low-end long-term subscriber loss rate of 9%, a number representing the combined percentage of current and potential subscribers who would either leave or decide not to sign up with a distributor in the event of a hypothetical long-term blackout of Turner content. *See* Tr. 2239:3-5 (Shapiro). Whether viewed as a measure of Turner's "market power" in the programming market or not, *id.* at 2239:18, that measure of customer loss – deemed the "long-term subscriber loss" rate by Professor Shapiro – is critical to Professor Shapiro's bargaining model and the predicted consumer harm it generates.

Of course, there has never been a long-term blackout of Turner content; Professor Shapiro thus had no "real-world" evidence on which to base his projected subscriber loss rate. *Id.* at 2394:8-11. Instead, as a basis for his chosen 9% value, Professor Shapiro relied on three principal pieces of evidence: (1) a third-party consultant slide deck commissioned by Charter in late 2016; (2) his own analyses of long-term blackouts of a different programmer, Viacom, with cable distributors Suddenlink and Cable ONE; and (3) the results of an internet survey conducted by another of the Government's testifying experts, Professor John Hauser. *See id.* at 2225:17-2226:7. The evidence indicates, however, that each of Professor Shapiro's sources is significantly flawed. Thus, even taken together, they fail to establish the reliability of Professor Shapiro's long-term subscriber loss rate and the conclusions generated by his model.

1) Charter's Third-Party Consultant Slide Deck

According to Professor Shapiro, a slide deck, commissioned by AT&T's competitor Charter in late 2016 and authored by consultants at a San Francisco-based firm called Altman, Vilandrie & Company ("Altman Vilandrie"), was the "single best document and analysis" he found in coming up with a measure for the long-term subscriber loss rate. *Id.* at 2235:11-14. That was so, according to Professor Shapiro, because the slide deck, in contrast to the other available pieces of evidence, addressed "exactly" the question of interest to his analysis: the subscriber-loss effects of a long-term Turner blackout with a major distributor, as measured in *both* lost current customers and lost potential customers. *Id.* at 2235:19-20, 2236:20-2237:3. But although the slide deck may have analyzed the questions in which Professor Shapiro was interested (perhaps not so fortuitously, *see infra* pp. 127-128), the evidence shows that it did so via methodologies that were significantly flawed.

Before explaining further, it is necessary to review the basics of the slide deck's analysis. Altman Vilandrie director Stefan Bewley, who was responsible for supervising the project, explained that the slide deck was designed to examine "the value of content programming." *Id.* at 1271:23 (Bewley (Altman Vilandrie)). The slide deck, entitled "Content Valuation Project," contains charts predicting Charter's subscriber losses in the event of permanent blackouts with various programming networks. *See id.* at 1249:18-21; *see also* PX79. To generate those loss predictions, Altman Vilandrie used three different methods: (1) an internet survey, (2) set top box data, and (3) the so-called "hybrid" method, which made slight adjustments to the set top box analysis. *See* Tr. 2792:10-11, 2801:1-5, 2808:6-20 (Rossi); *id.* at 1271:24-1272:6 (Bewley (Altman Vilandrie)). Although Professor Shapiro praised that analysis for its apparent rigor, *see id.* at 2235:18-19 (Shapiro), he later conceded, despite professing that he usually does not accept data without "look[ing] into it more and figur[ing] out how reliable it is," *id.* at 3848:10-13, that he did not take steps to evaluate the reliability of the Altman Vilandrie data before he relied on it, *id.* at 3863:21-23 ("Q. So we can establish that all you did was read the report, right? A. I relied on the report. I didn't dig behind it."). Rather, Professor Shapiro simply incorporated the final figure included in the slide deck's table of results. *See* PX79-6.

Defendants' survey and statistics expert, Professor Peter Rossi, did however examine the methods that Altman Vilandrie used to predict the reported subscriber loss rates. And in testimony that largely went unrebutted,[39] Rossi explained his conclusion that "[a]ll three are invalid." Tr. 2792:5 (Rossi). Those conclusions, which I accept, are outlined below.

First, Altman Vilandrie relied on an internet survey. That survey, as Professor Rossi explained, combines three different types of internet surveys – a "conjoint," a "channel chooser," and a "Max Diff." *Id.* at 2792:13-17. In the conjoint survey, respondents view eight to ten screens and are presented with different options and pricing for bundles of video programming, broadband, and telephone services; the survey seeks to infer the respondent's willingness to trade off different service features. The channel chooser survey, for its part, tries to ascertain how much priority respondents give to a particular

[39] The Government did not recall any Altman Vilandrie witnesses on rebuttal to answer to Professor Rossi's critiques.

cable network. And the Max Diff survey allows the respondent to rank the different networks. Based on its internet survey's combination of those approaches, Altman Vilandrie calculated one set of subscriber loss figures for current and prospective video customers. *See* PX 79-18.

Professor Rossi testified that the internet survey method was plagued by considerable flaws, both in the way the questions were designed and in the way the answers to those questions were used to project subscriber loss. He noted, for example, that the conjoint survey's presentation of 12 networks included only one network – CNN – owned by Turner. Tr. 2794:7-9 (Rossi). Although Professor Rossi testified to the common-sense proposition that it is "impossible" to infer the value of all of the remaining Turner networks just from CNN, apparently that is what Altman Vilandrie did with the results of the conjoint survey. *See id.* at 2793:11-14, 2800:6-11. With respect to the Max Diff survey's process for ranking channels, Professor Rossi testified that such a ranking can give a sense of relative importance, but cannot measure how much more or less important one network is than another; of particular relevance here, moreover, the ranking methodology does not define what "important" means to a respondent, and thus says "[a]bsolutely nothing" about "whether a subscriber to Charter would leave if there was a Turner blackout." *Id.* at 2795:9-16. Finally, although Altman Vilandrie purported to combine the conjoint and Max Diff methodologies to bolster its analysis, Professor Rossi testified that such methodologies "fundamentally cannot be combined" as a matter of statistical practice. *See id.* at 2796:18-2797:4; *see id.* at 2800:16-17 ("It's literally an impossibility, and there is absolutely no way to combine these two.").[40] For those reasons, Professor Rossi's "bottom line conclusion" about the survey methodology was that it is "completely invalid." *Id.* at 2800:22-24.

Second, Altman Vilandrie utilized a set top box methodology. Set top box data, as should now be familiar, shows the amount of time a particular cable set top box is tuned to specific channels. *See id.* at 1274:16-18 (Bewley (Altman Vilandrie)); *id.* at 2801:5-12 (Rossi). As Bewley acknowledged, set top box data does not necessarily reflect actual viewership or correlate to a particular network's value. *See id.* at 1275:17-22 (Bewley (Altman Vilandrie)). Professor Rossi testified similarly, noting that such data, without more, "cannot possibly answer the question about the effect of removing any channel or group of channels." *Id.* at 2802:7-8 (Rossi). In addition, because set top box data is generated by Charter's current customers, it provides no information about "prospective customers for Charter." *Id.* at 2801:19-24. Notwithstanding those limitations, the Altman Vilandrie slide deck purported to derive current and prospective subscriber loss figures from the set top box data by assigning differing "churn propensity" values – that is, values reflecting the likelihood that a viewer will leave a distributor – to different levels of viewing concentration. *Id.* at 2802:9-2804:14; *see* PX79-18, -68.

Professor Rossi testified, however, that the churn propensity values, and their correlation with set top box data, are "not based on data of any kind" and instead reflect

[40] Although Professor Rossi explained that Altman Vilandrie relied in part on the Sawtooth Software, which incorporates some of his own innovations in survey methodology, the combination procedure took place "outside of Sawtooth Software." Tr. 2855:20-2856:6 (Rossi).

"purely assumed numbers." Tr. 2804:12-13 (Rossi). Although the lack of empirical support is reason enough to disregard the slide deck's analysis of the set top box data, that flaw is compounded by the particular values assigned in the churn propensity schedule. In particular, based on the schedule, Altman Vilandrie predicts that the loss of a network with a specified viewing concentration or greater will *always* cause a distributor's customers to leave. *Id.* at 2807:13-20; PX79-68; DX0681-73. I agree with Professor Rossi that the upper-threshold assumption, and indeed the entire set-top box methodology, lacks a sufficient basis in evidence and is unreliable. *See* Tr. 2807:13-22.

Third, and most importantly for purposes of Professor Shapiro's analysis, Altman Vilandrie implemented what it refers to as a "hybrid" methodology. Ultimately, the April 27, 2017 slide deck upon which Professor Shapiro relied indicates that the hybrid methodology produces a video subscriber loss rate of 9% for current customers and 10% for prospective customers. Tr. 2388:1-11, 3868:1-20 (Shapiro). Professor Shapiro testified that the 9% long-term subscriber loss rate that he incorporated into his model "reflect[s]" those results. *Id.* at 2237:4-8, 2388:1-11; *see* PX79-6, -18.

A key problem with the design of the hybrid methodology, as Professor Rossi testified, is that it blends two methods only in the sense that it alters the set top box method's lower churn propensity threshold "based to some extent on some of the survey data." Tr. 2808:14-18 (Rossi). In other words, the hybrid methodology can be thought of as "just a revision or alteration, minor alteration to the set-top box method." *Id.* at 2808:19-20. The hybrid methodology is thus plagued by the same problems as is the set top box methodology, including the fact that it "can't say anything about prospective customers."

Id. at 2808:19-22. As a result, the hybrid methodology – and its associated 9% and 10% subscriber loss predictions for current and prospective customers – falters on the same grounds as the set top box methodology.

Moreover, evidence regarding the evolution of Altman Vilandrie's slide deck casts further doubt on the reliably of the figures associated with the hybrid methodology. Specifically, the evidence shows that a "final read out" version of the slide deck sent to Charter on April 21, 2017 reported that the hybrid method produced a 5% and 6% subscriber loss rate for current and prospective customers, respectively. *See id.* at 1302:4-20 (Bewley (Altman Vilandrie)); 3068:1-12 (Shapiro). Almost immediately after a meeting with Charter representatives a few days later, however, Altman Vilandrie, with the "permission" of Charter, altered the results of the hybrid methodology for "just" Turner and no other programmer. *Id.* at 1310:14-1311:15 (Bewley (Altman Vilandrie)). Those alterations led to the 9% and 10% current and prospective subscriber loss rates upon which Professor Shapiro's analysis relied. *See id.* at 3868:1-12 (Shapiro); *compare* DX681-23, *with* PX79-18.

That Turner-centric turn of events is enough alone to give me pause before accepting Professor Shapiro's reliance on the slide deck, notwithstanding the Government's presentation of a more benign view of the slide deck's evolution. *See, e.g.*, Tr. 1327:16-1332:4 (Bewley (Altman Vilandrie)) (testifying, among other things, that it was Altman Vilandrie that "proposed making an exception for Turner" based on the results of the hybrid methodology as compared to the results of other methodologies). In my view, moreover, the most troubling aspect of the testimony regarding the contested changes to the slide deck was that Professor Shapiro was entirely unaware of those changes when he "first relied on the document" to perform his analysis. *Id.* at 2365:8-10 (Shapiro); *see also id.* at 2366:4-7. At trial, Professor Shapiro admitted that he was not aware of the alterations made to the Altman Vilandrie slide deck until his pre-trial deposition by defendants. *Id.* at 2365:1-3. He nonetheless defended his reliance on the slide deck for the long-term subscriber loss figures, in no small part based on his insistence that although the current subscriber loss figure had been altered, the prospective subscriber loss figure "was not changed here." *Id.* at 2388:1-6; *see id.* at 2366:9-11 ("If I used the five percent instead, I would get a long-term subscriber loss rate of 8.5 percent instead of nine in my calculations."). Given that, Professor Shapiro continued, the altered current subscriber loss figure was "a lot less significant" because "it's just one of the two components that affects the long-term subscriber rate." *Id.* at 2388:11-15. Based on that assumption, Professor Shapiro testified that, even if one accepted the original 5% existing-customer subscriber loss figure, "[i]t's not as though my number would go from . . . nine to five percent if you made that change. It would go from nine to 8.5" percent. *Id.* at 2388:8-10.

But Professor Shapiro "made a mistake" in so testifying, a fact he was later forced to concede on rebuttal. *Id.* at 3868:17-20. When confronted on rebuttal with the two versions of the slide deck, Professor Shapiro acknowledged that the prospective subscriber loss figure *had* indeed been changed from an original value of 6% to the 10% value upon which he relied. *Id.* at 3868:1-20. He also testified, moreover, that using the original 5% existing customer subscriber loss figure and 6% prospective subscriber loss figure would yield a departure rate of about 5 or 6%, which in turn would "largely eliminate[] the net MVPD cost increase" he projects. *Id.* at 3870:22-3871:3.

For all of these reasons, I conclude that Professor Shapiro's reliance on the projected long-term subscriber loss rates contained in the Altman Vilandrie slide deck was misplaced. Given Professor Shapiro's testimony that the slide deck was the "single most important document" to him in calculating the long-term subscriber loss rate incorporated into the bargaining model, *id.* at 2360:25-2361:3, that conclusion *alone* is all but fatal to Professor Shapiro's analysis. To the extent, however, that Professor Shapiro relied upon two other categories of evidence, such evidence also fails to support his chosen long-term subscriber loss rate.

2) Long-Term Viacom Blackouts with Suddenlink and Cable ONE

In generating his long-term subscriber loss rate, Professor Shapiro also relied on his own analysis of the effects of long-term blackouts of Viacom programming – which includes networks such as MTV and Nickelodeon – with two MVPDs, Suddenlink and Cable ONE. In particular, Professor Shapiro opined that the Viacom blackout caused Suddenlink to lose 9.4% of its video subscribers and Cable ONE to lose 16% of its video subscribers. Gov't PFOF ¶ 208. The Court need not spill much ink addressing those figures because even a cursory review of the evidence shows that they are unreliable.

With respect to Professor Shapiro's 9.4% figure for Suddenlink, it is notable that *Suddenlink itself* represented to the public that it suffered only a 2 to 2.5% subscriber loss as a result of the blackout with Viacom. *See* Tr. 2480:21-22 (Carlton). Given the unusual nature of a long-term blackout, Charter, Comcast, and Wall Street power Citi also studied the event, the latter two concluding that Suddenlink's subscriber loss percentage was in the "low single digits." *Id.* at 2483:1-2; Defs.' PFOF ¶ 150. Altman Vilandrie's study for Charter produced similar results. *See* PX79-6. I heard from defendants' expert Professor Carlton that Professor Shapiro's estimates were inflated when compared to those other reported figures due to his failure to account for the fact that the rate of subscriber loss in the video distribution industry started to increase in 2016. *See* Tr. 2483:16-2484:2 (Carlton); *see also id.* at 2490:8-10.[41] When Professor Carlton corrected Professor Shapiro's analysis to control for that trend, he generated a 4.8% subscriber loss rate for the Suddenlink-Viacom blackout, a number much more in line with industry estimates. *See id.* at 2484:3-8.[42]

Professor Shapiro's 16% subscriber loss estimate for the Cable ONE long-term blackout of Viacom is even more unreliable. On that score, it is sufficient to note that Randy Sejen, Cable ONE's chief negotiator, testified that "[t]he losses attributable to Viacom are very, very small . . . and were not significant." *Id.* at 2123:21-2124:12 (Sejen

[41] Professor Shapiro omitted from his analysis of industry trends December 2016 data that showed an even steeper decline in industry subscribership. When first questioned about the decision not to include this data in his analysis, Professor Shapiro did not recall that any data was omitted, and could not provide an explanation for that omission. *See* Tr. 3879:1-14 (Shapiro). When called back to the stand days later, Professor Shapiro recalled that he had noticed something "peculiar" about the omitted numbers. *Id.* at 3915:9. Professor Shapiro's testimony concerning the 2016 data was not the only time that he demonstrated a lack of familiarity with the materials he presented to the Court. *See infra* pp. 127-129, 139-140. To be clear, although both call into question his analysis, Professor Shapiro's lack of familiarity with the contents of his report and with his own data analysis presents a credibility problem separate from the problems with key inputs generated by outside sources like Altman Vilandrie.

[42] Pursuant to the parties' representations and agreements during an April 26, 2018 bench conference related to the Suddenlink analysis, the Court will strike the following lines of trial testimony from Professor Shapiro: Tr. 3926:12-13; Tr. 3917:5-7; Tr. 3878:9-10; Tr. 3877:20-21; Tr. 3806:10-12.

(Cable ONE)). Specifically, Sejen noted that the Viacom blackout was "felt and absorbed" within four to six months and caused a subscriber loss of just 2%. *See id.* at 2130:1-4, 2123:21-24. Given Sejen's testimony that Cable ONE lost only 2% of subscribers, the Court has no reliable basis to accept Professor Shapiro's calculation of a subscriber loss figure eight times that amount – and therefore rejects it in toto.

To be sure, I heard evidence that, in relative terms, Turner programming is more valuable than Viacom programming. But that fact *alone* cannot make up for Professor Shapiro's baseline failure to establish any reliable measure of subscriber losses associated with the long-term Viacom blackouts. Having concluded that Professor Shapiro's Viacom analysis lacks an adequate basis, I will now turn to the last main piece of evidence he cited in support of his long-term subscriber loss figure.

3) Professor Hauser's Internet Survey

The last piece of evidence upon which Professor Shapiro based his long-term subscriber loss rate is an internet survey. The internet survey was conducted by another of the Government's testifying experts, Professor John Hauser, who heads the marketing department at the Massachusetts Institute of Technology. Tr. 756:9-14 (Hauser). The survey generated a long-term Turner blackout subscriber loss percentage of 12% and a 30-day Turner blackout subscriber loss percentage of a whopping 8.2%. *Id.* at 761:7, 803:24-804:3.

Although once at the forefront of the Government's presentation, *see, e.g.*, Gov't Pre-Trial Br. 29, Professor Hauser's survey now finds itself in the background, with even Professor Shapiro minimizing his reliance on it, *see* Tr. 2360:22-24 (Shapiro) ("[Hauser's] twelve percent is corroborative. If I didn't rely on that, if we decided that was unreliable, it wouldn't change my opinions."). Professor Shapiro however had good reason to unhitch his analysis from Professor Hauser's internet survey wagon: cross-examination and real-world evidence alike revealed that the survey was inherently unreliable and produced inflated results!

Before explaining that conclusion, a brief review of Professor Hauser's survey might be helpful. The survey had roughly 1,600 participants. *Id.* at 765:11 (Hauser). Those participants were drawn from an internet panel and then broken into four groups of approximately 400 participants each: three "test" groups and one "control" group. *See id.* at 775:10-14, 761:21-762:5 (Hauser). The test groups were presented with an online survey, in which they were presented with questions about their potential responses to Turner blackouts of varying lengths, including a permanent blackout, a one-month blackout, and a one-week blackout. *See id.* at 775:22-776:6. The control group was not presented with any information about a blackout. *See id.* at 776:14-18; *id.* at 2768:8-11 (Rossi).

Defendants' survey expert, Professor Rossi, testified that Professor Hauser's survey is "unreliable" for any number of reasons. *Id.* at 2768:15 (Rossi). For purposes of the analysis here, I need only discuss two.[43] First, Professor Rossi testified that the survey was drawn in a biased and misleading way, with the effect of overstating the importance of

[43] Professor Rossi also criticized Professor Hauser for failing: 1) to establish that his group of survey participants constituted a representative sample of the population of interest, and 2) to provide a margin of error – that is, a measure of reliability – for his survey's results. *See* Tr. 2771:22-2273:21, 2775:2-6 (Rossi). Although the Court agrees that those problems are notable, it sees no need to pile on by addressing them further in light of the two significant design flaws discussed below.

Turner content. Second, Professor Rossi testified that the survey's centerpiece, the intent-to-switch scale, was confusing and skewed. *See id.* at 2768:12-2769:8. After considering the expert testimony as well as other evidence calling into question the results of Professor Hauser's survey, I agree with Professor Rossi's conclusions.

First, Professor Rossi faulted Professor Hauser's survey as building in bias at the "priming" stage. *Id.* at 2786:17. Professor Hauser testified that many television viewers think about video programming in terms of specific shows or genres, not channels. *See id.* at 817:17-818:5. Professor Hauser therefore began his survey by "priming" survey respondents to connect genres of programming to specific channels through the use of network logos. *See id.* at 817:25-818:17; *see also id.* at 824:15-825:6 (sports); *id.* at 821:4-12 (special events). According to Professor Rossi, however, Professor Hauser's use of logos was problematic. In particular, Rossi noted that the internet survey "tend[ed] to visually overemphasize Turner content" relative to other content by, for example, enumerating the Turner channels in large font or inaccurately over representing the Turner networks relative to other programming. *Id.* at 2783:12, 15-17 (Rossi); *see also id.* at 2787:9-2788:25 (discussing DX915B).[44] At one point, the survey presented respondents in the test group with large Turner logos for six straight slides, despite not showing those slides to the control group. *See id.* at 838:23-839:3 (Hauser); *id.* at 2789:25-2790:8, 24-25

[44] This is not the first time Professor Hauser's "graphic effects and presentation methods" have been called into question on this basis. *See Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2014 WL 976898, at *10-*16 (N.D. Cal. Mar. 6, 2014).

(Rossi). As Professor Rossi explained, that priming tended to bias respondents in favor of indicating an intent to switch in the event of a Turner blackout. *Id.* at 2790:16-17 (Rossi).

Second, Professor Rossi testified that Professor Hauser's survey asked respondents to report their answers using a scale that was confusing and, again, likely to cause respondents to overestimate their likelihood of switching distributors in the event of a Turner blackout. Professor Hauser's survey did not squarely ask respondents whether they would switch providers in the event of a Turner blackout. Instead, the internet survey presented respondents with, as it is known in the industry, a "Juster scale" by which they answered the question, "How likely are you to switch your TV provider, on a scale from 1 to 99?" DX915-152; *see* Tr. 788:12-18, 814:1-4 (Hauser). The scale included percentages – 10%, 20%, 30%, etc. – and accompanying descriptors such as "very slight possibility," "slight possibility," "some possibility," and "fair possibility." *See* Tr. 813:15-814:19 (Hauser); DX915-152. The results of the Juster scale were translated directly into a subscriber loss rate. Thus, if each respondent rated his or her likelihood of switching at a "very slight possibility," corresponding to 10% on the Juster scale, Professor Hauser's survey would spin out a subscriber loss rate of 10%. *See* Tr. 815:20-816:18 (Hauser).

Professor Hauser's Juster scale had two critical flaws: first, its text descriptions were "out of w[h]ack with the numbers," Tr. 2778:17-21 (Rossi), and, second, Juster scales are particularly unreliable in quantifying consumer choices of this kind, *see id.* at 2779:1-2782:19. Professor Rossi put it in plain terms:

> Now if I told you that I thought there was a very slight possibility that I would get into a car accident driving from Washington to Baltimore on the Baltimore Washington Parkway this evening, I don't think you would say

> that was one out of every ten times I attempted that. You might say one out of every thousand or more. So the text description is out of whack with the numbers. And that's true throughout the scale.

Id. at 2778:12-19. Professor Rossi also testified that the survey's text was bound to present skewed results because it "minimiz[ed] or neglect[ed] many aspects of switching costs" – that is, the various costs associated with switching distributors. *Id.* at 2783:13-14 (Rossi); *see also id.* at 2783:19-2786:16 (detailing different kinds of switching costs, including search costs, transactional costs, bundle-derived costs, and psychological costs, and concluding that Professor Hauser's survey failed to adequately account for those costs). That problem casts further doubt on the reliability of the survey. *Cf. H & R Block*, 833 F. Supp. 2d at 66-68 (declining to rely on "customer survey[]" results in part because survey "failed to assign" adequate "pricing" data to some of participants' response options).

More fundamentally, Professor Rossi explained, Juster scales are notoriously inaccurate when used "as an exact quantification" of the likelihood that a customer will engage in some future behavior. Tr. 2779:16-21, 2782:2-13 (Rossi). Academic literature cited by both Professors Rossi and Hauser establishes that the average correlation for predictions of this kind falls between .3 and .6. *See id.* at 2779:16-2780:5. Professor Hauser's scale, nonetheless, purports to assign a correlation value of 1.0, that is, a *perfect* linear association where intent predicts behavior virtually every time. *See id.* 2872:15-2781:2, 2872:1-4. And even that unsupported correlation "basically disappears" when respondents are asked to predict their behavior with respect to new products or situations – such as a permanent Turner blackout. *See id.* at 2780:15-24.

Given the significant questions raised about the design of Professor Hauser's survey, it should come as no surprise that the survey's results were puzzling to expert and fact witnesses alike. Gregory Rigdon, Comcast's chief negotiator, responded to Professor Hauser's one-month blackout loss estimate of 8% by noting, "[T]hat seems like a big number in one month." *Id.* at 897:2-3 (Rigdon (Comcast)). He gave the same answer when asked about the survey's long-term 12% loss estimate. *See id.* at 898:3-5 ("Q: But in terms of nay group you've ever seen dropped, have you ever seen anything approaching a 12 percent – A. That seems like a big number."). Turner CEO John Martin put things a bit more strongly, calling the survey's 8% one-month blackout subscriber loss prediction "absurd." *See id.* at 660:9-11 (Martin (Turner)). Defendants' expert Professor Carlton, for his part, said that the 8% departure rate for one month "strikes me as way too high" and is "nothing like" the Cable ONE estimate of 1.1% to 1.2% for the actual temporary Turner drop. *Id.* at 2491:4-15 (Carlton). Finally, even Professor Shapiro himself noted that Professor Hauser's one-month subscriber loss estimate of 8% "seems high." *Id.* at 2360:18.

Of course, if Professor Hauser's survey generated inflated one-month subscriber loss estimates as compared to real-world evidence, that fact "cast[s] doubt on what Professor Hauser is doing" with the survey design generally. *Id.* at 2491:4-15 (Carlton). It is therefore small wonder why both the Government and Professor Shapiro have deemphasized the role of the Hauser internet survey. All in all, I can't help but conclude that the internet survey's methods are unreliable and that its results fly in the face of real-world evidence regarding the effect of programming blackouts.

For all of the reasons discussed above, the evidence is not sufficient to support the 9% long-term subscriber loss figure that Professor Shapiro utilized in his model.[45] Because the Government has the burden of proof as well as the responsibility to demonstrate that its proffered expert testimony has an adequate grounding in evidence, the lack of evidentiary support for Professor Shapiro's input is fatal to the model's probative value in predicting the asserted harm associated with the Government's increased-leverage theory.[46]

b. The Evidence Is Insufficient to Support Professor Shapiro's Diversion Rate

To evaluate the number of customers that AT&T stands to gain from a long-term Turner blackout with a rival distributor, it is necessary to estimate how many of that rivals' customers "will end up as DirecTV subscribers, either by moving to DirecTV or by staying at DirecTV and not going to" the rival. Tr. 2240:9-11 (Shapiro). In Professor Shapiro's

---

[45] The miniscule nature of subscriber losses resulting from the two actual instances of Turner blackouts perhaps should have alerted Professor Shapiro that something was awry with his sources. The evidence showed that there have been two short-term blackouts of Turner content with distributors: 1) a thirty-day blackout with Cable ONE in October 2013, which resulted in "fairly insignificant" subscriber losses in the range of about .6%, Tr. 2116:10-13, 2127:21-2128:2 (Sejen (Cable ONE)); and 2) a thirty-day blackout with DISH in November 2014, in which some Turner networks – including CNN, but not TBS or TNT – were blacked out, resulting in a loss of less than 1% of DISH subscribers, *see id.* at 388:10-389:5 (Schlichting (DISH)). Those subscriber loss figures simply cannot be squared with some of the figures represented in the sources upon which Professor Shapiro relied.

[46] Because the evidence does not support use of Professor Shapiro's 9% "low end" long-term subscriber loss rate, it stands to reason that the larger 14% long-term subscriber loss rate he used to generate the high end of his predicted harm range is also unsupported. Tr. 3851:21-3852:8 (Shapiro). The same goes for the higher 12% and 16% long-term subscriber loss rates he used, rather curiously and contrary to the Altman Vilandrie slide deck upon which he claimed to rely, to generate the predicted harms for a 2017 and 2021 market configuration. *See* Tr. 2493:9-2495:18 (Carlton). Professor Shapiro's appeal to the fact that he predicted a range of harm is therefore unavailing: He is not "suffering the consequences of being conservative" in his estimates, Tr. 3852:1-2 (Shapiro), the consequences arise because even his conservative estimate lacks sufficient evidentiary support and reliability. The same can be said for the Government's post-trial submissions regarding the "conservative[]" nature of Professor Shapiro's analysis. Gov't Post-Tr. Br. 14.

model, that figure is known as the "diversion rate." *Id.* at 2240:13. The diversion rates Professor Shapiro uses differ based on geography. Specifically, Professor Shapiro calculated a diversion rate for each of the local geographic markets based on an assumption that subscribers "move to the other [distributors], in each local market, to the other distributors proportional[ly] to their marketshare." *Id.* at 2240:23-2241:1-3, 2241:15-20.

The parties' main dispute related to diversion rate pertains to "cord cutting," also referred to in this context as the "outside good." *Id.* at 3871:8-9; *see id.* at 2604:13-17 (Carlton). As is likely familiar by now, an individual "cuts the cord" by discontinuing his MVPD subscription and opting instead to receive television programming through an internet-based SVOD like Netflix or Hulu. *See supra* pp. 22-23. Professor Shapiro acknowledges that, as a result of cord cutting, "[d]iversion to AT&T will be reduced to some extent because some current subscribers of a rival MVPD that would leave that MVPD due to a loss of Turner content will cancel their pay-TV service altogether" rather than "switch to AT&T or another MVPD that carries Turner." Gov't PFOF ¶ 215; *see* Tr. 2241:22-2242:18 (Shapiro). To account for that effect, Professor Shapiro assigns a value to cord cutting of approximately 10%. *See* Tr. 3871:8-15 (Shapiro).

According to defendants, Professor Shapiro's 10% figure understates the rate of cord-cutting and, accordingly, results in an inflated diversion rate. *See* Defs.' PFOF ¶¶ 182-187; *see also* Tr. 2515:16-20 (Carlton). Defendants insist that the proper cord-cutting rate is closer to 20%. *See* Defs.' PFOF ¶ 185; *see also* Tr. 2505:10-20 (Carlton). Plugging that 20% cord-cutting rate into Professor Shapiro's model, defendants' lead expert Professor Carlton testified, would result in a predicted net consumer *benefit*. *See*

Tr. 2515:16-20 (Carlton) (if one uses 20% cord-cutting rate in Professor Shapiro's model, then "Professor Shapiro's 27-cent price increase on average becomes [a] 6-cent benefit, decrease"). After evaluating the evidence and the parties' arguments on cord cutting, I conclude that there is insufficient evidence to support the 10% cord-cutting figure utilized by Professor Shapiro.

The basis for Professor Shapiro's 10% figure was the (by now discredited) Altman Vilandrie slide deck, created for Charter. *See id.* at 2372:8-10 (Shapiro) ("A: Well, you relied on Altman Vilandrie for what you called the outside good, correct? A: For that part, yes, that's correct."). What I learned about the slide deck's cord-cutting figure, however, was that it was derived from the results of Altman Vilandrie's "conjoint survey." *Id.* at 2821:7-15 (Rossi). Specifically, as explained by defendants' survey expert Peter Rossi, Altman Vilandrie first looked to the measure of people who answered that they would not "take any" MVPD service in the event of a blackout with Charter. *Id.* at 2821:9-14 (Rossi); *id.* at 2242:11-15 (Shapiro). Altman Vilandrie then took those estimates, Rossi testified, and "multiplied all of those coefficients by .6 without justification" – meaning, in layman's terms, that they "cam[e] up with a figure and then reduc[ed] it by 40 percent." *Id.* at 2821:14-18 (Rossi); *id.* at 3871:16-19 (Shapiro). That reduction, in turn, produced Altman Vilandrie's cord cutting estimate of 16.8%, which Professor Shapiro used to derive his ultimate cord cutting estimate of 10%. *Id.* at 2372:19-2373:4, 3871:11-19 (Shapiro); *id.* at 2821:16-21 (Rossi); *see* PX79-38.

Although Professor Shapiro testified that he was "aware" of Altman Vilandrie's 40% reduction methodology, he could not recall whether he was aware of it at the time he relied upon Altman Vilandrie's cord-cutting figure, or just as a result of Professor Rossi's trial testimony. Tr. 3871:16-23 (Shapiro). Moreover, Professor Shapiro was unable to explain Altman Vilandrie's choice to reduce the cord-cutting figure, stating only that his "understanding is Mr. Bewley explained he did that based on evidence that reflected market conditions in Altman Vilandrie, as part of their analysis." *Id.* at 3872:4-8. The Court, however, has been unable to locate that alleged testimony in the trial record, or in the Government's post-trial filings for that matter. *Cf.* Gov't PFOF ¶¶ 214-216 (discussing Altman Vilandrie's cord-cutting figure with no reference to Bewley testimony).

If that were not enough alone to give pause before accepting Professor Shapiro's 10% cord-cutting estimate, defendants cast additional doubt on that figure by citing to SNL Kagan data as well as to real-world evidence regarding the prevalence of cord cutting in the industry. With respect to SNL Kagan data, Professor Carlton testified that the data shows that "[a]round 20 percent" of "total TV households" are "cord cutters." Tr. 2505:12-18 (Carlton).[47] SNL Kagan's 20% figure, defendants state, aligns with other industry evidence about the extent of cord cutting. *See* Defs.' PFOF ¶¶ 183, 185. AT&T surveys of departing customers, for example, indicate that "25 to 30 percent" of those customers report that they are "going to cord cutting." Tr. 2506:19-24 (Carlton). RCN CEO Jim

[47] To be sure, the Government, through the rebuttal testimony of Professor Shapiro, attempted to rebuff Professor Carlton's 20% cord-cutting rate. Professor Shapiro pointed out that, in the context of examining the consequences of a Turner blackout, it is "pretty likely" that a departing customer would "want to go somewhere else where you can get the Turner content." Tr. 3808:11-12 (Shapiro). Thus, Professor Shapiro continued, stating that "20 percent of American households don't have pay-TV service" overall is "beside the point." *Id.* at 3808:5-6, 15. Were it defendants' obligation to provide sufficient support for the departure rate in Professor Shapiro's model, rather than Professor Shapiro's, that rebuff would perhaps be persuasive. But even accepting Professor Shapiro's point about defendants' proposed rate, that point does not prove that the departure rate *he* proffered had adequate evidentiary support.

Holanda testified that similar surveys by his company report that "at least half of the customers who leave RCN's video services are leaving for OTT providers" – a number that Holanda predicts is "likely to grow in the future as Millennials become more and more prominent in the marketplace." *Id.* at 2948:20-2949:3 (Holanda (RCN)). That evidence about the *increasing* presence of cord cutting in the market, in the Court's view, undercuts yet another aspect of Professor Shapiro's measures of cord cutting – namely, that they apparently "declin[e] over time" because of a particular "feature of his model." *Id.* at 2448:7-9 (Carlton).

In the final analysis, it is the Government's burden to adequately support its proffered model's harm – and, necessarily, the model's inputs – through the testimony of its expert or related evidence. The utter lack of explanation regarding Altman Vilandrie's methodology for generating the cord-cutting projection upon which Professor Shapiro relied, coupled with defendants' real-world evidence regarding the prevalence of cord cutting in the industry, leaves me with little confidence in the accuracy of Professor Shapiro's 10% cord-cutting figure. As with the long-term subscriber loss estimates, I therefore conclude that the Government has also failed to provide adequate support for Professor Shapiro's diversion rate estimate and thus the model's predicted net consumer harm.

c. *The Evidence Is Insufficient to Support Professor Shapiro's Profit Margin Figure*

Finally, Professor Shapiro's last input to his model is AT&T's monthly profit margins for its video customers. *See id.* at 2245:7-9, 2315:12-17 (Shapiro). To calculate those monthly video margins, Professor Shapiro relied on internal AT&T figures measuring new customers' "lifetime value" to AT&T, or "LTVs." *Id.* at 2344:12-16; *id.* at 2577:13-14 (Carlton). In particular, Professor Shapiro averaged AT&T's reported LTVs for a three-month period ending in June 2016. *See id.* at 2344:12-20, 3843:13-18 (Shapiro). That average generated a profit margin of $1,324, which Professor Shapiro used in his model to estimate the monetary benefits that AT&T would gain in the event of a long-term Turner blackout. *Id.* at 3843:21-3844:4.

Defendants argue that Professor Shapiro's 2016 LTV data is "outdated and thus not a reliable input into Professor Shapiro's model." Defs.' PFOF ¶ 188. Defendants assert that Professor Shapiro instead should have used the "latest" available LTV figure from June of 2017, or $821. Tr. 2508:3 (Carlton); *id.* at 3844:9 (Shapiro). That $821 figure – disclosed by an AT&T witness and Professor Carlton after Professor Shapiro's initial expert report and the close of fact discovery, but before Professor Shapiro's rebuttal report and the start of trial – is approximately 40% lower than the 2016 margin figure used by Professor Shapiro to generate his original estimates of net consumer harm. *See id.* at 2448:17-2449:1 (Carlton). Defendants argue that using the $821 figure from 2017, rather than the $1,324 figure from 2016, significantly reduces the net consumer harm predicted by Professor Shapiro's model. *See id.* at 2507:20-22 ("[I]f margins go down, Professor Shapiro will predict lower increases in Turner content, even in his own model."); *id.* at 2508:17-21 (using "the more up-to-date" profit margin figures "eliminates a large fraction of all [of Professor Shapiro's predicted] harms").

At trial, each side spent much time attempting to justify, or impugn, Professor Shapiro's reliance on the 2016 versus 2017 LTV data. The Government, for its part, raised questions about the genesis and legitimacy of the late-breaking 2017 margin data; on that score, it requested, and was granted, the opportunity to depose the AT&T executive responsible for compiling and producing the data. Defendants, on the other hand, questioned Professor Shapiro extensively about his continued reliance on the 2016 LTV data in the face of deposition testimony[48] and Professor Carlton's report, both of which disclosed updated 2017 LTV figures.

While I have no reason to doubt Professor Shapiro's good faith in continuing to rely upon the 2016 LTV data during his direct testimony, for present purposes, the important point is this: the trial evidence indicates that Professor Shapiro's 2016 LTV figures, and thus his measure of AT&T's margins, are outdated and too high. That is true whether they are compared against the "most current finalized" June 2017 LTV figure ($821) cited by Professor Carlton, *id.* at 3844:18, 3849:14-23 (Shapiro), or instead against an average of all three of the 2017 LTVs that had been finalized at the time of trial, *id.* at 2585:13-22 (Carlton).

At trial, AT&T witness David Christopher testified about AT&T's method for generating the 2017 LTV data; he also confirmed the values of the finalized LTVs for

[48] Specifically, David Christopher testified to the June 2017 LTV figure during his deposition on February 14, 2018. *See* Tr. 3002:16-25. Although Professor Shapiro's report cites Christopher's deposition, on the stand Professor Shapiro admitted that he did not read that deposition transcript and did not in fact know David Christopher's role in the case. *See id.* at 2345:17-2346:3 (Shapiro) ("Q: If I told you that you cited to [Christopher's] deposition in your report, does that ring a bell? A: No. Q: Well, did you read his deposition? A: I did not.").

January, April, and June 2017. *See id.* at 3001:9-17, 3011:11-17 (Christopher (AT&T)). Although the Government rightly points out that such LTV numbers can (and, in the case of the 2017 LTVs, do) fluctuate from month to month, *see id.* at 3015:10-24, the overall "downward trend is the same," *id.* at 3016:4; *see also id.* at 3003:15-3004:15 (discussing downward pressures on LTVs). The declining state of AT&T's 2017 LTVs, moreover, aligns with the testimony of numerous witnesses regarding the continued decrease of video margins in the distribution industry. *See, e.g.*, *id.* at 3852:22-25 (Shapiro) ("Q: And you are aware, sir, of the testimony of pretty much every other competitor witness in this case who has testified that their video margin are going down, right? A: Yes.").

Given that evidence, it is perhaps unsurprising that even Professor Shapiro conceded during his rebuttal testimony that he "think[s] there's some validity to using the 2017 margin instead of the 2016 margins." *Id.* at 3810:10-11; *see also id.* at 3843:17-18 ("[I]t would be reasonable to use the 2017 margins if one did it in the context of the rest of my analysis."); *id.* at 3849:5-8 ("Then when I'm given more data later and now we've had the trial, I understand that more; that's why I said this time around, I could see using the 2017 data."). Professor Shapiro also confirmed that using an average of all finalized 2017 LTVs would generate a 2016 net increase in MVPD costs of $98 million per year – a number "significantly lower" than his original estimate of $235 million in MVPD costs. *See id.* at 3849:24-3851:3. Those lower MVPD costs, in turn, would decrease the predicted harm to consumers from the $.27 per-subscriber-per-month figure Professor Shapiro testified about to a figure of approximately $.13 per-subscriber-per-month. *See id.* at 3851:6-14.

In view of the above evidence, I agree with defendants that the 2016 margin data utilized by Professor Shapiro is outdated and inflated.[49] Whether one substitutes that figure for the June 2017 LTV data or an average of all of the finalized 2017 LTV data in Professor Shapiro's model, the result is a significant decrease in the predicted amount of net consumer harm. Although that decrease, standing alone, does not eliminate all of the harms generated by Professor Shapiro's model (just the bulk of them), it provides yet another reason to reject the predictions offered by Professor Shapiro at trial.

---

[49] With his model's original reliance on the 2016 LTVs under attack, Professor Shapiro's rebuttal testimony doubled down on an argument relating to the value of AT&T's existing customers. The argument proceeds as follows. In addition to calculating LTVs for newly acquired video customers, AT&T assigns margin values to its existing video subscribers. Those values, known as active customer values ("ACVs"), are generally higher than LTVs because they do not account for "subscriber acquisition costs." Tr. 3854:22-3855:4 (Shapiro). Professor Shapiro's long-term subscriber loss rate includes a measure of the existing customers that AT&T will retain as a result of a long-term Turner blackout on its distribution rivals. The value of those maintained customers, Professor Shapiro opines, is likely "50 percent higher" than the margin value for new-customers. *Id.* at 2244:13-21. Professor Shapiro did not, however attempt to generate or otherwise assign a "measure of the margin on the retained subscribers." *Id.* at 2244:9-10. Instead, his model only incorporates the margin value associated with new subscribers. *Id.* at 2244:22. As a result, Professor Shapiro states that his "margin figure is definitely understated and substantially understated because I don't have the proper data on the value of the retained customers." *Id.* at 2244:14-17.

Therein lies the problem. Although opining about the importance of the value of retained customers to AT&T, Professor Shapiro undertook no analysis to incorporate that overall effect into his model. That should come as little surprise, given that this "larger point" appeared only in footnote 414 of the ninth appendix to Professor Shapiro's 300-page expert report; nonetheless, it renders his reliance on the existing-versus-new customer distinction unconvincing. *Id.* at 3809:18, 3855:5-3856:5. That footnote, Professor Shapiro testified, indicates that "the value of existing subscribers [is] between 150 and 225 percent as large as new subscribers." *Id.* at 3813:13-17. Beyond footnote 414's general observation, Professor Shapiro did not attempt to quantify the total dollar value of existing customers' margins versus new customer margins, much less incorporate a figure for existing customer margins into his model. *Id.* at 2244:22-2245:1 ("But, again, the data I have available, I'm using those gross add margins."). On rebuttal, Professor Shapiro nonetheless cited that "higher number" as "what gives me a higher end of my range" of projected harm. *Id.* at 3819:25-3820:7. That does not appear to be the case: elsewhere, Professor Shapiro testified that the "higher end" of the range derives from his use of a higher long-term subscriber loss rate of 14% (as compared to the 9% rate he chose to present to the Court during his direct testimony), rather than any alterations to other inputs, such as the margin data. *Id.* at 2259:4-8 ("I realize there are ranges here. These are based on, we're starting from the low end, 9 percent subscriber loss rate, and projecting that. So if we started with the 14 percent, we'd have higher numbers."); *see also id.* at 2239:3-7. Professor Shapiro's belated attempts to link his point regarding the increased margins for existing customers to the high-end projections he reported, or to present those increased margins as if they were quantified and incorporated into his model, are thus unavailing and further undermine the credibility of his presentation.

d. The Model's Failure to Account for the Real-World Effects of Turner's Long-Term Contracts Further Undermines Its Probative Value

Turner is currently party to long-term affiliate agreements with nearly all of its distributors. *See* Tr. 2316:3-18 (Shapiro); *id.* at 2444:10-23 (Carlton); *see also, e.g.*, PX211; PX410; PX422.[50] Those agreements, Professor Shapiro concedes, will "prevent [Turner] from raising the fees for some number of years" and thus "temporarily constrain[]" his predicted effects of the merger in the real- orld. Tr. 2209:8-9, 16 (Shapiro). In running his model and rendering his predictions, however, Professor Shapiro curiously chose to ignore Turner's current affiliate agreements. At trial, Professor Shapiro explained – and anticipated cross-examination on – that choice by noting that his model is designed to "evaluate the fundamental incentives and changes in the market created by the merger." *Id.* at 2208:21-25, 2209:4-19. In other words, Professor Shapiro's predictive exercise requires assessing "the longer term impact of a new market structure"; factoring in Turner's current affiliate agreements, he noted, would be counterproductive because those agreements are "temporar[y]" and will "expire in time." *Id.* at 2209:11-19, 2320:24-2321:10.

The evidence in this case, however, shows that the real-world effect of Turner's present affiliate agreements will be rather "significant" until at least 2021. *Id.* at 2316:14-18. Indeed, Professor Shapiro conceded that by simply factoring in the presence of one such affiliate agreement with a large distributor (which the Court will not name for

[50] The primary exception is Charter, which has been displaying Turner content pursuant to temporary, short-term extensions of the companies' affiliate agreement, which initially expired in 2016. *See* Tr. 1353:21-1354:3 (Montemagno (Charter)).

confidentiality purposes), the total MVPD price increase predicted by his model decreases by "about one-third" – a decrease that "take[s] away the vast majority the net effect" on MVPD monthly costs. *See id.* at 2317:25-2318:6, 2319:10-16; *see also id.* at 2617:12-2618:13 (Carlton) (factoring in that "one contract" reduces MVPD harm projection to "roughly a 5-cent projected price increase instead of a 27-cent price increase"). Not surprisingly, Professor Carlton testified that simply by accounting for all current affiliate agreements and making no other changes to Professor Shapiro's model, the model would generate a predicted net *benefit* to consumers rather than a net harm for the years 2016 and 2017. *See id.* at 2513:1-9 (2017) (discussing DXD116); *id.* at 2515:25-2516:1 (2016) (discussing DXD116).

In other words, given Turner's existing contracts, the level of post-merger harms predicted by Professor Shapiro's existing model would not begin to phase in until at least 2021. But even Professor Shapiro concedes that 2021 is "getting out there a ways" and that "it gets harder" to predict actual harm that far down the line. *Id.* at 2258:1-2, 2316:15-2317:4-5 (Shapiro). That recognition reflects the testimony of industry witnesses, many of whom testified that the landscape of the video distribution industry is continually changing and will continue to change as new entrants join the market. *See, e.g., id.* at 2456:7-11 (Carlton) ("So we have Netflix, we have Google coming in, you have Amazon Prime. These are all big firms, Apple and Facebook we know are coming in. . . ."); *id.* at 2948:20-2949:3 (Holanda (RCN)) (agreeing that migration to "OTT providers" is "likely to grow in the future as Millennials become more and more prominent in the marketplace"); *cf. id.* at 3853:18-19 (Shapiro) ("I think it is not disputed that the video margins are going down.").

I am thus left with projections of harm for the years 2016, 2017, and 2021 that all concede have not and will not occur in the real world due to Turner's actual affiliate agreements. *See, e.g.*, *id.* at 2317:6-15 (Shapiro) ("Q: So let's be clear about this when . . . you said $586,000,000 of annual price increase[s] to all of the MVPDs and a couple of virtual [MVPDs] in there, right? A: That's the number there. Q: So just to be clear, that isn't going to happen. This isn't going to happen let's say in the year after the merger, right? That can't happen. A: That is true."). As such, I have no choice but to agree with Professor Carlton that Professor Shapiro's model is "overestimating how quickly" the predicted harms "are going to start occurring." *Id.* at 2444:15-23 (Carlton). To the extent, moreover, that the model projects "actual effects [that] will only occur gradually" after the largest of those agreements expires in 2021, even Professor Shapiro admits that it "gets harder" to project what the industry – and thus actual, real-world harm – will look like that far down the road. *Id.* at 2209:17-19, 2316:19-2317:5 (Shapiro); *cf. id.* at 235:18-19 (Schlichting (DISH)) (Sling launched as the first virtual MVPD in February 2015). For those reasons, even putting aside the various problems with the model previously discussed, I conclude that the model's predictions of harm are not "'sufficiently probable and imminent'" to be probative in view of the facts of this case, especially "in the context" of the ever-increasing competitiveness of this "particular industry." *Arch Coal*, 329 F. Supp. 2d at 115 (quoting *Marine Bancorporation*, 418 U.S. at 623 n.22); *Aetna*, 240 F. Supp. 3d at 79 (quoting *Brown Shoe*, 370 U.S. at 321-22).

* * *

After hearing Professor Shapiro's bargaining model described in open Court, I wondered on the record whether its complexity made it seem like a Rube Goldberg contraption. Professor Carlton agreed at the trial that that was a fair description. *See* Tr. 2447:2-7 (Carlton). But in fairness to Mr. Goldberg, at least his contraptions would normally move a pea from one side of a room to another. By contrast, the evidence at trial showed that Professor Shapiro's model lacks both "reliability and factual credibility," and thus fails to generate probative predictions of future harm associated with the Government's increased-leverage theory. *Anthem*, 855 F.3d at 363. Accordingly, neither Professor Shapiro's model, nor his testimony based on it, provides me with an adequate basis to conclude that the challenged merger will lead to *any* raised costs on the part of distributors *or* consumers – much less consumer harms that outweigh the conceded $350 million in annual cost savings to AT&T's customers.[51]

---

[51] Although they amount to "extra icing on a cake already frosted," there are even more reasons to be skeptical of the Government's increased-leverage theory of competitive harm. *Yates v. United States*, 135 S. Ct. 1074, 1093 (2015) (Kagan, J., dissenting).

First, the Court has reason to believe that, post-merger, AT&T will honor Turner's commitment to arbitrate, counterparties will agree to the terms of that commitment, and the prospect of arbitration will influence affiliate negotiations. In short, the commitment, made by Turner shortly after the filing of this suit, will have real-world effects. For starters, the proposed arbitration agreement is similar "in many of the fundamental ways" to the arrangement blessed by the DOJ, FCC, and this Court in the Comcast-NBCU merger. Tr. 2680:1-9 (Katz); *see also* 7/27/2011 Hr'g Tr. 7:4-7, 13:6-10, Comcast Corp., 808 F. Supp. 2d 145. Record evidence confirmed the real-world impact of an arbitration provision of this kind, giving the Court confidence both that arbitration offer will have import to negotiations and would be accepted by Turner's counterparties. *See supra* pp. 100-105 (reviewing econometric analysis of affiliate-agreement prices after the Comcast-NBCU merger); *see also* Tr. 1388:18-22 (Montemagno (Charter)) (testifying to effects of arbitration in NBCU negotiations); *id.* at 2017:12-15 (Bond (NBCU)) (similar); *id.* at 121:14-122:9 (Fenwick (Cox)) (confirming that Cox had proposed arbitration "[j]ust like in Comcast case" as condition to this merger); *id.* at 464:17-20 (Schlichting (DISH)) (similar). Given its trial presentation, I am hard-pressed to conclude that AT&T would (much less could) retreat from the commitment in light of the apparent reputational costs of doing so – costs that would imperil future negotiations in a marketplace with repeat players. *See, e.g.*, *id.* at 3261:23-3262:3 (Stankey (AT&T)); *cf. id.* at 2622:4-2624:1 (Carlton).

IV. The Government Has Failed to Meet Its Burden to Show That the Proposed Merger Is Likely to Substantially Lessen Competition on the Theory That AT&T Will Act to Harm Virtual MVPDS Through Its Ownership of Time Warner Content

The Government's second theory of competitive harm relates to virtual MVPDs. Virtual MVPDs, like traditional MVPDs, offer consumers linear (or "live") television programming in exchange for a subscription fee. *See supra* pp. 11-13. Unlike traditional MVPDs, however, virtual MVPDs transmit their video content over the internet. *Id.* Compared to traditional MVPDs, virtual MVPDs generally offer lower-cost programming packages to consumers; those packages, known in the industry as "skinny bundles," contain fewer networks than do the larger bundles offered by MVPDs. *Id.* Although virtual MVPDs are of recent vintage, they are quickly gaining market share in the video

---

Contrary to the Government's insinuations about the reasons for the arbitration offer, moreover, the Court does not view the offer as akin to an admission by defendants that the proposed merger would lead to the anticompetitive harms that the Government posits. *Cf. id.* at 39:1-5 (Gov't Opening). Instead, the Court credits John Stankey's and Randall Stephenson's testimony that the commitment was intended to "put our money where our mouth is" in showing that the proposed merger, far from being aimed at "do[ing] any of the things that the government allege[s]," is instead a "vision deal" being pursued to achieve "lower prices, improved quality, enhanced service, [and] new products." *Id.* at 3261:16-3262:3 (Stankey (AT&T)); *id* at 3402:3 (Stephenson (AT&T)); *see also id.* at 3467:18-3468:9 (Stankey (AT&T)); *id.* at 3395:23-25 (Stephenson (AT&T)); *supra* pp. 36-40.

Second, the Court observes that the Government's increased-leverage theory fails to account for another feature of the market, namely the FCC's program access rules. As defendants' expert, Professor Katz, testified, those rules are calculated to prevent precisely the kind of harm predicted by the Government: a vertically integrated entity discriminatorily increasing programming prices on its distributor-rivals. *See* Tr. 2693:14-2694:5 (Katz) ("They wanted to make sure that somehow control of the programmer wasn't used to harm competition."); 47 U.S.C. § 548(b), (j); 47 C.F.R. § 76.1001(b)(1)(i)-(ii); *see* 47 U.S.C. § 548(c)(2). Those regulations are a proper subject of antitrust analysis, *see Verizon Comms Inc. v Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411-12 (2004), and appear to be squarely on-point, at least according to the unrebutted testimony of Professor Katz. *See* Tr. 2693:19-2694:1 (Katz) ("[T]here are two broad categories. One category . . . prohibits discrimination against different distributors. And the other broad category prohibits the distributor from having undue influence on the decisions of the programmer. So, again, the idea of you don't want the distributor telling the programmer to go do things to harm other distributors."). Nevertheless, the Government all but wishes them away – and does so with little explanation or, more importantly, record evidence.

programming and distribution industry. *See* Tr. 448:24-449:2 (Schlichting (DISH)). Examples of virtual MVPDs include AT&T's DirecTV Now, DISH's Sling TV, Sony's Playstation Vue, Hulu Live, Google's YouTube TV, FuboTV, and Philo. Gov't PFOF ¶ 14; Defs.' PFOF ¶ 8.

According to the Government, the challenged merger would give AT&T the "ability to harm competition by slowing the growth of emerging, innovative online distributors" – that is, virtual MVPDs. Gov't PFOF 104. AT&T could do so, the Government asserts, either acting on its own (under the "unilateral theory") or in coordination with Comcast-NBCU (under the "coordination theory"). *See* Gov't PCOL ¶ 63.[52] Defendants counter that the evidence does not support the Government's virtual MVPD theories. Far from showing that AT&T is trying to marginalize virtual MVPDs, defendants claim that the trial demonstrated that AT&T is embracing those providers – even launching and supporting a successful virtual MVPD, DirecTV Now. With respect to the supposed incentive to coordinate with Comcast, defendants argue that the Government's theory ignores critical differences between the positions of AT&T and those of Comcast vis-à-vis virtual MVPDs as well as key limitations on the companies' abilities to coordinate successfully. For the following reasons, I agree with the defendants that the Government has failed to show a

[52] It will come as no surprise that a basic premise of the virtual claims – as for the Government's increased-leverage theory – is the literal "must have" nature of Turner programming. For all the reasons stated earlier in this opinion, the Court is skeptical that, in the Government's words, virtual MVPDs are "dependent on programmers" like Turner. Gov't PFOF ¶ 17. For instance, Sling, the most successful virtual MVPD, offers a package without broadcast stations and does not offer CBS at all. *See* Tr. 351:12-25 (Schlichting (DISH)). As Sling President Warren Schlichting explained, the whole point of virtual MVPDs like Sling, in fact, is to carry *fewer* channels. *See id.* at 236:2-6 ("Q. Do you carry all the same channels as other pay-TV services? A. Certainly not all of them. One of the places that we tried to innovate is to carry fewer channels, many fewer channels.").

likelihood that the merger would substantially lessen competition by empowering the merged company to act, either unilaterally or in coordination with Comcast-NBCU, to harm virtual MVPDs.

Unilateral Theory. The Government first claims that AT&T has an incentive to harm innovative virtual MVPDs and could act unilaterally on that incentive by foreclosing or restricting virtual MVPDs' access to "must-have" Turner content. *See* Gov't Post-Tr. Br. 11. That is a curious claim, to say the least, in light of Professor Shapiro's testimony that, in his view, "standing alone, acting unilaterally, the – AT&T *will* still want to license the Turner content to virtual MVPDs." Tr. 2260:19-21 (Shapiro) (emphasis added); *see id.* at 2291:8-11 ("Q: Now with respect to coordination, you've made no claim that AT&T post merger would have a unilateral incentive to withhold Turner content from virtual MVPDs, correct? A: Correct."); *id.* at 2293:9-13 ("Q: And you're not contending and you've rendered no opinion that they will withhold Turner content from MVPD[s], correct? A: That's correct. Q: Or as we said unilaterally from virtual MVPDs, correct? A: Also correct."). That is so, according to Professor Shapiro, because as with traditional MVPDs, it would be "profitable" for the merged entity to continue to license Time Warner content to virtual MVPDs. *Id.* at 2293:14-17.

If citing Professor Shapiro's testimony weren't enough to dispel the Government's unilateral virtual MVPD theory, defendants put forward additional evidence that AT&T would have incentive to *license* Time Warner content to virtual MVPDs after the merger. For starters, given Turner's imperative of broad distribution, *see supra* pp. 10-11, Turner executives testified that it is important for Turner's content to be included on virtual

MVPDs as they continue to grow in relevance. With consumers choosing to cut or shave the cord, Turner has "embrac[ed] virtual MVPDs," Turner CEO John Martin testified, "because, again, we need to be distributed to as full distribution as possible." *Id.* at 607:13-16 (Martin (Turner)); *see also id.* at 3157:22-3158:7 (Bewkes (Time Warner)) (explaining that virtual MVPDs are a favorable trend because they are "another place where we could put our networks in front of consumers"); *id.* at 1064:25-1065:3 (Breland (Turner)) ("Q. . . . [W]hat was your strategy with respect to negotiating with the new entrant virtual MVPDs? A. I want to be on every platform that comes."); *cf. id.* at 3126:8-16 (Bewkes (Time Warner)) (stating that the Government's coordination theory "makes no sense" because "[w]e want to be on all the virtual MVPDs").

The entire premise of the proposed merger – allowing AT&T to go mobile with video content – provides yet another reason to reject the Government's unilateral merger theory. *See id.* at 3393:24-25 (describing plans to deploy Time Warner video content over AT&T's wireless network in order to make that content "worth far more"); *see also* PX456-3 (discussing merger strategy and AT&T "strategy of ensuring that its content is available to consumers on a wide range of distribution platforms"). AT&T's largest business is its wireless business, where it has more than 100 million subscribers. *Id.* at 3208:19-24 (Stankey (AT&T)); *id.* at 3379:19-20 (Stephenson (AT&T)). On its own, if separated from the rest of the corporation, AT&T's wireless business would be "number 37 on the Fortune 500" – approximately the size of Proctor & Gamble. *Id.* at 3379:20-3380:1 (Stephenson (AT&T)).

Within its wireless business, AT&T Chairman and CEO Randall Stephenson explained, "getting video delivered onto the mobile device" is one of AT&T's "big focus areas." *Id.* at 3381:24-25; *see id.* at 3208:20-22 (testifying about AT&T's goal of "transform[ing] the way we deliver video to customers, [to] make the video far more portable"). Increased video consumption is lucrative for AT&T because viewers consume more data on the wireless network. This leads AT&T customers to "buy up" on data plans, get more devices, or connect more devices to the network – all "good for [AT&T's] business." *Id.* at 3254:19-22 (Stankey (AT&T)). Indeed, "over half of all of the traffic on [AT&T's] network today is video, delivering video." *Id.* at 3382:4-5 (Stephenson (AT&T)).

Industry trend-lines point toward increased video consumption in the future – and AT&T aims to ride these tailwinds. *See id.* at 3505:21-3507:2. Right now, AT&T is working to develop fifth-generation wireless, which will drive video consumption even more. *Id.* at 3382:7-3383:5. And AT&T views mobile consumption of video, including through virtual MVPDs, as a critical part of its post-merger future. *See id.* at 3506:23-25 ("What we're all working towards is creating [$]35 and $15 bundles. And that's where the world is moving."). Notably, the benefits associated with AT&T customers accessing virtual MVPD content continue to accrue even when they use DirecTV Now's competitors like Sling and YouTube TV. *See id.* at 3432:16-20 ("With AT&T, we're in a unique position. We like over-the-top. Over-the-top generally means, in this day and age, wireless. People are using their wireless devices to watch video, whether it's our video or not, we're somewhat ambivalent."). All of this gives the combined entity even more reason to distribute Time Warner content as broadly as possible in order to encourage the proliferation of virtual MVPDs. As Randall Stephenson put it, the proposed merger is a "vision deal" reflecting a belief "that distribution of [Time Warner] content to wireless will drive the value of the content up" and that "the ability to pair our data with [Time Warner's] advertising inventory" for digital ads delivered over the internet "will drive value." *Id.* at 3402:24-3403:6.

Against that evidence, the Government cites a handful of AT&T documents and statements related to virtual MVPDs – documents the Government says show AT&T has the incentive to slow the rise of virtual MVPDs. *See, e.g.*, PX42; PX228; PX40; PX47; PX48. For multiple reasons, however, I do not consider the fact that AT&T executives may have previously expressed displeasure with Turner's relationships with its competitor virtual MVPDs to be probative of AT&T's post-merger economic incentive to license Turner content to virtual MVPDs. First, these statements shed no light on the post-merger incentive AT&T would have to maximize distribution of Turner content. As the reader now knows, wide distribution is the *sine qua non* of the programming industry, driving both subscription and advertising revenue. Indeed, because of these "[gains] from trade" associated with licensing Turner content as broadly as possible, Professor Shapiro himself refused to countenance the Government's unilateral virtual MVPD theory. Tr. 2293:12-17. Second, these statements do not explain why AT&T would discard the profits associated with increased video consumption by its 100 million-plus wireless subscribers accessing virtual MVPD offerings. In short, the Government's evidence on its unilateral withholding theory is fatally anemic.[53]

Second, from the other direction, the Government advances an alternative unilateral claim: that AT&T would have the ability to break the "skinny bundle" models of virtual MVPDs by forcing those distributors to take *too many* Turner networks. Citing the testimony of Sling's President, Warren Schlichting, the Government argues that a post-merger requirement that Sling "take eight Turner networks instead of four would 'break [Sling's] model'" and, indeed, would have a snowball effect with other programmers. Gov't PFOF ¶ 288 (quoting Tr. 265:17-266:8, 268:9-23 (Schlichting (DISH)).

That argument, however, ignores that Turner has less of an imperative to risk a deal with Sling (or other virtual MVPDs) by insisting on carriage of all of its networks. That is so, the evidence indicates, because Turner has a highly "concentrated portfolio of networks," Tr. 558:1 (Martin (Turner)), with 85 to 90% of Turner's revenues deriving from only four networks, *see* Defs.' PCOL ¶ 51 n.39; *accord* Gov't PFOF ¶ 75. That fact, as

[53] To the extent the Government seeks to recycle these statements for purposes of its coordination theory, this evidence is unpersuasive on that count, too. The combined entity would stand to gain much from wide distribution of Time Warner content to virtual MVPDs, and stand to lose much by refusing to do so. The Government's remaining fact evidence similarly fails to establish any incentive to act, unilaterally or coordination, to stifle virtual MVPDs. To the extent the Government seeks to recycle the slide deck, PX184, PX543, or Schlichting's testimony for its virtual claims, that evidence remains of limited probative value for the reasons stated above. *See supra* pp. 86-88 (PX184, PX543); *see supra* pp. 75-78 (Schlichting testimony). Nor does additional speculation of third parties, *see* Gov't PFOF ¶¶ 291-292, or testimony as to the "importan[ce]" of Turner content to virtual MVPDs, *see id.* ¶¶ 293-294 – even if presented for the first time in this section – move the needle. Altogether, the best the Government could marshal was a statement from AT&T's John Stankey that "we kind of expected [Sling] might be concerned about" AT&T attacking their skinny bundle. *See* Tr. 3256:3-15. Such evidence, on its own or in combination, simply cannot countermand the prime directive of programming – broad distribution – not to mention AT&T's independent incentive to grow video consumption on its wireless network, *see supra* pp. 153-155.

Time Warner CEO Jeff Bewkes noted – means Turner is "better placed" to succeed in the skinny bundle model. Tr. 3126:22. The Government's skinny bundle point also overlooks the fact that Turner – like other programmers – already fights tooth and nail to get all of its networks into all of the packages of every distributor. *See id.* at 433:18-21 (Schlichting (DISH)); *id.* at 606:5-11 (Martin (Turner)). Simply put, the Government has not produced sufficient evidence to show that the challenged merger is likely to make a meaningful difference to that dynamic.[54] For all of the above reasons, I conclude that the Government has failed to meet its burden on its claims arising from AT&T's asserted potential to unilaterally harm virtual MVPDs through its post-merger control of Turner content.

Coordination Theory. The Government posits that the challenged merger would also create a likelihood that AT&T would coordinate with Comcast-NBCU to harm virtual MVPDs. In contrast to the unilateral withholding claim just discussed, the Government did at least attempt to provide some expert support for this coordination claim. *See id.* at 2261:14-20 (Shapiro). Unfortunately for the Government, however, neither that expert testimony nor its other evidence is even close to sufficient to support its coordination claim. How so?

---

[54] In support of the notion that virtual MVPDs need Turner networks (again, in the most literal sense), the Government points to a statement by John Martin, Turner's Chairman and CEO, that Sling would be "shit without Turner." Gov't PFOF ¶ 156 (quoting PX4). This statement does not accomplish the work that the Government thinks it does. For starters, as discussed above, the very "skinny bundle" concept embraces fewer networks – even fewer popular ones – with the knowledge that some consumers will welcome the trade of fewer networks for a lower subscription fee. And second, it should come as no surprise that – even in colorful language – executives would be avid boosters for their companies' products. In the final analysis, the Government's repeated use of this John Martin quote, *see* Tr. 12:3-7 (Gov't Opening), 17-18 (Gov't Closing), calls to the mind one Court's admonition "rummage[ing] through business records" for "tidbits that will sound impressive (or aggressive)" undermines efforts to ensure "accuracy of decisions." *A.A. Poultry Farms, Inc.*, 881 F.2d at 1402.

A proposed merger may violate Section 7 by "enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms [consumers]." Gov't PCOL ¶ 67 (quoting *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1086 (N.D. Ill. 2012)). Such coordinated conduct need not constitute an illegal agreement under Section 1 of the Sherman Act, but instead can comprise instances of tacit coordination. *Cf. Heinz*, 246 F.3d at 715 (coordinated effects can occur "either by overt collusion or implicit understanding"). In order to assess whether a merger will lead to an unacceptable risk of competition-stifling coordination, courts evaluate various "market conditions, on the whole." *H & R Block*, 833 F. Supp. 2d at 77 (citation omitted). In short, that analysis involves consideration of whether would-be coordinators could wield anticompetitive power "by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Grp.*, 509 U.S. at 227. Not so here !

As it does for its other claims, the Government relies on a key assumption when pressing its theory of coordinated effects. Here, the Government assumes that, "[a]s the only two vertically integrated traditional MVPDs, Comcast and AT&T would share an incentive to slow the entry and growth of virtual MVPDs." Gov't PFOF ¶ 299. To act on that incentive, the Government further asserts, the companies could "'mutually forbear'" from licensing their programming content "'without any communication between them.'" *Id.* (quoting Tr. 2265:5-2265:6 (Shapiro)). Not only is that theory overly speculative, it ignores key differences between AT&T and Comcast that undermine the Government's argument.

First, the Government has failed to put forward sufficient evidence to show more than a theoretical "possibility" of coordination. *Cf. Baker Hughes*, 908 F.2d at 984 ("Section 7 involves *probabilities*, not certainties or possibilities."). Indeed, the Court need look no further than the testimony of Professor Shapiro in that regard. When questioned at trial about the Government's coordinated effects theory, Professor Shapiro conceded that he had no "way of accessing [sic] the probability" of coordination and thus had not attempted to "quantif[y] any risk whatsoever" that the predicted coordination "could occur." *See* Tr. 2291:25-2292:13 (Shapiro).[55] Accordingly, Professor Shapiro confirmed that he was "not in a position to say" that coordination is "more likely to happen than not," and indeed was not even prepared to say that there's a "one percent chance that coordination will happen" as a result of the challenged merger. *Id.* at 2292:6-13. Given that testimony, and the lack of "a detailed theory" with respect to coordination, I can

[55] The Government insists that it need not introduce quantitative evidence in support of the coordinated effects theory. *See* Gov't PCOL ¶ 71. The suggestion, of course, is that the Court should steer clear of imposing a requirement that the Government make a numbers-based showing on coordinated effects. Let me be clear. The Government here has failed to carry its burden on the coordination theory not because there is some *per se* requirement of quantitative analysis. Rather, the Government has failed to carry its burden because it has not put forward persuasive evidence – in any form – that AT&T and Comcast have the incentive or, given market constraints, the ability to coordinate in the manner predicted.

There is one more point. The cases cited by the Government *do* involve quantitative showings. In each one, the Court made or adopted a threshold quantitative assessment as to market concentration. *See H & R Block*, 833 F. Supp. 2d at 71-72 (applying Herfindahl-Hirschmann Index to determine market concentration); *OSF Healthcare*, 852 F. Supp. 2d at 1078-80 (same); *see also Hosp. Corp.*, 807 F.2d at 1384 (accepting "FTC's figures" as to "highly concentrated market"). That determination, in turn, triggered the "'ordinary presumption of collusion' that attaches to a merger in a highly concentrated market." *H & R Block*, 833 F. Supp. 2d at 77 (quoting *Heinz*, 246 F.3d at 725). And with that presumption in place, the burden shifted to defendants to rebut the case by "produc[ing] evidence of 'structural market barriers to collusion' specific to [the relevant] industry that would defeat" the presumption. *Id.* (quoting *Heinz*, 246 F.3d at 725). Thus, the Government's insinuation that past coordinated-effects challenges were tried without resort to quantitative analysis is simply misleading. In short, the Government cannot evade its burden of proof on the "ultimate issue [of] whether the challenged acquisition is likely to facilitate collusion," *Hosp. Corp.*, 807 F.2d at 1384; Gov't PCOL ¶ 71, by simply stating that it "does not need to quantify the potential harm," Gov't PCOL ¶ 71.

sympathize with Professor Carlton's reaction: "I'm not quite sure what I'm supposed to rebut on [t]his." *Id.* at 2454:1-10 (Carlton).

Second, the Government's argument regarding the incentive of AT&T and Comcast to coordinate to harm virtual MVPDs ignores that both stand to lose large amounts of affiliate fee and advertising revenues by withholding their content from virtual MVPDs. *See supra* pp. 10-11; Tr. 3126:8-16 (Bewkes (Time Warner)) (stating that the Government's coordination theory "makes no sense" because "[w]e want to be on all the virtual MVPDs"); *id.* at 2020:5-18 (Bond (NBCU)) ("Q: Why have you decided to license your networks to each of those virtual MVPDs? A: Well, simply we're interested in getting the most amount of distribution that we can get, and they represent an important new pathway of distribution. As I said, they now have well over three million subscribers in total. . . . [I]f we were not on those platforms we would have, you know, three million less subs, fewer subs."). Unsurprisingly, NBCU has licensed its content to each virtual MVPD. *See id.* at 2019:15-2020:2 (Bond (NBCU)). The Government has not explained why either company would be willing to forgo those affiliate fees and advertising revenues from virtual MVPDs. Nor has the Government proffered any expert analysis, for example, of how those economics could, or would, change assuming a coordinated blackout of both Turner and NBCU.

Third, and critically, the Government's argument also ignores key differences between the two companies – differences that AT&T executives believe give AT&T a competitive advantage over Comcast moving forward in this new era of rising virtual MVPD prevalence. AT&T's John Stankey, who will be responsible for running Time

Warner should the challenged merger proceed, emphatically (and credibly) stated at trial that he could not "even imagine" aligning with Comcast given the companies' history of dealings, adding, "I'm not going to cooperate with somebody I don't like." *Id.* at 3255:2-3256:2 (Stankey (AT&T)). AT&T CEO Randall Stephenson testified similarly, responding to a question about the Government's coordination theory as follows: "You probably have to live in this industry every day like I do to appreciate what a stretch that is. We compete with Comcast in the marketplace. The individual that runs communication company, he wakes up every day trying to think, how do I win in the marketplace against Comcast?" *Id.* at 3431:25-3432:5 (Stephenson (AT&T)).

The most obvious "advantage" AT&T has over Comcast when it comes to virtual MVPDs is that, unlike Comcast, and as discussed at length above, AT&T has a vast wireless business with over 100 million customers. *Id.* at 3432:2-7; *id.* at 3208:19-24 (Stankey (AT&T)); *see also id.* at 3432:17-22 (Stephenson (AT&T)) ("Over-the-top generally means, in this day and age, wireless. People are using their wireless devices to watch video, whether it's our video or not, we're somewhat ambivalent. We'd rather it be our video; but either way, it serves our interests for people to watch video over our wireless network."); *see also supra* pp. 153-155. The reasons to encourage, not quash, virtual MVPDs unilaterally become even more compelling in the context of a coordination claim with Comcast – a competitor that is much more beholden to legacy cable infrastructure and the traditional MVPD business model. *See id.* at 3432:2-12 (Stephenson (AT&T)); *cf. id.* at 3255:18-22 (Stankey (AT&T)) ("We don't want to cooperate with Comcast to play their game. We want to figure out how we use our mobile devices and our mobile network to change the game . . . ."); *id.* at 3208:19-24 ("[O]ne of the clear objectives [for AT&T in acquiring DirecTV] was to start to transform the way we deliver video to customers [to] make the video far more portable, start to emphasize the fact that we could use our 100 million wireless subscribers to be able to do things differently, which is dramatically different than Comcast.").

The Government does not dispute that AT&T's wireless business confers strong incentives to maximize distribution to virtual MVPDs. Nor can it be questioned that AT&T's strong positioning in the world of mobile content distribution gives it a powerful disincentive to work with Comcast to stifle those mobile providers of video. AT&T has plainly positioned itself to ride industry tailwinds in support of mobile consumption of video. As John Stankey explained, AT&T acquired DirecTV in 2015 not in order to double down on the satellite business, a concededly mature and declining asset, but to "pick up a lot of new customers that we could work on migrating" to new products. *Id.* at 3207:18-20 (Stankey (AT&T)); *see also id.* at 3207:21-3208:2. Indeed, as soon as the merger closed, AT&T began renegotiating DirecTV's contracts to allow for a mobile, direct-to-consumer option, DirecTV Now. AT&T knew that it was "in a foot race to basically start to change the product to be able to catch the next wave, whatever that next wave was going to be. And we didn't expect that we were going to continue to see traditional pay-TV subscribers" increasing. *Id.* at 3209:12-16. Nowhere does the Government explain why AT&T would deploy valuable Time Warner content to prop up a rival's business model, while harming its own. Go figure!

This fundamental problem of incentives and profitability buries the Government's claim. It is beyond dispute that neither the proffered concentration in the MVPD market (which, by the way, will be the same post-merger), *see* Gov't PFOF ¶ 306, nor the importance of Turner and NBCU content, *see id.* ¶ 307, nor some transparency in "key information," *see id.* ¶¶ 308-310, nor any other of the Government's evidence on the coordination theory (alone or in combination), can establish a "risk of coordination" unless the parties have an incentive or interest to collude in the first place.

Even assuming, contrary to the evidence, that AT&T would want to coordinate with Comcast under the Government's theory, the staggered, lengthy industry contracts would make that coordination strategy extremely risky. *See id.* at 643:20-644:2 (Martin (Turner)) (testifying that "because of the length of these contracts, because they're typically years in length," a strategy set "in 2013" would "begin to show up in '15, '16 and '17"); *id.* at 87:9-11 (Fenwick (Cox)) (testifying that affiliate agreements run "between five and eight years on average"). Under the Government's coordination theory, one party – AT&T or Comcast – would have to "jump first," giving up valuable programming rights on the hope that the other, in some years' time, would elect to do the same. Indeed, this barrier to coordination is so great as to put to rest the notion not only that AT&T and Comcast would have the *incentive* to coordinate, but that the post-merger marketplace would afford them the *ability* to do so. Whether by way of tacit coordination or an illegal agreement, putting such blind faith in one's chief competitor strikes this Court as exceedingly implausible ! Indeed, the decision to "not to renew [a] license or not to license to a new virtual MVPD and wait and see if the other did it," as Professor Shapiro proposes, would *enhance* the other party's position in its next round of negotiations with the virtual MVPD at issue. Tr. 2264:14-2265:13 (Shapiro). As Charter's Tom Montemagno explained, if a distributor goes dark with one network group, that distributor is in "a vulnerable spot, and I feel like I sort of have to do the deal" when another network group threatens a blackout. *Id.* at 1404:13-15. The result would be forgone revenue for a period of years, with AT&T's chief competitor gaining outsized profits in the next round of negotiations. The Government puts forward no persuasive reason why AT&T and Comcast would engage in such conduct.

The fundamental difference in incentives between AT&T and Comcast vis-à-vis virtual MVPDs, the barrier to coordination in the form of long-term contracts, coupled with the fact that the Government has provided no evidence to show how the benefits of a coordinated blackout would outweigh the companies' resulting losses of affiliate fee and advertising revenues, leave me completely unable to accept the Government's coordinated effects theory.[56]

---

[56] In support of its coordination theory, the Government points to past communication between Dan York of AT&T and counterparts at other distributors in the Los Angeles market concerning the Sportsnet LA network. *See* Gov't PFOF ¶¶ 311-312; Tr. 2081:9-2081:16 (York (AT&T)); PX462. These instances are only weakly probative of future coordination, involving, as they do, a different market, distinctive factual setting, and different distributors. In all respects, this evidence cannot overcome AT&T's strong disincentives to coordinate with Comcast detailed in this section. *Cf. H & R Block*, 833 F. Supp. 2d at 77-78 (detailing "highly persuasive historical act of cooperation" between the same two parties at the center of post-merger coordination allegations). The same goes for inquiries by York concerning Verizon Fios packages or evidence regarding John Harran's conversations with his counterpart and "good friend" at NBCU. *See* Defs.' PFOF ¶ 291; Gov't PFOF ¶ 313.

V. The Government Has Failed to Meet Its Burden to Show That the Proposed Merger Is Likely to Substantially Lessen Competition on the Theory That AT&T Will Restrict Distributors' Use of HBO as a Promotional Tool

The Government's final theory centers on HBO. On this score, the Government alleges that the combined entity will have the "incentive and ability" to prevent rival distributors from using HBO as a promotional tool to attract and retain customers. *See* Gov't Post-Tr. Br. 9-10; Compl. ¶ 39.[57] Under this theory, the combined entity would

[57] In its proposed conclusions of law, the Government describes its theory that the merged entity might "restrict the use of HBO as a competitive tool." Gov't PCOL ¶ 61; *see also* Tr. 3993:7-10 (Gov't Closing) ("It means that if this merger goes forward, then the combined firm could limit the use of HBO as a competitive tool, if that competition threatens to impact AT&T."). Under this theory, HBO is a "competitive tool" insofar as it is used by distributors for discounts, promotions, marketing, and ad campaigns. *See* Gov't PCOL ¶ 61 (predicting that AT&T will have an incentive "to restrict the use of HBO as a competitive tool, and *thereby impair the competitive process and deny consumers the benefits of discounted HBO and other promotions*" (emphasis added)); *see also* Gov't PFOF ¶ 234 ("Overall, HBO is a highly valuable brand, which currently engages in significant promotional activities with MVPDs, both AT&T and its rivals."). This is consistent with the way in which Professor Shapiro viewed the theory. *See* Tr. 2290:25-2291:3 (Shapiro) ("Q. The only theory of harm that you considered relating to HBO is this issue that perhaps some promotional, some promotion of HBO might be curtailed, right? A. That's fair."). It is also consistent with the way in which the Government's Complaint and Pre-Trial Brief characterized the theory. *See* Compl. ¶ 39 ("MVPDs . . . today use HBO as a tool to entice new customers and to dissuade unhappy customers from leaving and switching to a rival MVPD. . . . After the merger, however, the merged firm would have the incentive and ability, through contractual restrictions, to impede rival MVPDs from using HBO to compete against AT&T/DirecTV."); Gov't Pre-Trial Br. 39 ("HBO could limit approvals for the use of HBO in marketing and promotions by DirecTV's rivals in a number of ways, including forms of subtle or targeted obstruction.").

The Government's proposed findings of fact, like its closing argument, appear to advance a considerably broader theory on the ways in which HBO could limit the terms of its distribution post-merger. Such a theory would go well beyond restricting promotion-related terms. *See* Gov't PFOF ¶ 267 (listing ways in which HBO could restrict distributors' offerings of HBO to customers); Tr. 3975:11-19 (Gov't Closing) (same). Most troubling is the Government's suggestion, based solely on the testimony of Martin Hinson of Cox, that the combined entity could "withhold[] HBO entirely." Gov't PFOF ¶ 267 (citing Tr. 703:25-704:18 (Hinson (Cox)). Professor Shapiro himself disavowed this very theory of withholding HBO content: "Q. You don't claim that post-merger HBO will be withheld from any MVPD, correct? A. Correct." Tr. 2290:15-18 (Shapiro). Professor Shapiro similarly disavowed any claim that HBO's price would increase on account of the merger. *See id.* at 2290:21-23.

For the reasons discussed in this Part, the Government has failed to prove that the merged entity has an incentive to restrict rival distributors' use of HBO for promotions. To the extent that the Government suggests that AT&T will withhold HBO content altogether, will delay access to HBO content, will increase penetration rate requirements, or will engage in any other potentially anticompetitive conduct that falls outside the proffered promotion-withholding scheme, the Court holds that, in light of the sparse supporting "foreclos[e] competitors of the purchasing firm in the merger from access to a potential source of supply, *or from access on competitive terms*." Gov't PCOL ¶ 61 (quoting *Yankees Entm't & Sports Network*, 224 F. Supp. 2d at 673). The basic idea, the Government tells us, is that rival distributors' use of HBO in promotions will tend to draw potential customers to those MVPDs and away from AT&T, thereby giving AT&T reason to withhold or restrict its consent to use HBO in marketing, discounts, and bundles. *See* Gov't PFOF ¶ 234. At the risk of stating the obvious, this is a gossamer thin claim.

The Government has failed to meet its burden of proof on this theory for two independent reasons. *First*, the Government has failed to show that the merged entity would have *any* incentive to foreclose rivals' access to HBO-based promotions. This is because the Government's promotion-withholding theory conflicts with HBO's business model, which remains "heavily dependent" on promotion by distributors. Tr. 3074:5-6 (Bewkes (Time Warner)). HBO does not run ads, leaving subscription fees as its overwhelming source of revenue. *See id.* at 3070:3-5; PX456-67. This makes HBO a volume-based business, in which more subscribers means more revenue. *See* Tr. 3070:3-8, 3072:7-9 (Bewkes (Time Warner)). And because HBO continues to rely on distributors to reach the end-user, witnesses testified that HBO needs MVPD promotions in order to achieve this volume. *See, e.g.*, *id.* at 3128:16-3129:8; *id.* at 1496:10-17 (Sutton (HBO)); *see also id.* at 1508:14-16 ("[O]ur whole business is relying on our affiliates to promote us. If we can't do that, then our entire business model is destroyed."); *cf. id.* at 1528:25-1529:4

evidence and Professor Shapiro's disavowal of those theories, the Government has failed to meet its burden of proof that such conduct would likely result from the proposed merger.

(Patel (AT&T)). The Government simply fails to explain why AT&T would jeopardize – much less jettison – the promotional model on which HBO "absolutely" depends.[58] *Id.* at 1496:16-17 (Sutton (HBO)).

Second, the Government fails to establish that HBO promotions are so valuable that withholding or restricting them will drive customers to AT&T.[59] Put differently, the Government has failed to show that the marketplace substitutes for HBO are "inferior, inadequate, or more costly." Gov't PCOL ¶ 62 (internal quotation marks omitted). Third-party distributor witnesses testified that, for example, their companies had reduced the use of HBO in promotions, *see* Tr. 950:22-951:7 (SEALED); *id.* at 2135:17-22, 2135:24-2136:1 (Sejen (Cable ONE)). An executive from RCN said that his employer used HBO for promotions only because of the "economic incentives" offered by HBO to do so. *See id.* at 2971:16-23 (Holanda (RCN)); *cf. id.* at 2136:15-19 (Sejen (Cable ONE)). A Comcast executive confirmed that Netflix is a "substitute" for HBO that Comcast has incorporated into its set top box and includes in marketing. *See id.* 886:8-22 (Rigdon (Comcast)). This is all consistent with other evidence adduced at trial, which showed that distributors' choice of which premium content provider to use for promotions may vary based on a number of

---

[58] As an add-on, HBO is low-hanging fruit for customers looking to shave monthly cable bills. *Cf.* Tr. 2137:3-6 (Sejen (Cable ONE)). This results in high "churn," making HBO that much more reliant on promotions to maintain subscriptions. *See id.* at 2316:10-12; *id.* at 2972:20-24 (Holanda (RCN)). In these promotions, HBO depends on distributors because "the distributor . . . owns the relationship with the customer." *Id.* at 1528:22-1529:4 (Patel (AT&T)).

[59] The Court is aware that, in the most technical sense, HBO has the "ability" to withhold certain promotions by way of its contract-based approval process, under which HBO must bless distributors' use of HBO trademarks and talent for us in promotions. This fact alone, however, does not establish that AT&T would be able to "impair the competitive process." Gov't PCOL ¶ 61. For its theory, the Government must also show that HBO has an incentive to act anticompetitively and that only "inferior, inadequate, or more costly" substitutes for HBO promotions exist in the marketplace, *id.* ¶ 62 (citation omitted). The Government has failed to make these showings.

factors. *See id.* at 1526:17-25 (Patel (AT&T)).[60] Indeed, the evidence at trial further showed that MVPDs are hardly limited to premium content providers like HBO, Showtime, and Netflix in their choice of promotional tools; to the contrary, distributors have been known to bundle services with gift cards, price discounts, higher broadband speeds, additional telephone lines, video on demand films, devices such as iPads, and free installations or equipment. *Id.* at 717:15-25 (Hinson (Cox)); *id.* at 2972:1-6 (Holanda (RCN)); *id.* at 1497:5-10 (Sutton (HBO)).

Although this promotion-withholding theory made only a very brief appearance at trial, the Government asserts that this theory of harm constitutes an independent basis for blocking the merger. Gov't PCOL ¶¶ 61-62; Gov't Pre-Trial Br. 40.[61] But in support of this theory, the Government has brought to bear little evidence indeed. As with its primary,

---

[60] After a trial replete with evidence on evolving, hyper-competitive marketplace conditions, the notion that Netflix is an adequate substitute for HBO should come as no surprise. "There was a time," HBO President Simon Sutton explained, "when very few people were making the kinds of shows we make [at HBO]. Now, it seems like almost every week, there's an announcement of somebody else making it." Tr. 1494:13-21. Netflix now has a programming budget that more than doubles HBO's, *id.* at 3099:13-15 (Bewkes (Time Warner)), and Netflix and HBO openly compete "in many different ways," including for "the talent to make the same shows," *id.* at 1493:18-1494:3 (Sutton (HBO)). And when measured by number of subscribers, both Netflix and Amazon are "eclipsing HBO." DX709-3. Indeed, one of the Government's experts, in an improper communication sent to Government attorneys during the course of his testimony in violation of the Court's witnesses rule, forwarded a YouTube video describing Netflix as one of the "top-ten . . . monopolists you've never heard of." *See* Tr. 3602:17-3603:7, 3604:7-25 (Quintero). Put simply, HBO is in the fight of its life!

[61] The Government appears to suggest that incentive to engage in anticompetitive conduct – without any demonstration as to the probability of acting on that incentive – is sufficient reason to block a proposed merger. *See* Gov't PCOL ¶ 61 ("In this action, the effect of the merger may be to lessen competition substantially by incentivizing the merged firm to restrict the use of HBO as a competitive tool, and thereby impair the competitive process and deny consumers the benefits of discounted HBO and other promotions."). This proposition seems impossible to square with the legal standards governing Section 7 actions, which require a probability of anticompetitive effects. *See supra* pp. 50-52 & n.16. Because the Government has failed to establish that the merged entity will have any incentive to withhold HBO promotional rights, the Court need not answer the question whether the existence of such an incentive, without more, would be sufficient to show that the proposed merger would substantially lessen competition for purposes of Section 7.

increased-leverage claim of harm, the Antitrust Division decided to spill most of its ink developing undisputed facts – HBO is popular, *see* Gov't PFOF ¶¶ 28, 235-242, valuable, *see id.* ¶¶ 28, 235, 243-252, and an effective promotional tool for MVPDs, *see id.* ¶¶ 253-258. The Government also relays the undisputed fact that HBO, as a matter of contract, retains significant control over the way in which its "trademarks or . . . talent" are used in those promotions. Tr. 1458:10-13 (Sutton (HBO)); *see* Gov't PFOF ¶¶ 269-270 (discussing approval process for use of HBO in promotions). It did not, however, come to Court with economic evidence of any kind, *see* Tr. 2291:4-7 (Shapiro), and proffered only bare conjecture about how there may be "like a thumb on the scale" in favor of the Government's promotion-withholding stratagem, *id.* at 2267:8-21; *see also id.* at 2267:3-7. As such, the Government's evidence is too thin a reed for this Court to find that AT&T has, in that well-worn turn-of-phrase, either the "incentive" or the "ability" to withhold HBO promotional rights in order to "lessen competition substantially." Gov't PCOL ¶ 61. For these reasons, it is small wonder that Professor Shapiro himself refused to endorse the theory, testifying that, in his view as an economist, such a ploy "[o]n its own . . . would not have such a big impact, that it would substantially lessen competition." Tr. 2275:24-2276:13 (Shapiro).

For these two, independent reasons, the Government has failed to provide sufficient evidence to support its final theory in this case. Accordingly, I reject outright the assertion that the combined entity would likely restrict HBO as a promotional tool in order to harm AT&T's distribution rivals and thereby lessen competition in the marketplace.

CONCLUSION

The parties have waged an epic battle, under extremely restricted deadlines, to litigate and try this historic vertical merger case. Each side's evidence and theories have been subjected to cross-examination and the rigors of the Rules of Evidence and Civil Procedure. It has been a herculean task for all the parties and the Court.[62] Each side has had its proverbial day in Court. The Court has now spoken and the defendants have won. But, the process is not quite over yet !

There is a grave and understandable fear on the part of the defendants that the Government will now seek to do *indirectly* what it couldn't accomplish directly by seeking a stay of this Court's order pending an appeal to our Circuit Court.

The consequences of receiving such a stay would cause irreparable harm to the defendants in general and AT&T in specific. First, it would effectively prevent the consummation of the merger by the June 21, 2018 break-up date for the deal. Second, it would cause AT&T to have to pay the $500 million break-up fee it will owe to Time Warner if the deal is not consummated by that date. Those two consequences, of course, would occur regardless of whether this Court's decision were later upheld following appellate review. In this Court's judgment, a stay pending appeal would be a manifestly unjust outcome in this case.

The Government has had this merger on hold now since October of 2016 when it launched its investigation. In that 18-plus month period, the companies have twice

[62] *See, e.g.*, WDH & RSC at W.R. 6326.

extended the break-up date to accommodate the Government's litigation of this case. During that same period, the video programming and distribution industry has continued to evolve at a breakneck pace. The cost to the defendants and the Government to investigate, litigate, and try this case has undoubtedly been staggering – easily in the tens of millions of dollars.

If the Government were to ask me to stay this Court's ruling, I would, under the law, have to weigh whether the Government has a strong likelihood of success on the merits and would suffer irreparable harm should the stay be denied, among other things. Well, suffice it to say – as my 170-plus page opinion makes clear – I do not believe that the Government has a likelihood of success on the merits of an appeal. And in my judgment, given that our Circuit Court has never hesitated to unwind an unblocked merger if the law and facts warrant doing so, there would be no irreparable harm to the Government – only to the defendants – if my ruling were stayed. As such, I could not, and would not, grant such a stay in the first instance.

That of course is not to suggest in any way that the Government should not consider seeking appellate review of the merits of this Court's decision. That is, by any standard, fair game. But the temptation by some to view this decision as being something more than a resolution of this specific case should be resisted by one and all!

The Government here has taken its best shot to block the merger based on the law and facts, and within the time allowed. The defendants did their best to oppose it. The Court has spoken. To use a stay to accomplish *indirectly* what could not be done directly – especially when it would cause certain irreparable harm to the defendants – simply would be unjust. I hope and trust that the Government will have the good judgment, wisdom, and courage to avoid such a manifest injustice. To do otherwise, I fear, would undermine the faith in our system of justice of not only the defendants, but their millions of shareholders and the business community at large.

* * *

Thus, for all of the foregoing reasons, the Government's request to enjoin the proposed merger is **DENIED**.

RICHARD J. LEON
United States District Judge

Vertical Information Conduits

Coca-Cola/Coca-Cola Enterprises

Print Page | Close Window

Investor Relations

Financial News Release

The Coca-Cola Company and Coca-Cola Enterprises Strategically Advance and Strengthen Their Partnership

The Coca-Cola Company to Acquire CCE's North American Bottling Business

CCE Has Agreed in Principle to Buy The Coca-Cola Company's Bottling Operations in Norway and Sweden, and to Obtain the Right to Acquire the German Bottler

ATLANTA, Feb 25, 2010 (BUSINESS WIRE) -- The Coca-Cola Company (NYSE: KO) and Coca-Cola Enterprises Inc. (NYSE: CCE):

- **Advancement fully aligns with the Coca-Cola system's 2020 Vision and drives long-term value for all shareowners**
- **Evolves The Coca-Cola Company's North American business to more profitably deliver the world's greatest brands in the largest NARTD profit pool in the world**
- **CCE shareowners will benefit from the improved financial growth profile and expansion of the Western European business**
- **The Coca-Cola Company will generate immediate efficiencies with expected operational synergies of $350 million over four years, and the transactions, which are substantially cashless, are expected to be accretive to EPS on a fully diluted basis by 2012**
- **CCE shareowners to exchange each CCE share for a share in a new CCE, focused solely on Europe, and $10 per share in cash at closing**

The Coca-Cola Company (NYSE: KO) and Coca-Cola Enterprises Inc. (NYSE: CCE) announce that they have entered into agreements that will strategically advance the Coca-Cola system in North America and drive long-term value for all shareholders. In addition, the parties have an agreement in principle to expand CCE's European business.

"Our 2020 Vision calls for decisive and timely action to continuously improve and evolve our global franchise system to best serve our customers and consumers everywhere. Consistent with the 2020 Vision, our roadmap for winning together, we act today as an aligned system," said The Coca-Cola Company's Chairman and Chief Executive Officer Muhtar Kent. "We are not acquiring CCE, rather we are acquiring their North American operations, and they remain one of our key bottling partners with world-class management, financial and operational capabilities. We have a strong and unrelenting belief in our unique and thriving global bottling system. Our new North American structure will create an unparalleled combination of businesses, which will serve as our passport to winning in the world's largest nonalcoholic ready-to-drink profit pool. This transaction offers compelling value to both The Coca-Cola Company and CCE shareowners and will create substantial and sustainable benefits for both companies' stakeholders."

Mr. Kent continued, "Our North American business structure has remained essentially the same since CCE was founded in 1986, while the market and industry have changed dramatically. With this transaction, we are converting passive capital into active capital, giving us direct control over our investment in North America to accelerate growth and drive long-term profitability. We will work closely with our bottling partners to create an evolved franchise system for the unique needs of the North American market. Additionally, we will reconfigure our manufacturing, supply chain and logistics operations to achieve cost reductions over time. Importantly, the creation of a unified operating system will strategically position us to better market and distribute North America's most preferred nonalcoholic beverage brands. At the same time, in Europe, we are further strengthening our franchise system to provide broader, contiguous geographic coverage and optimizing our marketing and distribution leadership."

CCE's Chairman and Chief Executive Officer John Brock said, "This transformation creates significant near-term shareowner value through the sale of the North American business for fair value, delivering over $4 billion in cash to CCE shareowners, through cash distributions and planned share repurchases. At the same time, this enables our shareowners to retain equity in a sales and distribution company with an improved growth profile. In the future, CCE shareowners will also benefit from the expansion of our European business and our improved financial flexibility."

Mr. Brock added, "CCE remains the preeminent Western European bottler and a key strategic partner with The Coca-Cola Company. Our European business serves an attractive market with growing volumes and profit driven by rising per capita consumption. As such, CCE will have an improved profile with enhanced revenue, margins and EPS growth prospects. Together with The Coca-Cola Company, we will continue to improve the effectiveness of our operations in our expanded presence in Europe. These actions strengthen our ability to compete effectively and sustainably in Europe and represent the beginning of an exciting new era of long-term growth for CCE's business and shareowners."

Mr. Kent concluded, "This is a truly historic day for the Coca-Cola system. As the world's leading beverage Company, we are very excited about the vast opportunities before us and I can say with confidence there is no better business to be in. Over the next several years, the nearly $650 billion dollar global nonalcoholic ready-to-drink beverage industry is expected to grow faster than worldwide GDP and we are best positioned to capitalize on this enormous industry opportunity in North America and Europe. These joint actions further reinforce our confidence in achieving our 2020 Vision to more than double system revenue and double servings to over 3 billion per day. With our system more aligned than ever, the timing is right, and we believe that these actions will usher in a new era of winning for our Coca-Cola system."

Details of the Transactions

The Coca-Cola Company, in a substantially cashless transaction, will acquire CCE's entire North American business, which consists of approximately 75 percent of U.S. bottler-delivered volume and almost 100 percent of Canadian bottler-delivered volume. At the close of the transaction, The Coca-Cola Company will have direct control over approximately 90 percent of the total North America volume, including its current direct businesses. The Coca-Cola Company's acquisition of the assets and liabilities of CCE's North American business includes consideration of The Coca-Cola Company's current 34 percent equity ownership in CCE, valued at $3.4 billion, based upon a thirty day trailing average as of February 24, 2010. In addition, consideration includes the assumption of $8.88 billion of CCE debt and all of the North American assets and liabilities - including CCE's accumulated benefit obligation for North America of $580 million as of December 31, 2009, and certain other one-time costs and benefits.

In a concurrent agreement, The Coca-Cola Company and CCE have agreed in principle that CCE will buy The Coca-Cola Company's bottling operations in Norway and Sweden for $822 million, subject to the signing of definitive agreements, and that CCE will have the right to acquire The Coca-Cola Company's 83 percent equity stake in its German bottling operations 18 to 36 months after closing for fair value.

A new entity, which will retain the name Coca-Cola Enterprises Inc., will be created through a split-off that will hold CCE's European businesses. CCE's public shareowners will exchange each existing CCE share for a share in the new entity and will hold 100 percent of this new entity.

CCE will provide its shareowners, excluding The Coca-Cola Company, with a special one-time cash payment of $10 per share. In connection with the transactions, CCE expects to raise initial debt financing of up to 3.0x EBITDA to pay shareowners $10 per share in cash at closing, to acquire the Norway and Sweden bottlers and to fund the expected share repurchase program. Following completion of the transaction, it is expected that CCE will adopt a program to repurchase up to approximately $1 billion of shares and a policy of paying an expected annual dividend of $0.50 per share subject to the discretion of CCE's Board of Directors and its consideration of various factors.

The Coca-Cola Company and CCE expect the transactions to close in the fourth quarter of 2010.

About CCR-USA and CCRC

At the close, The Coca-Cola Company will rename the sales and operational elements of the North American businesses Coca-Cola Refreshments USA, Inc. ("CCR-USA") and Coca-Cola Refreshments Canada, Ltd. ("CCRC"), which will be wholly-owned subsidiaries of The Coca-Cola Company. Following the close, The Coca-Cola Company will combine the Foodservice business, The Minute Maid Company, the Supply Chain organization, including finished product operations, and our company-owned bottling operations in Philadelphia with CCE's North American business to form CCR-USA and CCRC. In the U.S., CCR-USA will be organized as a unified operating entity with distinct capabilities to include supply chain and logistics, sales and customer service operations. In Canada, CCRC will be a single dedicated production, marketing, sales and distribution organization. The Coca-Cola Company's remaining North American operation will continue to be responsible for brand marketing and franchise support. Details regarding the structure, leadership and integration plans will be forthcoming.

Once completed, the transactions are expected to generate operational synergies of approximately $350 million over four years for The Coca-Cola Company and are expected to be accretive to EPS on a fully diluted basis by 2012. Further, in North America, this will generate system synergies that will increase the growth rate and cash flow on a pro forma basis over time. Pro forma for this acquisition, the North American business, including CCR-USA and CCRC, would have generated approximately $19.2 billion in revenues and $3.6 billion of EBITDA in 2009.

The Coca-Cola Company 2010 Outlook

As a result of these agreements, The Coca-Cola Company has not made any share repurchases during the current fiscal year and will continue to be out of the market until the close of these transactions. However, the Company remains committed to repurchasing $1.5 billion in 2010.

About new CCE

CCE will be The Coca-Cola Company's strategic bottling partner in Western Europe and the third-largest independent bottler globally. Reflecting CCE's position as The Coca-Cola Company's strategic bottling partner in Western Europe, the companies will enter into a 10+10 year bottling agreement and a 5-year incidence pricing agreement. Pro forma, including the contributions of Norway and Sweden, CCE would have generated approximately $7.3 billion in revenues, $850 million in operating income, and $1.2 billion of EBITDA in 2009.

At closing, before planned share repurchases, CCE expects to have net debt of approximately $2 billion. Immediately after closing and before share repurchase, CCE is expected to have approximately 350-360 million outstanding shares on a fully diluted basis, substantially comparable to the publicly owned shares of CCE today.

Shortly after closing, the Board of CCE is expected to announce a planned share repurchase program of approximately $1 billion and an initial annual dividend of $0.50 per share. Payment of cash dividends and stock repurchases by CCE will be at the discretion of CCE's Board of Directors in accordance with applicable law after taking into account various factors, including, but not limited to, CCE's financial condition, operating results, current and anticipated cash needs and plans for growth. Therefore, no assurance can be given that CCE will pay any dividends to its shareowners or make share repurchases, and no assurance can be given to the amount of any such dividends or share repurchases if CCE's Board of Directors determines to do so.

CCE will retain the Coca-Cola Enterprises Inc. corporate name and remain headquartered in Atlanta. CCE will continue to be traded on the NYSE under the CCE ticker. John Brock, Chairman and Chief Executive Officer, Bill Douglas, Chief Financial Officer, Hubert Patricot, President of the European Group, and other members of the CCE corporate management team will continue to lead the company. In addition, the current independent directors will continue to comprise the CCE Board.

CCE 2010 Outlook

As a result of these agreements, CCE has not made any share repurchases during the current fiscal year, and it does not plan to do so before the transactions close. CCE intends to provide additional details on FY 2010 outlook during its upcoming first quarter call.

Additional Information

CCE's independent Affiliated Transaction Committee recommended that CCE's Board approve the transactions. The Boards of Directors of both The Coca-Cola Company and CCE have approved the transactions, which are subject to approval by CCE's public shareowners and customary regulatory approvals.

Allen & Company and Goldman Sachs & Co. acted as financial advisors to The Coca-Cola Company. Skadden, Arps, Slate, Meagher & Flom LLP acted as legal counsel. Cleary Gottlieb Steen & Hamilton LLP and Wilson Sonsini Goodrich & Rosati provided antitrust counsel.

Credit Suisse and Lazard acted as financial advisors to CCE and Cahill Gordon & Reindel LLP acted as legal counsel. Greenhill & Co. acted as financial advisor to the Affiliated Transaction Committee and McKenna Long & Aldridge LLP provided legal counsel.

For more information about the transactions, please access our transaction specific website at: www.KOsystemevolution.com (http://cts.businesswire.com/ct/CT?id=smartlink&url=http%3A%2F%2Fwww.KOsystemevolution.com&esheet=6193425&lan=en_US&anchor=www.KOsystemevolution.com&index=1&md5=14ad39169d5069741c96fe890c203426).

Conference Call/Webcast

The Coca-Cola Company and Coca-Cola Enterprises are hosting a joint conference call with investors and analysts to discuss our transactions today at 9:30 a.m. (EST). We invite investors to listen to the live audiocast of the conference call at either website, http://www.thecoca-colacompany.com (http://www.thecoca-colacompany.com) or at www.cokecce.com (http://cts.businesswire.com/ct/CT?id=smartlink&url=http%3A%2F%2Fwww.cokecce.com&esheet=6193425&lan=en_US&anchor=www.cokecce.com&index=3&md5=e2c76070338da1985a46a64f755ec369) in the "Investors" section. Further, the "Investors" section of each website includes a reconciliation of non-GAAP financial measures that may be used periodically by management when discussing their financial results with investors and analysts to our results as reported under GAAP.

The Company reports its financial results in accordance with U.S. generally accepted accounting principles (GAAP). However, management believes that certain non-GAAP financial measures used in managing the business may provide users of this financial information additional meaningful comparisons. Management is providing pro forma financial information for the Company's North American business reflecting the acquisition of the North American business of Coca-Cola Enterprises (CCE), including CCE Corporate. See the table below for the pro forma financial information for the year ended December 31, 2009. Non-GAAP financial measures should be viewed in addition to, and not as an alternative for, the Company's reported results prepared in accordance with GAAP.

THE COCA-COLA COMPANY AND SUBSIDIARIES
Reconciliation of GAAP to Non-GAAP Financial Measures
Net Operating Revenues and EBITDA
(UNAUDITED)
(In millions)

	Year Ended December 31, 2009						
		Items Impacting Comparability					
	North America Operating Segment As Reported (GAAP)	North America Comparability Adjustments (1)	CCE North America As Reported (2)	Estimate of CCE Corporate (2)	CCE Comparability Adjustments (2), (3)	Eliminations	Pro Forma North American Business (Non-GAAP)
Net Operating Revenues	$ 8,271	$ -	$ 15,128	$ -	$ -	$ (4,243)	$ 19,156
Operating Income	$ 1,699	$ 51	$ 1,059	$ (347)	$ 75	$ -	$ 2,537
Depreciation and Amortization	365	-	711	46	(15)	-	1,107
EBITDA (Non-GAAP)	$ 2,064	$ 51	$ 1,770	$ (301)	$ 60	$ -	$ 3,644

(1) Comparability adjustments include restructuring charges, productivity initiatives and compensation expense.
(2) EBITDA for acquired CCE North American business (including CCE Corporate) as adjusted for comparability is $1,529.
(3) Comparability adjustments include restructuring charges and compensation expense.

About The Coca-Cola Company

The Coca-Cola Company (NYSE: KO) is the world's largest beverage company, refreshing consumers with more than 500 sparkling and still brands. Along with Coca-Cola, recognized as the world's most valuable brand, the Company's portfolio includes 12 other billion dollar brands, including Diet Coke, Fanta, Sprite, Coca-Cola Zero, vitaminwater, Powerade, Minute Maid, Simply and Georgia Coffee. Globally, we are the No. 1 provider of sparkling beverages, juices and juice drinks and ready-to-drink teas and coffees. Through the world's largest beverage distribution system, consumers in more than 200 countries enjoy the Company's beverages at a rate of 1.6 billion servings a day. With an enduring commitment to building sustainable communities, our Company is focused on initiatives that protect the environment, conserve resources and enhance the economic development of the communities where we operate. For more information about our Company, please visit our website at http://www.thecoca-colacompany.com (http://www.thecoca-colacompany.com).

The Coca-Cola Company Forward-Looking Statements

This press release may contain statements, estimates or projections that constitute "forward-looking statements" as defined under U.S. federal securities laws. Generally, the words "believe," "expect," "intend," "estimate," "anticipate," "project," "will" and similar expressions identify forward-looking statements, which generally are not historical in nature. Forward-looking statements are subject to certain risks and uncertainties that could cause actual results to differ materially from The Coca-Cola Company's historical experience and our present expectations or projections. These risks include, but are not limited to, obesity and other health concerns; scarcity and quality of water; changes in the nonalcoholic beverages business environment, including changes in consumer preferences based on health and nutrition considerations and obesity concerns; shifting consumer tastes and needs, changes in lifestyles and competitive product and pricing pressures; impact of the global credit crisis on our liquidity and financial performance; our ability to expand our operations in developing and emerging markets; foreign currency exchange rate fluctuations; increases in interest rates; our ability to maintain good relationships with our bottling partners; the financial condition of our bottling partners; our ability and the ability of our bottling partners to maintain good labor relations, including the ability to renew collective bargaining agreements on satisfactory terms and avoid strikes, work stoppages or labor unrest; increase in the cost, disruption of supply or shortage of energy; increase in cost, disruption of supply or shortage of ingredients or packaging materials; changes in laws and regulations relating to beverage containers and packaging, including container deposit, recycling, eco-tax and/or product stewardship laws or regulations; adoption of significant additional labeling or warning requirements; unfavorable general economic conditions in the United States or other major markets; unfavorable economic and political conditions in international markets, including civil unrest and product boycotts; changes in commercial or market practices and business model within the European Union; litigation uncertainties; adverse weather conditions; our ability to maintain brand image and corporate reputation as well as other product issues such as product recalls; changes in legal and regulatory environments; changes in accounting standards and taxation requirements; our ability to achieve overall long-term goals; our ability to protect our information systems; additional impairment charges; our ability to successfully manage Company-owned bottling operations; the impact of climate change on our business; global or regional catastrophic events; and other risks discussed in our Company's filings with the Securities and Exchange Commission (SEC), including our Annual Report on Form 10-K, which filings are available from the SEC. You should not place undue reliance on forward-looking statements, which speak only as of the date they are made. The Coca-Cola Company undertakes no obligation to publicly update or revise any forward-looking statements.

COCA-COLA ENTERPRISES INC.
RECONCILIATION OF GAAP TO NON-GAAP
(Unaudited; In millions)

	Full Year 2009				
		Items Impacting Comparability			
	Europe Reported (GAAP)	Europe Restructuring Charges	Corporate [b]	Norway / Sweden [c]	**new CCE (non-GAAP) [a]**
Net Operating Revenue	**$ 6,517**	$ -	$ -	$ 741	**$ 7,258**
Operating Income (EBIT)	**$ 963**	$ 7	$ (185)	$ 62	**$ 847**
Depreciation & Amortization	**270**	-	25	37	**332**
EBITDA	**$ 1,233**	$ 7	$ (160)	$ 99	**$ 1,179**

(a) These non-GAAP measures are provided to allow investors to more clearly evaluate the operating performance and business trends. For new CCE, which includes CCE's European operating segment, a preliminary estimate of new CCE Corporate costs and Nordic.

(b) Corporate is a preliminary estimate of new CCE Corporate costs. CCE Corporate costs allocated to new CCE in its Form S-4 may be materially different.

(c) Represents the unaudited 2009 financial results of Norway and Sweden. Acquisition of Norway and Sweden bottlers subject to the signing of definitive agreements

About Coca-Cola Enterprises Inc.

Coca-Cola Enterprises Inc. is the world's largest marketer, distributor, and producer of bottle and can liquid nonalcoholic refreshment. CCE sells approximately 80 percent of The Coca-Cola Company's bottle and can volume in North America and is the sole licensed bottler for products of The Coca-Cola Company in Belgium, continental France, Great Britain, Luxembourg, Monaco, and the Netherlands. For more information about our Company, please visit our website at http://www.cokecce.com (http://www.cokecce.com).

Coca-Cola Enterprises Inc. Forward-Looking Statements

Included in this news release are forward-looking management comments and other statements that reflect management's current outlook for future periods. As always, these expectations are based on currently available competitive, financial, and economic data along with our current operating plans and are subject to risks and uncertainties that could cause actual results to differ materially from the results contemplated by the forward-looking statements. The forward-looking statements in this news release should be read in conjunction with the risks and uncertainties discussed in our filings with the Securities and Exchange Commission, including our most recent annual report on Form 10-K and subsequent SEC filings.

Important Additional Information and Where to Find It

This communication may be deemed to be solicitation material in respect of the proposed transaction. In connection with the proposed transaction and required shareowner approval, Coca-Cola Enterprises Inc. ("Company") will file relevant materials with the Securities and Exchange Commission (the "SEC"), including a proxy statement/prospectus contained in a Form S-4 registration statement, which will be mailed to the shareowners of the Company.

SHAREOWNERS OF THE COMPANY ARE URGED TO READ ALL RELEVANT DOCUMENTS FILED WITH THE SEC, INCLUDING THE PROXY STATEMENT/PROSPECTUS WHEN IT BECOMES AVAILABLE, BECAUSE THEY WILL CONTAIN IMPORTANT INFORMATION ABOUT THE PROPOSED TRANSACTION.

Shareowners may obtain a free copy of the proxy statement/prospectus, when it becomes available, and other documents filed by the Company at the SEC's web site at www.sec.gov (http://cts.businesswire.com/ct/CT?id=smartlink&url=http%3A%2F%2Fwww.sec.gov&esheet=6193425&lan=en_US&anchor=www.sec.gov&index=6&md5=3eae721001e24ed079b1918f6d120556).*Copies of the documents filed with the SEC by the Company will be available free of charge on the Company's internet website at www.cokecce.com* (http://cts.businesswire.com/ct/CT?id=smartlink&url=http%3A%2F%2Fwww.cokecce.com&esheet=6193425&lan=en_US&anchor=www.cokecce.com&index=7&md5=a7a09bb79236de8b4f9a8b9aacee6d95) *under the tab "Investor Relations" or by contacting the Investor Relations Department of Coca-Cola Enterprises at 770-989-3246.*

Participants in the Solicitation

Coca-Cola Enterprises ("Company") and its directors, executive officers and certain other members of its management and employees may be deemed to be participants in the solicitation of proxies from its shareowners in connection with the proposed transaction.Information regarding the interests of such directors and executive officers was included in the Company's Proxy Statement for its 2009 Annual Meeting of Shareowners filed with the SEC March 3, 2009 and a Form 8-K filed on December 18, 2009 and information concerning the participants in the solicitation will be included in the proxy statement/prospectus relating to the proposed transaction when it becomes available.Each of these documents is, or will be, available free of charge at the SEC's website at www.sec.gov (http://cts.businesswire.com/ct/CT?id=smartlink&url=http%3A%2F%2Fwww.sec.gov&esheet=6193425&lan=en_US&anchor=www.sec.gov&index=8&md5=62f631416e55534716c4ed4a0872a089) *and from the Company on its website or by contacting the Shareowner Relations Department at the telephone number above.*

SOURCE: The Coca-Cola Company and Coca-Cola Enterprises Inc.

The Coca-Cola Company
Investor Relations:
Jackson Kelly, +1 404-676-7563
or
Media Relations:
Dana Bolden, +1 404-676-2683
pressinquiries@na.ko.com (mailto:pressinquiries@na.ko.com)
or
Coca-Cola Enterprises Inc.
Investor Relations
Thor Erickson, +1 770-989-3110

Federal Trade Commission
Protecting America's Consumers

For Release: 9/27/2010

FTC Puts Conditions on Coca-Cola's $12.3 Billion Acquisition of its Largest North American Bottler

Coca-Cola Agrees to Restrictions on its Access to Competitively Sensitive Information of Dr Pepper Snapple Group Subsidiary

The Federal Trade Commission today announced that it will require The Coca-Cola Company to restrict its access to confidential competitive business information of rival Dr Pepper Snapple Group as a condition for completing Coca-Cola's proposed $12.3 billion acquisition of its largest North American bottler, which also distributes Dr Pepper Snapple carbonated soft drinks.

Under a settlement with the FTC, Coca-Cola will set up a "firewall" to ensure that its ownership of the bottling company does not give certain Coca-Cola employees access to commercially sensitive confidential Dr Pepper Snapple marketing information and brand plans. In a complaint filed with the settlement, the FTC charged that access to this information likely would have harmed competition in the U.S. markets for carbonated soft drinks. On February 26, 2010, the FTC approved a proposed settlement order in which PepsiCo agreed to set up a similar information firewall after acquiring its two largest bottlers and distributors (see press release at http://www.ftc.gov/opa/2010/02/pepsi.shtm).

Coca-Cola agreed on February 25, 2010, to acquire the North American operations of Coca-Cola Enterprises Inc., its largest North American bottler, for $12.3 billion. When the agreement was announced, Coca-Cola already owned about 34 percent of Coca-Cola Enterprises. After the acquisition is completed, the North American operations of Coca-Cola Enterprises will be known as Coca-Cola Refreshments USA, Inc.

In a related deal, after Coca-Cola agreed to acquire Coca-Cola Enterprises, it sought a license to continue to bottle and distribute the Dr Pepper Snapple brands that Coca-Cola Enterprises had distributed, including Dr Pepper brand products and Canada Dry products, in specific franchised geographic areas. Coca-Cola paid $715 million for the exclusive 20-year distribution license.

According to the FTC's complaint, Coca-Cola and Dr Pepper Snapple are direct competitors in the highly concentrated and difficult-to-enter markets for branded soft drink concentrate and branded carbonated soft drinks sold in stores. In all, the total sales of soft drink concentrate in the United States are about $9 billion annually, and the total U.S. sales of soft drinks sold by retailers are about $70 billion.

Dr Pepper Snapple will provide the commercially sensitive information about its marketing plans to Coca-Cola Refreshments USA, the newly created Coca-Cola bottling subsidiary. Dr Pepper Snapple currently provides the same sensitive information to Coca-Cola Enterprises to help it perform its bottler and distribution functions, according to the complaint. According to the complaint, Coca-Cola's access to this information could harm consumers by eliminating competition between Coca-Cola and Dr Pepper Snapple.

The FTC's proposed settlement order is designed to remedy these potential problems by requiring Coca-Cola to set up a "firewall" so the sensitive information cannot be accessed by anyone at Coca-Cola who may be in a position to use it against Dr Pepper Snapple. The proposed Coca-Cola order will expire in 20 years.

The FTC vote approving the complaint and proposed consent order was 4-0-1, with Commissioner Edith Ramirez recused. The order will be published in the Federal Register shortly, and will be subject to public comment for 30 days, until October 27, 2010, after which the Commission will decide whether to make it final. Comments can be submitted electronically at the following link: https://ftcpublic.commentworks.com/ftc/coca-cola.

NOTE: The Commission issues a complaint when it has "reason to believe" that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. The issuance of a complaint is not a finding or ruling that the respondent has violated the law. A consent order is for settlement purposes only and does not constitute an admission of a law violation. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of up to $16,000.

Copies of the complaint, consent order, and an analysis to aid public comment are available from the FTC's Web site at http://www.ftc.gov and also from the FTC's Consumer Response Center, Room 130, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The FTC's Bureau of Competition works with the Bureau of Economics to investigate alleged anticompetitive business practices and, when appropriate, recommends that the Commission take law enforcement action. To inform the Bureau about particular business practices, call 202-326-3300, send an e-mail to antitrust@ftc.gov, or write to the Office of Policy and Coordination, Room 383, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Ave, N.W., Washington, DC 20580. To learn more about the Bureau of Competition, read "Competition Counts" at http://www.ftc.gov/competitioncounts.

MEDIA CONTACT:

Mitchell J. Katz
Office of Public Affairs
202-326-2161

STAFF CONTACT:

Jill Frumin
Bureau of Competition
202-326-2758

(FTC File No. 101-0107)
(Coke.final.wpd)

Related Items:

***In the Matter of* The Coca-Cola Company, a corporation**
FTC File No. 101 0107

Last Modified: Tuesday, September 28, 2010

101 0107

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:	**Jon Leibowitz, Chairman** **William Kovacic** **J. Thomas Rosch** **Edith Ramirez** **Julie Brill**

In the Matter of **The Coca-Cola Company,** a corporation**.**	)	**Docket No. C -**

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Respondent The Coca-Cola Company ("TCCC"), a corporation, has entered into agreements to acquire the outstanding voting securities of one its independent bottlers, Coca-Cola Enterprises Inc. ("CCE"), and subsequently obtained a license agreement to continue to produce and distribute carbonated soft drink brands of Dr Pepper Snapple Group, Inc. ("DPSG"), that bottler CCE has produced and distributed, and that the agreements violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the agreements and terms of such agreements, when consummated or satisfied, would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. Respondent The Coca-Cola Company

1. Respondent TCCC is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1 Coca-Cola Plaza, Atlanta, Georgia 30313.

2. TCCC is a beverage company that includes Coca-Cola North America ("CCNA"), the company's North American operating company. TCCC produces the concentrate (or flavor ingredient) for the TCCC carbonated soft drink beverage brands that are distributed by its

independent bottlers. One of those independent bottlers is CCE. Some of TCCC's carbonated soft drink brands distributed by CCE are Coke, Diet Coke, and Sprite.

3. TCCC in 2009 had net revenues of about $31 billion. Most of TCCC's revenues are based on concentrate sales.

4. TCCC is, and at all times relevant herein has been, engaged in commerce or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

II. Third Party Dr Pepper Snapple Group, Inc.

5. DPSG is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5301 Legacy Drive, Plano, Texas 75024.

6. Among other things, DPSG produces concentrate for the DPSG carbonated soft drink beverage brands that are marketed, distributed, and sold by independent bottlers. One of those independent bottlers is CCE. Some of the DPSG carbonated soft drink brands distributed by CCE, in at least some territories, are Dr Pepper, Canada Dry, Schweppes, and Squirt.

7. DPSG in 2009 had net revenues from the sales of all products of about $5.5 billion. In 2009, DPSG's net sales in the United States and Canada of carbonated soft drink concentrate were about $1.5 billion.

8. DPSG is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

III. Coca-Cola Enterprises Inc.

9. CCE is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2500 Windy Ridge Parkway Suite 700, Atlanta, Georgia 30039.

10. CCE is the largest independently owned bottler of the carbonated soft drink brands of TCCC. CCE's North American business contributed 70% of CCE's total sales in 2009 of about $21 billion. CCE accounts for approximately 75% of the United States sales of TCCC's brands of bottled and canned carbonated soft drinks and about 14% of the United States sales of DPSG's brands of carbonated soft drinks.

11. The geographic areas or territories in which CCE is licensed to distribute the carbonated soft drink brands of TCCC include all or a portion of 46 states and the District of Columbia. The principal geographic areas or territories in which CCE is licensed to distribute

some of the carbonated soft drink brands of DPSG include North Texas (Dallas/Fort Worth area); Southern California; Northern California; New York; Arizona; New Mexico; and Nevada.

IV. TCCC's Acquisition of CCE

12. On or about February 25, 2010, TCCC entered into an agreement to acquire 100% of CCE's North American operations. Following the acquisition, TCCC will create a new organization known as Coca-Cola Refreshments USA, Inc. ("CCR"), that will take on the bottling and distribution functions previously performed by CCE.

13. At the time of the agreement, TCCC held about a 34% equity interest in CCE.

14. Under the terms of the license agreements that DPSG (or its predecessor companies) entered into with CCE, a change of ownership of the bottler would, depending on the brand and/or territory involved, either automatically trigger the termination of the license or require that DPSG consent to the acquisition of the license by the bottler's new owner.

15. The proposed acquisition by TCCC of 100% of CCE's North American assets would give TCCC control over CCE. This prospective change in control is the kind of change in ownership of CCE that, upon consummation, would either trigger the automatic termination clause of the license agreement with DPSG or require that DPSG consent to the change.

16. For brand Dr Pepper, DPSG did not consent to the transfer to TCCC of the licenses held by CCE. For certain other DPSG brands, the proposed change in ownership of CCE would, upon consummation of the ownership change, automatically terminate the DPSG licenses.

V. TCCC's Acquisition of DPSG Licenses

17. On or about June 7, 2010, in anticipation of the termination of the DPSG-CCE agreement upon the acquisition by TCCC of CCE, TCCC and DPSG entered into an agreement for TCCC, upon acquiring CCE, to obtain a license to distribute the Dr Pepper and Canada Dry carbonated soft drink brands of DPSG in the former CCE territories. The license agreement will be signed by Dr Pepper-Seven Up, Inc. ("DPSU"), an operating company of DPSG, and CCR.

18. The DPSG-CCR license agreement provides, among other things, that (a) CCR will acquire the exclusive right to sell and distribute the Dr Pepper and Canada Dry carbonated soft drink brands in CCE territories, (b) the license agreement will have a term of twenty (20) years, with a provision that it be "automatically renewed for additional twenty (20) year successive periods" for "no additional payments," (c) CCR will acquire a non-exclusive right to produce the Dr Pepper and Canada Dry carbonated soft drink brands in the CCE territories, and (d) TCCC will pay DPSG $715 million.

19. Pursuant to the DPSG-CCR license agreement, CCR and DPSG entered into additional, associated terms, whereby CCR has undertaken performance obligations to, among

other things, (a) distribute the Dr Pepper brand in all classes of trade based on certain TCCC brands; (b) grow the Dr Pepper brand based in some measure on certain sales criteria of other bottlers; and (c) advertise, promote, and market the Dr Pepper brand and provide sales support for such promotions, based in some measure on CCR's advertising, promotions, and marketing of certain TCCC brands.

20. The DPSG-CCR license agreement will not provide adequate safeguards against the access by TCCC to competitively sensitive and confidential information regarding DPSG carbonated soft drink brands provided to CCR by DPSG pursuant to the license.

VI. Trade and Commerce

A. Relevant Product Markets

21. The relevant product markets in which to assess the effects of the license between DPSG and CCR and the associated performance terms are (a) branded, direct-store-delivered carbonated soft drinks and (b) the branded concentrate used to produce branded, direct-store-delivered carbonated soft drinks.

B. Relevant Geographic Markets

22. The relevant geographic markets in which to assess the effects of the DPSG-CCR license agreement and the associated performance agreement terms are (a) in the branded concentrate relevant product market, the United States as a whole, and (b) in the branded, direct-store-delivered carbonated soft drinks product market, local areas in the CCE territories.

C. Conditions of Entry

23. Entry into each relevant market would not be timely, likely, or sufficient to prevent or mitigate any anticompetitive effect.

24. Effective (price constraining) entry requires that branded carbonated soft drinks be delivered by direct-store delivery. There are generally only three bottlers in the local carbonated soft drink markets that have exclusive rights to distribute their branded carbonated soft drink products, and they do so by direct-store delivery. Bottlers operate under flavor restrictions imposed upon them by concentrate companies TCCC, DPSG, and PepsiCo, Inc. The bottlers therefore are not permitted to carry the new brand of an existing flavor without first dropping the brand of that flavor that they carry. For the cola flavor, the bottlers licensed by TCCC and PepsiCo, Inc., are required to carry Coke and Pepsi, respectively, and no other cola-flavored carbonated soft drink.

25. There is no market for branded concentrate other than for the production of branded carbonated soft drinks.

D. Market Structure

26. Each relevant market is very highly concentrated, whether measured by the Herfindahl-Hirschman Index ("HHI") or by two-firm and four-firm concentration ratios.

27. The carbonated soft drink brands of TCCC and DPSG are the first and second choices for a substantial number of consumers.

VII. Effects of the Acquisition

28. TCCC's access to competitively sensitive confidential information provided by DPSG to CCR in furtherance of the DPSG-CCR license agreement, or the use by CCR of competitively sensitive information passed to it by DPSG in furtherance of the DPSG-CCR license agreement, may substantially lessen competition in the relevant markets in some or all of the following ways,

(a) by eliminating direct competition between TCCC and DPSG,

(b) by increasing the likelihood that TCCC may unilaterally exercise market power or influence and control DPSG's prices, and

(c) by increasing the likelihood of, or facilitating, coordinated interaction;

each of which may result in higher prices to consumers.

VIII. Violations Charged

29. TCCC's access to competitively sensitive confidential information of DPSG, provided in furtherance of the DPSG-CCR license agreement entered into between Respondent TCCC and DPSG for the sale and distribution by CCR of DPSG's brands of carbonated soft drinks, could lead to anticompetitive conduct and constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and upon consummation, would constitute a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15, U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this ______ day of _____________, 2010, issues its Complaint against Respondent TCCC.

By the Commission.

Donald S. Clark
Secretary

SEAL

the accommodation you will need, including as much detail as you can. Also include a way we can contact you if we need more information. Please allow at least five days advance notice; last minute requests will be accepted, but may be impossible to fill.

Proposed Agenda: Friday, October 22, 2010, 9:30 a.m.*

1. Announcements and Recent News.
2. Approval of Transcript—Meeting of May 21, 2010.
3. Report from the North American Numbering Plan Billing and Collection (NANP B&C) Agent.
4. Report of the Billing and Collection Working Group (B&C WG).
5. Report of the North American Numbering Plan Administrator (NANPA).
6. Report of the National Thousands Block Pooling Administrator (PA).
7. Report of the Local Number Portability Administration (LNPA) Working Group.
8. Report of North American Portability Management LLC (NAPM LLC).
9. Report of the Telcordia Dispute Resolution Team: Telcordia Appeal.
10. Report of the Numbering Oversight Working Group.
11. Status of the Industry Numbering Committee (INC) activities.
12. Report of the Future of Numbering Working Group (FoN WG).
13. Summary of Action Items.
14. Public Comments and Participation (5 minutes per speaker).
15. Other Business.

Adjourn no later than 5 p.m.

*The Agenda may be modified at the discretion of the NANC Chairman with the approval of the DFO.

Federal Communications Commission.

Marilyn Jones,

Attorney, Wireline Competition Bureau.

[FR Doc. 2010–24850 Filed 10–1–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL TRADE COMMISSION

[File No. 101 0107]

In the Matter of The Coca-Cola Company; Analysis of Agreement Containing Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis of Agreement Containing Consent Order to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order — embodied in the consent agreement — that would settle these allegations.

DATES: Comments must be received on or before October 27, 2010.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to "The Coca-Cola Company, File No. 101 0107" to facilitate the organization of comments. Please note that your comment — including your name and your state — will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at (*http://www.ftc.gov/os/publiccomments.shtm*).

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. . . .," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*https://ftcpublic.commentworks.com/ftc/coca-cola*) and following the instructions on the web-based form. To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink: (*https://ftcpublic.commentworks.com/ftc/coca-cola*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at (*http://www.ftc.gov/*) to read the Notice and the news release describing it.

A comment filed in paper form should include the "The Coca-Cola Company, File No. 101 0107" reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex D), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The Federal Trade Commission Act ("FTC Act") and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: Jill Frumin, (202-326-2758), Bureau of Competition, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis of Agreement Containing Consent Order to Aid Public Comment describes the terms of the consent

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for September 27, 2010), on the World Wide Web, at (*http://www.ftc.gov/os/actions.shtm*). A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, either in person or by calling (202) 326-2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

Analysis of Agreement Containing Consent Order to Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order from Respondent The Coca-Cola Company ("TCCC") to address concerns in connection with TCCC's acquisition of its largest bottler and the subsequent exclusive license from Dr Pepper Snapple Group, Inc. ("DPSG"), to bottle, distribute, and sell the Dr Pepper, Diet Dr Pepper, and Canada Dry carbonated soft drink brands of DPSG in certain territories. The Consent Agreement, among other things, requires that TCCC limit the persons within the company who have access to the commercially sensitive confidential information that DPSG may provide to TCCC to carry out the distribution functions contemplated by the license.

The DPSG-TCCC license agreement followed TCCC's announced proposed acquisition of the North American business of its largest bottler, Coca-Cola Enterprises Inc. ("CCE"). CCE is licensed by TCCC and DPSG to bottle and distribute many of their carbonated soft drink brands. Following the acquisition, TCCC, through its subsidiary Coca-Cola Refreshments U.S.A., Inc. ("CCR"), will take on the bottling and distribution functions previously performed in the United States by CCE.

The Complaint alleges that TCCC's access to DPSG's commercially sensitive confidential marketing and brand plans, without adequate safeguards to ensure that TCCC will not misuse the information, could lead to anticompetitive conduct that would make DPSG a less effective competitor and/or facilitate coordination in the industry. The proposed Consent Agreement remedies this concern by limiting access to the DPSG commercially sensitive information to TCCC employees who perform traditional carbonated soft drink "bottler functions" formerly performed by CCE and not permitting access to TCCC employees involved in traditional "concentrate-related functions."

II. Respondent The Coca-Cola Company

TCCC is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1 Coca-Cola Plaza, Atlanta, Georgia 30313. It is the world's largest soft drink company and makes or licenses more than 3,000 drinks under 500 brand names in 200 countries. In 2009, TCCC's worldwide revenues from the sale of all products were about $31 billion.

III. Licensor Dr Pepper Snapple Group, Inc.

DPSG is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5301 Legacy Drive, Plano, Texas 75024. Among other things, DPSG produces the concentrate for the DPSG carbonated soft drink brands that are distributed by its bottlers. Some of these brands are Dr Pepper, Diet Dr Pepper, Crush, Canada Dry, Schweppes, Vernor's, A&W Root Beer, 7-UP, RC Cola, Sunkist, and Squirt. In 2009, DPSG's net sales were about $5.5 billion, and its United States net sales of carbonated soft drink concentrate were about $1.1 billion. Dr Pepper Seven Up, Inc., will sign the license with TCCC.

IV. The Bottler

A. Coca-Cola Enterprises Inc.

CCE is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 2500 Windy Ridge Parkway Suite 700, Atlanta, Georgia 30039. It is the largest TCCC bottler in North America, spanning 46 states and the District of Columbia. In 2009, CCE's sales of carbonated soft drinks totaled about $21 billion. CCE's North American business operations contributed 70% of this revenue. CCE accounts for about 75-80% of TCCC's North America bottler-distributed volume, and TCCC products represent over 90% of CCE's total volume.

V. The Transactions

A. The Bottler Acquisition

On February 25, 2010, TCCC reached an agreement with CCE to acquire the North American assets of CCE for $12.3 billion. At the time of the agreement, TCCC owned about 34% of CCE. Post-acquisition, the North American operations of CCE will be subsumed within a new organization known as Coca-Cola Refreshments USA, Inc. ("CCR"). CCR's business will comprise CCE's current North American operations, and CCR also will have responsibility for the supply chain for still beverages and juices, fountain/Freestyle, and national key customer management. Post-acquisition, Coca-Cola USA will manufacture and supply concentrate and engage in consumer brand marketing and innovation with respect to new drinks and brands.

B. The DPSG-TCCC License Agreement

Following the agreement to acquire CCE, TCCC sought a license to continue to bottle and distribute the DPSG brands that CCE had distributed. (The DPSG license held by CCE was terminated by DPSG as a result of the proposed acquisition.) In the DPSG-CCR license agreement, TCCC agreed to bottle and distribute DPSG's Dr Pepper brand products and Canada Dry products in the former CCE territories, where CCE had been producing and distributing these products. TCCC to agreed to pay DPSG $715 million for a non-exclusive license to produce and an exclusive, twenty-year[2] license to distribute and sell those brands.

Under the license agreement, CCR has agreed, among other things to, (a) distribute the Dr Pepper brand in all classes of trade based on certain TCCC brands; (b) grow the Dr Pepper brand based in some measure on certain sales criteria of other bottlers; and (c) advertise, promote, and market the Dr Pepper brand and provide sales support for such promotions, based in some measure on CCR's advertising, promotions, and marketing of certain TCCC brands.

C. The DPSG-CCR Freestyle Agreement

TCCC also will give Dr Pepper access to TCCC's new proprietary "Freestyle" fountain dispensing equipment. The Freestyle machine has a footprint comparable to a traditional lever-based fountain dispenser, but it allows users to create more than 120 custom-flavored beverages. DPSG values the Freestyle

[2] The license agreement is for an initial term of twenty (20) years, with automatic renewal for additional twenty (20) year periods, unless terminated pursuant to its terms.

Participation Agreement at approximately $115 million.

VI. The Proposed Complaint

The Commission's Complaint alleges that TCCC and DPSG are direct competitors in the highly concentrated and difficult to enter (a) branded concentrate and (b) branded direct-store-delivered carbonated soft drink markets. The concentrate market is national, and the branded soft drink markets are local. Total United States sales of concentrate is about $9 billion, and total United States sales of carbonated soft drinks, measured at retail, is about $70 billion.

To carry out the distribution activities currently undertaken by the bottler and contemplated under the license agreement, DPSG will need to provide commercially sensitive confidential information about its marketing plans to CCR, the newly created TCCC bottler subsidiary. DPSG currently provides this sort of information to CCE in order for it to perform its bottler or distribution functions. The Commission is concerned that TCCC's access to this information could enable it to use the information in ways that could impair DPSG's ability to compete and ultimately injure competition by weakening a competitor or facilitating coordination in the industry. The Complaint alleges that TCCC's access to DPSG's confidential information could eliminate competition between TCCC and DPSG, increase the likelihood that TCCC may unilaterally exercise market power, and facilitate coordinated interaction in the industry.

VII. The Proposed Consent Order

Under the proposed Consent Order, to remedy the alleged competitive concern associated with access to the DPSG commercially sensitive confidential information, TCCC will be required to set up a "firewall" to ensure that persons at TCCC who may be in a position to use the DPSG commercially sensitive information in ways that may injure DPSG and/or facilitate coordination will not be allowed access to such information. Persons at TCCC who are assigned to perform traditional "bottler functions"– the kinds of functions that CCE have historically performed for DPSG – will be permitted access to the DPSG information. Persons responsible for "concentrate-related functions"– the kinds of functions that TCCC engaged in as a competitor of DPSG when both had their brands distributed by CCE – will not be permitted access to the DPSG information.

The proposed Consent Agreement provides for the appointment of a monitor to assure TCCC's compliance with the Consent Order. The monitor will have a fiduciary responsibility to the Commission. The monitor will be appointed for a five (5) year term, but the Commission may extend or modify the term as appropriate.

The proposed Consent Agreement contains a prior notice provision for subsequent acquisitions by TCCC of its franchised bottlers that also are licensed to distribute DPSG products. Under the order, TCCC will be required to give the Commission forty-five (45) advance notice of a proposed acquisition that is not subject to the Hart-Scott-Rodino Act and provide the Commission with all management documents relating to the proposed acquisition. If the 45-day period expires without Commission action, TCCC will be permitted to consummate the proposed acquisition and use DPSG confidential information in the territories of the newly acquired bottler as specified in this order. The standard Hart-Scott-Rodino procedures and time periods would continue to apply for Hart-Scott-Rodino reportable transactions.

The order, like the DPSG-TCCC license agreement, will have a term of twenty (20) years.

VIII. Opportunity for Public Comment

The Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement, as well as the comments received, and will decide whether it should withdraw from the Consent Agreement or make final the Decision and Order.

By accepting the Consent Agreement subject to final approval, the Commission anticipates that the competitive problem alleged in the Complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the Consent Agreement. It is not intended to constitute an official interpretation of the proposed Consent Agreement, nor is it intended to modify the terms of the Decision and Order in any way.

By direction of the Commission, Commissioner Ramirez recused.

Donald S. Clark,

Secretary.

[FR Doc. 2010–24838 Filed 10–1–10; 12:10 pm]

BILLING CODE 6750–01–S

GOVERNMENT ACCOUNTABILITY OFFICE

Financial Management and Assurance; Government Auditing Standards

Correction

In notice document 2010–23374 beginning on page 57274 in the issue of Monday, September 20, 2010 make the following corrections:

1. On page 57275, in the first column, under the **ADDRESSES** section, in the second line, "(GAO–1O–853G)" should read "(GAO–10–853G)".

2. On the same page, in the same column, under the **ADDRESSES** section, in the third and fourth lines, "*http://www.gao.gov/govaud/vbkO1.htm.*" should read "*http://www.gao.gov/govaud/ybk01.htm.*".

3. On the same page, in the same column, under the **SUPPLEMENTARY INFORMATION** section, in the seventh line, "*yeJlowbookgao.gov*" should read "*yellowbook@gao.gov.*"

[FR Doc. C1–2010–23374 Filed 10–1–10; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Advisory Committee on Blood Safety and Availability

AGENCY: Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Services is hereby giving notice that the Advisory Committee on Blood Safety and Availability (ACBSA) will hold a meeting. The meeting will be open to the public.

DATES: The meeting will take place Thursday, November 4, and Friday, November 5, 2010, from 8:30 a.m. to 5 p.m.

ADDRESSES: The Universities at Shady Grove, 9630 Gudelsky Drive, Rockville, Maryland 20850, Phone: 301–738–6000.

FOR FURTHER INFORMATION CONTACT: Jerry A. Holmberg, PhD, Executive Secretary, Advisory Committee on Blood Safety and Availability, Office of the Assistant Secretary for Health, Department of Health and Human Services, 1101 Wootton Parkway, Suite 250, Rockville, MD 20852, (240) 453–8803, FAX (240) 453–8456, e-mail *ACBSA@hhs.gov.*

SUPPLEMENTARY INFORMATION: The Advisory Committee on Blood Safety

Coca-Cola/Coca-Cola Enterprises

Print Page | Close Window

Investor Relations

Financial News Release

The Coca-Cola Company and Coca-Cola Enterprises Strategically Advance and Strengthen Their Partnership

The Coca-Cola Company to Acquire CCE's North American Bottling Business

CCE Has Agreed in Principle to Buy The Coca-Cola Company's Bottling Operations in Norway and Sweden, and to Obtain the Right to Acquire the German Bottler

ATLANTA, Feb 25, 2010 (BUSINESS WIRE) -- The Coca-Cola Company (NYSE: KO) and Coca-Cola Enterprises Inc. (NYSE: CCE):

- **Advancement fully aligns with the Coca-Cola system's 2020 Vision and drives long-term value for all shareowners**
- **Evolves The Coca-Cola Company's North American business to more profitably deliver the world's greatest brands in the largest NARTD profit pool in the world**
- **CCE shareowners will benefit from the improved financial growth profile and expansion of the Western European business**
- **The Coca-Cola Company will generate immediate efficiencies with expected operational synergies of $350 million over four years, and the transactions, which are substantially cashless, are expected to be accretive to EPS on a fully diluted basis by 2012**
- **CCE shareowners to exchange each CCE share for a share in a new CCE, focused solely on Europe, and $10 per share in cash at closing**

The Coca-Cola Company (NYSE: KO) and Coca-Cola Enterprises Inc. (NYSE: CCE) announce that they have entered into agreements that will strategically advance the Coca-Cola system in North America and drive long-term value for all shareholders. In addition, the parties have an agreement in principle to expand CCE's European business.

"Our 2020 Vision calls for decisive and timely action to continuously improve and evolve our global franchise system to best serve our customers and consumers everywhere. Consistent with the 2020 Vision, our roadmap for winning together, we act today as an aligned system," said The Coca-Cola Company's Chairman and Chief Executive Officer Muhtar Kent. "We are not acquiring CCE, rather we are acquiring their North American operations, and they remain one of our key bottling partners with world-class management, financial and operational capabilities. We have a strong and unrelenting belief in our unique and thriving global bottling system. Our new North American structure will create an unparalleled combination of businesses, which will serve as our passport to winning in the world's largest nonalcoholic ready-to-drink profit pool. This transaction offers compelling value to both The Coca-Cola Company and CCE shareowners and will create substantial and sustainable benefits for both companies' stakeholders."

Mr. Kent continued, "Our North American business structure has remained essentially the same since CCE was founded in 1986, while the market and industry have changed dramatically. With this transaction, we are converting passive capital into active capital, giving us direct control over our investment in North America to accelerate growth and drive long-term profitability. We will work closely with our bottling partners to create an evolved franchise system for the unique needs of the North American market. Additionally, we will reconfigure our manufacturing, supply chain and logistics operations to achieve cost reductions over time. Importantly, the creation of a unified operating system will strategically position us to better market and distribute North America's most preferred nonalcoholic beverage brands. At the same time, in Europe, we are further strengthening our franchise system to provide broader, contiguous geographic coverage and optimizing our marketing and distribution leadership."

CCE's Chairman and Chief Executive Officer John Brock said, "This transformation creates significant near-term shareowner value through the sale of the North American business for fair value, delivering over $4 billion in cash to CCE shareowners, through cash distributions and planned share repurchases. At the same time, this enables our shareowners to retain equity in a sales and distribution company with an improved growth profile. In the future, CCE shareowners will also benefit from the expansion of our European business and our improved financial flexibility."

Mr. Brock added, "CCE remains the preeminent Western European bottler and a key strategic partner with The Coca-Cola Company. Our European business serves an attractive market with growing volumes and profit driven by rising per capita consumption. As such, CCE will have an improved profile with enhanced revenue, margins and EPS growth prospects. Together with The Coca-Cola Company, we will continue to improve the effectiveness of our operations in our expanded presence in Europe. These actions strengthen our ability to compete effectively and sustainably in Europe and represent the beginning of an exciting new era of long-term growth for CCE's business and shareowners."

Mr. Kent concluded, "This is a truly historic day for the Coca-Cola system. As the world's leading beverage Company, we are very excited about the vast opportunities before us and I can say with confidence there is no better business to be in. Over the next several years, the nearly $650 billion dollar global nonalcoholic ready-to-drink beverage industry is expected to grow faster than worldwide GDP and we are best positioned to capitalize on this enormous industry opportunity in North America and Europe. These joint actions further reinforce our confidence in achieving our 2020 Vision to more than double system revenue and double servings to over 3 billion per day. With our system more aligned than ever, the timing is right, and we believe that these actions will usher in a new era of winning for our Coca-Cola system."

Details of the Transactions

The Coca-Cola Company, in a substantially cashless transaction, will acquire CCE's entire North American business, which consists of approximately 75 percent of U.S. bottler-delivered volume and almost 100 percent of Canadian bottler-delivered volume. At the close of the transaction, The Coca-Cola Company will have direct control over approximately 90 percent of the total North America volume, including its current direct businesses. The Coca-Cola Company's acquisition of the assets and liabilities of CCE's North American business includes consideration of The Coca-Cola Company's current 34 percent equity ownership in CCE, valued at $3.4 billion, based upon a thirty day trailing average as of February 24, 2010. In addition, consideration includes the assumption of $8.88 billion of CCE debt and all of the North American assets and liabilities - including CCE's accumulated benefit obligation for North America of $580 million as of December 31, 2009, and certain other one-time costs and benefits.

In a concurrent agreement, The Coca-Cola Company and CCE have agreed in principle that CCE will buy The Coca-Cola Company's bottling operations in Norway and Sweden for $822 million, subject to the signing of definitive agreements, and that CCE will have the right to acquire The Coca-Cola Company's 83 percent equity stake in its German bottling operations 18 to 36 months after closing for fair value.

A new entity, which will retain the name Coca-Cola Enterprises Inc., will be created through a split-off that will hold CCE's European businesses. CCE's public shareowners will exchange each existing CCE share for a share in the new entity and will hold 100 percent of this new entity.

CCE will provide its shareowners, excluding The Coca-Cola Company, with a special one-time cash payment of $10 per share. In connection with the transactions, CCE expects to raise initial debt financing of up to 3.0x EBITDA to pay shareowners $10 per share in cash at closing, to acquire the Norway and Sweden bottlers and to fund the expected share repurchase program. Following completion of the transaction, it is expected that CCE will adopt a program to repurchase up to approximately $1 billion of shares and a policy of paying an expected annual dividend of $0.50 per share subject to the discretion of CCE's Board of Directors and its consideration of various factors.

The Coca-Cola Company and CCE expect the transactions to close in the fourth quarter of 2010.

About CCR-USA and CCRC

At the close, The Coca-Cola Company will rename the sales and operational elements of the North American businesses Coca-Cola Refreshments USA, Inc. ("CCR-USA") and Coca-Cola Refreshments Canada, Ltd. ("CCRC"), which will be wholly-owned subsidiaries of The Coca-Cola Company. Following the close, The Coca-Cola Company will combine the Foodservice business, The Minute Maid Company, the Supply Chain organization, including finished product operations, and our company-owned bottling operations in Philadelphia with CCE's North American business to form CCR-USA and CCRC. In the U.S., CCR-USA will be organized as a unified operating entity with distinct capabilities to include supply chain and logistics, sales and customer service operations. In Canada, CCRC will be a single dedicated production, marketing, sales and distribution organization. The Coca-Cola Company's remaining North American operation will continue to be responsible for brand marketing and franchise support. Details regarding the structure, leadership and integration plans will be forthcoming.

Once completed, the transactions are expected to generate operational synergies of approximately $350 million over four years for The Coca-Cola Company and are expected to be accretive to EPS on a fully diluted basis by 2012. Further, in North America, this will generate system synergies that will increase the growth rate and cash flow on a pro forma basis over time. Pro forma for this acquisition, the North American business, including CCR-USA and CCRC, would have generated approximately $19.2 billion in revenues and $3.6 billion of EBITDA in 2009.

The Coca-Cola Company 2010 Outlook

As a result of these agreements, The Coca-Cola Company has not made any share repurchases during the current fiscal year and will continue to be out of the market until the close of these transactions. However, the Company remains committed to repurchasing $1.5 billion in 2010.

About new CCE

CCE will be The Coca-Cola Company's strategic bottling partner in Western Europe and the third-largest independent bottler globally. Reflecting CCE's position as The Coca-Cola Company's strategic bottling partner in Western Europe, the companies will enter into a 10+10 year bottling agreement and a 5-year incidence pricing agreement. Pro forma, including the contributions of Norway and Sweden, CCE would have generated approximately $7.3 billion in revenues, $850 million in operating income, and $1.2 billion of EBITDA in 2009.

At closing, before planned share repurchases, CCE expects to have net debt of approximately $2 billion. Immediately after closing and before share repurchase, CCE is expected to have approximately 350-360 million outstanding shares on a fully diluted basis, substantially comparable to the publicly owned shares of CCE today.

Shortly after closing, the Board of CCE is expected to announce a planned share repurchase program of approximately $1 billion and an initial annual dividend of $0.50 per share. Payment of cash dividends and stock repurchases by CCE will be at the discretion of CCE's Board of Directors in accordance with applicable law after taking into account various factors, including, but not limited to, CCE's financial condition, operating results, current and anticipated cash needs and plans for growth. Therefore, no assurance can be given that CCE will pay any dividends to its shareowners or make share repurchases, and no assurance can be given to the amount of any such dividends or share repurchases if CCE's Board of Directors determines to do so.

CCE will retain the Coca-Cola Enterprises Inc. corporate name and remain headquartered in Atlanta. CCE will continue to be traded on the NYSE under the CCE ticker. John Brock, Chairman and Chief Executive Officer, Bill Douglas, Chief Financial Officer, Hubert Patricot, President of the European Group, and other members of the CCE corporate management team will continue to lead the company. In addition, the current independent directors will continue to comprise the CCE Board.

CCE 2010 Outlook

As a result of these agreements, CCE has not made any share repurchases during the current fiscal year, and it does not plan to do so before the transactions close. CCE intends to provide additional details on FY 2010 outlook during its upcoming first quarter call.

Additional Information

CCE's independent Affiliated Transaction Committee recommended that CCE's Board approve the transactions. The Boards of Directors of both The Coca-Cola Company and CCE have approved the transactions, which are subject to approval by CCE's public shareowners and customary regulatory approvals.

Allen & Company and Goldman Sachs & Co. acted as financial advisors to The Coca-Cola Company. Skadden, Arps, Slate, Meagher & Flom LLP acted as legal counsel. Cleary Gottlieb Steen & Hamilton LLP and Wilson Sonsini Goodrich & Rosati provided antitrust counsel.

Credit Suisse and Lazard acted as financial advisors to CCE and Cahill Gordon & Reindel LLP acted as legal counsel. Greenhill & Co. acted as financial advisor to the Affiliated Transaction Committee and McKenna Long & Aldridge LLP provided legal counsel.

For more information about the transactions, please access our transaction specific website at: www.KOsystemevolution.com (http://cts.businesswire.com/ct/CT?id=smartlink&url=http%3A%2F%2Fwww.KOsystemevolution.com&esheet=6193425&lan=en_US&anchor=www.KOsystemevolution.com&index=1&md5=14ad39169d5069741c96fe890c203426).

Conference Call/Webcast

The Coca-Cola Company and Coca-Cola Enterprises are hosting a joint conference call with investors and analysts to discuss our transactions today at 9:30 a.m. (EST). We invite investors to listen to the live audiocast of the conference call at either website, http://www.thecoca-colacompany.com (http://www.thecoca-colacompany.com) or at www.cokecce.com (http://cts.businesswire.com/ct/CT?id=smartlink&url=http%3A%2F%2Fwww.cokecce.com&esheet=6193425&lan=en_US&anchor=www.cokecce.com&index=3&md5=e2c76070338da1985a46a64f755ec369) in the "Investors" section. Further, the "Investors" section of each website includes a reconciliation of non-GAAP financial measures that may be used periodically by management when discussing their financial results with investors and analysts to our results as reported under GAAP.

The Company reports its financial results in accordance with U.S. generally accepted accounting principles (GAAP). However, management believes that certain non-GAAP financial measures used in managing the business may provide users of this financial information additional meaningful comparisons. Management is providing pro forma financial information for the Company's North American business reflecting the acquisition of the North American business of Coca-Cola Enterprises (CCE), including CCE Corporate. See the table below for the pro forma financial information for the year ended December 31, 2009. Non-GAAP financial measures should be viewed in addition to, and not as an alternative for, the Company's reported results prepared in accordance with GAAP.

THE COCA-COLA COMPANY AND SUBSIDIARIES

Reconciliation of GAAP to Non-GAAP Financial Measures

Net Operating Revenues and EBITDA

(UNAUDITED)

(In millions)

	Year Ended December 31, 2009						
		Items Impacting Comparability					
	North America Operating Segment As Reported (GAAP)	North America Comparability Adjustments (1)	CCE North America As Reported (2)	Estimate of CCE Corporate (2)	CCE Comparability Adjustments (2), (3)	Eliminations	Pro Forma North American Business (Non-GAAP)
Net Operating Revenues	$ 8,271	$ -	$ 15,128	$ -	$ -	$ (4,243)	$ 19,156
Operating Income	$ 1,699	$ 51	$ 1,059	$ (347)	$ 75	$ -	$ 2,537
Depreciation and Amortization	365	-	711	46	(15)	-	1,107
EBITDA (Non-GAAP)	$ 2,064	$ 51	$ 1,770	$ (301)	$ 60	$ -	$ 3,644

(1) Comparability adjustments include restructuring charges, productivity initiatives and compensation expense.
(2) EBITDA for acquired CCE North American business (including CCE Corporate) as adjusted for comparability is $1,529.
(3) Comparability adjustments include restructuring charges and compensation expense.

About The Coca-Cola Company

The Coca-Cola Company (NYSE: KO) is the world's largest beverage company, refreshing consumers with more than 500 sparkling and still brands. Along with Coca-Cola, recognized as the world's most valuable brand, the Company's portfolio includes 12 other billion dollar brands, including Diet Coke, Fanta, Sprite, Coca-Cola Zero, vitaminwater, Powerade, Minute Maid, Simply and Georgia Coffee. Globally, we are the No. 1 provider of sparkling beverages, juices and juice drinks and ready-to-drink teas and coffees. Through the world's largest beverage distribution system, consumers in more than 200 countries enjoy the Company's beverages at a rate of 1.6 billion servings a day. With an enduring commitment to building sustainable communities, our Company is focused on initiatives that protect the environment, conserve resources and enhance the economic development of the communities where we operate. For more information about our Company, please visit our website at http://www.thecoca-colacompany.com (http://www.thecoca-colacompany.com).

The Coca-Cola Company Forward-Looking Statements

This press release may contain statements, estimates or projections that constitute "forward-looking statements" as defined under U.S. federal securities laws. Generally, the words "believe," "expect," "intend," "estimate," "anticipate," "project," "will" and similar expressions identify forward-looking statements, which generally are not historical in nature. Forward-looking statements are subject to certain risks and uncertainties that could cause actual results to differ materially from The Coca-Cola Company's historical experience and our present expectations or projections. These risks include, but are not limited to, obesity and other health concerns; scarcity and quality of water; changes in the nonalcoholic beverages business environment, including changes in consumer preferences based on health and nutrition considerations and obesity concerns; shifting consumer tastes and needs, changes in lifestyles and competitive product and pricing pressures; impact of the global credit crisis on our liquidity and financial performance; our ability to expand our operations in developing and emerging markets; foreign currency exchange rate fluctuations; increases in interest rates; our ability to maintain good relationships with our bottling partners; the financial condition of our bottling partners; our ability and the ability of our bottling partners to maintain good labor relations, including the ability to renew collective bargaining agreements on satisfactory terms and avoid strikes, work stoppages or labor unrest; increase in the cost, disruption of supply or shortage of energy; increase in cost, disruption of supply or shortage of ingredients or packaging materials; changes in laws and regulations relating to beverage containers and packaging, including container deposit, recycling, eco-tax and/or product stewardship laws or regulations; adoption of significant additional labeling or warning requirements; unfavorable general economic conditions in the United States or other major markets; unfavorable economic and political conditions in international markets, including civil unrest and product boycotts; changes in commercial or market practices and business model within the European Union; litigation uncertainties; adverse weather conditions; our ability to maintain brand image and corporate reputation as well as other product issues such as product recalls; changes in legal and regulatory environments; changes in accounting standards and taxation requirements; our ability to achieve overall long-term goals; our ability to protect our information systems; additional impairment charges; our ability to successfully manage Company-owned bottling operations; the impact of climate change on our business; global or regional catastrophic events; and other risks discussed in our Company's filings with the Securities and Exchange Commission (SEC), including our Annual Report on Form 10-K, which filings are available from the SEC. You should not place undue reliance on forward-looking statements, which speak only as of the date they are made. The Coca-Cola Company undertakes no obligation to publicly update or revise any forward-looking statements.

COCA-COLA ENTERPRISES INC.
RECONCILIATION OF GAAP TO NON-GAAP
(Unaudited; In millions)

	Full Year 2009				
		Items Impacting Comparability			
	Europe Reported (GAAP)	Europe Restructuring Charges	Corporate [(b)]	Norway / Sweden [(c)]	new CCE (non-GAAP) [(a)]
Net Operating Revenue	**$ 6,517**	$ -	$ -	$ 741	**$ 7,258**
Operating Income (EBIT)	**$ 963**	$ 7	$ (185)	$ 62	**$ 847**
Depreciation & Amortization	**270**	-	25	37	**332**
EBITDA	**$ 1,233**	$ 7	$ (160)	$ 99	**$ 1,179**

(a) These non-GAAP measures are provided to allow investors to more clearly evaluate the operating performance and business trends. For new CCE, which includes CCE's European operating segment, a preliminary estimate of new CCE Corporate costs and Nordic.

(b) Corporate is a preliminary estimate of new CCE Corporate costs. CCE Corporate costs allocated to new CCE in its Form S-4 may be materially different.

(c) Represents the unaudited 2009 financial results of Norway and Sweden. Acquisition of Norway and Sweden bottlers subject to the signing of definitive agreements

About Coca-Cola Enterprises Inc.

Coca-Cola Enterprises Inc. is the world's largest marketer, distributor, and producer of bottle and can liquid nonalcoholic refreshment. CCE sells approximately 80 percent of The Coca-Cola Company's bottle and can volume in North America and is the sole licensed bottler for products of The Coca-Cola Company in Belgium, continental France, Great Britain, Luxembourg, Monaco, and the Netherlands. For more information about our Company, please visit our website at http://www.cokecce.com (http://www.cokecce.com).

Coca-Cola Enterprises Inc. Forward-Looking Statements

Included in this news release are forward-looking management comments and other statements that reflect management's current outlook for future periods. As always, these expectations are based on currently available competitive, financial, and economic data along with our current operating plans and are subject to risks and uncertainties that could cause actual results to differ materially from the results contemplated by the forward-looking statements. The forward-looking statements in this news release should be read in conjunction with the risks and uncertainties discussed in our filings with the Securities and Exchange Commission, including our most recent annual report on Form 10-K and subsequent SEC filings.

Important Additional Information and Where to Find It

This communication may be deemed to be solicitation material in respect of the proposed transaction. In connection with the proposed transaction and required shareowner approval, Coca-Cola Enterprises Inc. ("Company") will file relevant materials with the Securities and Exchange Commission (the "SEC"), including a proxy statement/prospectus contained in a Form S-4 registration statement, which will be mailed to the shareowners of the Company.

SHAREOWNERS OF THE COMPANY ARE URGED TO READ ALL RELEVANT DOCUMENTS FILED WITH THE SEC, INCLUDING THE PROXY STATEMENT/PROSPECTUS WHEN IT BECOMES AVAILABLE, BECAUSE THEY WILL CONTAIN IMPORTANT INFORMATION ABOUT THE PROPOSED TRANSACTION.

Shareowners may obtain a free copy of the proxy statement/prospectus, when it becomes available, and other documents filed by the Company at the SEC's web site at www.sec.gov (http://cts.businesswire.com/ct/CT?id=smartlink&url=http%3A%2F%2Fwww.sec.gov&esheet=6193425&lan=en_US&anchor=www.sec.gov&index=6&md5=3eae721001e24ed079b1918f6d120556).*Copies of the documents filed with the SEC by the Company will be available free of charge on the Company's internet website at www.cokecce.com* (http://cts.businesswire.com/ct/CT?id=smartlink&url=http%3A%2F%2Fwww.cokecce.com&esheet=6193425&lan=en_US&anchor=www.cokecce.com&index=7&md5=a7a09bb79236de8b4f9a8b9aacee6d95) *under the tab "Investor Relations" or by contacting the Investor Relations Department of Coca-Cola Enterprises at 770-989-3246.*

Participants in the Solicitation

Coca-Cola Enterprises ("Company") and its directors, executive officers and certain other members of its management and employees may be deemed to be participants in the solicitation of proxies from its shareowners in connection with the proposed transaction.Information regarding the interests of such directors and executive officers was included in the Company's Proxy Statement for its 2009 Annual Meeting of Shareowners filed with the SEC March 3, 2009 and a Form 8-K filed on December 18, 2009 and information concerning the participants in the solicitation will be included in the proxy statement/prospectus relating to the proposed transaction when it becomes available.Each of these documents is, or will be, available free of charge at the SEC's website at www.sec.gov (http://cts.businesswire.com/ct/CT?id=smartlink&url=http%3A%2F%2Fwww.sec.gov&esheet=6193425&lan=en_US&anchor=www.sec.gov&index=8&md5=62f631416e55534716c4ed4a0872a089) *and from the Company on its website or by contacting the Shareowner Relations Department at the telephone number above.*

SOURCE: The Coca-Cola Company and Coca-Cola Enterprises Inc.

The Coca-Cola Company
Investor Relations:
Jackson Kelly, +1 404-676-7563
or
Media Relations:
Dana Bolden, +1 404-676-2683
pressinquiries@na.ko.com (mailto:pressinquiries@na.ko.com)
or
Coca-Cola Enterprises Inc.
Investor Relations
Thor Erickson, +1 770-989-3110

Federal Trade Commission
Protecting America's Consumers

For Release: 9/27/2010

FTC Puts Conditions on Coca-Cola's $12.3 Billion Acquisition of its Largest North American Bottler

Coca-Cola Agrees to Restrictions on its Access to Competitively Sensitive Information of Dr Pepper Snapple Group Subsidiary

The Federal Trade Commission today announced that it will require The Coca-Cola Company to restrict its access to confidential competitive business information of rival Dr Pepper Snapple Group as a condition for completing Coca-Cola's proposed $12.3 billion acquisition of its largest North American bottler, which also distributes Dr Pepper Snapple carbonated soft drinks.

Under a settlement with the FTC, Coca-Cola will set up a "firewall" to ensure that its ownership of the bottling company does not give certain Coca-Cola employees access to commercially sensitive confidential Dr Pepper Snapple marketing information and brand plans. In a complaint filed with the settlement, the FTC charged that access to this information likely would have harmed competition in the U.S. markets for carbonated soft drinks. On February 26, 2010, the FTC approved a proposed settlement order in which PepsiCo agreed to set up a similar information firewall after acquiring its two largest bottlers and distributors (see press release at http://www.ftc.gov/opa/2010/02/pepsi.shtm).

Coca-Cola agreed on February 25, 2010, to acquire the North American operations of Coca-Cola Enterprises Inc., its largest North American bottler, for $12.3 billion. When the agreement was announced, Coca-Cola already owned about 34 percent of Coca-Cola Enterprises. After the acquisition is completed, the North American operations of Coca-Cola Enterprises will be known as Coca-Cola Refreshments USA, Inc.

In a related deal, after Coca-Cola agreed to acquire Coca-Cola Enterprises, it sought a license to continue to bottle and distribute the Dr Pepper Snapple brands that Coca-Cola Enterprises had distributed, including Dr Pepper brand products and Canada Dry products, in specific franchised geographic areas. Coca-Cola paid $715 million for the exclusive 20-year distribution license.

According to the FTC's complaint, Coca-Cola and Dr Pepper Snapple are direct competitors in the highly concentrated and difficult-to-enter markets for branded soft drink concentrate and branded carbonated soft drinks sold in stores. In all, the total sales of soft drink concentrate in the United States are about $9 billion annually, and the total U.S. sales of soft drinks sold by retailers are about $70 billion.

Dr Pepper Snapple will provide the commercially sensitive information about its marketing plans to Coca-Cola Refreshments USA, the newly created Coca-Cola bottling subsidiary. Dr Pepper Snapple currently provides the same sensitive information to Coca-Cola Enterprises to help it perform its bottler and distribution functions, according to the complaint. According to the complaint, Coca-Cola's access to this information could harm consumers by eliminating competition between Coca-Cola and Dr Pepper Snapple.

The FTC's proposed settlement order is designed to remedy these potential problems by requiring Coca-Cola to set up a "firewall" so the sensitive information cannot be accessed by anyone at Coca-Cola who may be in a position to use it against Dr Pepper Snapple. The proposed Coca-Cola order will expire in 20 years.

The FTC vote approving the complaint and proposed consent order was 4-0-1, with Commissioner Edith Ramirez recused. The order will be published in the Federal Register shortly, and will be subject to public comment for 30 days, until October 27, 2010, after which the Commission will decide whether to make it final. Comments can be submitted electronically at the following link: https://ftcpublic.commentworks.com/ftc/coca-cola.

NOTE: The Commission issues a complaint when it has "reason to believe" that the law has been or is being violated, and it appears to the Commission that a proceeding is in the public interest. The issuance of a complaint is not a finding or ruling that the respondent has violated the law. A consent order is for settlement purposes only and does not constitute an admission of a law violation. When the Commission issues a consent order on a final basis, it carries the force of law with respect to future actions. Each violation of such an order may result in a civil penalty of up to $16,000.

Copies of the complaint, consent order, and an analysis to aid public comment are available from the FTC's Web site at http://www.ftc.gov and also from the FTC's Consumer Response Center, Room 130, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The FTC's Bureau of Competition works with the Bureau of Economics to investigate alleged anticompetitive business practices and, when appropriate, recommends that the Commission take law enforcement action. To inform the Bureau about particular business practices, call 202-326-3300, send an e-mail to antitrust@ftc.gov, or write to the Office of Policy and Coordination, Room 383, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Ave, N.W., Washington, DC 20580. To learn more about the Bureau of Competition, read "Competition Counts" at http://www.ftc.gov/competitioncounts.

MEDIA CONTACT:

Mitchell J. Katz
Office of Public Affairs
202-326-2161

STAFF CONTACT:

Jill Frumin
Bureau of Competition
202-326-2758

(FTC File No. 101-0107)
(Coke.final.wpd)

E-mail this News Release
If you send this link to someone else, the FTC will not collect any personal information about you or the recipient.

Related Items:

***In the Matter of* The Coca-Cola Company, a corporation**
FTC File No. 101 0107

Last Modified: Tuesday, September 28, 2010

101 0107

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:	**Jon Leibowitz, Chairman**
	William Kovacic
	J. Thomas Rosch
	Edith Ramirez
	Julie Brill

In the Matter of	)	
	)	
The Coca-Cola Company,	)	**Docket No. C -**
a corporation.	)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Respondent The Coca-Cola Company ("TCCC"), a corporation, has entered into agreements to acquire the outstanding voting securities of one its independent bottlers, Coca-Cola Enterprises Inc. ("CCE"), and subsequently obtained a license agreement to continue to produce and distribute carbonated soft drink brands of Dr Pepper Snapple Group, Inc. ("DPSG"), that bottler CCE has produced and distributed, and that the agreements violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the agreements and terms of such agreements, when consummated or satisfied, would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. Respondent The Coca-Cola Company

1. Respondent TCCC is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1 Coca-Cola Plaza, Atlanta, Georgia 30313.

2. TCCC is a beverage company that includes Coca-Cola North America ("CCNA"), the company's North American operating company. TCCC produces the concentrate (or flavor ingredient) for the TCCC carbonated soft drink beverage brands that are distributed by its

independent bottlers. One of those independent bottlers is CCE. Some of TCCC's carbonated soft drink brands distributed by CCE are Coke, Diet Coke, and Sprite.

3. TCCC in 2009 had net revenues of about $31 billion. Most of TCCC's revenues are based on concentrate sales.

4. TCCC is, and at all times relevant herein has been, engaged in commerce or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

II. Third Party Dr Pepper Snapple Group, Inc.

5. DPSG is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5301 Legacy Drive, Plano, Texas 75024.

6. Among other things, DPSG produces concentrate for the DPSG carbonated soft drink beverage brands that are marketed, distributed, and sold by independent bottlers. One of those independent bottlers is CCE. Some of the DPSG carbonated soft drink brands distributed by CCE, in at least some territories, are Dr Pepper, Canada Dry, Schweppes, and Squirt.

7. DPSG in 2009 had net revenues from the sales of all products of about $5.5 billion. In 2009, DPSG's net sales in the United States and Canada of carbonated soft drink concentrate were about $1.5 billion.

8. DPSG is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

III. Coca-Cola Enterprises Inc.

9. CCE is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2500 Windy Ridge Parkway Suite 700, Atlanta, Georgia 30039.

10. CCE is the largest independently owned bottler of the carbonated soft drink brands of TCCC. CCE's North American business contributed 70% of CCE's total sales in 2009 of about $21 billion. CCE accounts for approximately 75% of the United States sales of TCCC's brands of bottled and canned carbonated soft drinks and about 14% of the United States sales of DPSG's brands of carbonated soft drinks.

11. The geographic areas or territories in which CCE is licensed to distribute the carbonated soft drink brands of TCCC include all or a portion of 46 states and the District of Columbia. The principal geographic areas or territories in which CCE is licensed to distribute

some of the carbonated soft drink brands of DPSG include North Texas (Dallas/Fort Worth area); Southern California; Northern California; New York; Arizona; New Mexico; and Nevada.

IV. TCCC's Acquisition of CCE

12. On or about February 25, 2010, TCCC entered into an agreement to acquire 100% of CCE's North American operations. Following the acquisition, TCCC will create a new organization known as Coca-Cola Refreshments USA, Inc. ("CCR"), that will take on the bottling and distribution functions previously performed by CCE.

13. At the time of the agreement, TCCC held about a 34% equity interest in CCE.

14. Under the terms of the license agreements that DPSG (or its predecessor companies) entered into with CCE, a change of ownership of the bottler would, depending on the brand and/or territory involved, either automatically trigger the termination of the license or require that DPSG consent to the acquisition of the license by the bottler's new owner.

15. The proposed acquisition by TCCC of 100% of CCE's North American assets would give TCCC control over CCE. This prospective change in control is the kind of change in ownership of CCE that, upon consummation, would either trigger the automatic termination clause of the license agreement with DPSG or require that DPSG consent to the change.

16. For brand Dr Pepper, DPSG did not consent to the transfer to TCCC of the licenses held by CCE. For certain other DPSG brands, the proposed change in ownership of CCE would, upon consummation of the ownership change, automatically terminate the DPSG licenses.

V. TCCC's Acquisition of DPSG Licenses

17. On or about June 7, 2010, in anticipation of the termination of the DPSG-CCE agreement upon the acquisition by TCCC of CCE, TCCC and DPSG entered into an agreement for TCCC, upon acquiring CCE, to obtain a license to distribute the Dr Pepper and Canada Dry carbonated soft drink brands of DPSG in the former CCE territories. The license agreement will be signed by Dr Pepper-Seven Up, Inc. ("DPSU"), an operating company of DPSG, and CCR.

18. The DPSG-CCR license agreement provides, among other things, that (a) CCR will acquire the exclusive right to sell and distribute the Dr Pepper and Canada Dry carbonated soft drink brands in CCE territories, (b) the license agreement will have a term of twenty (20) years, with a provision that it be "automatically renewed for additional twenty (20) year successive periods" for "no additional payments," (c) CCR will acquire a non-exclusive right to produce the Dr Pepper and Canada Dry carbonated soft drink brands in the CCE territories, and (d) TCCC will pay DPSG $715 million.

19. Pursuant to the DPSG-CCR license agreement, CCR and DPSG entered into additional, associated terms, whereby CCR has undertaken performance obligations to, among

other things, (a) distribute the Dr Pepper brand in all classes of trade based on certain TCCC brands; (b) grow the Dr Pepper brand based in some measure on certain sales criteria of other bottlers; and (c) advertise, promote, and market the Dr Pepper brand and provide sales support for such promotions, based in some measure on CCR's advertising, promotions, and marketing of certain TCCC brands.

20. The DPSG-CCR license agreement will not provide adequate safeguards against the access by TCCC to competitively sensitive and confidential information regarding DPSG carbonated soft drink brands provided to CCR by DPSG pursuant to the license.

VI. Trade and Commerce

A. Relevant Product Markets

21. The relevant product markets in which to assess the effects of the license between DPSG and CCR and the associated performance terms are (a) branded, direct-store-delivered carbonated soft drinks and (b) the branded concentrate used to produce branded, direct-store-delivered carbonated soft drinks.

B. Relevant Geographic Markets

22. The relevant geographic markets in which to assess the effects of the DPSG-CCR license agreement and the associated performance agreement terms are (a) in the branded concentrate relevant product market, the United States as a whole, and (b) in the branded, direct-store-delivered carbonated soft drinks product market, local areas in the CCE territories.

C. Conditions of Entry

23. Entry into each relevant market would not be timely, likely, or sufficient to prevent or mitigate any anticompetitive effect.

24. Effective (price constraining) entry requires that branded carbonated soft drinks be delivered by direct-store delivery. There are generally only three bottlers in the local carbonated soft drink markets that have exclusive rights to distribute their branded carbonated soft drink products, and they do so by direct-store delivery. Bottlers operate under flavor restrictions imposed upon them by concentrate companies TCCC, DPSG, and PepsiCo, Inc. The bottlers therefore are not permitted to carry the new brand of an existing flavor without first dropping the brand of that flavor that they carry. For the cola flavor, the bottlers licensed by TCCC and PepsiCo, Inc., are required to carry Coke and Pepsi, respectively, and no other cola-flavored carbonated soft drink.

25. There is no market for branded concentrate other than for the production of branded carbonated soft drinks.

D. <u>Market Structure</u>

26. Each relevant market is very highly concentrated, whether measured by the Herfindahl-Hirschman Index ("HHI") or by two-firm and four-firm concentration ratios.

27. The carbonated soft drink brands of TCCC and DPSG are the first and second choices for a substantial number of consumers.

VII. <u>Effects of the Acquisition</u>

28. TCCC's access to competitively sensitive confidential information provided by DPSG to CCR in furtherance of the DPSG-CCR license agreement, or the use by CCR of competitively sensitive information passed to it by DPSG in furtherance of the DPSG-CCR license agreement, may substantially lessen competition in the relevant markets in some or all of the following ways,

(a) by eliminating direct competition between TCCC and DPSG,

(b) by increasing the likelihood that TCCC may unilaterally exercise market power or influence and control DPSG's prices, and

(c) by increasing the likelihood of, or facilitating, coordinated interaction;

each of which may result in higher prices to consumers.

VIII. <u>Violations Charged</u>

29. TCCC's access to competitively sensitive confidential information of DPSG, provided in furtherance of the DPSG-CCR license agreement entered into between Respondent TCCC and DPSG for the sale and distribution by CCR of DPSG's brands of carbonated soft drinks, could lead to anticompetitive conduct and constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and upon consummation, would constitute a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15, U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this ______ day of _____________, 2010, issues its Complaint against Respondent TCCC.

By the Commission.

Donald S. Clark
Secretary

SEAL

the accommodation you will need, including as much detail as you can. Also include a way we can contact you if we need more information. Please allow at least five days advance notice; last minute requests will be accepted, but may be impossible to fill.

Proposed Agenda: Friday, October 22, 2010, 9:30 a.m.*

1. Announcements and Recent News.
2. Approval of Transcript—Meeting of May 21, 2010.
3. Report from the North American Numbering Plan Billing and Collection (NANP B&C) Agent.
4. Report of the Billing and Collection Working Group (B&C WG).
5. Report of the North American Numbering Plan Administrator (NANPA).
6. Report of the National Thousands Block Pooling Administrator (PA).
7. Report of the Local Number Portability Administration (LNPA) Working Group.
8. Report of North American Portability Management LLC (NAPM LLC).
9. Report of the Telcordia Dispute Resolution Team: Telcordia Appeal.
10. Report of the Numbering Oversight Working Group.
11. Status of the Industry Numbering Committee (INC) activities.
12. Report of the Future of Numbering Working Group (FoN WG).
13. Summary of Action Items.
14. Public Comments and Participation (5 minutes per speaker).
15. Other Business.

Adjourn no later than 5 p.m.

*The Agenda may be modified at the discretion of the NANC Chairman with the approval of the DFO.

Federal Communications Commission.

Marilyn Jones,

Attorney, Wireline Competition Bureau.

[FR Doc. 2010–24850 Filed 10–1–10; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL TRADE COMMISSION

[File No. 101 0107]

In the Matter of The Coca-Cola Company; Analysis of Agreement Containing Consent Order to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed Consent Agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis of Agreement Containing Consent Order to Aid Public Comment describes both the allegations in the draft complaint and the terms of the consent order — embodied in the consent agreement — that would settle these allegations.

DATES: Comments must be received on or before October 27, 2010.

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form. Comments should refer to "The Coca-Cola Company, File No. 101 0107" to facilitate the organization of comments. Please note that your comment — including your name and your state — will be placed on the public record of this proceeding, including on the publicly accessible FTC website, at (*http://www.ftc.gov/os/publiccomments.shtm*).

Because comments will be made public, they should not include any sensitive personal information, such as an individual's Social Security Number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. Comments also should not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, comments should not include any "[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential. . . .," as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and Commission Rule 4.10(a)(2), 16 CFR 4.10(a)(2). Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c), 16 CFR 4.9(c).[1]

Because paper mail addressed to the FTC is subject to delay due to heightened security screening, please consider submitting your comments in electronic form. Comments filed in electronic form should be submitted by using the following weblink: (*https://ftcpublic.commentworks.com/ftc/coca-cola*) and following the instructions on the web-based form. To ensure that the Commission considers an electronic comment, you must file it on the web-based form at the weblink: (*https://ftcpublic.commentworks.com/ftc/coca-cola*). If this Notice appears at (*http://www.regulations.gov/search/index.jsp*), you may also file an electronic comment through that website. The Commission will consider all comments that regulations.gov forwards to it. You may also visit the FTC website at (*http://www.ftc.gov/*) to read the Notice and the news release describing it.

A comment filed in paper form should include the "The Coca-Cola Company, File No. 101 0107" reference both in the text and on the envelope, and should be mailed or delivered to the following address: Federal Trade Commission, Office of the Secretary, Room H-135 (Annex D), 600 Pennsylvania Avenue, NW, Washington, DC 20580. The FTC is requesting that any comment filed in paper form be sent by courier or overnight service, if possible, because U.S. postal mail in the Washington area and at the Commission is subject to delay due to heightened security precautions.

The Federal Trade Commission Act ("FTC Act") and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives, whether filed in paper or electronic form. Comments received will be available to the public on the FTC website, to the extent practicable, at (*http://www.ftc.gov/os/publiccomments.shtm*). As a matter of discretion, the Commission makes every effort to remove home contact information for individuals from the public comments it receives before placing those comments on the FTC website. More information, including routine uses permitted by the Privacy Act, may be found in the FTC's privacy policy, at (*http://www.ftc.gov/ftc/privacy.shtm*).

FOR FURTHER INFORMATION CONTACT: Jill Frumin, (202-326-2758), Bureau of Competition, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), and § 2.34 the Commission Rules of Practice, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis of Agreement Containing Consent Order to Aid Public Comment describes the terms of the consent

[1] The comment must be accompanied by an explicit request for confidential treatment, including the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. The request will be granted or denied by the Commission's General Counsel, consistent with applicable law and the public interest. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Home Page (for September 27, 2010), on the World Wide Web, at (*http://www.ftc.gov/os/actions.shtm*). A paper copy can be obtained from the FTC Public Reference Room, Room 130-H, 600 Pennsylvania Avenue, NW, Washington, D.C. 20580, either in person or by calling (202) 326-2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. All comments should be filed as prescribed in the **ADDRESSES** section above, and must be received on or before the date specified in the **DATES** section.

Analysis of Agreement Containing Consent Order to Aid Public Comment

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order from Respondent The Coca-Cola Company ("TCCC") to address concerns in connection with TCCC's acquisition of its largest bottler and the subsequent exclusive license from Dr Pepper Snapple Group, Inc. ("DPSG"), to bottle, distribute, and sell the Dr Pepper, Diet Dr Pepper, and Canada Dry carbonated soft drink brands of DPSG in certain territories. The Consent Agreement, among other things, requires that TCCC limit the persons within the company who have access to the commercially sensitive confidential information that DPSG may provide to TCCC to carry out the distribution functions contemplated by the license.

The DPSG-TCCC license agreement followed TCCC's announced proposed acquisition of the North American business of its largest bottler, Coca-Cola Enterprises Inc. ("CCE"). CCE is licensed by TCCC and DPSG to bottle and distribute many of their carbonated soft drink brands. Following the acquisition, TCCC, through its subsidiary Coca-Cola Refreshments U.S.A., Inc. ("CCR"), will take on the bottling and distribution functions previously performed in the United States by CCE.

The Complaint alleges that TCCC's access to DPSG's commercially sensitive confidential marketing and brand plans, without adequate safeguards to ensure that TCCC will not misuse the information, could lead to anticompetitive conduct that would make DPSG a less effective competitor and/or facilitate coordination in the industry. The proposed Consent Agreement remedies this concern by limiting access to the DPSG commercially sensitive information to TCCC employees who perform traditional carbonated soft drink "bottler functions" formerly performed by CCE and not permitting access to TCCC employees involved in traditional "concentrate-related functions."

II. Respondent The Coca-Cola Company

TCCC is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1 Coca-Cola Plaza, Atlanta, Georgia 30313. It is the world's largest soft drink company and makes or licenses more than 3,000 drinks under 500 brand names in 200 countries. In 2009, TCCC's worldwide revenues from the sale of all products were about $31 billion.

III. Licensor Dr Pepper Snapple Group, Inc.

DPSG is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5301 Legacy Drive, Plano, Texas 75024. Among other things, DPSG produces the concentrate for the DPSG carbonated soft drink brands that are distributed by its bottlers. Some of these brands are Dr Pepper, Diet Dr Pepper, Crush, Canada Dry, Schweppes, Vernor's, A&W Root Beer, 7-UP, RC Cola, Sunkist, and Squirt. In 2009, DPSG's net sales were about $5.5 billion, and its United States net sales of carbonated soft drink concentrate were about $1.1 billion. Dr Pepper Seven Up, Inc., will sign the license with TCCC.

IV. The Bottler

A. Coca-Cola Enterprises Inc.

CCE is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 2500 Windy Ridge Parkway Suite 700, Atlanta, Georgia 30039. It is the largest TCCC bottler in North America, spanning 46 states and the District of Columbia. In 2009, CCE's sales of carbonated soft drinks totaled about $21 billion. CCE's North American business operations contributed 70% of this revenue. CCE accounts for about 75-80% of TCCC's North America bottler-distributed volume, and TCCC products represent over 90% of CCE's total volume.

V. The Transactions

A. The Bottler Acquisition

On February 25, 2010, TCCC reached an agreement with CCE to acquire the North American assets of CCE for $12.3 billion. At the time of the agreement, TCCC owned about 34% of CCE. Post-acquisition, the North American operations of CCE will be subsumed within a new organization known as Coca-Cola Refreshments USA, Inc. ("CCR"). CCR's business will comprise CCE's current North American operations, and CCR also will have responsibility for the supply chain for still beverages and juices, fountain/Freestyle, and national key customer management. Post-acquisition, Coca-Cola USA will manufacture and supply concentrate and engage in consumer brand marketing and innovation with respect to new drinks and brands.

B. The DPSG-TCCC License Agreement

Following the agreement to acquire CCE, TCCC sought a license to continue to bottle and distribute the DPSG brands that CCE had distributed. (The DPSG license held by CCE was terminated by DPSG as a result of the proposed acquisition.) In the DPSG-CCR license agreement, TCCC agreed to bottle and distribute DPSG's Dr Pepper brand products and Canada Dry products in the former CCE territories, where CCE had been producing and distributing these products. TCCC to agreed to pay DPSG $715 million for a non-exclusive license to produce and an exclusive, twenty-year[2] license to distribute and sell those brands.

Under the license agreement, CCR has agreed, among other things to, (a) distribute the Dr Pepper brand in all classes of trade based on certain TCCC brands; (b) grow the Dr Pepper brand based in some measure on certain sales criteria of other bottlers; and (c) advertise, promote, and market the Dr Pepper brand and provide sales support for such promotions, based in some measure on CCR's advertising, promotions, and marketing of certain TCCC brands.

C. The DPSG-CCR Freestyle Agreement

TCCC also will give Dr Pepper access to TCCC's new proprietary "Freestyle" fountain dispensing equipment. The Freestyle machine has a footprint comparable to a traditional lever-based fountain dispenser, but it allows users to create more than 120 custom-flavored beverages. DPSG values the Freestyle

[2] The license agreement is for an initial term of twenty (20) years, with automatic renewal for additional twenty (20) year periods, unless terminated pursuant to its terms.

Participation Agreement at approximately $115 million.

VI. The Proposed Complaint

The Commission's Complaint alleges that TCCC and DPSG are direct competitors in the highly concentrated and difficult to enter (a) branded concentrate and (b) branded direct-store-delivered carbonated soft drink markets. The concentrate market is national, and the branded soft drink markets are local. Total United States sales of concentrate is about $9 billion, and total United States sales of carbonated soft drinks, measured at retail, is about $70 billion.

To carry out the distribution activities currently undertaken by the bottler and contemplated under the license agreement, DPSG will need to provide commercially sensitive confidential information about its marketing plans to CCR, the newly created TCCC bottler subsidiary. DPSG currently provides this sort of information to CCE in order for it to perform its bottler or distribution functions. The Commission is concerned that TCCC's access to this information could enable it to use the information in ways that could impair DPSG's ability to compete and ultimately injure competition by weakening a competitor or facilitating coordination in the industry. The Complaint alleges that TCCC's access to DPSG's confidential information could eliminate competition between TCCC and DPSG, increase the likelihood that TCCC may unilaterally exercise market power, and facilitate coordinated interaction in the industry.

VII. The Proposed Consent Order

Under the proposed Consent Order, to remedy the alleged competitive concern associated with access to the DPSG commercially sensitive confidential information, TCCC will be required to set up a "firewall" to ensure that persons at TCCC who may be in a position to use the DPSG commercially sensitive information in ways that may injure DPSG and/or facilitate coordination will not be allowed access to such information. Persons at TCCC who are assigned to perform traditional "bottler functions"– the kinds of functions that CCE have historically performed for DPSG – will be permitted access to the DPSG information. Persons responsible for "concentrate-related functions"– the kinds of functions that TCCC engaged in as a competitor of DPSG when both had their brands distributed by CCE – will not be permitted access to the DPSG information.

The proposed Consent Agreement provides for the appointment of a monitor to assure TCCC's compliance with the Consent Order. The monitor will have a fiduciary responsibility to the Commission. The monitor will be appointed for a five (5) year term, but the Commission may extend or modify the term as appropriate.

The proposed Consent Agreement contains a prior notice provision for subsequent acquisitions by TCCC of its franchised bottlers that also are licensed to distribute DPSG products. Under the order, TCCC will be required to give the Commission forty-five (45) advance notice of a proposed acquisition that is not subject to the Hart-Scott-Rodino Act and provide the Commission with all management documents relating to the proposed acquisition. If the 45-day period expires without Commission action, TCCC will be permitted to consummate the proposed acquisition and use DPSG confidential information in the territories of the newly acquired bottler as specified in this order. The standard Hart-Scott-Rodino procedures and time periods would continue to apply for Hart-Scott-Rodino reportable transactions.

The order, like the DPSG-TCCC license agreement, will have a term of twenty (20) years.

VIII. Opportunity for Public Comment

The Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed Consent Agreement, as well as the comments received, and will decide whether it should withdraw from the Consent Agreement or make final the Decision and Order.

By accepting the Consent Agreement subject to final approval, the Commission anticipates that the competitive problem alleged in the Complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the Consent Agreement. It is not intended to constitute an official interpretation of the proposed Consent Agreement, nor is it intended to modify the terms of the Decision and Order in any way.

By direction of the Commission, Commissioner Ramirez recused.

Donald S. Clark,

Secretary.

[FR Doc. 2010–24838 Filed 10–1–10; 12:10 pm]

BILLING CODE 6750–01–S

GOVERNMENT ACCOUNTABILITY OFFICE

Financial Management and Assurance; Government Auditing Standards

Correction

In notice document 2010–23374 beginning on page 57274 in the issue of Monday, September 20, 2010 make the following corrections:

1. On page 57275, in the first column, under the **ADDRESSES** section, in the second line, "(GAO–1O–853G)" should read "(GAO–10–853G)".

2. On the same page, in the same column, under the **ADDRESSES** section, in the third and fourth lines, "*http://www.gao.gov/govaud/vbkO1.htm.*" should read "*http://www.gao.gov/govaud/ybk01.htm.*".

3. On the same page, in the same column, under the **SUPPLEMENTARY INFORMATION** section, in the seventh line, "*yeJlowbookgao.gov*" should read "*yellowbook@gao.gov.*"

[FR Doc. C1–2010–23374 Filed 10–1–10; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Meeting of the Advisory Committee on Blood Safety and Availability

AGENCY: Office of the Assistant Secretary for Health, Office of the Secretary, Department of Health and Human Services.

ACTION: Notice.

SUMMARY: As stipulated by the Federal Advisory Committee Act, the U.S. Department of Health and Human Services is hereby giving notice that the Advisory Committee on Blood Safety and Availability (ACBSA) will hold a meeting. The meeting will be open to the public.

DATES: The meeting will take place Thursday, November 4, and Friday, November 5, 2010, from 8:30 a.m. to 5 p.m.

ADDRESSES: The Universities at Shady Grove, 9630 Gudelsky Drive, Rockville, Maryland 20850, Phone: 301–738–6000.

FOR FURTHER INFORMATION CONTACT: Jerry A. Holmberg, PhD, Executive Secretary, Advisory Committee on Blood Safety and Availability, Office of the Assistant Secretary for Health, Department of Health and Human Services, 1101 Wootton Parkway, Suite 250, Rockville, MD 20852, (240) 453–8803, FAX (240) 453–8456, e-mail *ACBSA@hhs.gov.*

SUPPLEMENTARY INFORMATION: The Advisory Committee on Blood Safety