



Federal Communications Commission  
Washington, D.C. 20554

March 2, 2020

Jeffrey A. Rosen, Deputy Attorney General  
Makan Delrahim, Assistant Attorney General  
Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

Dear Mr. Rosen and Mr. Delrahim,

The Office of Economics and Analytics (OEA) at the Federal Communications Commission (FCC)<sup>1</sup> commends and supports the Department of Justice (DOJ) and the Federal Trade Commission (FTC) (collectively, the “Agencies”) for seeking to provide updated guidance to practitioners evaluating the potential competitive effects of vertical mergers.<sup>2</sup> In particular, OEA supports the recognition in the *Draft Guidelines* that vertical mergers could reduce costs paid by end-consumers through the elimination of double marginalization or other efficiencies and also could lead to adverse unilateral and coordinated effects in a variety of settings that were not contemplated by the *1984 DOJ Non-Horizontal Merger Guidelines*.<sup>3</sup> Below, we suggest areas where additional explanation and clarification might potentially be provided within the *Draft Guidelines*. Additionally, OEA appreciates the opportunity for further public discussion of the *Draft Guidelines* and would be interested in participating at one or both public workshops to be held in March 2020.<sup>4</sup>

Sections 214(a) and 310(d) of the Communications Act of 1934, as amended (the Act), require the FCC to determine whether transactions seeking to transfer ownership of certain licenses and authorizations will serve the public interest, convenience and necessity.<sup>5</sup> The FCC’s competitive analysis, which forms an important part of its public interest evaluation, is informed by, but not limited to traditional antitrust principles.<sup>6</sup> The FCC and the DOJ each has independent authority to examine the

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<sup>1</sup> OEA was established in 2018 and draws on much of the collective economics and related expertise and experience of the FCC, including specialists in the economics of industrial organization, media and information, and telecommunications. *Establishment of the Office of Economics and Analytics*, MD Docket No. 18-3, Order, 33 FCC Rcd 1539 (2018); Press Release, FCC, FCC Opens Office of Economics and Analytics (Dec. 11, 2018), <https://docs.fcc.gov/public/attachments/DOC-355488A1.pdf>.

<sup>2</sup> U.S. Department of Justice and Federal Trade Commission, U.S. Department of Justice and the Federal Trade Commission Draft Vertical Merger Guidelines Released for Public Comment on January 10, 2020 (2020), <https://www.justice.gov/opa/press-release/file/1233741/download> (*Draft Guidelines*).

<sup>3</sup> U.S. Department of Justice, Non-Horizontal Merger Guidelines (1984), <https://www.justice.gov/atr/page/file/1175141/download?splash=1> (*1984 DOJ Non-Horizontal Merger Guidelines*).

<sup>4</sup> Press Release, Federal Trade Commission, FTC and DOJ Extend Deadline for Public Comments on Draft Vertical Merger Guidelines, Announce Two Related Public Workshops (Feb. 3, 2020), <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-doj-extend-deadline-public-comments-draft-vertical-merger>.

<sup>5</sup> 47 U.S.C. §§ 214, 310(d). Section 310(d) of the Communications Act requires that we consider applications for transfer of Title III licenses under the same standard as if the proposed transferee were applying for licenses directly under section 308 of the Act, 47 U.S.C. § 308.

<sup>6</sup> See *Satellite Bus. Sys.*, 62 FCC 2d 997, 1068-73, 1088 (1977), *aff’d sub nom United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*); see also *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 947 (1st Cir. 1993) (public interest standard does not require agencies “to analyze proposed mergers under the same standards that the Department of Justice . . . must apply”); *Applications of Charter Communications, Inc., Time Warner Cable Inc.*,

competitive impacts of proposed mergers and transactions involving transfers of FCC licenses, but the standards governing the FCC's competitive review differ somewhat from those applied by the DOJ.<sup>7</sup> Nevertheless, the FCC, like the DOJ, considers how a transaction would affect competition by defining a relevant market, looking at the market power of incumbent competitors, and analyzing barriers to entry, potential competition, and the efficiencies, if any, that may result from the transaction.<sup>8</sup>

In recent years, the FCC, pursuant to its statutory authority, has reviewed a number of vertical mergers, including mergers between content providers and distributors,<sup>9</sup> or between providers of Internet backbone and transport wholesale inputs (i.e., backhaul) and retail telecommunications service providers who rely on these inputs.<sup>10</sup> In its analyses, the FCC identified and assessed the presence of harms that arise specifically in the context of vertical mergers and similar transactions, such as foreclosure (whether in the upstream or downstream markets), raising rivals' costs strategies, and the exercise of market power due to increased bargaining leverage.<sup>11</sup> In approving or conditioning vertical mergers, the FCC also looked at potential offsetting benefits, including the elimination of double marginalization.<sup>12</sup> OEA's

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*and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 15-149, Memorandum Opinion and Order, 31 FCC Rcd 6327, 6337 para. 28 (2016) (*Charter/Time Warner Cable Order*); *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Memorandum Opinion and Order, 30 FCC Rcd 9131, 9140, para. 20 (2015) (*AT&T/DIRECTV Order*).

<sup>7</sup> See *Charter/Time Warner Cable Order* at 31 FCC Rcd at 6337-38, para. 28; *AT&T/DIRECTV Order*, 30 FCC Rcd at 9140, para. 20.

<sup>8</sup> See *Charter/Time Warner Cable Order* at 31 FCC Rcd at 6338, para. 28; *AT&T/DIRECTV Order*, 30 FCC Rcd at 9141, para. 20.

<sup>9</sup> See, e.g., *Charter/Time Warner Cable Order*; *AT&T/DIRECTV Order*; *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licenses*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238 (2011) (*Comcast/NBCU Order*); *Applications of General Motors Corporation, Hughes Electronics Corporation and The News Corporation LTD*, MB Docket No. 03-124, Memorandum Opinion and Order, 19 FCC Rcd 473 (2004) (*News Corp./Hughes Order*); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc., and America Online, Inc., et al.*, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd 6547 (2001) (*AOL/Time Warner Order*).

<sup>10</sup> See, e.g., *Applications of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, Memorandum Opinion and Order, 20 FCC Rcd 18433 (2005) (*Verizon/MCI Order*); *Applications of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290 (2005) (*SBC/AT&T Order*). Additionally, certain horizontal mergers that the FCC analyzed presented competition issues, such as selling to downstream competitors, that are similar to those found in vertical mergers. See, e.g., *Applications of T-Mobile US, Inc., and Sprint Corporation For Consent To Transfer Control of Licenses and Authorizations; et al.*, WT Docket No. 18-197, Memorandum Opinion and Order, Declaratory Ruling, Order Proposing Modification, 34 FCC Rcd 10578 (2019) (*T-Mobile/Sprint Order*).

<sup>11</sup> See, e.g., *Charter/Time Warner Cable Order*, 31 FCC Rcd at 6340, 6402-03, 6623, paras. 34, 160, Appx. C, para. 109; *AT&T/DIRECTV Order*, 30 FCC Rcd at 9191-92, 9205, paras. 162, 198; *Comcast/NBCU Order*, 26 FCC Rcd at 4250, 4252-53, 4282, 4382-98, paras. 29, 34, 110, Appx. B, paras. 2-52; *Verizon/MCI Order*, 20 FCC Rcd at 18446, para. 20; *SBC/AT&T Order*, 20 FCC Rcd at 18303, para. 20; *News Corp./Hughes Order*, 19 FCC Rcd at 519, 522-23, 632-647, paras. 101, 109, Appx. D; *AOL/Time Warner Order*, 16 FCC Rcd at 6582, 6644, paras. 80, 238.

<sup>12</sup> See, e.g., *Charter/Time Warner Cable Order*, 31 FCC Rcd at 6501, para. 373; *AT&T/DIRECTV Order*, 30 FCC Rcd at 9175, 9177, paras. 114, 119; *Comcast/NBCU Order*, 26 FCC Rcd at 4334-35, paras. 235-237; *Verizon/MCI*

comments on the *Draft Guidelines* are informed by those efforts and the lessons learned therein. We note that, while our response is framed in terms of discussion of vertical mergers, we view the *Draft Guidelines* as potentially applicable to a broader set of vertical transactions and transactions involving complementary products.<sup>13</sup>

## Market Definition

The *Draft Guidelines* state that many of the general purposes and limitations of market definition described in the *2010 DOJ/FTC Horizontal Merger Guidelines* are also relevant when the Agencies define markets for vertical mergers.<sup>14</sup> In Section 2 of the *Draft Guidelines*, we suggest stating more explicitly, as do the *2010 DOJ/FTC Horizontal Merger Guidelines*,<sup>15</sup> that market definition does not need to underpin all aspects of an antitrust analysis.<sup>16</sup> Specifically, we suggest appending the following sentence from the *2010 DOJ/FTC Horizontal Merger Guidelines* to the end of paragraph 1 of Section 2 of the *Draft Guidelines*:

**The Agencies’ analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.**

## Related Products

We understand that by identifying two relevant markets, *Example 1* in the *Draft Guidelines* lays the groundwork for investigating two potential anticompetitive stories. The first is that the merging retail chain would gain control of a “significant” cleaning product and might refuse to sell it to competing retailers of cleaning products (or sell it at a significantly higher price), which could disadvantage competing retail sellers (possibly leading to their exit from sale of cleaning products), potentially resulting in higher prices for cleaning products to end user customers. A second anticompetitive story is that the chain might refuse to carry competing cleaning products post-merger, which could cause the exit

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*Order*, 20 FCC Rcd at 18533-34, para. 202; *SBC/AT&T Order*, 20 FCC Rcd at 18387, para. 190; *News Corp./Hughes Order*, 19 FCC Rcd at 544-45, paras. 154-56.

<sup>13</sup> See, e.g., *T-Mobile/Sprint Order*, 34 FCC Rcd at 10704, para. 285; *Charter/Time Warner Cable Order*, 31 FCC Rcd at 6344, para. 41; *AT&T/DIRECTV Order*, 30 FCC Rcd at 9166-67, para. 85; *Applications of GCI Communication Corp., ACS Wireless License Sub, Inc., ACS of Anchorage License Sub, Inc. and Unicom, Inc. For Consent to Assign Licenses to the Alaska Wireless Network, LLC*, WT Docket No. 12-187; WC Docket No. 09-197, Declaratory Ruling, Memorandum Opinion and Order, 28 FCC Rcd 10452, 10453, paras. 48-49 (2013); *Comcast/NBCU Order*, 26 FCC Rcd at 4250, para. 27; *Verizon/MCI Order*, 20 FCC Rcd at 18534, para. 203; *SBC/AT&T Order*, 20 FCC Rcd at 18387-8, para. 191.

<sup>14</sup> *Draft Guidelines* at § 2; U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, § 4 (2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> (*2010 DOJ/FTC Horizontal Merger Guidelines*).

<sup>15</sup> *2010 DOJ/FTC Horizontal Merger Guidelines* at § 4.

<sup>16</sup> We appreciate that this point is made with respect to merger simulation in Section 5, but believe the point should be moved up and broadened. *Draft Guidelines* at § 5.

of competing cleaning products (due perhaps to a reduction in scale economies for these products).<sup>17</sup> Both stories have been raised as potential areas of concern in vertical mergers reviewed by the FCC.

Based on this understanding of *Example 1*, we have several specific comments regarding the exposition in Section 2.

- We suggest calling “related products” “vertically related products” to narrow the focus. The word “related” is a very general term that could be subject to unintended interpretation.
- The draft refers to the “supply of a product” or the “purchase of a product” as a product itself. We think the use of “supply” or “purchase” as a product could be confusing. It could either refer to the products themselves (as in *Example 1* for cleaning products) or it could refer to retail services involved in selling cleaning products to end users or wholesale distribution services used to sell cleaning products to retail establishments. Both may be useful designations (or they may be equivalent). It would be helpful to specify which of these is meant by “supply” or “purchase.”
- *Example 1* indicates that a vertically related product could be either an input or a final good. However, the description above *Example 1* only suggests that vertically related products are inputs. It would be helpful to state specifically that final goods could be vertically related products when the relevant market is an input.<sup>18</sup>
- We think it would avoid unintended interpretation to state specifically that vertically related products are not part of the relevant market for purposes of market definition or market share calculation. We suggest the following or a similar phrase to the end of paragraph 2 of Section 2 of the *Draft Guidelines*: **For the purposes of market definition, the vertically related product is not itself part of the relevant market. For clarity this implies (*inter alia*), quantities of the vertically related product are not part of the calculations of market shares of the relevant market.**

Accepting the suggestions above, we would rewrite *Example 1* as follows:

*Example 1: A retail chain buys a manufacturer of cleaning products. In this example, the Agencies may identify two relevant markets. The first potential relevant market is ~~the supply of~~ cleaning products **sold** to retail customers in a given geographic area. For this relevant market, ~~thea~~ **vertically** related product is ~~the supply of the cleaning products sold by the merging manufacturer to retailers in the geographic area.~~ The second potential relevant market is ~~the supply of~~ cleaning products **sold** to retailers in a given geographic area. For this relevant market, ~~thea~~ **vertically** related product is ~~the purchase or distribution of that manufacturer’s cleaning products to sell~~ **sold** to retail customers in a geographic area.*

We believe that the above clarifications have the potential to eliminate confusion among antitrust practitioners by more clearly laying out the association between vertically related product and relevant

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<sup>17</sup> Thus, *Example 1* in the *Draft Guidelines* indicates that vertical mergers have the potential to result in post-merger unilateral effects in an upstream product (i.e., input) market, a downstream product market, or both, and the extent of adverse unilateral effects in each can depend on the degree of product or geographic market competition either upstream or downstream.

<sup>18</sup> Note that we view “final good” as being potentially different from “means of distribution” mentioned in the *Draft Guidelines*. *Draft Guidelines* at § 2.

market. While, as we interpret it, the concept of vertically related product is not novel—for instance, it factors in the FCC’s various vertical merger analyses<sup>19</sup>—to our knowledge, the meaning of “related product” applied in the *Draft Guidelines* is non-standard.

### **Market Participants, Market Shares, and Market Concentration**

While we do not comment on the specific choice of 20% as the market share threshold in the *Draft Guidelines*, we suggest that the *Draft Guidelines* further elaborate that the threshold serves as a guide to practitioners rather than being dispositive of either the absence or presence of competitive concerns.<sup>20</sup> Specifically, it might be helpful if the *Draft Guidelines* clarify or provide examples of conditions under which the Agencies may be less concerned about a vertical merger that exceeds the threshold or more concerned about a vertical merger that does not.

For instance, even if an input has a related product share that exceeds a specific threshold, if that input is easily substitutable, the Agencies might be less concerned. Alternatively, if the input is technologically necessary and users would have to incur significant fixed costs to substitute away from that input, then the Agencies might wish to conduct further analysis. Additionally, the Agencies may also wish to elaborate on whether and how the post-merger bargaining power of the vertically related product provider would be a consideration with respect to the relevance of a specific threshold, recognizing that the economics literature on this topic continues to evolve.<sup>21</sup>

### **Evidence of Adverse Competitive Effects**

The *Draft Guidelines* state that evidence of pre-existing contractual relationships may affect a range of relevant market characteristics.<sup>22</sup> The *Draft Guidelines* might clarify factors in such contracts that could be used in evaluating vertical mergers or, alternatively, in referencing pre-existing contractual relationships, the *Draft Guidelines* might refer to the relevant corresponding sections of the *2010 DOJ/FTC Horizontal Merger Guidelines*.<sup>23</sup>

### **Merger Specificity of Vertical Harm**

As stated above, we view the *Draft Guidelines* as applying to a broader set of vertical transactions and transactions involving complementary products. In this respect, an area where the *Draft Guidelines* might provide additional clarification concerns the analysis of mergers of already vertically integrated firms. The FCC has analyzed a number of such mergers and found that certain theories of harm that apply in vertical mergers are relevant in these mergers as well.<sup>24</sup> For example, in reviewing the

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<sup>19</sup> See Footnote 11, above.

<sup>20</sup> *Draft Guidelines* at § 3.

<sup>21</sup> See, e.g., Gregory Crawford, Robin Lee, Michael Whinston, & Ali Yurukoglu, *The Welfare Effects of Vertical Integration in Multichannel Television Markets*, 86(3) *Econometrica*, 891-954 (2018); U.S. Department of Justice, Gloria Sheu & Charles Taragin, *Simulating Mergers in a Vertical Supply Chain with Bargaining* (2017), <https://www.justice.gov/atr/page/file/1011676/download>.

<sup>22</sup> *Draft Guidelines* at § 4.

<sup>23</sup> See, e.g., *2010 DOJ/FTC Horizontal Merger Guidelines* at § 2.2.2, 5.2, 7.2.

<sup>24</sup> See, e.g., *Charter/Time Warner Cable Order*, 31 FCC Rcd at 6341-42, 6347, paras. 36, 46 (discussing how the merger could potentially harm online video distribution competition), id. at 6402-03, para. 160 (discussing potential

Charter/Time Warner Cable transaction, the FCC examined the increased incentive and ability of the merged firm to either temporarily or permanently foreclose (or to raise the price for) New Charter's video distribution rivals from access to valuable programming.<sup>25</sup> To the extent possible, we believe that the *Draft Guidelines* should offer guidance concerning the merger specificity of vertical harm when foreclosure incentives already exist. Transactions that give downstream or upstream firms a significantly larger footprint potentially result in greater market power to engage in exclusionary strategies.

### **Organization of the *Draft Guidelines***

The order of the sections in the Draft Guidelines could follow a more natural progression similar to that found in the *2010 DOJ/FTC Horizontal Merger Guidelines*. Section 4 (Evidence) could precede Sections 2 and 3, as it lays out the discussion to come. Additionally, Section 7 (Coordinated Effects) could come before Section 6. This way, the two sections on adverse competitive effects (unilateral and coordinated) can precede the two sections on countervailing benefits (elimination of double marginalization and efficiencies).

Thank you once again for your thoughtful effort in creating these guidelines and for giving us a chance to review them. Once finalized, we anticipate that these guidelines will prove immensely insightful to FCC staff and antitrust practitioners more broadly.

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harm arising from Time Warner Cable's and Bright House's ownership of video programming and cable distribution networks); *Comcast/NBCU Order*, 26 FCC Rcd at 4252-54, paras. 34-36.

<sup>25</sup> *Charter/Time Warner Cable Order*, 31 FCC Rcd at 6402-03, para. 160.

Respectfully submitted,

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