



August 20, 2018

The Honorable Joseph Simons  
Chairman  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Dear Chairman Simons,

Thank you for inviting public comment on competition and consumer protection issues in communication, information, and media technology networks. I am submitting these comments on behalf of the Writers Guild of America West (WGAW), a labor organization representing more than 10,000 professional writers of motion pictures, television, radio, and Internet programming, including news and documentaries. Our members and the members of our affiliate, Writers Guild of America East (jointly, "WGA") create nearly all of the scripted entertainment viewed in theaters and on television today as well as most of the original scripted series now offered by online video distributors ("OVDs") such as Netflix, Hulu, Amazon, Crackle, and more.

As broadband Internet becomes the central technology for distributing and consuming news and entertainment, reasonably priced, high quality broadband service and a free and open Internet are essential to the health of democracy, the economy, and the livelihoods and creative freedom of WGAW members. However, evidence indicates a lack of meaningful competition and resultant harm to Internet and video consumers.

During a recent California Public Utilities Commission investigation into the state of broadband competition, WGAW examined high-speed<sup>1</sup> wired broadband availability data for the state, finding that 69% of California's population lived in census blocks served by only one provider of high-speed wired broadband.<sup>2</sup> As the FCC has observed, most high-capacity broadband activities, such as streaming video, still occur on wired broadband because of mobile data costs and reliability issues, meaning that wireless broadband does not provide a competitive substitute.<sup>3</sup> Limited investment in overbuilding due to significant costs and barriers to entry

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<sup>1</sup> Using the Federal Communications Commission's definition of high-speed broadband as 25 Mbps downstream and 3 Mbps upstream or higher.

<sup>2</sup> Writers Guild of America West, *Testimony Submitted as Supplemental Information Request Response in the Matter of the Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions Raised in the Limited Rehearing of Decision 08-09-042*, Public Utilities Commission of the State of California (November 5, 2015); Data source is FCC Form 477 data as of June 30, 2015, which contains broadband availability information by U.S. census block. This analysis likely overstates broadband availability as a broadband provider may not offer service to all of the residents or any given census block.

<sup>3</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, 2018 Broadband Deployment Report*, GN Docket No. 17-199, ¶ 15 (2018); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Improvement Act, 2016 Broadband Progress Report*, GN Docket No. 15-191, ¶ 2 (2016).

means that the lack of competition is unlikely to change substantially. Even the expansion of Google Fiber has stalled out, despite the vast resources of its parent company. As industry analyst Craig Moffett testified before Congress, “The returns to be had from overbuilding—that is, being the second or third broadband provider in a given market—are generally poor... Stated simply, it means that market forces are unlikely to yield a competitive broadband market.”<sup>4</sup>

The lack of competition leaves Internet service providers free to raise prices and interfere with content without fear of customer defections. After Charter Communications acquired Time Warner Cable and Bright House Networks, the new company immediately increased prices in the double or triple digit percentages for its acquired customers.<sup>5</sup> Consumers with no alternatives for high-speed Internet access likewise cannot opt out of service that throttles or discriminates against unaffiliated online video services, degrades the customer experience to leverage interconnection fees from edge providers,<sup>6</sup> or steers customers to affiliated online or traditional video services through data caps. According to an analysis by the Institute for Local Self Reliance, 40% of Americans in census blocks served by only one high-speed broadband provider, and 33% of Americans in census blocks served by two high-speed broadband providers, must purchase service from a company with a record of violating net neutrality.<sup>7</sup>

As a result, Americans are deeply dissatisfied with the broadband marketplace. Cable and Internet service providers rank lowest among the 46 industries covered by the American Customer Satisfaction Index (ACSI), and customer satisfaction deteriorated year over year.<sup>8</sup> According to the ACSI’s 2018 Telecommunications Report, “Customers are unhappy with the high price of poor service, but many households have limited alternatives.”<sup>9</sup>

The failures of the market for high-speed broadband access are typical of infrastructure markets due to the high cost of entry. Regulatory oversight is warranted where markets systematically

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<sup>4</sup> Craig Moffett. *Testimony on Promoting Broadband Infrastructure Investment*. Committee on Energy and Commerce, US House of Representatives (July 22, 2015). Available at:

<https://docs.house.gov/meetings/IF/IF16/20150722/103745/HHRG-114-IF16-Wstate-MoffettC-20150722.pdf>.

<sup>5</sup> Rick Moriarty, *Price-shocked Spectrum cable customers react, ready to cut cord: 'I'm really upset'*, Syracuse.com (May 22, 2017),

[https://www.syracuse.com/news/index.ssf/2017/05/higher\\_prices\\_prompting\\_some\\_spectrum\\_cable\\_tv\\_customers\\_to\\_cut\\_the\\_cable.html](https://www.syracuse.com/news/index.ssf/2017/05/higher_prices_prompting_some_spectrum_cable_tv_customers_to_cut_the_cable.html); Linnea Zielinski, *Here's how to get your old rate back if Spectrum jacks up your internet bill*, Metro (May 11, 2017), <https://www.metro.us/news/local-news/new-york/negotiate-time-warner-cable-spectrum-internet-rate>; *Brindisi calls for investigations into Spectrum cable TV, internet price hikes*, The Rome Sentinel (Apr. 26, 2018), <http://romesentinel.com/county/brindisi-calls-for-investigations-into-spectrum-cable-tv-internet-price-hikes/QBqrdz!5O6Mnw5Mp8vfbvnxr84SVw/>; John Matarese, *How to lower that soaring Spectrum cable bill*, WCPO Cincinnati (Mar. 15, 2018), <https://www.wcpo.com/money/consumer/dont-waste-your-money/how-to-lower-that-soaring-spectrum-cable-bill>; Danielle Serino, *Spectrum customers get big surprises in their monthly bills*, WKYC 3 (May 17, 2018), <https://www.wkyc.com/article/tech/spectrum-customers-get-big-surprises-in-their-monthly-bills/552799867>; Andrew Hyman, *Price hike in Spectrum Cable bills can leave customers stunned*, Erie News Now (May 18, 2018), <http://www.erienewsnow.com/story/38228295/price-hike-in-spectrum-cable-bills-can-leave-customers-stunned>; Jackie Callaway, *Spectrum raising rates on almost everyone; in some cases customers say they are shocked*, ABC Action News (Mar. 9, 2017), <https://www.abcactionnews.com/money/consumer/taking-action-for-you/spectrum-raising-rates-on-almost-everyone-in-some-cases-customers-say-they-are-shocked>; John Cheves, *'What the hell?': TV screens go dark as Spectrum cuts channels, raises prices*, Lexington Herald Leader (May 1, 2017), <https://www.kentucky.com/news/politics-government/article147369744.html>.

<sup>6</sup> Open Technology Institute. *Beyond Frustrated: The Sweeping Consumer Harms as a Result of ISP Disputes* (Nov. 12, 2014), <https://www.newamerica.org/oti/policy-papers/beyond-frustrated-the-sweeping-consumer-harms-as-a-result-of-isp-disputes/>.

<sup>7</sup> Christopher Mitchell, *Repealing Net Neutrality Puts 177 Million Americans at Risk*, Institute for Local Self-Reliance (Dec. 11, 2017), <https://ilsr.org/repealing-net-neutrality-puts-177-million-americans-at-risk/>.

<sup>8</sup> American Customer Satisfaction Index. *ACSI Telecommunications Report 2018* (May 22, 2018), <http://marketing.theacsi.org/acton/attachment/5132/f-0060/1/-/-/-/ACSI%20Telecommunications%20Report%202018.pdf>.

<sup>9</sup> *Ibid.* at 8.

fail to serve the interests of consumers. We encourage vigorous oversight of the broadband access market and prohibitions on anticompetitive practices by Internet service providers that favor their own affiliated online and traditional video services over unaffiliated video services. Enforcement is welcome, although an ex post facto case-by-case approach will not provide adequate deterrence. Addressing market failures and consumer abuses ultimately requires the reclassification of broadband as a Title II common carrier.

We thank you again for the opportunity to participate in these hearings.

Sincerely,

Garrett Andrew Schneider, PhD  
Senior Research and Policy Analyst  
Writers Guild of America West



August 20, 2018

The Honorable Joseph Simons  
Chairman  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

Dear Chairman Simons,

Thank you for inviting public comment on evaluating the competitive effects of corporate acquisitions and mergers. I am submitting these comments on behalf of the Writers Guild of America West (WGAW), a labor organization representing more than 10,000 professional writers of motion pictures, television, radio, and Internet programming, including news and documentaries. Our members and the members of our affiliate, Writers Guild of America East (jointly, "WGA") create nearly all of the scripted entertainment viewed in theaters and on television today as well as most of the original scripted series now offered by online video distributors ("OVDs") such as Netflix, Hulu, Amazon, Crackle, and more.

The entertainment industry has experienced significant consolidation in recent years. The three largest employers—Disney-Fox, AT&T-Time Warner, and CBS-Viacom<sup>1</sup>—control almost 60% of the market for professional audiovisual writing services.<sup>2</sup> This level of consolidation creates significant buyer power in a labor market with high levels of search and matching frictions. The market for above-the-line<sup>3</sup> talent in the entertainment industry is characterized by limited and irregularly timed demand per job title, highly specialized skills, and a matching process strongly influenced by relationships and personal idiosyncrasies, contributing to employers' leverage. The three largest film distributors—Disney-Fox, AT&T-Time Warner, and Comcast-NBCU—account for more than two-thirds of annual box office receipts, with the other major studios, Sony and Viacom, accounting for most of the remainder.<sup>4</sup> Disney-Fox alone controls 30% of all basic cable affiliate fees in the US.<sup>5</sup>

Conventional economic and legal analysis of the competitive effects of corporate acquisitions and mergers has allowed this accumulation of market power and deterioration of competition in the entertainment industry and economy-wide. As Professor John Kwoka observed, "[M]erger enforcement has over time both diminished overall and tilted toward especially problematic mergers...the diminished attention to mergers involving somewhat lower market shares and concentration appears to have resulted in approval of significantly more mergers that prove to

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<sup>1</sup> Due to joint supermajority ownership by National Amusement, CBS and Viacom are treated as a single entity for antitrust purposes according to Viacom's own annual reports. In addition, National Amusements is attempting to formally merger CBS and Viacom together.

<sup>2</sup> WGAW analysis using internal data.

<sup>3</sup> Above-the-line talent is the entertainment industry terminology for the key creative talent on a production, i.e. the writers, actors, and directors.

<sup>4</sup> Calculation using Box Office Mojo data

<sup>5</sup> Calculation using SNL Kagan data.

be anticompetitive.”<sup>6</sup> In particular, the current model for antitrust enforcement fails to give sufficient consideration to labor market monopsony and vertical integration.

The Department of Justice and Federal Trade Commission’s *Horizontal Merger Guidelines* state, “To evaluate whether a merger is likely to enhance market power on the buying side of the market, the Agencies employ essentially the same framework described above for evaluating whether a merger is likely to enhance market power on the selling side of the market.”<sup>7</sup> Despite this, little attention has been paid to the effects of mergers on labor markets, and not a single merger has been blocked by the courts on the basis of labor market harm.<sup>8</sup> The extent and impact of antitrust underenforcement in this area is becoming clear from a stream of academic research suggesting extreme labor market concentration in much of the country. Using a dataset on the near universe of online job openings, Azar, Marinescu, Steinbaum, and Taska (2018) found an average labor market HHI of 3,963; 54% of labor markets are extremely concentrated.<sup>9</sup> A paper by Azar, Marinescu, and Steinbaum (2017) drawing upon CareerBuilder.com data found an average labor market HHI of 3,157.<sup>10</sup> The authors also found that extreme labor market concentration harms workers by suppressing wages. Moving from labor markets in the 25<sup>th</sup> percentile of concentration to labor markets in the 75<sup>th</sup> percentile is associated with a 17% decline in posted wages.<sup>11</sup>

Conventional economic and legal antitrust analysis tends to overstate the benefits and understate the harms of vertical integration, leading to relatively infrequent enforcement and a reliance on behavioral remedies. The DOJ’s recent effort to block the AT&T-Time Warner merger stands out for the size of the transaction and the DOJ’s insistence on structural remedies. However, between 1994 and 2016, the DOJ and FTC challenged only 52 vertical mergers, compared to 30-50 horizontal enforcement actions annually.<sup>12</sup> Recent research questions the realization of consumer benefits from the elimination of double marginalization (“EDM”), identifies the incentives to foreclose and resulting damage, and takes seriously the harms of access to competitively sensitive business information and enhanced bargaining leverage.<sup>13</sup> In a study of the integration of regional sports networks with multichannel video programming distributors, Crawford, Lee, Whinston, and Yurukoglu (2017) found that vertical integration harms rival distributors, and leads to consumer and total welfare losses in the absence of effective enforcement of program access rules.<sup>14</sup> In the vertical merger between Comcast and NBCU, the DOJ itself acknowledged minimal gains from EDM: “In certain industries, however, including the one at issue here, vertical mergers are far less likely to reduce or eliminate double marginalization...much, if not all, of any potential double marginalization is reduced, if not completely eliminated through the course of contract

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<sup>6</sup> John Kwoka. 2015. *Mergers, Merger Control, and Remedies: A Retrospective Analysis of US Policy*. (Cambridge: The MIT Press), at 158.

<sup>7</sup> US Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* at 32 (Aug. 29, 2010).

<sup>8</sup> Hovencamp and Marinescu at 1.

<sup>9</sup> Jose Azar, Ioana Marinescu, Marshall Steinbaum, and Bledi Taska. 2018. “Concentration in US Labor Markets: Evidence from Online Vacancy Data.” (Unpublished ms.). Available at: <http://www.nber.org/papers/w24395>.

<sup>10</sup> Jose Azar, Ioana Marinescu, and Marshall Steinbaum. 2017. “Labor Market Concentration.” (Unpublished ms.). Available at: <http://www.nber.org/papers/w24147>.

<sup>11</sup> *Ibid.* at 2.

<sup>12</sup> Steven C. Salop and Daniel P. Culley. 2017. “Vertical Merger Enforcement Actions: 1994-2016.” (Unpublished ms.). Available at: <https://scholarship.law.georgetown.edu/facpub/1529/>; Steven C. Salop. 2018. “Invigorating Vertical Merger Enforcement,” *The Yale Law Journal*. 127:1962-1994 (“Salop 2018”).

<sup>13</sup> Salop 2018.

<sup>14</sup> Gregory S. Crawford, Robin S. Lee, Michael D. Whinston, and Ali Yurukoglu. 2017. “The Welfare Effects of Vertical Integration in Multichannel Television Markets.” *NBER Working Paper Series*, Working Paper 21832. Available at: <http://www.nber.org/papers/w21832>.

negotiations.”<sup>15</sup> But the merger did incentivize Comcast to use its control as a distributor to favor its own networks and harm rival programmers, as evidenced in its dispute with Bloomberg TV.<sup>16</sup> Professor Steven Salop’s call for stronger vertical enforcement rings especially true in the entertainment industry: “[V]igorous vertical merger enforcement is a necessity...particularly...in markets where economies of scale and network effects lead to barriers to entry and durable market power.”<sup>17</sup>

These deficiencies in the existing antitrust enforcement framework have contributed to the current levels of concentration in the entertainment industry, where writers have long recognized the harms of consolidated media and creative labor markets. Writers experience these harms in downward pressure on their compensation, shrinking television writing staffs, the elimination of development jobs, and the near impossibility of walking away from abusive terms and working conditions. Media consolidation makes it even harder for diverse and independent voices to reach the public. As media conglomerates increasingly seek to own content and monetize it across ancillary markets worldwide, independent companies get squeezed out by the affiliated studios of television networks, OVDs, and major film distributors. Furthermore, media consolidation impedes innovation by subjecting creative decision-making to increased employer control and encouraging theatrical development budgets to be slashed in favor of movie franchises and remakes.

The entrance of Netflix and Amazon, two deep-pocketed and highly-visible companies, into the production of original programming has created a misperception that the market for creative labor has become robustly competitive. Netflix and Amazon are currently only minor producers of original content, each accounting for just 2% of WGAW-covered TV/digital earnings in 2016. As exhibitors of original programming, Netflix and Amazon are larger because they release series produced by third parties, but Amazon exhibited just 4% of all original scripted TV/digital episodes last season, while Netflix exhibited 12%. Instead, much of Netflix and Amazon’s substantial programming budgets go to licensing syndicated content produced by traditional media companies who exercise buyer power in the market for creative labor. While Netflix may become a larger producer and exhibitor in the future, it will likely concentrate production in-house rather than nurturing an ecosystem of competing content suppliers. Beyond new streaming services from already-powerful players like Apple and Disney, additional competition is increasingly unlikely,<sup>18</sup> suggesting that attrition and consolidation in streaming services may diminish competition in the next few years.

Addressing the harms of labor market consolidation and vertical integration requires the discipline of retrospective review as well as new legal tools. Retrospective review is helpful in revising economic and legal analysis in light of observed behavior and unwinding mergers and acquisitions that prove anticompetitive. In addition, we encourage the Federal Trade Commission to support legislation that creates a rebuttable presumption of harm for megamergers and reduces the burden on plaintiffs suing to block a merger. These tools will enable the FTC to prevail in its attempts to restore free and fair market competition.

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<sup>15</sup> Competitive Impact Statement, *United States et al. v. Comcast Corp., et al.* (2011). Available at: <http://www.justice.gov/atr/case-document/competitive-impact-statement-72>.

<sup>16</sup> Jasmine Melvin, *FCC sides with Bloomberg over Comcast dispute*, Reuters (May 2, 2012), <https://www.reuters.com/article/fcc-comcast-bloomberg/u-s-fcc-sides-with-bloomberg-over-comcast-dispute-idUSL1E8G2N8C20120502>.

<sup>17</sup> Salop 2018 at 1962.

<sup>18</sup> Moffett Nathanson Research, *What Should Amazon Do with Prime Video*, at 1 (June 26, 2018).

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