Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue NW
Washington, DC 20580

Re: FTC [illegible] DOJ [illegible]

To the FTC Commissioners and Staff and the DOJ Antitrust Division:

Introduction and Summary

These comments express the views of Randolph May, President of the Free State Foundation, and Theodore Bolema, Director of the Institute for the Study of Economic Growth at Wichita State University and a member of the Board of Academic Advisors of the Free State Foundation.[1] The Free State Foundation is an independent, nonpartisan, non-profit free market-oriented think tank focusing heavily on communications and Internet law and policy. Within the realm of that communications and Internet law and policy work, the Free State Foundation has focused on, and devoted scholarly resources to, researching and writing about public policy-related issues. It is with this expertise and experience in mind that we offer these comments on the two agencies' proposed vertical merger guidelines.

[1] The views expressed do not necessarily represent the views of others associated with the Free State Foundation or Wichita State University.

The Free State Foundation
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presumption.[4] In effect, deregulatory rebuttable presumptions are a matter of procedure not requiring substantive law change, while it is less clear that a presumption of harm from a vertical merger is not a substantive change. Randolph May points out that similar deregulatory presumptions have been created by other agencies, including:

> FERC's presumption that sellers who "pass[] two indicative . . . screens" lack horizontal market power and the FCC's presumption that foreign carriers with less than 50% market share in relevant foreign markets "lack[] sufficient market power to effect competition in the United States." In both cases, the agency expressly provided for parties who wish to contest the application of the presumption in specific circumstances to make their case to the agency. Similar provisions for contesting the rebuttable presumption could be made by the FCC in implementing Sections 10 and 11 (internal citations omitted).[5]

While some burden-shifting presumptions already exist for horizontal mergers, it is not appropriate at this time to impose new presumptions against vertical mergers. With very little

distribution channel is considered related if access to "an input, a means of distribution, or . . . set of customers" would affect competition in the relevant market. For example, in the challenge to the AT&T/Time Warner merger, DOJ claimed that the combined company could deny access to key Warner programming such as HBO to video programming distributors that compete with AT&T's U-Verse and DirecTV services.

The foreclosure theory raised by DOJ in its AT&T/Time Warner challenge is a plausible economic theory that failed to persuade the court based on the harm not being supported by the DOJs evidence. The foreclosure and raising rivals' costs theories, which are included in the new Draft Guidelines, were not discussed in the 1984 Guidelines. If including a definition for related products is intended to provide a foundational concept for these vertical theories of harm, then including the definition is a useful addition to the Draft Guidelines. If, however, the concept of "related product" is included to support a separate theory of harm, the agencies should clarify that this is their intent.

We propose that the agencies add some clarifying language to this section of the Draft Guidelines. We do not believe that the agencies intend to create a separate theory of harm by adding this definition of related products, nor should they, but this language appears to be somewhat unclear about what the agencies intended. Moreover, the agencies could add some language on how the agencies plan to determine whether access to a related product affects competition in the relevant market.

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The Draft Guidelines recognize that evidence of efficiencies can be used to offset anticompetitive concerns from a vertical merger. This discussion is presented in a rather negative way, however. Section 6 of the Draft Guidelines presents the agencies' discussion of eliminating "double marginalization," or having only one company profiting from marking up prices instead of two. The Draft Guidelines acknowledge that eliminating double marginalization often benefits both the merging companies and their customers. Elsewhere the Draft Guidelines only briefly acknowledge that other efficiencies are possible and refers to efficiency analysis in the Horizontal Mervideniidelatthat other efficiencsisiciencustom.5g <<1 (a)4 4-1.15 6-2 (ff)-3 (ive gv.-2 (ffr.