Federal Communications Commission
Washington, D.C. 20554

March 2, 2020

Joseph J. Simons, Chairman
Ian R. Conner, Director, Bureau of Competition
Andrew Sweeting, Director, Bureau of Economics
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Mr. Simons, Mr. Conner, and Dr. Sweeting:

The Office of Economics and Analytics (OEA) at the Federal Communications Commission (FCC)[1] 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.[2] In particular, OEA supports the recognition in the Draft Gui98 2d [(I)-2(f 370.87 502.03 Td [(O)5 (EA)7.002 ( )]TJ ETd [(D)5 (ra6T0 11.04 T46424.24 489.43 Td ( 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.[3] 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.[4]

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.[5] 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.[6] The FCC and the DOJ each has independent authority to examine the

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[1] 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.

[2] 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).

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

[4] 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.

[5] 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.

[6] See Satellite Bus. Sys., 62 FCC 2d 997, 1068-73, 1088 (1977), D I I ¶ G V X E Q R P 8 Q L W H G 6 W D W H V Y ) & 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

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.[7] Nevertheless, the FCC, like the DOJ, considers how a transaction would affect competition by defining a 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.[13]

**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.[14] In Section 2 of the Draft Guidelines, we suggest stating more explicitly, as do the 2010 DOJ/FTC Horizontal Merger Guidelines,[15] that market definition does not need to underpin all aspects of an antitrust analysis.[16] 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 of competing cleaning products (due perhaps to a reduction in scale economies for these products).[17]

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[19]—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.[20] 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.[21]

**Evidence of Adverse Competitive Effects**

The Draft Guidelines state that evidence of pre-existing contractual relationships may affect a range of relevant market characteristics.[22] 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.[23]

**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.[24] For example, in reviewing the

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[19] See Footnote 11, above.

[20] Draft Guidelines at § 3.

[21] 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.

[22] Draft Guidelines at § 4.

[23] See, e.g., 2010 DOJ/FTC Horizontal Merger Guidelines at § 2.2.2, 5.2, 7.2.

[24] See, e.g., Charter/Time Warner Cable Order, 31 FCC Rcd at

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.[25] To the extent possible, we believe that the

Respectfully submitted,


/s/ Giulia McHenry
Giulia McHenry
Chief
Office of Economics and Analytics
Federal Communications Commission

Jeffrey T. Prince
Chief Economist
Federal Communications Commission

Patrick DeGraba
Associate Chief, Wireless & Spectrum
Office of Economics and Analytics

Eric Ralph
Associate Chief, Wireline
Office of Economics and Analytics

Catherine Matraves
Deputy Chief
Economic Analysis Division
Office of Economics and Analytics

Eugene Kiselev
Katherine LoPiccalo
Associate Chiefs
Economic Analysis Division

Aleksandr Yankelevich
Industry Economist
Economic Analysis Division


CC: Jeffrey A. Rosen, DOJ
Makan Delrahim, DOJ