



Comments on the Draft Vertical Merger Guidelines

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Public Knowledge and New America’s Open Technology Institute submit these comments in response to the request for public comment regarding the Federal Trade Commission’s and Department of Justice’s Draft Vertical Merger Guidelines.¹ We support the decision to revisit the non-horizontal merger guidelines that were last published in 1984. Since then, there has been much more antitrust scholarship on mergers generally and vertical mergers specifically, as well as real-world examples that should inform the new guidelines.

While the FTC and DOJ have made the right decision to revise the guidelines, the current draft has important shortcomings that should be addressed. In particular, we recommend revising the guidelines to include: (1) rebuttable anticompetitive presumptions; (2) application to all non-horizontal mergers; (3) an evaluation of previous vertical mergers and their enforcement impact; and (4) an extended deadline for first-round public comments and a second round of reply comments.

In addition to these written comments, Charlotte Slaiman of Public Knowledge and Joshua Stager of the Open Technology Institute would welcome the opportunity to participate as speakers at the workshops scheduled for March 11 and March 18, 2020.

I. The Guidelines Should Include Anticompetitive Presumptions

Vertical mergers in concentrated markets are often anticompetitive. As a result, certain anticompetitive presumptions are warranted in some types of cases. Presumptions can help the agencies and merging parties save valuable resources at every stage of a transaction’s review. Presumptions also provide a certain level of business certainty to merging parties so that they can make informed decisions about their legal risks.

The agencies should adopt *rebuttable* presumptions that can be invoked when at least one of the markets is concentrated and therefore competitive harm is more likely, and when certain other key criteria are met.² None of the presumptions are based solely on market shares and concentration.³ All of the presumptions would be rebuttable by evidence showing that anticompetitive effects are unlikely.⁴

¹ *Draft Vertical Merger Guidelines*, DOJ and FTC (rel. Jan. 10, 2020).

² Jonathan B. Baker, Nancy L. Rose, Steven C. Salop, and Fiona Scott Morton, *Five Principles for Vertical Merger Enforcement Policy*, Georgetown Law Faculty Publications and Other Works (hereafter “*Five Principles*”) (Summer 2019), at 16, available at: <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3166&context=facpub>; see also *Recommendation and Comments on the Draft Vertical Merger Guidelines*, Jonathan B. Baker, Nancy L. Rose, Steven C. Salop, and Fiona Scott Morton (hereafter “*Comments of Baker, Rose, Salop, Morton*”) (filed Feb. 24, 2020), at 18-20.

³ *Five Principles*, at 17.

⁴ *Id.*

The Commission should adopt a **dominant platform presumption**. This would be a presumption that a merger is anticompetitive if a dominant platform acquires a firm with a substantial probability of entering into competition with it absent the merger, or if that dominant platform company acquires a competitor in an adjacent market.⁵ Competition against platforms occurs differently than in other types of markets and is often harder. Entering from an adjacent market is one of the few viable ways to compete against a dominant platform.⁶ As a result, it is important that mergers between dominant platforms and adjacent markets receive extra scrutiny.

For purposes of this presumption, a dominant platform could be defined as a firm with bottleneck power, as discussed in the Stigler Digital Platforms and Market Power Report and the UK Digital Markets Competition Report (also known as “The Furman Report”). According to the Stigler Report, “‘bottleneck power’ describes a situation where consumers primarily single-home and rely upon a single service provider (a ‘bottleneck’), which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly.”⁷ The Furman Report describes gatekeepers as companies that “have a high degree of control and influence over the relationship between buyers and sellers, or over access by advertisers to potential buyers.”⁸ These platforms are often important routes to market for other firms. Bottlenecks also benefit from market characteristics that tend to impede entry and lead to foreclosure, such as high switching costs for users, bundled services (either by contract or technology), and the inertia of defaults. Digital businesses that have this incentive and ability to develop and preserve a single-homing environment should be considered dominant platforms and therefore subject to the presumption.

Platforms often face “competition for the market” rather than dynamic and ongoing competition.⁹ This type of competition is especially hard for new entrants and can be easily thwarted. Dominant platforms will often be in a better position to identify potential competitors that have a chance of unseating the incumbent than regulators. The threat to the dominant incumbent is existential, but the chances of success for the new entrant may be low. This makes proving the likely anticompetitive effect of the merger especially difficult at the same time that protecting the potential competition is especially important. This is a situation where a presumption can provide a real competitive benefit to the market, as it incentivizes the dominant platform to compete rather than purchase the potential competitor. This presumption is similar to the elimination of potential entry presumption, but due to the network effects and economies of

⁵ *Id.*; see also *Comments of Baker, Rose, Salop, Morton*, at 18-19.

⁶ Stigler Committee on Digital Platforms, Final Report, Stigler Center for the Study of the Economy and the State (Sept. 2019) (hereafter “Stigler Report”), available at: <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>.

⁷ *Stigler Report*, at 84.

⁸ *Unlocking digital competition: Report of the Digital Competition Expert Panel* (Mar. 2019) (hereafter “Furman Report”), at 41, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

⁹ *Stigler Report*, at 88.

scale that protect dominant platforms from competition,¹⁰ the need to prove that an adjacent market is a potential competitor is lifted.

Dominant platforms also have particular foreclosure capabilities for adjacent markets, which create incentives similar to vertical mergers in non-platform markets. A platform with market power could substantially disadvantage firms in an adjacent market by refusing to interoperate with them. If a platform purchased one adjacent market firm, it would then benefit from preferencing the owned firm over competing adjacent market firms, either by denying interoperability or making interoperability difficult, thereby diverting substantial business to the owned firm.

We can use the acquisition of Instagram by Facebook as an example. Though Instagram and Facebook may already have been horizontal competitors at the time of the merger, some have indicated that the two companies, one focused on mobile devices and photo sharing, the other focused on desktop devices and general social networking, may in fact have been in different markets.¹¹ If the FTC determined that in fact the two were not horizontal competitors, it could have been a useful time for a dominant platform presumption.

An **input foreclosure** presumption is another important anti-competitive presumption to include in the guidelines. When a company buys its input supplier, the merger may or may not be substantially likely to reduce competition.¹² But if the supplier produces a *critical* input, and if the market they're selling in (the input market) is *concentrated*, and if the merged company could divert substantial business to itself through a refusal to deal with competing customers, then a presumption that the merger would be substantially likely to reduce competition is warranted.¹³

This is because this situation allows the new merged firm to exercise market power. The new merged firm likely has the incentive and ability to fully withhold, or offer to sell only on unfavorable terms, the critical input from buyers that have now become competitors in the post-merger world.

¹⁰ *Five Principles*, at 17.

¹¹ There is no discussion of this question in the public closing documents, so we have no reliable indications of how the agency analyzed this merger. See *FTC Closes Its Investigation Into Facebook's Proposed Acquisition of Instagram Photo Sharing Program*, Press Release, Federal Trade Commission (Aug. 22, 2012), available at: <https://www.ftc.gov/news-events/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition>.

¹² *Five Principles*, at 16.

¹³ This should also apply facing the other direction, as distribution can be considered a critical input for a manufacturer, such that what we typically think of as a downstream firm could also be considered an upstream firm, and vice versa. *Id.*

An illustrative example is the purchase of NBCUniversal, primarily a television content company, by Comcast, primarily a multi-channel video programming distributor (MVPD), in 2011. In that case, the FCC, applying its public interest standard, analyzed the merger much as an antitrust enforcer would, looking at possible input foreclosure.¹⁴ The FCC found that a post-merger Comcast/NBCU would have the power to disadvantage downstream rivals—competing MVPDs—by permanently cutting off a rival from access to NBCU video programming, or even temporarily withholding that access.¹⁵ It also found that the merged company could raise its rivals’ costs by increasing the price of video programming to MVPD competitors.¹⁶ The FCC then asked whether the exclusion of rivals would result in harm to competition and concluded that successful exclusion using one of these strategies would likely permit a merged Comcast/NBCU to obtain or maintain market power in the downstream MVPD market.¹⁷ The FCC found that the merged firm would have the ability to “exclude all Comcast’s rivals” from its programming.¹⁸ In the end, the FCC approved a consent decree that it argued would remedy these problems, but as advocates argued at the time, it did not prove sufficient to remedy the complete competitive harm created by the merger.¹⁹

A presumption of anticompetitiveness in cases of input foreclosure would work in a similar way. Enforcers would have to show that the video programming market was concentrated, and that video programming was a critical input for MVPDs. They would have to show that a merged NBC/Comcast could divert substantial business—in this case subscribers to cable television—from competitors to itself by refusing to offer its programming to rival MVPDs. If enforcers could prove those three things, the burden would shift to Comcast to rebut the presumption that the merger is anti-competitive. Having such a presumption in place would not necessarily mean that a merger like Comcast/NBCU would not be settled with a consent decree. However, shifting the burden would make it possible to more easily block some anti-competitive mergers and to achieve stronger and more effective remedies if a consent decree was ordered. For example, the DOJ may have been able to require Comcast to commit to better arbitration requirements and/or stronger limits on most favored nation clauses (MFNs).

¹⁴ Jonathan Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis* (2011), at 37, available at: https://transition.fcc.gov/osp/projects/baker_vertical_mergers.pdf.

¹⁵ *Id.* at 37.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 38.

¹⁹ Commissioner Michael Copps correctly identified the problem with the consent decree, “I believe loopholes remain that will allow Comcast-NBCU to unduly pressure both distributors, especially small cable companies, and content producers who sit across the table from the newly-consolidated company during high-stakes business negotiations for programming and carriage.” (Dissenting Statement of Commissioner Michael J. Copps, *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket 10-56, FCC 11-4 (rel. Jan. 18, 2011) (hereafter “*Comcast/NBCU Order*”, available at: <https://www.fcc.gov/proceedings-actions/mergers-transactions/comcast-corporation-and-nbc-universal-mb-docket-10-56>).

A similar anti-competitive presumption should apply in the case of **customer foreclosure**. Like input foreclosure, this deals with customers and suppliers, but in this case, rather than selling a critical input, the merging firm need only be a *substantial* purchaser of an input produced in a *concentrated* market.²⁰ Similar to input foreclosure, the merged firm must also be able to divert a substantial amount of business through refusing to deal.²¹ Again, in this type of case we expect the new merged firm can exercise market power. The new merged firm likely has the incentive and ability to refuse to buy, or offer to buy only on unfavorable terms, from input suppliers that have now become competitors in the post-merger world, and the merged firm represents a substantial part of their business.

This also came up in the context of the Comcast/NBCU merger. Though the FCC has a different legal standard, their economic analysis appears similar to the concept of customer foreclosure in antitrust law. The FCC considered a range of exclusionary strategies that Comcast might employ, including refusing to carry a rival programming network on Comcast's distribution system; placing a rival network in a less advantageous service tier where fewer users would pay for access to it, or making it difficult for subscribers to find the rival network by giving it a less advantageous channel number.²² These exclusionary strategies could harm the rival programming networks by reducing their viewership thereby making them less attractive to advertisers. The FCC concluded, "As a result, these unaffiliated networks may compete less aggressively with NBCU networks, allowing the latter to obtain . . . or maintain market power with respect to advertisers seeking access to their viewers."²³ In a similar analysis at the DOJ or FTC, we might expect similar results under the antitrust laws.

Non-horizontal mergers should also be presumed anti-competitive if the merger **eliminates a potential entrant** to a concentrated market. This can be defined as one merging firm having a substantial probability of entering into the other firm's market in the absence of merger, when the market losing the potential entrant due to the merger is concentrated.²⁴ This would be a two component test, the first component is substantial probability of entry in the absence of the merger, and the second component is concentration in the potential entry market. Even the threat of entry can put competitive pressure on a concentrated market.

The **elimination of a maverick** firm should also lead to a presumption that a merger is anti-competitive. A maverick is defined as a firm that has prevented or substantially constrained coordination by its competitors in a concentrated market.²⁵ If a firm with a vertical relationship to the maverick, either a customer of the maverick's products or an input supplier to the

²⁰ *Five Principles*, at 16.

²¹ *Id.*

²² Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis*, at 39.

²³ *Comcast/NBCU Order*, at ¶ 116.

²⁴ *Five Principles*, at 16.

²⁵ *Id.*

maverick, purchases the maverick, the constraining influence of the maverick could be eliminated, which would lead to higher prices.²⁶ This is because it would likely be in the interest of the new merged firm to cease the maverick firm's maverick behavior since it would now benefit from coordination in that market. The mechanism by which this change takes place may not be obvious, so an example is helpful. Perhaps the maverick firm is an input supplier being purchased by a customer. Ordinarily the customer would benefit from having a maverick in the upstream market. However, once the customer owns the maverick, it now benefits from a lack of competition in the upstream market, as it can absorb the increased revenues in the upstream market.

II. The Guidelines Should Apply to All Non-Horizontal Mergers

The previous guidelines were named Non-Horizontal Merger Guidelines rather than Vertical Merger Guidelines. This is an important and valuable distinction. Not all non-horizontal mergers are vertical, yet other types of non-horizontal mergers may also have anti-competitive effects. The Commission should explicitly clarify that the guidelines apply broadly to non-horizontal mergers and not only to vertical mergers.

Mergers of complementary products in particular share economic similarities to vertical mergers. It will not be a good use of resources for agencies to have to prove that the merger they are concerned about is actually vertical rather than complementary in order to benefit from these new guidelines. One key component of a vertical merger is that a company engaged in a vertical line of business often has an easier time entering a market than other companies. This is similar for complementary products, as products that are complementary today can quickly become competitors.

Limiting the application of these guidelines to cases where the agency can prove a vertical relationship would leave out many merging firms in non-horizontal markets, where a similar analysis should nonetheless apply. Especially in communications and internet-related markets, where products and services change often, it can be difficult to identify whether the two merging parties are "at different stages of the same supply chain," as the draft guidelines require in footnote 2. However, the merger still shares important characteristics with vertical mergers and should be subject to the same guidelines.

In today's economy, it is common to have mergers that would not necessarily be characterized as vertical yet where a vertical merger analysis should still apply.²⁷ For example, we can imagine a situation where an Internet service provider ("ISP") buys a programming company that offers a video streaming channel directly to consumers. If the consumer then buys Internet service from

²⁶ *Id.*

²⁷ *Comments of Baker, Rose, Salop, Morton*, at 5.

the ISP and contracts directly with the programming company for the video channel, is this a vertical relationship? It may not be so clear. Yet the economic analysis should apply in the same way. As such, the guidelines should include vertical as well as non-horizontal mergers to address mergers, such as the aforementioned example, that involve complementary products.

III. The Guidelines Should Include An Evaluation Of Past Enforcement Impact

The guidelines would benefit from an evaluation of how markets have fared after the approval of vertical mergers. At a minimum, past enforcement impact should inform the future direction of the Commission's work. Commenters have participated in several vertical transaction reviews, each of which can contribute to the Commission's record and understanding of the impacts of vertical mergers.

AT&T's 2015 acquisition of DirecTV demonstrates how promised efficiencies can fail to materialize in vertical mergers. AT&T claimed that the merger would produce efficiencies that would incentivize the deployment of new broadband service to millions of new customers. Specifically, AT&T committed to deploy fiber-to-the-home broadband to 12.5 million new locations and Fixed Wireless Local Loop services to 13 million rural households, all by the end of 2019.²⁸ This efficiency claim played a significant role in the transaction's approval, as it was viewed as a public interest benefit that could help close America's digital divide.²⁹

However, AT&T appears to have wildly overestimated the merger's efficiencies. According to latest estimates, AT&T has only deployed Fixed Wireless Local Loop to 2.7 million households—a far cry from the 13 million household commitment.³⁰ When asked in 2017 if AT&T would honor this commitment, a spokesman merely replied that the commitment was not binding.³¹ AT&T is even more opaque in its fulfillment of the fiber-to-the-home pledge. The company recently claimed it now “markets” fiber to 14 million locations.³² However, *marketing* and *deployment to the home* are not synonymous, and AT&T is reportedly deeming any location within 1,000 feet of its fiber network as being served.³³ The Federal Communications Commission does not recognize this 1,000-foot threshold, and it is unclear how many locations

²⁸ *FCC releases order approving AT&T-DIRECTV Transaction*, Federal Communications Commission, (July 28, 2015), <https://www.fcc.gov/document/fcc-releases-order-approving-att-directv-transaction>.

²⁹ *Id.*

³⁰ *Fixed Wireless Internet Providers*, BroadbandNow, <https://broadbandnow.com/Fixed-Wireless-Providers>.

³¹ Jon Brodtkin, *AT&T's wireless home Internet, with 160GB cap, is now in 18 states*, Ars Technica, (Sept. 28, 2017), <https://arstechnica.com/information-technology/2017/09/atts-10mbps-wireless-replacement-for-slow-dsl-comes-to-nine-more-states/>.

³² AT&T, *Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, (Nov. 5, 2019), <https://otp.tools.investis.com/clients/us/atnt2/sec/sec-show.aspx?Type=html&FilingId=13718698&CIK=0000732717&Index=10000>.

³³ Bruce Kushnik, *AT&T's 1000 Foot Violation of AT&T-DirecTV Merger Conditions?*, HuffPost, (June 14, 2016), https://www.huffpost.com/entry/atts-1000-foot-violation_b_10449612.

are merely close to AT&T's fiber network rather than directly connected as the commitment entailed.

It is clear that, since the transaction closed, AT&T has given DirecTV preferential treatment over third-party content providers. At the time, experts voiced concerns that if the merger was allowed, AT&T would give anticompetitive preference to DirecTV content on its network.³⁴ In 2017, the FCC concluded that AT&T's free data or "zero rating" plan for DirecTV content likely violated the agency's net neutrality rules.³⁵ Pointedly, this plan runs afoul of the pledge that AT&T made, just two years prior, to adhere to net neutrality rules as a condition of the DirecTV merger.³⁶

Throughout the past four years of broken promises and unrealized efficiencies, the video service that AT&T acquired through the merger has suffered greatly. By the end of 2019, AT&T had 20.4 million video subscribers—down from 25.4 million when the merger closed in 2015.³⁷ According to industry press, DirecTV "keeps tanking" as it hemorrhages subscribers and faces investor calls to divest from AT&T.³⁸ Much of this was foreseeable from the get-go due to the inherent incentives of the market. Clearer, more specific guidelines could have helped the Department of Justice to either block this merger or obtain more effective conditions.

AT&T offers yet another instructive example with its **2018 acquisition of Time Warner**. This transaction closed less than two years ago, yet it has already provided ample evidence that relying on AT&T's price reduction claims in lieu of clear market structure-based guidelines was a failed approach. In 2018, AT&T told a federal judge that "the evidence overwhelmingly showed that this merger is likely to enhance competition substantially, because it will enable the merged company to reduce prices ... There is no sound evidence from which the Court could fairly conclude that retail pay-TV prices are likely to increase."³⁹ Moreover, AT&T specifically argued that "certain merger efficiencies will begin exerting downward pressure on consumer prices almost immediately." Instead, AT&T raised the price of its video streaming service within

³⁴ Tom Wheeler to Sens. Edward J. Markey, Al Franken, Ron Wyden, Bernard Sanders, Elizabeth Warren, Tammy Baldwin, Richard Blumenthal, (Jan. 11, 2017), <https://ecfsapi.fcc.gov/file/60001076101.pdf>.

³⁵ FCC, Letter to Senator Markey (Jan. 11, 2017), https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342982A1.pdf.

³⁶ *FCC releases order approving AT&T-DIRECTV Transaction*, Federal Communications Commission, (July 28, 2015), <https://www.fcc.gov/document/fcc-releases-order-approving-att-directv-transaction>.

³⁷ Jon Brodtkin, *AT&T loses another 1.2 million TV subscribers as DirecTV keeps tanking*, Ars Technica, (Jan. 29, 2020), <https://arstechnica.com/information-technology/2020/01/att-loses-another-1-2-million-tv-subscribers-as-directv-keeps-tanking/>.

³⁸ *Id.*

³⁹ *United States of America v. AT&T et al.*, Case 1:17-cv-02511-RJL, (D.C. 2018), https://www.courtlistener.com/recap/gov.uscourts.dcd.191339/gov.uscourts.dcd.191339.121.0_1.pdf.

weeks of the transaction closing.⁴⁰ Eight months later, AT&T imposed a second price increase.⁴¹ Six months after that, the company increased prices yet again.⁴² Also within months of the transaction closing, AT&T engaged in a dispute with Dish Network that ultimately led to AT&T withholding HBO content from Dish for the first time in 40 years.⁴³ The loss of HBO could drive consumers to leave Dish's rival streaming service in favor of AT&T's—precisely what AT&T told the federal judge it would not do. Clearer vertical merger guidelines should specify the economic expectations in a situation like this so that agencies and courts are not relying on promises of companies to defy economic expectations. These price hikes and distribution disputes have created, in short order, a compelling record of the dangers of vertical mergers, particularly in oligopoly markets such as broadband service.

Comcast's purchase of NBCUniversal in 2011 is another transaction that the FTC and DOJ should take into account while developing new guidelines. This merger offers clear lessons in why new, specific and clear non-horizontal merger guidelines would be useful and effective. The Justice Department and the FCC approved Comcast/NBCU in 2011 with a relatively complex set of conditions, obtained under both the antitrust laws and the FCC's public interest authority, addressing the company's video and broadband services. For years, Comcast evaded and outright violated the conditions as enforcers struggled to monitor the company's conduct. For example, Comcast failed to “visibly offer and adequately market” a standalone broadband plan, as the 2011 consent decree required, resulting in an unprecedented \$800,000 fine and FCC investigation.⁴⁴ Comcast also violated a condition to carry all unaffiliated news networks in the same “neighborhood” of channels by discriminating against Bloomberg, a news network that competed with Comcast-owned CNBC.⁴⁵ Both violations were uncovered by complaints from consumer groups and a well-resourced company; they do not necessarily constitute the full extent of Comcast's violations. They do, however, offer instructive examples of why enforcers should be skeptical of promises that companies will behave differently than the market structure suggests they will.

⁴⁰ Jon Brodtkin, *AT&T promised lower prices after Time Warner merger—it's raising them instead*, Ars Technica, (July 2, 2018), <https://arstechnica.com/information-technology/2018/07/att-promised-lower-prices-after-time-warner-merger-its-raising-them-instead/>.

⁴¹ Todd Spangler, *DirectTV Now Prices Going Up by \$10 per Month for All Customers, AT&T Rolling Out Two New Reformatted Packages*, Variety, (Mar. 11, 2019), <https://variety.com/2019/digital/news/directv-now-price-increases-10-dollars-new-packages-1203160152/>.

⁴² Jon Brodtkin, *AT&T hits online TV customers with second big price increase this year*, Ars Technica, (Oct. 18, 2019), <https://arstechnica.com/information-technology/2019/10/att-hits-online-tv-customers-with-second-big-price-increase-this-year/>.

⁴³ Chaim Gartenberg, *AT&T and Dish's HBO battle is the bleak future of cable and streaming*, The Verge, (Nov. 2, 2018), <https://www.theverge.com/2018/11/2/18055780/att-dish-hbo-battle-warnermedia-cable-streaming-battle-future>.

⁴⁴ *FCC Resolves Comcast NBCU Investigation*, Federal Communications Commission, (June 27, 2012), <https://www.fcc.gov/document/fcc-resolves-comcast-nbcu-investigation>.

⁴⁵ *FCC Affirms Bloomberg v. Comcast News Neighborhooding Decisions*, Federal Communications Commission, Sept. 26, 2013, <https://www.fcc.gov/document/fcc-affirms-bloomberg-v-comcast-news-neighborhooding-decisions>.

The Comcast/NBCU conditions have since expired, but Comcast’s potential for market abuse has not. Within months of the conditions’ expiration, Comcast faced complaints that it was using its content ownership to harm competitors. The American Cable Association, a lobbying group for smaller video and broadband providers, argued that Comcast now poses “an even bigger threat to competition than in 2011” and a bigger threat than the AT&T/Time Warner merger.⁴⁶ “When it was subject to the 2011 conditions, Comcast/NBCU at least thought twice about engaging in anticompetitive acts,” the group wrote.⁴⁷ “Without a leash, it can engage in a much wider range of bad behavior and, if it gets caught, merely use its deep pockets to play out the clock or, at worst, ask for forgiveness.”⁴⁸ The letter echoed concerns raised by Senator Richard Blumenthal, D-Conn., who in 2017 urged the Justice Department to investigate the expiring Comcast/NBCU conditions and to consider unwinding the merger.⁴⁹ The agencies should consider whether stronger guidelines would have helped DOJ to devise a more effective way to prevent the harms identified in the DOJ Complaint.

Just as these examples are useful in these comments for explaining the presumptions, it will be useful for the final guidelines to have an accompanying commentary document explaining how the guidelines relate to recent precedents. The FTC endeavored to do this in 2006 with the *Commentary on the Horizontal Merger Guidelines*.⁵⁰ The FTC and DOJ should consider providing a similar commentary to accompany the new Non-Horizontal Merger Guidelines.

IV. The FTC and DOJ Should Extend The Comment Deadline And Solicit Reply Comments

The FTC and DOJ should extend the deadline for public comments and create a second round of reply comments. The FTC and DOJ publicly announced the draft guidelines on Jan. 10 along with a 30-day comment period. Reflecting the concerns of many, including Commissioner Chopra⁵¹, the FTC and DOJ extended this deadline by two weeks. While we welcome this extension, we must acknowledge that six weeks is simply not sufficient time for individuals,

⁴⁶ Matthew W. Polka to Assistant Attorney General Makan Delrahim, (Nov. 6, 2018), <https://www.americancable.org/wp-content/uploads/2018/11/181106-DOJ-Letter-re-Comcast-NBCU-w-Appendix-FINAL.pdf>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Sen. Richard Blumenthal to Assistant Attorney General Makan Delrahim, (Dec. 13, 2017), <https://www.blumenthal.senate.gov/imo/media/doc/12.13.17%20Letter%20to%20DOJ%20Antitrust%20re%20Comcast-NBCU.pdf>.

⁵⁰ *Commentary on the Horizontal Merger Guidelines*, Department of Justice and Federal Trade Commission (March 2006), available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/commentaryonthehorizontalmergerguidelinesmarch2006.pdf>.

⁵¹ Statement of FTC Commissioner Rohit Chopra (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561727/p810034chopravmgabstain.pdf.

organizations, and scholars to adequately rethink 36 years of new antitrust scholarship, court decisions, case studies, and the future of vertical merger enforcement.

The FTC and DOJ announced they will be holding two joint public workshops on the Draft Vertical Merger Guidelines in March. While we support these workshops, we believe it would have been more productive and valuable for the agencies and commenters alike if the comment deadline occurs *after* these workshops. If the goal is to have guidelines that are rigorously developed and robustly vetted, it would make sense to allow potential commenters to attend the workshops, participate in an exchange of ideas, and then file their comments. Accordingly, the FTC and DOJ should extend the current deadline beyond these two workshops.

In addition, the FTC and DOJ should create a second round of comments to allow commenters to reply to issues raised in the first round. Revising the guidelines is a significant endeavor that will significantly impact the public interest. The public should be given ample opportunity to weigh in on such an important matter, to read arguments presented in the record, and to express support or offer criticism. This additional level of engagement promotes transparency and gives the agencies important additional context. A reply-comment round is also consistent with decades of public comment precedent, such as the process established by the Administrative Procedure Act. The FTC and DOJ do not need to speed through this process.

V. Conclusion

For the reasons described above, the FTC and DOJ should move forward with new guidelines in a manner that best reflects the reality of vertical and non-horizontal mergers today. This includes acknowledging the failed enforcement of previous vertical mergers; incorporating anticompetitive presumptions in addition to the competitive presumptions; ensuring the revised guidelines apply to all non-horizontal mergers; and allowing for an adequate public comment period. If adopted, these recommendations will create stronger guidelines that benefit the agencies and the public interest alike.