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November 12, 2015

Federal Communications Commission
445 12th Street, SW
Washington DC 20554

RE: Docket 15-149, on APPLICATIONS OF CHARTER COMMUNICATIONS, INC., TIME WARNER CABLE INC., AND ADVANCE/NEWHOUSE PARTNERSHIP FOR CONSENT TO TRANSFER CONTROL OF LICENSES AND AUTHORIZATIONS

Dear Commissioners:

I appreciate the opportunity to share the thoughts of the Institute for Policy Innovation (IPI) on your review of the Charter-Time Warner Cable-Bright House Networks transaction.

IPI is a 28 year-old market-oriented public policy think tank that closely follows the communications marketplace. We submit these comments in hope that they are useful to you in your review of the merger.

Introduction

In our view, in a free society, people are free to make economic arrangements and engage in commerce as they see fit so long as they operate within the law and don't do harm to others. Government should not preclude entire areas of economic activity in anticipation that there might be harm or that there might be a bad actor; rather, we allow people the freedom to experiment and try new things, and we take action if and where there is evidence of harm.

There is no sound policy reason why the same logic should not apply to businesses, since businesses are simply forms in which free people organize themselves for common purposes.

Further, when there is free exchange of goods and services in a free market, both parties benefit. One side of the transaction is not predating on the other; in fact, in a competitive marketplace, a business must constantly be seeking to please its customers. Only through pleasing customers can a business advance its own interests.

Of course, even in an ideal market there are occasional bad actors. A just system identifies behaviors and practices that harm others and remediates the harm without limiting the freedom of those who are acting properly in the marketplace.

But regulation designed in an assumption of anticipating possible bad behavior and precluding it risks running afoul of the Law of Unintended Consequences, in which regulations restrict or preclude entire areas of beneficial economic activity that could not have even been anticipated when the regulatory policy was put in place.

This is because of the Knowledge Problem; i.e., in an economy as large and as complex as human behavior, regulators have neither the information nor the processing power to even fully understand the current economy, much less to anticipate all possible strands of the future economy. To assert such knowledge in promulgating regulatory policy is simply arrogance.

With Regard to Merger Reviews

How does this philosophy apply to merger review? When those reviewing a merger claim to know how an industry or marketplace will develop in both the scenarios of the merger going forward and the merger being rejected, they assert an impossible degree of knowledge, including knowledge of counterfactuals. In fact, regulators have little to no idea what the future holds for the companies that are merging or for the industry in which they operate.

The good news is that this lack of foreknowledge shouldn’t matter. In a free society, the default condition should be approval of mergers, or even an end to the merger review process altogether. It’s a relic of the Progressive Era, during which there was an overreaction of distrust against the behavior of businesses. The history of that era provides us with abundant examples of the federal government attempting to direct industries from the top-down in the arrogant assertion that the government knew best. This assertion turned out to be predictably wrong.

Since the 1970s, policy has generally shifted in a more deregulatory direction, and the benefits to consumers have been clear. Innovation and economic growth have increased as a result. The less government asserts an ability to understand, predict and direct industries and markets, the better the economy performs. Almost 300 million American adults making multiple economic decisions every day in a free marketplace is a much better way to determine economic outcomes than assertions by federal regulators that they know in advance what all those decisions are going to be.

The danger in the merger review process is that U.S. policy making begins to resemble European-style competition policy, where regulators indeed assert that they know how a particular market should function and review mergers through that lens. But what has been the result of European style competition policy?

Interestingly, in a recent analysis, it was revealed that, if European countries were American states, the richest and most productive European country, Norway, would be only the 7th richest American state, just below Massachusetts. Switzerland would be 20th, Germany 39th, and Sweden, 40th. Yes, the massive German economy would only be the 39th richest American state. The average of the Eurozone would be 41st, just below West Virginia, and the U.K. would be next-to-last, just above Mississippi.[1]

This at least suggests that European-style competition policy has not resulted in levels of innovation and wealth creation in excess of that experienced in the United States, and thus suggests that, instead of the U.S. moving toward European-style competition policy, the U.S. should retain our hands-off approach to experimentation in the economy and our light-touch regulatory environment.

Of course, should a company behave in a manner that is monopolistic, abusive of consumers or harmful to a competitive marketplace, there remains an abundant body of law and significant law enforcement resources within the Justice Department to prosecute such harmful activity.

But absent such clear evidence of harm, companies should be free to experiment in the marketplace and outcomes should be determined by the interactions between consumers and businesses rather than by the dictates of regulators who don't possess sufficient knowledge to undertake such a task, and thus who will almost certainly be wrong.

Additionally, the merger review process has become a source of uncertainty in and of itself, chilling investment. In a speech delivered in 2011 by then-FCC Commissioner Meredith Attwell Baker at IPI's third Annual Communications Policy Summit, Commissioner Baker identified features of the FCC's merger review process that require addressing:

> Let's assume you are the CEO of a company and you have $10 billion to invest. You are considering acquiring a company with broadcast and wireless assets. Looking at that deal, you need to know if it serves your shareholders' best interests, and whether it is the right long-term vision for the company. If the deal can be structured correctly, you are willing to infuse the new company with billions in capital and to create new jobs. Your decision to invest is complicated today by the uncertainty surrounding the necessary regulatory approvals.

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[1] http://blogs.spectator.co.uk/coffeehouse/2014/08/why-britain-is-poorer-than-any-us-state-other-than-mississippi/

> What does that mean in practice? You have to factor in approximately a year of regulatory scrutiny. Some deals take longer, 18 months or more. More than likely, merger conditions will also be imposed, but you will have little sense of the cost, complexity, length, or even topic of those conditions when you make the deal. In recent years, the FCC has imposed conditions mandating jobs to be created in a particular region, a billion dollars to be invested in a geographic market, and broadband services to be offered on specific terms and conditions.
>
> So, ask yourself, would you subject yourself to the FCC merger review process? Or in our global market would you look elsewhere to invest in telecom companies overseas or more certain investments in other industries altogether? My concern is that you might walk away, and how many other consumer enhancing and job-creating deals are not getting done today.[2]

Commissioner Baker suggested that the FCC's job in a merger review is simply to "transfer a license, not bless the entire transaction." *Why should mergers of communications companies be subjected to a duplicative and more stringent review process than mergers in other industries?*

Commissioner Baker also criticized the length of FCC merger reviews as most often grossly exceeded its supposed 180 day shot clock, and especially the FCC's practice of imposing conditions on companies. As former Commissioner Abernathy has stated, such conditions "are the *quid pro quo* that merger applicants must accept in order to get timely approval."

By imposing such conditions, regulators have developed a habit of accomplishing their policy goals through the merger review process, which is offensive to the rule of law. Demanding that companies agree to abide by policies that have not become law either through either the legislative or rule-making processes, but are simply the preferences of the current FCC chairman, is an illegitimate means of policy making. Policies set precedents for entire industries, and thus policy should be made through normal policy-making processes rather than at the convenience of whatever chairman happens to be in office when two companies decide to merge.

With Regard to the Charter\Time Warner Cable\Bright House Networks Transaction

Because of the cable industry's historical business model, these companies do not compete with each other—their business territories do not overlap to a significant

[2] http://www.ipi.org/ipi_issues/detail/towards-a-more-targeted-and-predictable-merger-review-process

degree. Thus, consumer choice will not be reduced by the merger, and that should be the most significant factor in the Commission's review process.

Further, it has been generally observed that Charter has been a leader in delivering innovative products and services to its customers. This suggests that *the merger will actually bring an improved level of products and services to Time Warner Cable's customers. In other words, in the short to intermediate term, consumer benefit will likely result from the merger, rather than consumer harm.*

That level of investment commitment has been demanded of Charter, at least in part, because of the tremendous level of competition that exists between cable, satellite, telecom and wireless options. Hopefully by now the Commission realizes that, in highly capital-intensive industries like broadband, one does not gauge competition simply by the number of competitors. There are, for instance, more donut shops than broadband providers, but that doesn't mean that the donut business is significantly more competitive than the broadband business. In fact, other measurements, such as the investment in competitive advertising, would suggest that the broadband market is much more competitive than the donut business.

In fact, the United States is one of only two nations in the world with three (3) fully deployed broadband technologies competing for consumers—cable, telco, and wireless 4G LTE. And, in fact, it is growth in wireless broadband that is currently outpacing the other technologies. There is no danger of the newly merged Charter possessing dominant market share such that consumers would be harmed. Charter would still have less than the FCC's arbitrary and vacated 30 percent of the pay TV market concerns.

In the long term, as we have already argued, who knows what will happen? Perhaps it will be the ingenious move that saved the cable industry, or that transformed it into something entirely new, offering increased innovation and enhanced competition with other industries. We just don't know, and can't know.

Hopefully by now it's clear that we do not think it wise or even possible for the FCC to know, much less to direct, how the video and broadband marketplaces develop in the future. To state the obvious, no one knows what the video and broadband marketplaces will look like five or ten years hence. The only thing we can be assured of is that, based on observations of the current rate of change and dynamism in the marketplace, it will be different. And it is up to the market itself to determine how that future is shaped, not the FCC, and certainly not the critics of this merger.

Many critics, however, assert that they *do* know what will happen. We should dismiss the majority of social media concerns against the merger as rhetorically empty, since there is no economic evidence that the combined companies will be "too big," and it's impossible to know what "too big" would actually be.

In summary, today's video marketplace is radically more competitive than ever before. Consumers have never had as many choices and options, and there is no indication that this trend will do anything other than continue. Fears that a post-merger Charter will wield overwhelming market power such that it will be able to quash such competition seems more based in Progressive Era general distrust of corporations rather than any informed understanding of the current video marketplace and obvious current trends.

In today's diverse video marketplace, where consumers have a dizzying array of options for how, when and where they access the content of their choice, only purposefully ignoring this diversity of competition could lead one to believe that the Charter\Time Warner Cable\Bright House Networks transaction would have any effect other than continued positive enhancement of consumer choice and welfare.

Conclusion

It should be clear from our comments that we believe the transaction between Charter, Time Warner Cable and Bright House Networks should be allowed to not only proceed, but to proceed promptly and without the addition of conditions and concessions. Further, we believe there is need for serious reform of the merger review process that would strictly limit the FCC's role.

We thank you for the opportunity to submit our thoughts on this proceeding, and would be happy to answer any questions or discuss this matter further with FCC personnel at your request.

Sincerely,

Tom Giovanetti

Tom Giovanetti
President