In the Matter of
Applications of Comcast Corp. and Time Warner Cable, Inc.
For Consent to Assign or Transfer
Control of Licenses and Authorizations

MB Docket No. 14-57

Comments of TechFreedom

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Introduction

In February of this year, Comcast Corporation (Comcast) announced its intention to consummate a merger with Time Warner Cable (TWC).[1] Both companies provide multichannel video programming delivery (MVPD) and broadband Internet access services — but in separate geographic markets, and so do not compete with each other for subscribers.[2] The total transaction is estimated to cost Comcast $45 billion, and, if approved, the merger would make the merged entity the largest provider of MVPD and broadband services in the country.[3]

Some have claimed that the merger would give the combined Comcast-TWC undue power in both markets. In theory, a sufficient degree of "horizontal" concentration in the distribution market could allow a company to exercise market power in "vertical" relationships with content providers in ways that would harm consumers. Indeed, Congress recognized this possibility in the 1992 Cable Act, when it authorized the FCC to cap both horizontal concentration and vertical integration.[4] The FCC twice proposed to cap horizontal concentration at 30% of the U.S. MVPD market.[5] But both times, the D.C. Circuit failed to justify such a cap.[6]

While the underlying concern remains theoretically plausible (at some degree of horizontal concentration), it has grown increasingly difficult to see how even a 30% cap could be justified — let alone a *de facto* lower ban.

Video Competition has Exploded

The merged Comcast-TWC would stay below the 30% limit that the FCC twice failed to justify.[7] Moreover, there seems to be little reason to fear that the combined company will continue to

[1] Comcast Corp., *Time Warner Cable to Merge with Comcast Corporation to Create a World-Class Technology & Media Company* (Feb. 13, 2014), *available at* http://bit.ly/1tLbip5.
[2] Comcast Corp. & Time Warner Cable, Inc., *Applications & Public Interest Statement: Description of Transaction, Public Interest Showing, & Related Demonstrations*, 138 (Apr. 8, 2014) [*Public Interest Statement*], *available at* http://bit.ly/1lOr7ei.
[3] Comcast Corp. & Time Warner Cable, Inc., *Public Interest Benefits Summary*, 1 (last visited Aug. 25, 2014) [*Public Interest Benefits Summary*], *available at* http://bit.ly/1ebrgPM.
[4] *See* Cable Television Consumer Protection & Competition Act of 1992, Pub. L. No. 102-385, § 2(a) (1992), *available at* http://uscode.house.gov/statutes/pl/102/385.pdf.
[5] *See* Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order*, 14 F.C.C.R. 19098 (1999); 47 C.F.R. § 76.503(a) ("No cable operator shall serve more than 30 percent of all multichannel-video programming subscribers nationwide through multichannel video programming distributors owned by such operator or in which such cable operator holds an attributable interest.").
[6] *See Time Warner Entm't Co. v. F.C.C.*, 240 F.3d 1126, 1136 (D.C. Cir. 2001) ("On the record before us, we conclude that the 30% horizontal limit is in excess of statutory authority."); *Comcast Corp. v. F.C.C.*, 579 F.3d 1, 9 (D.C. Cir. 2009) ("In light of the changed marketplace, the Government's justification for the 30% cap is even weaker now than in 2001 when we held the 30% cap unconstitutional.").
[7] *Public Interest Benefits Summary*, at 1.

grow without additional acquisitions — any of which would provide the FCC another opportunity to check Comcast's growth.

In general, cable companies are losing, not gaining, market share.[8] The merger would merely restore Comcast to the market share it possessed in the early 2000s — before growing competition from satellite and telco providers whittled down its leadership of the MVPD market.[9] In 1992, cable was the only alternative to broadcast for multichannel video programming. But today, roughly a third of Americans get their video service from satellite providers,[10] 8.5% from telephone companies[11] (companies that were barred, by law, from providing video service until 1996 and who continued to be stymied franchising requirements until 2006),[12] and companies like Google Fiber and Sonic.Net are starting to lay a "third pipe" to Americans' homes.[13] Cable's market share seems, for the moment, to have reached its high water mark. Indeed, this merger will be the third time that Comcast has reached the 30% figure by acquisition: In 2002, Comcast bought AT&T broadband and in 2006, it bought Adelphia cable, each time reaching 30% nationwide, only to see its market share within a larger footprint whittled away again by competition.[14]

And as cable's share of the MVPD market falls, so too does the relevance of measuring the "MVPD market" at all. The Internet has become an alternative video distribution channel preferred by millions. Netflix already has more subscribers than will a combined Comcast-TWC — and, unlike Comcast, will continue gaining market share nationwide.[15] An estimated 7.6 million American households have simply "cut the cord," cancelling their MVPD subscription and obtaining video content from other sources, such as Netflix or Hulu subscriptions, a la carte

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[8] *Public Interest Statement*, at 5 ("Notably, since 2009 when the court last rejected the 30 percent cap, the two nationwide DBS providers have added another 1.7 million subscribers and the telco video providers have added 6.2 million subscribers, while traditional cable operators have *lost* 7.3 million video subscribers.") (emphasis in original).

[9] *See id.*

[10] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Fifteenth Report*, 28 FCC Rcd. 10496, 10558, Table 7 (2013) [*Fifteenth Video Competition Report*], *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-13-99A1.pdf (showing DBS providers to make up 34% of MVPD Video Subscribers at the End of June 2012).

[11] *Id.*

[12] *See* Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, *Report & Order & Notice of Proposed Rulemaking*, MB Docket No. 05-311 (Dec. 20, 2006), *available at* http://www.mhcrc.org/docs/ops_FCCCFAR.pdf.

[13] *See generally* Google fiber, *A Different Kind of Internet & TV* (last visited Aug. 25, 2014), *available at* https://fiber.google.com/about2/; Sonic.net, *About Us* (last visited Aug. 25, 2014), *available at* http://sonic.net/company/.

[14] *The Impact of the Comcast-Time Warner Cable Merger on American Consumers: Hearing Before the S. Comm. on the Judiciary*, 113th Cong., at 3, (joint statement of David Cohen, Executive Vice President of Comcast Corp., and Arthur T. Minson, Executive Vice President of Time Warner Cable), *available at* http://www.judiciary.senate.gov/imo/media/doc/04-09-14CohenMinsonJointTestimony.pdf.

[15] Brian Stelter, *Netflix Stock Soars 16% on Huge Subscriber Growth*, CNN (Jan. 23, 2014), *available at* http://money.cnn.com/2014/01/22/technology/netflix-earnings/ (showing Netflix to have ended 2013 with 44 million subscribers and a quarterly add of 2.3 million American households).

content purchases from Amazon or iTunes, streaming shows on the websites of the channels that distribute them, finding more user-generated content on YouTube or Vimeo, or (and this is the best part) finding a combination of these outlets that suits their tastes.[16] Several companies, including DISH and Verizon, are launching Over-the-Top (OTT) services that will deliver MVPD-style linear video programming over broadband connections to subscribers of any broadband service, including Comcast — a prospect that makes cord-cutting that much more feasible.[17]

Over-the-Air (OTA) broadcasting, once written off as irrelevant, has once again become a part of that mix, too, because, once the the Digital Television Transition was completed in 2009, over-the-air broadcasting became another digital distribution channel for video. Broadcasting is now a robust digital wireless streaming service, with high-definition signals carried over the air to viewers' Digital Video Recorders, thus allowing them to subscribe to broadcast content and watch it at their convenience in ways that are directly substitutable with MVPD services.[18] Yes, a dwindling percentage of users actually rely solely on over-the-air broadcasting, but broadcast networks still retain a large share of the market that matters most: the market for eyeballs on content.[19] The same devices that allow users to stream Internet video content can also capture and record OTA content and present it to the user in a seamless interface that provides an alternative to MVPD services.[20] Theatres and DVDs/Blu-Rays also remain important alternative distribution channels for video content, especially in rural areas, which might lack adequate bandwidth for OTT services to be effective substitutes.

These are just a few of the major reasons why it would be difficult for the FCC to justify any new horizontal cable ownership cap in an increasingly competitive and dynamic video market. But these trends also illustrate how fundamentally the video market has changed since 1992 — and even since the D.C. Circuit struck down the 30% cap in 2009.[21] Cable had already become a

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[16] Adrienne Zulueta, *More Households Ditching Cable, Satellite TV*, ABC News (Apr. 21, 2014), *available at* http://abcnews.go.com/Business/household-cable-cord-cutting-rise/story?id=23411056.

[17] Jeff Baumgartner, *Ergen: DISH Has Enough Deals For OTT Service*, Multichannel News (May 8, 2014), *available at* http://www.multichannel.com/news/tv-apps/ergen-dish-has-enough-deals-ott-service/374442; Steve Donohue, *Verizon: Intel OnCue Acquisition Will Power New OTT Video Service, Next-Gen FiOS TV Product*, FierceCable (Jan. 21, 2014), *available at* http://bit.ly/1l4kzZ6.

[18] *See generally* FCC, *Digital Television* (last visited Aug. 25, 2014), *available at* http://www.fcc.gov/digital-television (describing DTV technology, the analog-to-digital TV transition, and offering links for consumers to more information about DTV).

[19] *See Fifteenth Video Competition Report*, at 10597, Table 20 (showing Broadcast TV to have a 15% share of local advertising revenues in 2011, compared to only 6% for cable TV).

[20] *See* Roku, *What is Roku?* (last visited Aug. 25, 2014), *available at* https://www.roku.com/meet-roku (describing the Roku IPTV streaming product); *see also* Simple.TV, *The Whole Planet DVR* (last visited Aug. 25, 2014), *available at* https://us.simple.tv/ (describing how the Simple.TV service can be used to record OTA content and stream it over the Internet to a Roku, Chromecast, iOS, Android, or Windows Phone 8 device).

[21] *Comcast Corp. v. F.C.C.*, 579 F.3d 1, 8 (D.C. Cir. 2009) ("We conclude the Commission has failed to 'examine[] the relevant data and articulate[] a satisfactory explanation for its action,' and hold the 30% subscriber cap is arbitrary and capricious.") (alterations in original) (internal citation omitted).

relatively shrinking subset of the MVPD market, which is also diminishing in importance as a subset of the larger video market.

In short, there is little reason to believe that there is anything about the structure of this market that requires a *sui generis* competition law. And there is every reason to believe that the standard antitrust laws of general application[22] are competent to assess whether this merger is more likely to cause harm to consumers than to benefit them, keeping in mind the dynamic nature of the market, and, just as importantly, whether blocking or conditioning the merger would do more harm than good.

President Obama's Department of Justice articulated well the reasons for caution in intervening in broadband markets, even via antitrust law, in its 2009 comments on the National Broadband Plan, "We do not find it especially helpful to define some abstract notion of whether or not broadband markets are 'competitive.' Such a dichotomy makes little sense in the presence of large economies of scale, which preclude having many small suppliers and thus often lead to oligopolistic market structures."[23]

Consumer Benefits of the Merger

Critics of mergers, especially in the telecom sector, typically begin from the presumption that mergers will harm consumers because "Big is Bad."[24] Whether a merger offers sufficient "synergies" to overcome such a presumption is inevitably the subject of intense debate, with both sides accusing the other of baseless speculation.

Consumers would be better served if regulators began from the opposite presumption: that, in the absence of demonstrated harm, mergers are likely to *benefit* consumers because mergers are, far from being a suppression of market forces, a critical way for markets to work. Indeed, "in the presence of large economies of scale, which preclude having many small suppliers and thus often lead to oligopolistic market structures" (as the Obama DOJ put it[25]), mergers may be the only way for "the market" — specifically the market for corporate control[26] — to ensure that

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[22] *See generally* U.S. Dept. of Justice & Fed. Trade Comm., *Horizontal Merger Guidelines* (Aug. 19, 2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf (setting forth the applicable analytical framework to be used in reviewing proposed horizontal mergers).
[23] Economic Issues in Broadband Competition: A National Broadband Plan for Our Future, *Ex Parte Submission of the U.S. Dept. of Justice*, GN Docket No. 09-51, at 11 (2009), *available at* http://www.justice.gov/atr/public/comments/253393.pdf.
[24] *See* Seth L. Cooper, *The Comcast/Time Warner Cable Deal: Keep the Focus on the Consumer Welfare Benefits*, 9 Perspectives from FSF Scholars 20, at 2 (June 2, 2014), *available at* http://bit.ly/1tM6C2d (asking the FCC to disregard pleas "based on appeals to emotional incredulity or 'big is bad' sloganeering).
[25] *See supra* note 23, at 11.
[26] *See generally* Richard S. Ruback & Michael C. Jensen, *The Market for Corporate Control: The Scientific Evidence*, 11 J. Fin. Econ. 5 (1983), *available at* http://bit.ly/1t6E7PV (reviewing scientific literature on the market for corporate control, and finding that the evidence indicates that corporate takeovers generate positive gains, and that those gains do not appear to come from the creation of market power).

consumers are getting the best product. Since Time Warner Cable and Comcast do not compete head-to-head (as the result of both the high fixed costs inherent in the industry and the government-created barriers to deployment we discuss below), a dissatisfied TWC subscriber cannot today take his business to Comcast. Only through a merger can he get the benefit of Comcast's superior management. Market forces have recognized Comcast's management as superior, based on the stock performance of the two companies.[27] But more importantly, Comcast has done a better job of investing in its network and upgrading speeds. Two key details illustrate the point: Comcast's average speeds are consistently higher than TWC's,[28] and Comcast is well ahead of TWC in its deployment of next-generation DOCSIS 3.1 broadband networking technology.[29]

Specifically, the FCC should keep in mind four clear consumer benefits of the merger

1. **Greater investment and faster speeds**: Faster deployment of DOCSIS 3.1, higher speeds, more deployment of Fiber-to-the-Home.[30] Allowing Comcast and TWC to eliminate redundancies via the merger process (e.g., by consolidating legal and advertising teams into a single group) frees the combined entity to allocate more of its resources towards investments in network infrastructure, maintenance, and operation.
2. **Promote expansion of Internet Essentials Program to serve low-income families**. Comcast has led the industry's effort to offer affordable broadband service to low-income families.[31] The merger will expand this program throughout Comcast's footprint, demonstrably advancing the FCC's goal of bringing all Americans into the digital communications age.[32]
3. **Greater Wireless Competition**. For years, critics of the wireless "oligopoly" have dreamt of building mesh networks using Wi-Fi to offer consumers another option. Grassroots efforts to build such networks have met with little success, but Comcast has built the nation's largest wireless mesh network, using its routers as hotspots.[33] The

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[27] *See* David Gelles, *Comcast Shares Are Down, But Time Warner Cable Deal Is Still Safe*, N.Y. Times (Apr. 7, 2014), *available at* http://nyti.ms/1zsXr8q (discussing the recent stock preformances of Comcast, Time Warner Cable, and other cable operators).
[28] *Public Interest Benefits Summary*, at 1 ("According to the FCC and industry sources, Comcast's broadband speeds are consistently higher than Time Warner Cable's.").
[29] *Public Interest Statement*, at 2 ("While TWC has upgraded its entire network to DOCSIS 3.0 and has plans to improve speeds and further digitize its network, Comcast has already transitioned to a fully digital network, stands ready to implement DOCSIS 3.1 (the next-generation broadband standard), and has rolled out some of the fastest Internet speeds and the largest Wi-Fi network in the nation. This transaction will accelerate network upgrades in the TWC markets and produce a more advanced broadband network.").
[30] *See, e.g.*, Shalini Ramachandran, *Comcast Steps Up Its Game on Internet Speeds: Cable Operator Is Going All-Fiber for Some of Its Customers*, Wall St. J. (July 24, 2014), *available at* http://online.wsj.com/articles/comcast-steps-up-its-game-on-internet-speeds-1406238911.
[31] *See*, Comcast Corp., *Introducing Internet Essentials from Comcast* (last visited Aug. 25, 2014), *available at* http://www.internetessentials.com/about.
[32] *Public Interest Statement*, at 59.
[33] Jon Brodkin, *Comcast Turns Your Xfinity Modem into Public Wi-Fi Hotspot*, ArsTechnica (June 10, 2013), *available at* http://bit.ly/1ntEA7v.

merger would allow Comcast to expand this network to many more consumers and in key parts of the country.[34]

4. **Greater Video Platform Competition**. The video market is fundamentally changing as the MVPD model faces increasing pressure from OTT platforms, which may replicate the linear programming model of MVPD distributors, in addition to offering content *a la carte*. Operators like Netflix, Hulu, Amazon, Apple, Google, and DISH all have the potential to reach *all* Americans. Cable operators are struggling to reinvent the MVPD model to keep up with this potential paradigm shift. Denying any cable operator the minimum scale needed to compete may deny consumers the benefits of seeing the MVPD model evolve. It is one thing to ensure (as the antitrust laws should) that cable operators do not engage in conduct that denies consumers the benefits of new competitive options. It is quite another to bar cable operators the ability to keep up, hamstringing incumbents simply because they are incumbents.

Conclusion: Our Recommendations

Ideally, as we have previously urged, FCC merger review should "continue to maintain that the FCC's review should focus narrowly on telecom-specific issues (*e.g.*, compliance with FCC rules and fitness to hold a license). The FCC should act to advise and inform the antitrust agency's determination; its own competition review should not have dispositive effect."[35]

Short of that, if the FCC *does* identify merger-specific harms related to the structure of the MVPD market, the FCC's inquiry should begin by asking whether those concerns are really to do, not with horizontal concentration, but with vertical affiliation — the potential for Comcast to leverage control over programming. Since Time Warner Cable became independent from Time Warner Inc., and thus relinquished ownership over most of the channels it once owned, it is difficult to see how significant this concern could be.[36] But more importantly, the FCC should ask whether the conditions volunteered by Comcast when it bought NBCUniversal, Inc. are adequate to address these concerns.[37]

If the FCC's concerns are about the market for OTT video — that the combined company would have greater incentive and ability to block or degrade competitors' video streaming services — that is precisely the kind of problem that antitrust law is well-suited to address. If the FCC can

[34] *Public Interest Statement*, at 38-42.
[35] Geoffrey Manne, Will Rinehart, Ben Sperry, Matt Starr, & Berin Szoka, *The Law and Economics of the FCC's Transaction Review Process* 52 (TPRC 41 Working Paper, Aug. 23, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2242681.
[36] *Time Warner Inc. Chooses to Separate Time Warner Cable Inc. Through Spinoff* (Mar. 12, 2009), http://ir.timewarnercable.com/files/doc_downloads/Separation%20Documents/TWC_News_2009_2_19_Financial.pdf.
[37] *See* Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion & Order*, MB Docket No. 10-56, Appendix A (Jan. 18, 2011), *available at* http://corporate.comcast.com/images/FCC-Order-on-NBCU.pdf.

identify a clear reason why antitrust law is inadequate to prevent harm to consumers, that might well be a sound basis for the FCC to bar the blocking of lawful content and to prevent discrimination that harms consumers — through binding "net neutrality" regulations resting on clear legal authority.[38] But it would not be a merger-specific harm, and therefore it would not be appropriate to address by regulating *ad hoc* through conditions applied only to this merger.

Ultimately, concerns about this merger seem to boil down to frustration that there is not more broadband competition. As the DOJ has noted, there are good reasons for this — the high fixed costs inherent in the business — and we should not expect the broadband market ever to look like textbook models of perfect competition. Having said that, we believe there is much that could be done to lower the barriers to entry that have largely shaped the current state of the market. We urge the FCC to focus its limited staff resources on those barriers.

Unfortunately, thus far, the FCC has been too focused on the idea of promoting government-owned broadband networks — despite lacking clear preemption authority to strike down state laws restricting such networks and despite what would be obvious to any economist: it is far from clear that allowing government to compete with the private sector for the provision of a product will, on net, result in more investment in the product.[39]

There *are,* however, many things that could be done to promote the deployment of private networks, in the form of both upgrades to existing networks and installation of new ones. Making it easier for telcos to upgrade their networks and for new entrants like Google Fiber and Sonic.Net to build a "third pipe" would be a far better use of the Commission's limited resources than wringing its hands over a marginal increase in Comcast's ownership of cable systems. In short, the Commission should spend more time stimulating broadband supply than quibbling over the structure of the market, growing the broadband pie instead of trying to micromanage how it is divided.

Specifically, we urge the Commission to open a Notice of Inquiry to re-examine the Commission's 2010 National Broadband Plan; update its recommendations in light of the experience of the last few years, especially of the deployment of fiber-to-the-home networks; and issue recommendations as to what the FCC should do with its existing authority, new federal legislation, and best practices at the state and local level to encourage broadband deployment. That should include clearing the red tape that has made deployment painful — for example, even in San Francisco, one of the tech-iest cities in the world, scrappy Sonic.Net has struggled to deploy a fiber-to-the-home as a "third pipe" because NIMBY activists have protested the cabinets

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[38] *See* Modified Final Judgment § V.G, *United States v. Comcast Corp.*, No. 11-cv-00106 (D.D.C. Aug. 21, 2013), *available at* http://www.justice.gov/atr/cases/f300100/300146.pdf#page=22. Since Comcast has volunteered to extend the net neutrality conditions it accepted when it bought NBCUniversal, this is not an issue here.

[39] *See* Pleading Cycle Established for Comments on Electric Power Board and City of Wilson Petitions, Pursuant to Section 706 of the Telecommunications Act of 1996, Seeking Preemption of State Laws Restricting the Deployment of Certain Broadband Networks, *Public Notice*, WCB Docket Nos. 14-115 & 14-116 (July 28, 2014), *available at* http://bit.ly/1l88gGo.

the company has to install on sidewalks to make their system work, and because the city issues permits for fiber deployment block-by-block, a regulatory nightmare.[40] Similarly, putting up small cell antennas to make wireless broadband work well in cities remains a nightmare despite some efforts to address the enormous backlog of tower siting and modification applications. It is an unfortunate accident of telecom law that new entrants cannot get fair pricing for using rights-of-way or pole attachments if they are not Title II or Title VI services (which often involve prohibitive regulatory burdens).[41] Finally, the FCC should explore and recommend "smart infrastructure" policies, such as the installation of "Dig Once" conduits under streets that any broadband company can rent.[42] These ideas have stalled in Congress, state legislatures, and town halls — and will probably advance only slowly without clear support from the Commission. In short, the FCC should follow the Federal Trade Commission's well-established model of competition advocacy: using the bully pulpit to advocate for a neutral competitive playing field.

Attachments

For the Commission's benefit, we attach (1) the transcript of Berin Szoka's discussion of the merger along with Susan Crawford and Gautham Nagesh on the Diane Rehm show, and (2) the testimony of Professor Christopher S. Yoo before the U.S. Senate Committee on the Judiciary on "Examining the Comcast-Time Warner Cable Merger and the Impact on Consumers" from earlier this year.

[40] Stephen Lawson, *Sonic.net Plans 1 Gbps Fiber Service to San Francisco Homes*, ComputerWorld (Dec. 14, 2011), *available at* http://bit.ly/VOhO2L (describing Sonic.net's network deployment plans for San Francisco and the numerous hurdles it faces due to, *inter alia*, the efforts of the group San Francisco Beautiful to prevent the installation of necessary network elements).

[41] *See* Google fiber, *Google Fiber City Checklist*, at 5 (Feb. 2014), *available at* http://bit.ly/1bVcl1o ("We would like to see clear, predictable rules and reasonable terms for all providers to attach fiber to any utility poles that are within the public right of way. Providers of broadband Internet services, including IPTV, should have access to existing utility poles, city-owned ducts and conduit, on nondiscriminatory terms, in exchange for reasonable payment. Ideally, these terms would be at least equivalent to the rights made available to traditional cable operators and telephone companies per the FCC's current rules.").

[42] *See, e.g.*, Fed. Highway Admin., Office of Transp. Policy Studies, *Policy Brief: Minimizing Excavation Through Coordination* (Oct. 2013), *available at* *http://1.usa.gov/VKONoO* (discussing "Dig Once" initiatives).