MODERATOR: Good day and welcome to the Comcast Time Warner Cable Merger conference call with Allen Grunes and Maurice Stucke. I would now like to turn the call over to Mr. Jonathan Rubin with the Capitol Forum. Please go ahead, sir.

MR. JONATHAN RUBIN: Thanks to everyone for joining the Capitol Forum’s first conference call this morning on the Comcast and Time Warner cable merger. I’m Jonathan Rubin, Senior Correspondent here at the Capitol Forum, and we’re delighted to have with us Allen Grunes and Maurice Stucke to discuss the merger today.

For a quick introduction, Allen is a partner at GeyerGorey and he previously spent more than a decade at the DOJ’s Antitrust Division. And Maurice Stucke is of counsel at GeyerGorey and is also currently an Associate Professor of Law at the University of Tennessee College of Law.

More importantly for this call, Allen and Maurice are the authors of two recently released papers on the merger entitled “Crossing the Rubicon: Why the Comcast Time Warner Merger Should Be Blocked,” which appeared in Global Competition Review in February of this year, and “The Beneficent Monopolist” which will be in the forthcoming April, 2014 issue of Competition Policy International.

Before we get started, a few quick things to note. I’ll spend the first thirty minutes or so interviewing Allen and Maurice, and then we’ll turn it over to the audience for questions. If you have a question for us, please email editorial@thecapitolforum.com.

With that, let’s get started. Allen and Maurice, welcome. To put the first question into perspective, let’s just note that we are in the very early stages of this transaction. We don’t know all the facts and the arguments. The public interest statement was just filed this morning, and I don’t think any of us have an opportunity to read it thoroughly.
So, from a preliminary perspective, does this transaction cross the Rubicon? And what does that mean?

MR. MAURICE STUCKE: All right. This is Maurice Stucke. Thank you so much for inviting us to the program today. The way that this came about was Allen and I, when we heard about the merger, we spoke with several members in the financial community about the deal and what the prevailing wisdom was about the transaction. And our thought experiment was, well, let's suppose that the financial community is correct. And let's suppose that the merger—while it's not going to exactly sail through the regulatory process—is likely to remain relatively intact.

And if that is true then, and let’s say Comcast acquires Time Warner Cable, what then is to prevent Comcast from extending its footprint across the United States and acquiring all the remaining cable companies? What is the limiting principle?

The argument that Comcast makes here—that it doesn’t compete with Time Warner—conceivably could apply to any other merger. And it also raises the issue that if the DOJ allows this transaction, is it really then going to complain if Comcast acquires a smaller cable company in Iowa or in North Dakota? And we thought it was unlikely.

So, we thought this is crossing the Rubicon for the DOJ. If they allow this transaction to go through, is there really any limit on Comcast’s ability to acquire other cable and broadband companies? And then we said, well, if that's the case, what are going to be the theories of harm that the DOJ could likely rely upon. We came up with five in the article, and I only will touch on a couple here.

The essential argument—and they made it again today—is that they don’t really compete, that they’re not in each other’s geographic market. And as another thought experiment: is that a valid argument? Let’s say that there was a cable monopoly in each of the fifty states, could one company then acquire each of the local cable monopolies
without violating Section 7? Is there some concern if a local monopoly expands its footprint nationwide? Does that trigger any antitrust concerns?

And one of the things that we argued is that you don’t necessarily have to be competing in the same market in order for consumers to be harmed because Comcast could disadvantage its rivals by raising their costs. And if that were the case, then consumers would be adversely affected.

Another thing that we thought that the argument ignores is monopsony power. And here there are two things that are going on. First, with the monopsony power argument, you don’t have to show necessarily that consumers will be harmed as a result; you can show that sellers can be adversely affected.

And then the second is that monopsony—while it is often said to be a mirror image of monopoly—is not exactly a mirror image. Peter Carstensen, among others, has pointed out that monopsony power can come at a much lower market share than monopoly power.

And then finally, we looked at what sort of impact would this have on the online video programming distributors such as Netflix, and how are they likely to be adversely affected? And to what extent their being adversely affected will thwart innovation and thereby harm consumers? So that’s what got us onto this topic.

MR. ALLEN GRUNES: This is Allen. Let me add a point and summarize. Comcast and Time Warner Cable have, it seems to me, tried to minimize the significance of this transaction. They said essentially, “hey we’re just a regional cable company, and this merger will give us a few more markets and extend our geographic reach a bit.” And the reaction from a lot of folks has been, well, DOJ did not stop the NBC/Universal deal, which was a game changer, so how’s it going to say no to this one?
But it seems to us that once you begin to scratch the surface, you begin to see the deal risk. And we wanted to debunk the argument that Comcast and Time Warner Cable don’t compete.

MR. JONATHAN RUBIN: Now, when you talk about raising rivals’ costs, aren’t you directly challenging one of the propositions that Comcast has been putting forward, which is that there is no horizontal effect to this merger?

MR. MAURICE STUCKE: Allen, do you want or should I?

MR. ALLEN GRUNES: Go ahead, Maurice.

MR. MAURICE STUCKE: No. If you look at the vertical transaction between NBC/Universal and Comcast, one of the concerns there was that through the vertical component of that transaction, Comcast could raise its rivals’ costs. And later, Allen’s going to touch on to what extent does that decree protect consumers.

But you don’t necessarily have to be in the same market in order to adversely affect competitors and thereby affect consumers. One theory involves buyer power and the waterbed effect, which Paul Dolan raised. What a powerful buyer can do is that it could demand terms from sellers, and that sellers then, as a result, can’t absorb the costs. They then try to pass those costs to less powerful buyers, and, as a result, the consumers of those less powerful buyers are adversely affected.

So there’s no requirement that the buyers be in the same market. A buyer in New York can impose costs on consumers in California under the waterbed effects theory.

MR. JONATHAN RUBIN: In the second article that you guys wrote, you discussed some of the defenses that Comcast is likely to raise. Could you tell us about those? And tell us what you think about them.
MR. ALLEN GRUNES: Well, we talked about a few of Comcast’s likely arguments. And taking a brief look at the public interest statement, it looks like we hit the nail on the head for at least a few of them.

But one of the arguments we talked about in particular that we think they’re going to make is about broadband. Given how high the national combined Comcast and Time Warner Cable share would be—and depending on how you measure it, it’s probably forty or as much as fifty percent and growing nationally, and, of course, larger in local markets—our expectation is that Comcast is going to argue this is a dynamic market, and they’ll point to appearance of Google Fiber in some markets and greater speeds that wireless has been able to achieve in recent years through LTE and 4G.

So in the article, what we do is we point out that Google Fiber is and is likely to remain a tiny competitor, despite the fact that Google is behind it. And there are reasons to believe that wireless is not going to be regarded as part of the same broadband market as wired broadband. And that's what DOJ is likely to conclude at the end of the day.

We also point out that Comcast’s own senior management said in an investor call after the Comcast/NBCU deal, that Comcast only has one broadband competitor. And he was referring to FiOS which is only in 15 percent of Comcast’s market and is not expanding, at least not at this point.

So the bottom line for us, at least on this point, is that the merger will dramatically increase Comcast’s share in high speed broadband. And that’s likely to be a focus of both the DOJ and the FCC review.

MR. JONATHAN RUBIN: Anything to add to that, Maurice?

MR. MAURICE STUCKE: No. Allen, you're going to touch on the Netflix and the OVDs, right?
MR. JONATHAN RUBIN: We’ll get there. Part of the interesting thing about this merger is that it's coming not long after the 2011 vertical integration of NBCUniversal and Comcast. In connection with that merger, most people know that there were certain commitments and conditions imposed as a condition of the approval of that merger. What do you think of those commitments? And have they worked? And are those the kind of commitments that would help get this merger approved?

MR. ALLEN GRUNES: Maurice, do you want to start? Or should I?

MR. MAURICE STUCKE: I’ll just start with a very general overview. When Allen and I were at the Division, the focus was primarily on structural remedies. It was often the case that the companies in a merger would say, “well if our prices are unreasonable or if our terms are unreasonable, then you can come in and tell us no, and then we can then charge accordingly.”

And our response typically was, “we’re not a regulator.” We don’t have necessarily the knowledge of what the proper price should be or what the proper terms should be. That should be left to the market.

So we relied traditionally on structural remedies--such as divestitures and the like--that would bring then the market back to what it would have been absent the merger, i.e. restore competition.

And that really wasn’t controversial. That was both during Republican and Democratic administrations. And one issue is behavioral remedies and what’s your faith in behavioral remedies? Comcast here has already decided that they’re willing to abide by the behavioral remedies. In fact, they tout this as a benefit of this merger--that now net neutrality would be applied to Time Warner Cable.

So one overarching issue is to what extent are you confident in the DOJ as a behavioral regulator? And then, to what extent, even if you have behavioral regulations, to
what extent are they right? And this was not without controversy. The American Antitrust Institute wrote a very good paper questioning behavioral remedies. And it’s now come to the fore: are the behavioral remedies in place here adequate to protect regulation? Or should we rely more on competition and structural remedies and let the market decide?

MR. ALLEN GRUNES: So let me just add to that a little bit. As people know, some folks out there have argued that Comcast hasn’t lived up to the conditions that it agreed to as part of the NCB/Universal deal. And Comcast, of course, denies that. And there have also been some unintended consequences and provisions in need of interpretation or clarification.

The real point I think is that regulation through consent decree is not a good solution. The fact that Comcast has agreed to observe something like 100 conditions between the FCC and DOJ makes you wonder on multiple scores about the wisdom of this kind of regulation. It puts the agencies into the position of having to constantly monitor compliance. It puts Comcast into a place that is very different from other industry participants in terms of regulatory requirements. And in some way, it also makes Comcast in charge of how it is going to be regulated.

So, for example, as Maurice said, Comcast has now offered to make Time Warner Cable subject to the same conditions that Comcast agreed to. Well, that's clearly throwing a bone to the FCC on things like net neutrality, which the FCC would like to have, but, of course, is questioned. And it’s offered to reduce its subscribership. It’s similarly throwing a bone to the FCC on the cable ownership cap, which the courts have thrown out.

And if you think about DOJ’s concern with protecting new online distribution, you've got to ask yourself whether that early stage market is still evolving; whether the NBC/U decree has been in place long enough for that market to take root; whether there’s evidence that the decree has
been and will continue to be effective; and whether this merger is going to slow down the development of the online distribution market and undercut the things that DOJ was trying to do last time around.

MR. JONATHAN RUBIN: Given that the choice was made in the last merger to go the route of imposing behavioral remedies, what effect, if any, does that have on the scope of remedies if that question comes up in this particular merger? In other words, is it too late to put the toothpaste back in the tube? Would it be even thinkable for a structural remedy to be imposed at this point after the behavioral remedies from 2011?

MR. ALLEN GRUNES: I would think so. I actually think that there are a couple of very possible outcomes here. One includes litigation. The other includes much tougher conditions than in the earlier merger.

Obviously, this merger gives DOJ a chance to look back and see what worked and what didn’t work in the last merger. And as Maurice talked about at the beginning, I think there’s going to be some concern here that without a limiting principle, in two years Comcast will be back buying Charter or Cox or there will be another cable merger. They’ll be looking at the whole picture again and, it’s going to be progressively harder, as Maurice also said earlier, to do anything about those.

So I think you put those things together, and it makes me think that there is not only room, but a fair likelihood in the deal, that if behavioral conditions happen, they’re going to be significantly more draconian and more serious than before.

And to get to your point, I think things like divestitures or regulatory creation of competition via, for example, wholesale broadband in the last mile, are not out of the question here.
MR. JONATHAN RUBIN: Well, perhaps I put the cart before the horse. You mentioned litigation risks, so let’s sort of bottom line this at this point. What do you think are the chances of litigation on this merger from the DOJ? What is the extent of the litigation risk in this deal?

MR. ALLEN GRUNES: Well, I wouldn’t want to handicap it this early, but I can see this deal ending up in litigation in at least two different ways.

First, the market power that DOJ and FCC found Comcast to possess last time around seems like it would be increased by this merger. To me, when you add important markets like New York and LA, it’s only logical that that’s increasing your power to disadvantage or foreclose rivals or harm competition. I’m sure Comcast is going to take issue with that, but intuitively it sounds right to me.

So when I look at that, I think there’s probably a straight up basis to challenge this merger just on an increase of market power given what was found in the last merger that it seems to be worse here. That’s number one.

So I’ve got to assume that both DOJ and Comcast know that. The other way I think you could end up in litigation is if Comcast and DOJ get into some negotiations down the road, and Comcast doesn’t offer enough concessions or the type of concessions that DOJ is looking for.

And what we’ve seen with Bill Baer in this administration is that if parties present him with half-baked or cheap settlements, he sues. That happened, Jonathan, as you know in the beer and the airlines deal, and I think it’s a hallmark of the Baer administration.

So take all that together—the need to draw a line in the sand somehow here, the likelihood that DOJ is going to find at least some major parts of this deal anti-competitive, and the possibility that Comcast will offer remedies that DOJ will find inadequate—and I think there’s some real litigation risk.
MR. MAURICE STUCKE: And just to add to what Allen pointed out--and Jonathan as you know as well--many times the DOJ has to prepare a case for litigation, but very rarely do cases go to litigation. So to what extent will DOJ prepare to go to litigation? In addition to what Allen pointed out, a lot of it is also going to depend on the complainants and what type of theory they’re telling to the agency and to what extent the agency has witnesses and evidence in order to show that the antitrust law is being violated.

And then the second component is once the DOJ says, “We are concerned about the transaction; not only do we have concerns, but we are confident that we can prove it in court, and we don’t think that the remedies that you are proposing satisfy our concerns” and they’re at an impasse. Rather than having litigation, to what extent will Comcast and Time Warner Cable walk away from this transaction?

It’s interesting that in their telephone call with investors, the CEOs of both companies pointed out the absence of any breakup fee or reverse breakup fee as evidence of their confidence that this deal would be approved. And if market conditions change to such an extent and if litigation seems likely on the horizon, the parties could walk away from the transaction.

MR. JONATHAN RUBIN: The concern about the TV, cable, video services competition has been sort of pushed by Comcast, but we don’t get as much discussion about the broadband angle. Is there a role for the Antitrust Division in the broadband piece of this transaction, or is that mostly the FCC’s concern?

MR. ALLEN GRUNES: Well, I think it's going to be interesting to see how that develops and what antitrust theories prove to have traction over at DOJ. I think the short answer is that it is going to play a role over at DOJ. What the theory or theories will be, I think is an open question at this point.
Comcast is, I believe, kind of anticipating that DOJ will be looking at a theory where they would have the power to throttle the speed of online programming coming in through the Internet or otherwise harm that. I think for those of us who are Netflix subscribers, we’ve seen some of the slowdown in the last several months. And I’m sure I’m not the only person out there who got frustrated with it. It didn’t make me think of canceling my FiOS account; it made me think of canceling my Netflix account.

So, I think Comcast is coming in partly to respond to kind of a “throttling of the Internet” theory. But there are other theories that could be in play. One, for example, that I could see potentially getting developed is a Microsoft-type theory in the sense that you could look at Comcast as a dominant or potentially dominant firm in one market that is then trying to move over into another market that represents a threat to it.

And DOJ kind of has talked about that in the context of the NBC/U merger with their concern for online video distributors—even though it’s a nascent market—and trying to protect online video distributors. And that theory is really an innovation theory; at least that's the way I interpret it.

MR. JONATHAN RUBIN: Well, along those lines, first I’d like to ask our listeners that if there are questions, please don’t hesitate to email us at editorial@thecapitolforum.com. So on this theory of nascent competition, that's kind of a dynamic competition theory, isn’t it?—sort of looking out into the future at the effects of the transaction on future innovation.

Could you see a scenario in which the DOJ would or could challenge this merger on the grounds of concerns about dynamic competition rather than the sort of more standard static competition concerns that usually occupy antitrust analysis?
MR. ALLEN GRUNES: I actually can. It’s obviously somewhat complex; it’s not a no-brainer. But if you go back to some of both the litigated and settled cases that DOJ has done involving the Internet as a disruptive force, I think you can see they’ve laid the groundwork for doing such a challenge.

You can look at the Microsoft case, for example, which was litigated and got through the crucible of litigation, but you can also look at things like the National Association of Realtors, a case that had to do with online brokers. So DOJ has got a track record of looking at these things.

MR. JONATHAN RUBIN: I’m afraid you're at a little bit of a disadvantage Maurice because Allen is with us in the same room. Do you have anything to add?

MR. MAURICE STUCKE: Yes, just a couple of points about that. One is that the competition authority, and the antitrust community, generally, recognize that dynamic efficiencies are generally more important than static price efficiencies— that dynamic efficiency involving innovation is the real driver of economic growth. So everyone seems to accept the importance of dynamic efficiencies.

The problem then is how do you measure dynamic efficiencies? How do you quantify them, and how do you determine whether or not a particular merger may lessen innovation? And that's been the real rub.

There was this foray by the agencies earlier to look at innovation markets and to look at research and development as a relevant market. But here, to the point that Allen raised, the agencies don’t necessarily have to go that route to say what is the likely effect that this merger has on their incentives to innovate looking at research and development as an input.

They could look at to what extent will controlling broadband really hamper these emerging technologies? And here, the OVDs--the Online Video Distributors--they’re
going to be critical. And what they’re telling the DOJ, that’s going to be a key component.

And they can show by Comcast, by controlling the pipes, can then disadvantage these OVDs in ways that would prevent them from becoming better competitive alternatives to Comcast’s video programming distribution services. So that's not a real stretch, and that theory, I think, would resonate with a judge.

MR. JONATHAN RUBIN: Well, before we leave OVDs and Netflix, most people are aware that there was a deal made regarding interconnection between Netflix and Comcast not too long ago. Is this deal significant for the review of this merger in your opinion?

MR. ALLEN GRUNES: I think so. I think it’s an important deal. It also illustrates something that people at the antitrust agencies see pretty regularly in merger review. There’s nothing that stops merging parties from making deals with customers or suppliers who might otherwise complain. It’s just a tactic and it looks like it happened here despite Comcast’s claim that the Netflix deal was independent of a merger.

What makes it potentially troublesome, I think, from DOJ’s standpoint is that they said back in 2011 that Comcast was a threat to Netflix and similar companies. And presumably, Netflix is a bit of the poster child of who could be harmed by this merger. So if Netflix is taken out of the picture, then that seems like it could weaken DOJ’s case.

What I think is interesting here though is that Reed Hastings doesn’t seem to want to play the role that Comcast may have expected him to play. He made the deal with Comcast, but almost immediately went public with a criticism of the deal and of Comcast. He called the deal an arbitrary tax that demonstrates Comcast’s leverage.

On the other side of the coin, Comcast, for its part, characterized Netflix’s deal as an amicable, market-based
solution. So the question is what’s Netflix going to do going down the road? Are they going to do more than grouse about it or blog about it? If push comes to shove, would somebody from Netflix be willing to sign a declaration? Would they be willing to stand up and serve as a witness at trial? We’re a long way off from that point, but I think that’s a real question.

MR. JONATHAN RUBIN: Do you all get the sense that the Baer administration at the division is equally concerned with the development of online video distribution as the Varney administration was? Maurice?

MR. MAURICE STUCKE: I would see no reason why they wouldn’t be. It’s not particularly an ideological point. It’s more that you have this nascent innovation that could benefit consumers in many ways. Consumers seem to want the service when it’s available.

And I think that it’s not that the Baer administration or the Varney administration are picking winners and losers. They’re basically saying, well, let’s let consumers decide, and the ability for consumers to decide can be hampered by the exercise of market power, for the reason that Allen gave. When his internet service was slow, he may not necessarily punish his broadband provider because he may not have a viable option there. He could then cancel Netflix as a result.

And the other point I want to make as well with behavioral remedies is we could say, well, Netflix is not affected, but does that mean that other OVDs are unlikely to be affected? And so DOJ can reach out to some of the smaller companies.

But then it’s also: what is the incentive to invest in this space if you know that Comcast has this power? And to what extent if I’m looking to invest my money is this a viable opportunity for me to invest in? Particularly if I would have to then rely on these behavioral protections that
seemingly did not even protect Netflix, as Netflix sought to carve out its own separate deal with Comcast.

MR. JONATHAN RUBIN: What’s interesting is that when Comcast describes the market in their filings and public relations materials, they describe it as being highly competitive. And one of the folks they point to as being one of their competitors is Netflix. So let me ask you is Netflix a competitor of Comcast?

MR. ALLEN GRUNES: Jonathan, what do you think?

MR. JONATHAN RUBIN: Well, I mean, you all have been talking about the relationship between the two companies. What is the effect of the control over the broadband of the ability of Netflix to compete with Comcast? And should there be any difference there between that and any other provider of TV services?

MR. ALLEN GRUNES: Well, I mean, there was a complaint a while back that Comcast had its own Netflix-like service, and Comcast was imposing data caps on Netflix but not on its own product. I’m not going to get into the details of that. I’m sure there are arguments on both sides. But that certainly suggests to me that there’s a competitive dynamic going on there.

MR. JONATHAN RUBIN: Anything to add to that, Maurice?

MR. MAURICE STUCKE: No. It's just that the DOJ has recognized how the OVDs are dependent upon Comcast to deliver their content to subscribers. You raise an interesting point because if Comcast were just purely a distribution mechanism, then they wouldn’t be competitors.

In fact, you could see how their interests would be aligned—that Comcast would have an incentive to increase its broadband speeds to enable Netflix to provide its services, and that would increase the demand for both broadband as well as for these OVDs.
The wrinkle here is that Comcast is not only a distributor—it has the pipes—but it also produces some of the products. And that creates a conflict between its interests and that of its consumers.

MR. JONATHAN RUBIN: But, of course, that’s pre-existing because they already are vertically integrated. So I suppose by raising that, what you're saying is that that particular dynamic would be worsened with an additional ten million subscribers.

MR. MAURICE STUCKE: That would be one of the concerns that the DOJ would consider.

MR. JONATHAN RUBIN: We’ve got a question from the audience about the limiting principle. And in connection with that, the audience member has referred to the thirty percent horizontal ownership cap. And the question, in essence, is isn’t that a sufficient limiting principle to which Comcast has voluntarily agreed to adhere? And doesn’t that really solve the problem that you all were talking about with respect to the acquisition of other systems?

MR. MAURICE STUCKE: Yes, let me address that. The FCC’s thirty percent limit on nationwide, multi-channel video subscribers that any single cable provider can serve, that was vacated in 2009. And Time Warner Cable in its most recent annual report wrote that it’s unable to predict when the FCC will take action to set new limits if any.

So right now it’s not legally binding. It’s unclear if it ever will be legally binding. Time Warner Cable doesn’t see it necessarily as legally binding as well.

And then the question is why thirty percent? Comcast can argue thirty percent might have made sense some time ago. But as you pointed out, Jonathan, they pointed out how competitive the markets are today. The thirty percent is no longer valid.
So it really doesn’t serve as any limitation on Comcast’s growth. It’s not law, it doesn’t bind Time Warner Cable or Comcast today, and seemingly won’t bind them in the future.

MR. ALLEN GRUNES: So let me answer that because I think one of the problems with just having a number like thirty percent is that it doesn’t tell the whole story. And here’s my example why: Imagine that Comcast owns movie theaters in large markets and is a very significant movie theater chain in a bunch of the large markets in the U.S. And imagine that it’s merging with Time Warner which owns movie theaters in New York and LA—in other words, in additional large markets in the U.S.

The real significance is, I think, which markets you're in. It’s not just the abstract numbers. So if I were a movie studio looking at a merger like that where post-merger the chain would own the most important movie theaters and the most important markets in the country, I would be very concerned about the negotiating power that would convey.

MR. JONATHAN RUBIN: Okay. Let’s switch gears a little bit from the technicalities of the antitrust analysis. One has to admire Comcast’s ability to frame its transaction in the most positive light possible and the very able folks that they’ve gotten to help them. Do you think that these—I don't mean to be disparaging by calling them lobbying efforts, but let’s call them that—do these lobbying efforts and political activities make a difference for a merger review?

MR. ALLEN GRUNES: Well, I don't think it’s going to have an appreciable effect on DOJ. I don't think it's going to make any sort of significant difference here. I do think it’s important for Congress to look into significant mergers, and this one’s no exception, and it’s important that the issues and possible consequences get aired and discussed.

And Congress obviously also has an oversight role to play. So to the extent lobbyists play a role in educating members
and staff about issues and arguments, I’ve got no problem with that.

In general, what I say, is lobbying doesn’t convert an anti-competitive merger into a competitive one and does not make or break a government investigation. I’d say just look at AT&T/T-Mobile for example. That was one of the heaviest lobbied mergers in history.

MR. JONATHAN RUBIN: Maurice, anything to add to that?

MR. MAURICE STUCKE: No. It just prompted what John Adams said many years ago, that facts are stubborn things, and they don’t change. And so a fact is a fact, regardless of the amount of lobbying effort that exists. And there are some facts that aren’t in dispute here. There will be other facts that will be in dispute. But there are some facts that are of significance that aren’t in dispute.

MR. JONATHAN RUBIN: So gentlemen, what's next in the weeks ahead on this transaction?

MR. ALLEN GRUNES: One thing that we’ve written about, and I think it's an important question, is whether the traditional content providers and more of the edge providers will be willing to come forward on the merger and take a public stand.

I think if you think about what Sprint did during the AT&T/T-Mobile case, Sprint was very public about its opposition and devoted the kind of resources that could be necessary to fight a merger like this one. And as I said back then, I thought Sprint added considerable firepower—legal and economic firepower—to DOJ’s case.

So it’s possible to do a case with only a limited number of complainants, but it’s comparatively rare and difficult. So I think we should keep an eye out to see who comes forward in the next several weeks and what sort of resources they’re devoting.
MR. MAURICE STUCKE: And I would just add, just on a procedural basis, that last week the parties filed the Hart Scott Rodino notification with the DOJ. So now that sets the clock under the HSR Act.

The next question is will the DOJ issue a second request in the next month? And I think it's highly likely that the DOJ will issue a second request in this transaction, given the amount of concern.

Then one issue before the documents start rolling in is how broad will the second request be? Second requests typically are not public knowledge, but one issue is does the second request carve out certain areas? The second request at times can signal what the concerns are of the DOJ. And can the parties then try to minimize those concerns and limit then the scope of the second request?

Once the second request has been issued, the parties will have to start producing documents under the second request. You're typically looking at a four to six month process in which the DOJ will be then interviewing and deposing market participants--this could be sellers, customers and the like.

They're also going to be gathering data for their economists; they're going to be testing various economic theories; they're also going to then be looking at the internal documents which can play a key role in the merger analysis.

And then the next time you'll likely hear something would be probably around four or five months, just to see where the transaction is going, what the DOJ’s concerns are and to what extent are they going to then try to settle this? Or will the DOJ likely file a complaint and litigate?

MR. JONATHAN RUBIN: Very good. And with that, we’re going to take some questions that we’ve received from the audience. Again, if you'd like to submit a question, please just email us at editorial@thecapitolforum.com. One of our
listeners has asked another question about Netflix. If Netflix users are taking so much bandwidth that’s affecting other users, why should the lower users pay to subsidize the capacity for others to watch Netflix?

MR. ALLEN GRUNES: Well, I think it's an interesting question, and I suspect the answer is there’s a lot more going on here than we know today. There obviously was a debate beginning to brew between Netflix and Comcast in terms of how Netflix delivered traffic onto the last mile.

You can imagine Netflix saying Comcast was either not investing where it could and should have or taking some affirmative action to make it harder for Netflix to get onto the last mile. And you can imagine Comcast saying, “Netflix, this is your choice on how you get onto our network, and you don’t have to do it the way you're doing it, and you could do it more directly with us.”

So I think this is one of those questions where the facts actually do matter. And my guess is that the facts are going to be contested.

MR. JONATHAN RUBIN: Okay, gotcha. So we have a guest questioner here. I’d like to introduce you to Teddy Downey, our CEO at The Capitol Forum. Teddy?

MR. TEDDY DOWNEY: Hey, I know this maybe jumping the gun a little bit, but I wanted to ask about potential remedies. There is some sense that the deal could either be blocked or carry some really weighty, controversial remedies or divestitures. What might those look like? And also would divesting NBC be one of those potential remedy ideas?

MR. ALLEN GRUNES: I think it's a little bit early in the game for that, Teddy. All I’ll say is that I can't imagine Comcast divesting NBC to get this deal done.

MR. TEDDY DOWNEY: Maurice, anything to add there?
MR. MAURICE STUCKE: Really, the remedies really flow from the concerns. And so what are the concerns that the DOJ would likely have? And you could see then there’s a spectrum of possible remedies. They could be just the pure behavioral remedies that are in the existing decree—on the one hand—and Comcast has already agreed to abide by those.

On the other hand, it can be a straight up injunction that the DOJ says that the deal should be enjoined because of the likely anti-competitive effects. And that's on the other extreme.

And then in the middle is, well, what would it take to remedy the DOJ’s concerns? That's going to depend then on what concerns the DOJ articulates. And to what extent it’s confident that the proposed remedies adequately address those concerns.

And that, as Allen pointed out, is still to be developed. I mean, that's going to depend upon what sort of complaints they hear in the marketplace. It’s going to depend on the evidence, the documents, that they receive from the parties. It’s going to depend on the admissions that the parties make in their depositions. And that we don’t know.

MR. JONATHAN RUBIN: All right then. Thank you both so much. That's about all the time we have today for this. And we appreciate you both participating. And for the audience, if anyone would like a replay of this call, please don’t hesitate to email us at editorial@thecapitolforum.com. Again, Maurice and Allen, thank you again for your time today. And with that, I’ll turn it back to the operator.

MR. ALLEN GRUNES: Thank you, Jonathan.

MR. MAURICE STUCKE: Thank you.

(END OF TRANSCRIPT)