Comments for the Record

Comments to FCC on the Comcast-Time Warner Cable Merger

DOUGLAS HOLTZ-EAKIN, WILL RINEHART | AUGUST 25, 2014

Introduction

The Comcast-Time Warner Cable (TWC) deal will strike the tenor for technology mergers in the coming years, so it is important the regulators understand its impact on consumers and the competitive environment. Technology policy's fundamental question again takes center: should we regulate beforehand, deterring all potential positive benefits, or regulate when there is actual consumer harm? Answering that question requires knowledge of both the current market realities and an exploration of the future competitive environment. The current market realities are certain: there are few horizontal and vertical concerns in both paid TV and broadband Internet, the broadband market is extremely competitive, and the deal is likely to benefit consumers. While the future is far more uncertain, efforts by rivals in the converged television and broadband market continue to bode well for competition. More importantly, the Federal Communications Commission (FCC) should be hesitant to stop this deal from closing. However, if concerns and merger conditions are pursued, those constraints should be narrowly tailored to this deal. All combined, the deal is clearly in the public interest and should be allowed.

How Market Realities Affect Horizontal and Vertical Concerns

Merger review, as part of antitrust law, is meant "to protect and enhance competition and consumer welfare."[1] By all accounts, competition is robust in both the paid TV and broadband spaces, and the merger itself has few vertical and horizontal integration concerns.

Horizontal mergers can reduce the number of competitors in the market. However, Comcast and TWC do not compete in any relevant market for multichannel video programming distributors (MVPDs).[2] Even though the 1992 Cable Act prohibits exclusive cable franchises, local regulations called "cable franchising rules" usually result in just one cable provider for a market.[3] Consequently, this deal will not change an important feature of TV: 98 percent of Americans can choose from three or more MVPDs. In addition to two satellite providers, the entry of fiber into countless market allows 32.8 percent of Americans the choice of four or more MVPD options, up from a mere 4.7 percent in 2006.[4]

Paid TV is a relatively mature market, but the last two decades have been a transformative time. High quality serial dramas have proliferated, which has driven up the cost of production and changed the ways that consumers watch content. TV sets have steadily increased in resolution and size, creating upward pressure for high definition signals in programming. Meanwhile, cheap alternatives on the Internet increasingly compete for attention. The TV viewing habits of Americans have been stable and consumers are turning to cord cutting and cord trimming to get their content without the cost of cable.[5] While cable is indeed the largest U.S. broadband provider, its share of TV distribution is only a little more than 50 percent with total subscribers on a decline from 2008.[6] Forty four million American homes now get video from non-cable providers such as fiber and satellite, who have cut into the core business.[7]

The combined company would sit below the arbitrary 30 percent market share threshold that had long been a cap by the Federal Communication Commission (FCC). The FCC established this cap as a limit for pay TV ownership, but it was struck down by the courts in 2009, because the agency "failed to demonstrate that allowing a cable operator to serve more than 30 percent of all cable subscribers would threaten to reduce either competition or diversity in programming."[8]

Programming is really the primary concern in the pay TV market. About half of a cable bill goes to programming companies such as Viacom and Disney, and costs are on an incline.[9] From 2006 to 2011, total spending by cable companies on programming increased 29 percent in real, inflation adjusted dollars.[10] Programming expenditures have increased substantially more than the average cable price.[11] Time Warner spun off its cable operations partly due to this squeeze.

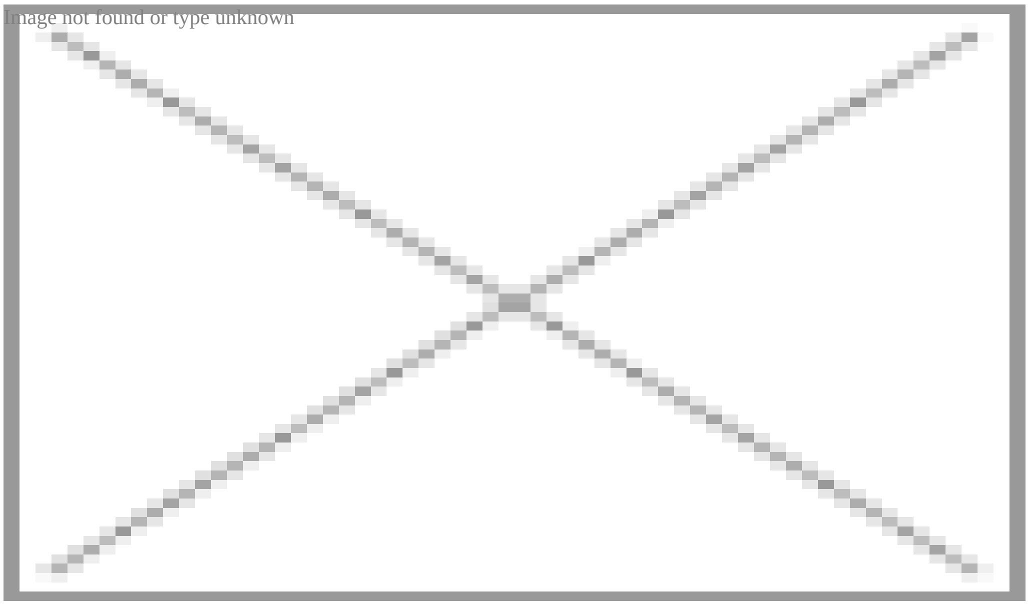
Will this deal stifle the production of content? The entire cable industry only owns about 14 percent of all programming channels, according to the FCC.[12] It is hard to see how this would substantially change the production of programming given that it is a little more than a 1/8 of the market. Moreover, Comcast will still be subject to its conditions from its acquisition of NBC Universal. In allowing the deal to move forward, the cable company agreed to a length set of restrictions, which included a provision requiring the company to provide online distributors with TV content, and an agreement to not "exercise corporate control over or unreasonably withhold programming from Hulu."

What will change is the calculus between Comcast and huge content players like ESPN, CBS, and NBC. Merging the two operators would give them bargaining power. Consumers have the potential to win in this deal because the combined company would be able to slow down these programming costs. However, nothing is given. TWC just saw itself on the losing side of a programming debate with CBS when they negotiated their programming fees, losing more than 275,000 subscribers in the fight.

The future of cable is the Internet, and that is where any concerns, be they minimal at best, of this acquisition lie.

Competition is Robust in Broadband

The broadband market is both competitive and dynamic, marked by falling relative prices, expanding output, rapid innovation, and convergent competition. Even though broadband did not exist as a practical option for residential consumers until the early 2000s, it has rapidly developed. Average download speeds for wired connections in America have increased 32 percent in the past year alone, far faster than projected growth.[13] The U.S. is now the 9th fastest country overall. Last year alone, the number of Internet subscribers with a connection over 10 Mbps jumped 60 percent, putting the U.S. close behind small countries like South Korea and Japan where the population density makes it cheap to build networks.[14] The 6-year historical trend is depicted in the chart below and shows a strong upward trajectory with a projected growth path of nearly 35 percent in the coming year.



Building out broadband infrastructure is expensive, but the US, driven by private investment, continues to lead the world. Of the world's total investment in broadband, the U.S. has nearly a fourth of it, even though we have just 4 percent of the world's population.[15] All totaled, nearly 1.2 trillion has been invested since 1996.[16]

It is important to remember that the absolute numbers of broadband providers in any given city won't change in this deal because local regulations set up in the 1960s and 1970s allowed only one cable company to exist in a jurisdiction. Fully understanding of these impediments to competition, U.S. communication competition policy has generally been one of intermodal competition, that is, competition exists among technologies. So, there has been an effort by regulators to ensure that cable competes against fiber, DSL, satellite, and increasingly wireless for broadband market share. Because of the sheer cost in laying wire and the rules set up by the Telecom Act, it is unlikely that two companies will utilize the same last mile technology in serving wired customers, as is the case right now. Even the newest entrant, Google, is going straight for fiber development because of a combination of long term cost and regulatory headaches.

Demand by consumers for faster speeds is placing pressure on both wired and wireless companies to upgrade. Last year, AT&T announced a $14 billion upgrade to its wired and wireless broadband networks.[17] They are currently in the middle of this project which will bring a significant portion of its wired footprint on to superfast broadband and help to lay the basis of future upgrades. With the upgrades, AT&T will be able to offers speeds up to 45 Mbps in the near future, ramping up to 75 Mbps and 100 Mbps soon after, putting them ahead of most cable offerings. As the FCC's most comprehensive plan for faster Internet had suggested, DSL is uniquely situated to serve consumers, and with the increased demand for faster Internet, traditional telephone companies like AT&T are upgrading their DSL offerings.

The investments have paid off. AT&T has put seven consecutive quarters of U-verse broadband net adds on the books, most recently with 634,000 in Q1 2014[18] and 488,000 in Q2 2014.[19] As a point of comparison, Comcast's broadband net adds in Q2 2014 were 203,000,[20] and in Q1 2014,[21] they were 383,000. In other words, when AT&T invested, their U-verse broadband net adds in these quarters were twice as Comcast's.

At the same time, these same companies are also getting into fiber networks, leapfrogging cable companies to capture consumers. The third largest telecommunications company, CenturyLink, is pushing out fiber to Seattle and is looking to expand into the 15 other communities. For their own part, AT&T is investing in fiber under the name of Gigapower. In addition to their well known project in Austin, the legacy phone company is working to install a network in Dallas, Raleigh-Durham, and Winston-Salem. However, they are also now considering 21 other metro areas including Chicago, Cleveland, Houston, Los Angeles, Miami, and San Francisco.[22] Cox Communications also announced intentions to launch a 1 Gbps fiber to the home (FTTH) service, a move that will challenge both AT&T and Google Fiber.[23] The genesis of this fiber build out can be partially attributed to Google, which has shaken up the stolid regulatory process and other industry players with their offering in Kansas City. With Provo and Austin, finished, the search company is working closely with 34 cities across the U.S. to deploy the service in more households. As consumers find uses for these speeds and change companies, a merged Comcast-TWC will find its market position being assailed, as is the case now with satellites entry into traditional TV.

Google should not be a special case in broadband. Yet, in Kansas City, the government sped up the permitting process, gave Google rights-of-way access for little to no cost, and allowed Google to build-out in select neighborhoods where consumers actually expressed demand. Local costs tilt the scales. As Milo Medin, Google's vice president for access services and a lead on the Google Fiber project, testified before the Senate, "regulations – at the federal, state, and local levels – can be central factors in company decisions on investment and innovation." Franchising rules are often the worst offenders and "result in unreasonable fees, anti-investment terms and conditions, and long and unpredictable build-out timeframes."[24]

AT&T's decision to build a fiber network in Austin just days after Google serves as a further example. As Raymond James analyst Frank Louthan pointed out in Reuters, "AT&T is making the point that they could make a lot more investments in many of their communities, absent the regulatory burdens which every community puts on providers."[25] Franchising rules, pole attachments, and other local fees are where competition is actually hampered. Removing those barriers to entry would help bring a fresh wave of competitors into this space.

The FCC even recognized the problems, and is moving towards solving some of the key deterrents to investment.[26] But still, as many as 30,000 jurisdictions issue video franchises, with just as much variance as you'd expect. These are the real problems to broadband deployment that need to be dealt with, not a merger that is clearly a natural outgrowth of market processes and in the interest of consumers.

A Merged Comcast Will Bring Real Benefits to Consumers

The merger between Comcast and Time Warner Cable carries real and substantial gains in consumer welfare.

First, the merged company could expect two kinds of internal efficiency gains. For one, it will be easier to buy inputs in bulk, including all of the wires, routers, and switches that make Internet connections possible. This will be especially important when cable begins to upgrade to the newest technology, DOCSIS 3.1. Similarly, because companies bundle TV with their broadband offerings, there are likely to be long term cost savings for consumers with television inputs, namely programming.

Moreover, there is the real possibility that Comcast could force networks and video providers onto one online package. As one commentator noted,

> "A cable company with true nationwide reach could cut the kind of deal that would change that, providing enough subscribers to make a next-generation TV product viable and create enough market pressure to bring its competitors to the table and sign on to similar arrangements. It's the kind of deal that could turn a new Apple TV into a set-top box that would let you watch live television — and one that Cupertino has reportedly been working on with Time Warner Cable already."[27]

Second, technological transfers will benefit consumers. In the case of Comcast, they have touted their X1 platform, which could help initiate innovation in the set top space (if paired with regulatory reforms). This new technology would likely be shared with all current Comcast and Time Warner Cable customers, implementing a new integrated software stack that brings together search, apps, and other entertainment options through the TV. In a similar vein, when Google bought the ad network DoubleClick, the search engine was able to quickly integrate the services for the benefit of consumers. Congressional hearings were replete with voices proclaiming that this deal would substantially reduce competition in the search market, but in reality it marked the beginning of a new era in search engine competition, as well as advantageous for the development of robust ad networks, which Facebook and others are trying to emulate.

Lastly and importantly, a merged Comcast is likely to bring on new investment and spur competition within the industry. As the FCC Chief Economist Tim Brennan noted in a recent talk, mergers change the bargaining positions of both competitors and partners, and can induce new deals.[28] The explosion of announced projects in fiber, next generation TV, and online content, can in part be seen as a result of the Comcast-TWC announcement and exemplifies this positive shift in the market.

Of course, many of these deals have been in the works for some time, suggesting that the entire industry is moving online and to faster infrastructure. To make a bright line separation between the two primary markets of interest especially difficult, as these markets are cannibalizing each other and integrating in unique ways that requires serious consideration for the merger.

What Kind of Competition Should Consumers Expect in Future Broadband Markets?

While the future is difficult to predict, it does look bright. As a result of competition and increasing speeds, a "broadband ecosystem" has emerged. Cheap computers, ubiquitous cell phones, and smart televisions have spurred broadband providers to advance their speeds. While video was once consumed primarily through TV, technology has made it possible to watch video content online and through wireless networks, thus expanding everyone's choices and leading to a shift in preferences and an ever bigger shift in expectations. Forecasted changes are leading to a new wave of investment and competitive pressure. Developing the capacity to meet these demands is part of the strategy of a merged Comcast, but will also act as a competitive constraint.

To understand, it is helpful to compare the usage patterns of the United States and Europe. U.S. households receive nearly double the broadband investment dollars as those in Europe, but they also consume nearly double the amount of data.[29] The culprit is Netflix, as Americans spend a significantly higher amount of time streaming video over the net. To put that more succinctly, as a result of Netflix, Hulu, and others, broadband providers have been forced to upgrade their networks to keep up. The investments by AT&T, Google Fiber, Century Link, and others are a result of this upward trending demand.

Wireless networks have been undergoing similar and radical transformations. When the iPhone was first introduced, no one could predict how the data-intensive device would affect network buildouts. Yet, in just three years, data volumes increased nearly 8,000 percent.[30] To help mitigate these congestions issues, wireless carriers pressed forward with the newest 4G technology, which in turn provided enhanced service and speeds. Emboldened by these download speeds, a growing contingent of consumers are now choosing to access broadband solely through mobile devices, thus adding a new competitor to wire broadband. The story of the iPhone is indicative of the larger market. Spurred on by these complementary goods, providers are being forced to provide better service, the ultimate goal of competition.

Faster broadband speeds are upending the cable industry's traditional product. A recent survey found that 23 percent of Netflix subscribers have canceled their TV service.[31] Netflix and other Internet content providers increasingly compete for attention. As a result, consumers are cutting the cable all together, or choosing basic packages with Netflix and Hulu as additional "channels." Cord-cutting has climbed to 6.5 percent of U.S. households up from 4.5 percent in 2010.[32] With Netflix just passing 50 million subscribers and a number of new shows in the works, the converged TV and broadband market will continue to develop and be competitive.

As Jessica Rosenworcel, a commissioner on the Federal Communications Commission, noted, the media mergers currently underway – Comcast and TWC included – are the direct result of competition from online and other video sources and this should be central to any agency decision.[33] "I think all of the activity you're seeing right now is a response to that change," she said. Like countless others in the space, it is clear that "television will change more in the next five years than it has in the last five decades."

While the future bodes well for competition, regulators are still tasked with a difficult choice: should they regulate beforehand, deterring all potential positive benefits, or regulate when there is actual consumer harm? This question has been asked time and again by the Federal Communications Commission and answered in the same way for nearly three decades. Beginning with the National Information Infrastructure of 1991 through the Next Generation Internet initiative of 1996 and into the National Broadband Plan of 2010, the governing policy of the Internet has followed a common thread that offers guidance for this merger:

> "Many uncertainties will shape the evolution of broadband, including the behavior of private companies and consumers, the economic environment and technological advances. As a result, the role of government is and should remain limited."[34]

Regulatory humility has long been the de facto policy in broadband and been a contributing factor to its success. Along with consumer harm, regulatory humility should be the guiding principle for antitrust and merger analysis. The reasoning is simple, as Federal Trade Commissioner Maureen Ohlhausen notes, because "even agencies with the best-designed statutory and regulatory structure will be less effective and possibly make consumers worse off" without bearing in mind these two principles.[35]

The AOL-Time Warner Cable deal serves as prime example. When Time Warner Cable merged with AOL, there was constant fear that the larger company would stifle innovation on the Internet, but these worries were clearly overblown. Technological winds shifted away from AOL's core business in Internet service, and the synergies that were expected on the technological and management side never materialized. While AOL once seemed unassailable, they are now largely a content production company with a greatly reduced market share. The AOL-Time Warner deal is a reminder that we need a much higher threshold on just what evidence is needed to deter a deal.

The DoJ generally agrees with this sentiment, noting,

> "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. The operative question in competition policy is whether there are policy levers that can be used to produce superior outcomes, not whether the market resembles the textbook model of perfect competition. In highly concentrated markets, the policy levers often include: (a) merger control policies; (b) limits on business practices that thwart innovation (e.g., by blocking interconnection); and (c) public policies that affirmatively lower entry barriers facing new entrants and new technologies."[36]

As the DoJ predicted, interconnection negotiations between content providers and cable companies have become a concern with this merger. Some worry that a merged Comcast would have unassailable bargaining power, but the content blackout and consumer flight from TWC during their negotiations with CBS suggest otherwise. Content is still king and content companies will continue to have bargaining power as a result. More importantly, free negotiations between network providers benefit consumers, who have seen steadily falling prices in this market for over two decades. For these reasons and others, economists have been positive about the current bargaining arrangements.[37]

The comparison between this environment and one in which the FCC manages the arrangement is stark. Because the FCC prescribes the rates at which telephone companies connect with each other, an entire bureau has been erected to manage this regulatory regime. The problems with this managed regime are clear, and the FCC is now in a protracted regulatory process to allow telephone companies to upgrade their networks as a result. Applying this costly and slow moving process to the Internet would be detrimental to consumers and for competition.

The FCC would do well to lower the entry barriers that face entrants, as pointed out earlier, but with this deal, many have wondered what merger control policies the FCC and DoJ might pursue. As Federal Trade Commissioner Joshua Wright has clearly explained, merger conditions can and do play an important role in competition enforcement.[38] Yet, these agreements should address competitive concerns arising from a deal and not broader policy goals by the agency. While many applauded the network neutrality rules Comcast agreed to under the NBC-Universal deal, for the sake of rule of law, industry wide policies like network neutrality should be done at the rulemaking level and not the dealmaking level. These consent decrees have real effects upon consumers and need to be understood as doing such. Yet, as was shown earlier, there are few concerns that actually necessitate merger conditions for the deal between Comcast and Time Warner Cable.

Conclusion

As past mergers and present competition shows, the merged company will face more scrutiny from competitors, the market and consumers than from either the DoJ or FCC. It is hard to deny the immediate reality in which a merged Comcast would find itself. The broadband market is extremely competitive, there are few horizontal and vertical concerns, and the deal is likely to benefit consumers. Yet, it is just as important to include the future of competition in a merger analysis, and efforts by rivals in the converged television and broadband space continue to bode well for both competition and consumers. More importantly, however, the Federal Communications Commission (FCC) should take a page from their successful playbook and pursue regulatory humility. Stopping this natural deal could have a huge negative effect on consumers, so it is clearly in everyone's best if the agency allows the arrangement to continue.

[1] Deborah Platt Majoras, *Statement of FTC Chairman Deborah Platt Majoras Before the Antitrust Modernization Commission Concerning Modernization of Antitrust Law*, http://www.ftc.gov/public-statements/2006/03/statement-ftc-chairman-deborah-platt-majoras-antitrust-modernization.