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I. INTRODUCTION

"I blew it on Microsoft." So concluded Harvard Law Professor Larry Lessig in 2007, reflecting a decade after the antitrust prosecution of Microsoft by federal and state regulators.[2] A self-described "reluctant regulator," Lessig recalled his reasoning at the time: "As the evidence of Microsoft's practices became clear, I remember well thinking, 'Of course the government needs to do something.'"

Lessig's "programming" as a lawyer, he said, led him to assume that Microsoft's dominance in PC-based operating systems precluded a market-based solution to problems that dominance was causing. That assumption turned out, as he said, to be "completely false." Lessig had made a "mistake." Linux, an open source operating system developed virtually by a group of semi-volunteer engineers, was the proof. Markets worked, Microsoft's dominance was only transitory. The need for government to "do something" was chimerical.

Oops.

If anything, since 2007 it's only become clearer how little the software market needed government intervention. Linux and other operating systems became genuine competition for Microsoft's Windows; desktop hardware platforms converged; gaming and television devices acquired computing power and their own systems software; and new applications including social networks (Facebook) and micro blogging (Twitter) came to dominate consumer interactions.

Microsoft's supremacy in web browsers, which agitated antitrust regulators most of all, was broken not by mandates to publish more technical specifications or to offer easier tools for users to choose alternatives. It was broken by competition. Firefox, an open source web browser, now holds 40 percent of the market. Google's Chrome, introduced in late 2008, has already captured 30 percent. Microsoft's Internet Explorer is down to 22 percent.[3] And it's all still free, thanks very much.

But even these sobering developments pale in comparison to the impact on Microsoft of the mobile computing revolution of the last few years. Users are wholesale abandoning their clunky desktop and laptop computers, preferring to compute on the go with a new breed of smart

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[2] *See* Larry Lessig, *I Blew it on Microsoft*, *WIRED*, Jan 2007. Lessig had played a part in the case, acting briefly as Special Master to District Judge Thomas Penfield Jackson. Both Lessig and later Jackson himself were disqualified from the case for public statements perceived as biased against Microsoft. *See* Dan Goodin, "Lessig Appointment Suspended," *CNET News.com*, Feb. 2, 1998. http://news.cnet.com/Lessig-appointment-suspended/2100-1001_3-207749.html?tag=mncol;txt

[3] *See* "Browser Statistics," W3Schools.com, http://www.w3schools.com/browsers/browsers_stats.asp.

mobile devices that combine traditional telephone service with full computing capability, digital cameras, and high-definition video displays.

Microsoft today plays an even smaller role in the mobile ecosystem. According to the Federal Communication Commission's ("FCC's") most recent Mobile Competition Report,[4] the operating system market for smartphones, tablet computers, and other mobile devices is fully competitive. Microsoft's Windows Mobile ranks a distant fourth, behind Research in Motion, Apple, and Google's Android, which holds first place with 36 percent—only three and a half years after launch.[5]

Overall, Microsoft is a shadow of its formerly "dominant" self. The chilling effect of antitrust action against the company both in the United States and abroad has slowed innovation to a dangerous degree. Microsoft's market cap has fallen from $447 billion in 1999 to almost half that in 2011; Apple's, meanwhile, has grown over 4,000 percent, from $9 billion to over $400 billion. Google, which wasn't even public until 2004, is now about the same size as Microsoft.

II. *U.S. v. AT&T*: Déjà vu All Over Again

On Aug 31, 2011, the Department of Justice, joined later by seven state attorneys general filed suit to block AT&T's pending merger with T-Mobile USA. To be sure, the Department of Justice has never expressed any regret over the *Microsoft* case or any other recent antitrust action. But the decision to sue has plenty of self-interested fans, including AT&T competitors Sprint and Cellular South as well as advocacy groups in Washington who believe every merger will end the consumer internet as they know it.[6]

Though different provisions of antitrust law apply to the two cases,[7] both lawsuits repeat the same fatal flaws:

A. Both rely on a definition of the "relevant market" that is narrow and static.

B. Both cling to old models of economic analysis better suited for mature industrial age markets than to rapidly-evolving information markets, where new categories of products and services rise and fall in the time it takes to bring a case to appeal.

C. Both cases pursue sweeping remedies with little regard for their structural impact, either on the defendant or on fast-growing consumer markets.

Let's take each of these defects in turn.

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[4] Federal Communications Commission, *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Docket 10-133, June 27, 2011. (hereinafter 15th Mobile Competition Report)

[5] Todd Haselton, *Android's US Smartphone OS Market Share Plateaus in Latest Nielsen Report*, BGR, May 31, 2011, http://www.bgr.com/2011/05/31/androids-u-s-smartphone-market-share-plateaus-in-latest-nielsen-report/.

[6] Mergers, quite the contrary, are an integral part of how the mobile market functions. Since 2005, the FCC and the Department of Justice have approved a dozen mergers in the mobile industry. *See* 15th Mobile Competition Report, *supra* note 4 at ¶ 75 and Table 10 ("Facilities-based providers have expanded their network coverage and capacity through mergers and acquisitions, as well as through increased investment and expansion of their existing assets. Over the years, the four current nationwide facilities-based providers have all employed mergers or acquisitions as a growth strategy to realize nationwide networks.")

[7] *U.S. v Microsoft*, 253 F.3d. 34 (D.C. Cir. 2001) (en banc) (per curiam). *U.S. v Microsoft* was based on claims under the Sherman Act; the Department of Justice's complaint in *U.S. v. AT&T* relies on the Clayton Act for jurisdiction.

A. A Static View of the Relevant Market

In *Microsoft*, the government claimed the company had established monopoly power in "Intel-compatible PC operating systems." Under that market definition, the trial court found that Microsoft had "a greater than 95% share." It also found the company's position was "protected by a substantial entry barrier."[8]

These findings look naive in hindsight. Why did the government think, even in the 1990's, that the market for "Intel-compatible PC operating systems" was a market at all, let alone a relevant market for antitrust purposes? There were other computing platforms for which Microsoft sold no products, and many of these platforms were reasonable substitutes for "Intel-compatible PCs," including workstation computers, Apple computers (on which Apple did and does maintain a nearly 100 percent monopoly on operating systems) and small minicomputers. The definition is almost circular, defining the market as the market of Microsoft's existing customers.

What was also clear, even at the time, was that the consumer computing market was expanding and converging with other markets. The mobile revolution had already begun, as had the explosive growth of gaming platforms and other specialized computing devices that had the potential—since realized—to evolve into traditional computing applications.

Likewise, the market for operating systems was already under pressure from substitute software, known as middleware, which runs on top of the operating system and replaces many of its key functions—perhaps most notably search. Microsoft had developed Explorer, its internet browser, not to dominate internet computing but rather to staunch the bleeding in a rapid shift to the world wide web, a shift it had no hope of stopping. (Today's cloud model is the fruition of that shift.)

In the AT&T case, the Justice Department's complaint describes the relevant market as all providers of "mobile wireless communications services." But it quickly narrows that definition to include only national providers, which limits the number of potential competitors to four. The merger represents a combination of numbers two and three.

The complaint also focuses on "enterprise and government" buyers, whose "selection and service requirements" are "materially different than those of individual consumers." This is true but largely irrelevant. While T-Mobile USA does serve enterprise and government customers, most are employees of these entities purchasing service as individuals. Overall, these customers represent a small part of the company's total revenue. But without a straw man enterprise customer to consider, the analysis would naturally focus on competitive harms at the local level, where the case is weak.

However, enterprise buyers, unlike consumers, are more likely to include the availability of nationwide coverage as a selection criterion, propping up the government's case. In the least convincing section of the complaint, the government goes farther, arguing that the needs of enterprise and government buyers somehow matter to consumers the government admits buy

[8] *Id.* at 52. The appellate court responds: "Microsoft argues that the District Court incorrectly defined the relevant market. It also claims that there is no barrier to entry in that market. Alternatively, Microsoft argues that because the software industry is uniquely dynamic, direct proof, rather than circumstantial evidence, more appropriately indicates whether it possesses monopoly power. Rejecting each argument, we uphold the District Court's finding of monopoly power in its entirety." *Id.* at 51.

locally. The complaint concludes that "AT&T's acquisition of T-Mobile will have national effects across local markets."

How are local markets affected nationally? The logic seems to be that because AT&T and T-Mobile both offer service in nearly all of the same locations, the complaint simply assumes the two companies are *ipso facto* in direct competition in each of those markets. By taking out one competitor in each market, the argument goes, the merger will seriously damage competition in all of them. (The same, of course, would be true for any other national carrier's effort to acquire T-Mobile.)

The facts, unfortunately, don't stack up. As noted, T-Mobile's enterprise business is small. And while T-Mobile technically competes with AT&T for consumer business, in large part the two companies serve different segments. T-Mobile is focused on budget-conscious consumers, or the "value option" as the government euphemistically calls it.

In most local markets, there is vibrant and growing competition for mobile broadband provisioning, and even stronger competition for mobile telephony. The FCC's latest Mobile Competition Report, for example, found that in 2010 almost 68 percent of U.S. consumers had four or more mobile broadband providers to choose from. And 90 percent had a choice of five or more mobile voice providers. Emerging providers using new technologies, including LightSquared and Dish Networks, are only waiting for government approvals to complete nationwide rollout of new services.

More to the point, direct competition is only part of the total ecosystem. Competitors for the combined AT&T/T-Mobile go far beyond other "mobile wireless communications providers." As mobile broadband technology has improved, intermodal competition with fixed services from copper, cable, and fiber is increasing. At the beginning of 2010, according to the FCC, 25 percent of all households had "cut the cord," relying exclusively on mobile devices for telephone service. The number is much higher for young adults, making clear that the future of communications is one in which the wired infrastructure will support, rather than lead, new product offerings.

But the mobile ecosystem is an ecosystem precisely because competition takes place not just among carriers but also from a wide range of other service providers, including device manufacturers, and operating system and application ("apps") providers. Today, mobile consumers are less likely to compare the service offerings of different carriers than they are to choose the network that offers a particular device they crave, or has the apps they want most.

Again, the FCC has the data. The Mobile Competition Report found, for example, that from 2008 to 2009, 38 percent of those who had switched carriers did so because it was the only way to obtain the particular handset that they wanted.

Tastes change fast. Today, there are dozens of handsets to choose from, and no dominant provider among smartphone operating systems or device manufacturers. New entrants can and do thrive: Handsets running Google's Android operating system rose from 5 percent of the total market at the end of 2009 to 36 percent today—now the leading platform. Software apps,

provided by a burgeoning cottage industry of large and small software developers, are exploding.[9]

Anyone actually involved in this market—a group that includes, at a minimum, consumers—knows that dynamism in the mobile ecosystem has only accelerated since the FCC's last data collection exercise. It's no exaggeration to say that consumers, increasingly, are both defining and driving competition in mobile services.

The government's complaint describes a static industry where a few dominant carriers dictate terms for siloed services to a cowed and captive buying public.

To say that competition will suffer without T-Mobile's "innovations" and "disruptive" pricing plans to discipline the other national carriers is incorrect and the conclusion that the merger will "likely" result in "higher prices, diminished investment, and less product variety and innovation" in the mobile ecosystem overall is so inconsistent with what is happening in the marketplace.

B. Relying on Outdated Analytic Tools

Even if the government has accurately described the relevant market in either case, competitive analysis of that market requires real data adapted to particular industries. In both cases, however, the government instead relies on traditional competitive metrics and tools that don't adequately describe dynamic markets driven by rapidly evolving information technologies. The legal analysis comes across as academic. It simply doesn't match real-world consumer experience.

Perhaps traditional antitrust has simply been rendered obsolete by information products and services. That, at least, was a question the D.C. Circuit raised and quickly dispensed with in its first review of *U.S. v Microsoft*. In a *per curiam* opinion from the full court, the judges made light of the very idea that new economic dynamics call for new analytic tools. Calling it a "theoretical" matter, the court described the argument and then dismissed it without evaluation:

> We decide this case against a backdrop of significant debate amongst academics and practitioners over the extent to which "old economy" § 2 monopolization doctrines should apply to firms competing in dynamic technological markets characterized by network effects.[10]

Network effects, or increasing returns to scale, mean that as more consumers adopt a particular standard, the more compelling the standard becomes. In markets driven by network effects, the court continues, "Once a product or standard achieves wide acceptance, it becomes more or less entrenched. Competition in such industries is 'for the field' rather than 'within the field.'"

Citing Joseph Schumpeter, the court then notes, "In technologically dynamic markets, however, such entrenchment may be temporary, because innovation may alter the field altogether."

Were markets for operating systems "technologically dynamic" in 2001? No matter. The "commentators" have not reached "consensus" as to whether current monopolization doctrine

[9] According to the FCC, the total number of downloaded apps passed the 1 billion mark in early 2011. 15th Mobile Competition Report, *supra* note 4, at ¶ 345 and Chart 45.

[10] *U.S. v Microsoft*, *supra* note 7, at 49.

should be amended "to account for competition in technologically dynamic markets characterized by network effects."

And anyway, according to the court, Microsoft hadn't asked for different analysis, arguing only that, "the measure of monopoly power should be different." So the court put aside this interesting academic debate and moved on to more familiar territory, evaluating the market for operating systems as if it functioned under the same principles as markets for tomato sauce, photo developing, or medical services.[11]

Today, it seems, there is still no academic "consensus" that dynamic markets require different analytic tools. The government's complaint in *U.S. v. AT&T,* in any case, doesn't argue otherwise. In assessing the potentially anticompetitive effects of the AT&T/T-Mobile merger, the government strongly emphasizes old tools such as the Herfindahl-Hirschman Index ("HHI"), which it says is "typically" used to measure concentration in "relevant markets."

Relying on HHI scores helps the government's case, but at the cost of its relevance. Given high levels of market concentration that already exist in mobile services, it's no surprise that in nearly all major U.S. markets, the post-merger AT&T/T-Mobile would achieve HHI scores of over 2,500, a result considered "highly concentrated." As the complaint concludes, "Nationally, the proposed merger would result in an HHI of over 3,100…an increase of nearly 700 points. These numbers substantially exceed the thresholds above which mergers are presumed to be likely to enhance market power."

Perhaps so, but why even mention the national average when the complaint elsewhere admits that mobile competition is only relevant in local markets? More to the point, why rely so heavily on so indirect and incomplete a test as market concentration, when real data are readily available—data that demonstrate effective market power simply doesn't exist in the mobile ecosystem?

That reliance is especially confusing given recent filings from both the Department of Justice and the FCC arguing that HHI's should play a lesser role, particularly in mobile competition analysis. In general, the Department's current Horizontal Merger Guidelines note that high levels of HHI are no longer to be used as a "rigid screen" to flush out presumed "anticompetitive mergers." Rather, they simply "raise the likelihood that the Agencies will request additional information to conduct their analysis."

Likewise, while the Guidelines confirm that "Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power," that presumption "may be rebutted by persuasive evidence showing that the merger is unlikely to enhance market power."[12]

Following the lead of the Horizontal Merger Guidelines, the FCC's 15th Mobile Competition Report begins by noting helpfully, "High market concentration may indicate that a

[11] Those, in any case, are the markets involved in cases cited in the court's legal analysis.

[12] U.S DEPT. OF JUSTICE & FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES, pp. 18-19 (August, 2010). *See also* Randolph J. May & Seth L. Cooper, *The Department of Justice's Case Against the AT&T/T-Mobile Merger: A Faulty Static Marketplace Vision*, 6 PERSPECTIVES FROM FSF SCHOLARS 26, Oct. 14, 2011.

firm or firms potentially may be able to exercise market power, but market concentration measures alone are insufficient to draw such a conclusion."[13]

Why rely on statistical data, in other words, when it's now possible to evaluate actual market conditions? The agency now "analyzes other factors that may influence the state of competition in the mobile wireless services market. These include entry and exit conditions, the degree of price and non-price rivalry, innovation, and the influence of the upstream and downstream markets."

Instead of considering any evidence, however, the Department of Justice pre-empted its review with a lawsuit to block the merger. What other information might the Department have considered to rebut the HHI result? In evaluating the competitiveness of the mobile market, the Report goes well beyond HHIs and other mathematical proxies.

Evaluating those conditions, there is ample evidence to suggest that in each of these categories the mobile ecosystem is more than capable of policing high customer concentrations without the need for antitrust intervention.

For one thing, as the 15th Mobile Competition Report points out, demand for mobile services is soaring. The number of mobile internet subscribers, the fastest-growing category, doubled between 2008 and 2009. Yet despite poor economic conditions elsewhere, new infrastructure investment continues at a frenzied clip. Between 1999 and 2009, total industry investment exceeded $213 billion. In 2009 alone, at the depths of current economic woes, investments by the four leading carriers topped $20 billion—almost 15 percent of total industry revenue.[14]

Yet, unlike virtually every other commodity, prices for mobile services continue to decline across the board—hardly a sign of flagging competition. The price of mobile voice services, the FCC reports, has "declined dramatically over the past 17 years," falling 9 percent from 2008-2009 alone. (The average price for a voice minute is now 4 cents in the United States, compared with 16 cents in Western Europe.) Text prices fell 25 percent in 2009. The price per megabyte of data traffic fell sevenfold from 2008-2010, from $1.21 to 17 cents.

But, for whatever reason and in conflict with the Guidelines the Department of Justice released in 2010, the government's analysis appears to begin and end with the HHI.

Reading the complaint at its word, the Department of Justice now argues that **any highly concentrated post-merger market, as measured by HHI, is presumptively anticompetitive, enough so to violate the Clayton Act.**

This is strange, seeing how the FCC's more enlightened view of mobile competition came from the Department of Justice in the first place. We know that because the 15th Mobile Competition Report repeatedly cites the Department of Justice's *ex parte* filing in the FCC's National Broadband Plan ("NBP") proceeding, a filing that spelled out the Administration's view.

[13] 15th Mobile Competition Report, *supra* note 4, ¶ 54.

[14] Of the leading providers, only Sprint decreased its investments in recent years. *See* 15th Mobile Competition Report, *supra* note 4, at ¶ 211 and Chart 30.

The agency assures us that "the DOJ's position on competition policy is in agreement with the approach taken in this *Report*.[15]

In the NBP filing, the Department of Justice urged the FCC to accept that "Broadband services are one part of a wider information technology ecosystem that ultimately delivers value to consumers." That ecosystem, according to the filing, should be evaluated holistically in determining its level of competitiveness. The agency, in stark contrast to its complaint in *U.S. v. AT&T*, cautioned the FCC to consider "competition broadly," 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.**[16]

How to rationalize that sensible view of competitive analysis with the rigid approach taken in the complaint? The answer remains a mystery.

C. Defining Remedies in a Structural Vacuum

In *U.S. v. Microsoft*, the district court granted the government's request for an extreme, even shocking, remedy. To correct Microsoft's modestly anticompetitive behaviors with regard to Windows, the company was ordered split into two separate entities, one making operating software ("OpsCo") and the other making application software ("AppsCo").

Though less invasive solutions didn't seem to have given Judge Jackson much pause, divestiture was already a controversial remedy. IBM had barely escaped a similar fate in 1982 after a long legal struggle. The former AT&T did not—the company was split into separate local, long distance, and equipment companies in 1984. There were lessons to be learned from both these examples, but Judge Jackson preferred to split the baby largely as a sanction for what he saw as an unduly proud Microsoft.

Wisely, the D.C. Circuit made short work of this solution, reversing Jackson's proposed divestiture. Having rejected some of the lower courts' findings of antitrust violations, a remand was certain. But more than that, the appellate court was clearly annoyed that the trial court had refused to hold an evidentiary hearing on its proposed remedy, in violation of Supreme Court precedent.

What's more, under sensible and longstanding precedent, the remedy in antitrust must be tailored to solve the actual problems the defendant's monopolization caused. The trial judge had given no explanation for his order, let alone shown how it would "unfetter a market from anticompetitive conduct, terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future."[17]

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[15] 15th Mobile Competition Report, *supra* note 4, at ¶ 15. *See also Ex Parte* Submission of the United States Department of Justice, GN Docket No. 09-51 at 11 (filed Jan. 4, 2010).

[16] *Id.* (emphasis added)

[17] *U.S. v. Microsoft*, *supra* note 7, at 103. (citations omitted)

Microsoft had shown insufficient remorse for its business practices to warrant the required care in fashioning a remedy. Instead, according to one of the interviews to reporters that led to Jackson's disqualification, he based his remedy to the story of a mule trainer who whacked the animal in the head with a 2X4 "to get its attention." The divestiture was Jackson's way of getting Microsoft's "attention," an approach to the law that deeply disturbed the appellate court.[18]

The government is likewise asking for severe action in its case against AT&T. The government has demanded the deal be permanently enjoined.[19] The DOJ seeks cancellation of the parties' stock purchase agreement and an injunction that would bar any future transaction that would bring AT&T and T-Mobile USA "under common control or ownership."

As indicated above, an enlightened view of both the relevant market and its level of competition leave no reasonable basis to block the transaction, let alone to seek its permanent prohibition. But more to the point, the proposed remedy here will leave the mobile marketplace –and mobile consumers—worse off, much as personal computer customers would have been the real victims of a broken Microsoft.

Here the complaint fails to recognize a seismic shift in mobile communications, one that is well underway. Consumers are migrating at breakneck speed to new communications standards, particularly the 4G Long Term Evolution ("LTE") protocols. LTE offers improved transmission speeds, more efficient transfers, and support for consumers' now-insatiable appetite for bandwidth-intensive applications, particularly video services, on their mobile devices.

Today's allocation of customers, in other words, is largely irrelevant. What matters more is a carrier's ability to offer LTE. Verizon is currently the only provider offering LTE to a significant portion of U.S. consumers. Indeed, AT&T's purported $39 billion purchase price for T-Mobile's assets makes business sense only as a way for the company to accelerate its competition with Verizon for LTE customers.

On its own, AT&T has neither the spectrum nor the cell tower infrastructure to respond quickly with an LTE offering of its own. But, by combining T-Mobile's highly complementary infrastructure and spectrum holdings, that problem is solved in a single stroke. AT&T can move T-Mobile's customers to its current network, and free up enough spectrum, combined with other recent spectrum acquisitions, to launch a robust LTE service. And quickly.[20]

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[18] *Id.* at 111 ("He had a trained mule who could do all kinds of wonderful tricks. One day somebody asked him 'How do you do it? How do you train the mule to do all these amazing things?' 'Well,' he answered, 'I'll show you.' He took a 2–by–4 and whopped him upside the head. The mule was reeling and fell to his knees, and the trainer said: 'You just have to get his attention.')"

[19] The last major communications industry merger involved Comcast and NBC Universal, completed when the parties agreed to dozens of conditions, many of them seemingly unrelated to any antitrust or public interest concerns. *See* Federal Communications Commission, "In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc.," MB Docket No. 10-56, Jan. 20, 2011.

[20] AT&T acquired much of the "B" block in the 2008 auctions for 700 Mhz. spectrum freed up in the transition to digital television, the last major auction the FCC has conducted. Verizon acquired the "C" block, whose superior properties allowed the company to launch LTE in early 2011. AT&T is also waiting approval to acquire spectrum from Qualcomm's failed Flo-TV service. The FCC consolidated that transfer request with the T-Mobile proceeding.

AT&T has committed, if the transaction goes through, to deploying LTE service to 97 percent of the U.S. population, "including rural areas and small towns."[21] That is what the transaction has been about from the beginning. It is not, as the government sees it, a $39 billion dollar snub aimed at removing a technologically limited non-competitor from the existing 3G market.

By defining the problem incorrectly, the wrong remedy naturally follows. If the government prevails in blocking the transaction, LTE will be delayed for all consumers, with no corresponding benefit to competition in general. T-Mobile's parent company, Deutsche Telekom, has already acknowledged what the data make clear—its U.S. mobile subsidiary cannot succeed as a standalone provider. T-Mobile has no path to an LTE network, and its owners are not prepared to make the investments necessary to get them there.[22]

Ironically, the leading impediments to natural evolution to LTE service, and indeed the catalyst for so many mobile mergers in the last decade, are constraints entirely of the government's making. The FCC, for example, has repeatedly sounded the alarm that mobile users will require as much as 300 Mhz. of additional radio spectrum in the next five years. That spectrum must come from reallocations of existing licenses, but Congress has shown little sign of being ready to grant the FCC the authority it needs to begin designing new auctions which, in any case, take years to complete.[23]

Improving coverage by modifying or adding cell towers, the FCC also found, is subject to considerable unnecessary and illegal delay at the local level. Of 3,300 zoning applications for wireless facilities pending in 2009, nearly 25 percent had been idling for more than a year. Some had been languishing for more than three years, despite an FCC requirement that applications be decided within 150 days at the most.[24]

If the government's new theory holds and high concentration in a narrowly defined market is sufficient cause to block future transactions, no other national carrier will be able to acquire T-Mobile. With the deal, T-Mobile's assets will accelerate the deployment of a second (that is, competitive) LTE network. Without the deal, that won't happen. Either way, T-Mobile will be liquidated. It is virtually certain that the United States will go from the current four to three national providers, at least until technology makes way for new entrants.

III. The "Expedited" Process is Still Too Slow

One last comparison of the *Microsoft* and *AT&T* cases is worth mentioning. Both demonstrate the danger of leaving to litigation the solution to market problems involving technology markets. Law moves at its own pace; technology simply moves. In *US v. Microsoft*, the D.C. Circuit acknowledged but sidestepped the likely damage caused by these differing speeds:

> [I]t is noteworthy that a case of this magnitude and complexity has proceeded from the filing of complaints through trial to appellate decision in a mere three years…. What is somewhat problematic, however, is that just over six years have passed since Microsoft engaged in the first conduct plaintiffs allege to be

[21] *Facts*, THE PLANNED MERGER OF AT&T AND T-MOBILE, http://mobilizeeverything.com/facts/top-ten-benefits-of-combining-att-and-t-mobile#

[22] *See* May and Cooper, *supra* note 12, at 8-9.

[23] 15th Mobile Competition Report, *supra* note 4, at ¶ 267.

[24] *Id.* at ¶ 58.

> anticompetitive. As the record in this case indicates, six years seems like an eternity in the computer industry.[25]

Even on the fast track, there is no pride in a "mere" three years to produce an appellate decision.[26] In those three years, Netscape—Microsoft's original competitor in the browser market—had gone out of business. Meanwhile, the internet boom ignited by Netscape's initial public offering raged in full force. Companies including Yahoo, eBay, and Amazon rushed to the front lines, oblivious to Microsoft's supposed dominance. Microsoft's strategy had been to compete with the internet, until then-CEO Bill Gates finally had his epiphany. By then, Microsoft had been pushed into a background role.

That lesson, too, has failed to take hold. Even if regulators have good reasons to block the AT&T/T-Mobile merger today, those reasons are sure to evaporate long before the case completes its slog through the courts. Other problems, hypothetical or otherwise, could develop along the way, but that's no reason to litigate. As we've seen, antitrust is much more likely to get it wrong than to get it right. And consumers are the one who pay the error costs.

As the D.C. Circuit noted in 2001:

> By the time a court can assess liability, firms, products, and the marketplace are likely to have changed dramatically. This, in turn, threatens enormous practical difficulties for courts considering the appropriate measure of relief in equitable enforcement actions, both in crafting injunctive remedies in the first instance and reviewing those remedies in the second. Conduct remedies may be unavailing in such cases, because innovation to a large degree has already rendered the anticompetitive conduct obsolete (although by no means harmless). And broader structural remedies present their own set of problems, including how a court goes about *restoring* competition to a dramatically changed, and constantly changing, marketplace.[27]

Better to let the market do its best to resolve even actual harms to actual consumers. That approach may not be perfect but, on balance, it is far more likely to generate a workable solution.

If only the D.C. Circuit had had the courage of its convictions and sent the government packing in *U.S. v. Microsoft*. And if only the Justice Department had learned from the negative consequences generated by the *Microsoft* case to leave well enough alone.

Yet here we are. With *U.S. v. AT&T*, as Yogi Berra put it so inelegantly, it's déjà vu all over again. There is, however, one important difference. The market is shifting faster all the time. Even as consumers rush to take the next plunge, regulators are left gasping for breath, fashioning an antitrust case without the necessary ingredients.

This time, it won't take ten years to see just the folly in trying.

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[25] *U.S. v. Microsoft*, *supra* note 7, at 48-49.

[26] In the end, the case took an additional three years for final resolution, plus several years of federal oversight of a consent decree approved by the court.

[27] *U.S. v. Microsoft*, *supra* note 7 at 49.