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The Beneficent Monopolist

Allen P. Grunes
(GeyerGorey LLP)
&
Maurice E. Stucke
(University of Tennessee College of Law)

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The Beneficent Monopolist

Allen P. Grunes & Maurice E. Stucke[1]

I. INTRODUCTION

Comcast has fired the opening salvo in defense of its proposed acquisition of Time Warner Cable ("TWC"), which the U.S. Department of Justice ("DOJ") is reviewing under the federal competition laws and the Federal Communications Commission ("FCC") is reviewing under its "public interest" standard.

The DOJ and FCC will have their hands full. As the DOJ previously found, Comcast and TWC already have market power for both video and broadband services in numerous local geographic markets. Comcast is the nation's largest provider of video services (22 million residential customers at the end of 2012), internet services (19.4 million customers), and voice services (10 million customers). As the largest video content distributor in many areas of the country, Comcast controls the pipes. But it also creates content through its national cable networks (including CNBC, MSNBC, and USA Network), regional sports networks, broadcast television (including NBC and Telemundo broadcast networks) and movie studio Universal Pictures, which produces, acquires, markets, and distributes filmed entertainment worldwide.

In acquiring TWC, the second largest cable provider of video, high-speed data, and voice services in the United States, Comcast would extend its market power in five geographic areas: New York State (including New York City), the Carolinas, the Midwest (including Ohio, Kentucky, and Wisconsin), Southern California (including Los Angeles), and Texas. A combined Comcast/TWC would control as much as half of the country's high-speed broadband access at a time when a record number of Americans are using broadband to get their information, news, and entertainment.

As surely as spring eventually follows a long winter, we will soon hear from many recipients of Comcast's charitable giving and community support (and likely also many recipients of its campaign contributions) about why Comcast is a good corporate citizen and deserves our full support for this latest mega-merger. For Comcast knows how to play the monopoly game, which, as Judge Richard Posner points out, involves not only a deadweight loss to society but also the wasteful use of resources by a monopolist to defend its monopoly. The playbook is presented in detail in Susan Crawford's book *Captive Audience*. And Comcast executed the playbook almost flawlessly in connection with its earlier acquisition of NBCUniversal.

So what are Comcast's opening arguments? To the FCC, Comcast will likely say: We will voluntarily advance your agenda even though the courts have questioned your authority to

[1] Allen Grunes is Partner at GeyerGorey LLP and Maurice Stucke is Associate Professor at the University of Tennessee College of Law and Of Counsel at GeyerGorey LLP.

regulate us in important ways. We are willing to live by the net neutrality principles and cable ownership limits you would like to have.

To DOJ, Comcast will likely say: We don't compete with TWC, so the merger does not lessen competition. We have our geographic markets for cable television, internet service, and voice—they have their markets. Even if we were a monopoly provider, which we are not, a merger of two monopolies does not violate the Clayton Act.

And to both agencies, Comcast will likely say: We are willing to extend the commitments we made in the NBCUniversal deal, so they now cover TWC. Unless you are willing to admit you got it wrong back then, what more could you ask for? The NBCUniversal deal was a game changer that combined significant content and cable assets; the TWC deal is only a geographic extension of Comcast's cable territory. Since you let the earlier merger go through, you should let this one go through too.

We recently outlined in another article why the Comcast/TWC merger actually represents "crossing the Rubicon" and probably should be blocked rather than conditioned. In that article, we conducted a thought experiment that looked at the result if Comcast's arguments prevailed. Our thought experiment was to suppose that the predictions of the financial community, along with some members of the antitrust bar, were correct—namely, that the Comcast/TWC merger, while not sailing through the regulatory process, is likely to remain relatively intact. If true, we asked the following question: If Comcast can acquire TWC, what prevents Comcast from extending its footprint across America by acquiring the remaining cable companies? It seems difficult to discern a limiting principle (other than Comcast's voluntary commitment to limit its national reach), since the same justification for the Comcast/TWC transaction could be offered for another cable deal. Cable companies dominate their local markets, and tend not to invade each other markets to compete for customers.

However, the predictions that this merger will experience relatively smooth sailing, we argue, may be wrong for several reasons:

1. A merger can violate section 7 of the Clayton Act without the parties competing in the same geographic markets.
2. The Congressional command for section 7 is to arrest a trend toward concentration in its incipiency before the trend develops to the point that a market is left in the grip of a few powerful companies. One potential consequence of this merger is to accelerate the trend toward concentration among content providers and cable companies or other distributors. Indeed, arguably, Comcast itself set the stage for further consolidation when it entered into the NBCUniversal joint venture.
3. One reason Congress sought to thwart a market dominated by a few firms is to prevent coordination or collusion. As evidenced by the enforcement action involving the Verizon/Spectrum Co. deals, where DOJ sought to limit what could be regarded as a truce between Comcast and its most significant competitor, Verizon, we are already beyond that point.
4. Comcast's "no-competitive-overlap" argument considers only cable and internet subscribers. It ignores how the competition laws were also enacted to protect sellers from

powerful buyers. Thus, another concern is how the acquisition would increase Comcast's power to disadvantage sellers of video content.

5. In investigating Comcast's deal with General Electric that ultimately enabled Comcast to control NBCUniversal, the DOJ discussed various ways Comcast could disadvantage its traditional video competitors (direct broadcast satellite and telephone companies) plus the emerging online video programming distributors ("OVDs"). In acquiring TWC, Comcast will have even more power to raise the costs of its traditional video competitors and also to thwart emerging OVD rivals by impairing or delaying the delivery of their content.

Our focus here is to assess three of the arguments Comcast likely will make to argue that its acquisition of TWC is unlikely to lessen competition: (a) the broadband market is becoming more competitive—Google has introduced Google Fiber in a number of markets, and mobile broadband offered by wireless providers like AT&T and Sprint is competitive with fixed broadband; (b) Netflix and traditional media companies have sufficient clout to negotiate with Comcast and the government should not intervene on their behalf; and (c) the "wide array of FCC and antitrust rules and conditions from the NBCUniversal transaction in place . . . more than adequately address any potential vertical foreclosure concerns in the area of video programming." We'll consider each of these below.

II. "WE HAVE ONE COMPETITOR" IN RESIDENTIAL BROADBAND . . . AND IT ISN'T GOOGLE

We know that Comcast, from its public pronouncements, does not see itself as competing with TWC. Focusing on high-speed residential broadband, let's ask the question: With whom *does* Comcast compete?

Speaking to a group of Wall Street analysts in 2011, Comcast's CEO Brian Roberts said that residential broadband "may be the best business we are in." Why? Among other reasons, broadband does not come with high programming acquisition costs, like Comcast's traditional video television business. That can make it more profitable. And another reason broadband is a good business to be in, according to Roberts, is Comcast's ability to increase prices. Comcast's CEO put it bluntly in 2011: "We have one competitor." And that competitor, Verizon's FiOS, was in only about 15 percent of Comcast's territories. In the same year, 2011, another cable veteran, John Malone, was even blunter: "In broadband, other than in the FiOS area, cable's pretty much a monopoly now."

Comcast and TWC are the largest providers of high-speed residential broadband in the United States today. Post-merger, Comcast would become by far the largest provider. While one can argue about what the DOJ should count as "high-speed" when defining the relevant market, the market share numbers and concentration levels are enormous any way you slice it, and post-merger Comcast could easily approach or exceed 50 percent nationwide of high-speed broadband, with higher shares in important local markets.

So what will Comcast likely argue in 2014? First, that Google Fiber, and municipalities that are offering fiber to the home, represent significant new broadband competition. Second, that wireless broadband speeds are increasing to the point where wireless represents a true substitute to wired broadband.

But has the market really changed that much in the past three years? As of early 2014, Google had rolled out fiber in three cities—perhaps more accurately characterized as neighborhoods—and has recently started discussions with nine more cities. Its decisions about what markets to serve appear to be based on a number of factors, including user demand and the level of governmental cooperation. Google has said that its fiber project is not a loss leader; it needs to be self-supporting. As to whether it plans to expand further, Google has publicly stated, "Not for now."

In this way, Google seems to be following Verizon's footsteps, although in an even more cautious and incremental way. Verizon decided to limit the number of markets it serves with FiOS in order to get a significant return on its investment. The prospect of either Google or municipalities displacing Comcast any time soon as a cheap source of high-speed broadband seems remote indeed.

Admittedly, TWC apparently increased its own broadband service's speed when Google entered Kansas City. But this only proves what most of us know anyway: competition, when it happens, is generally good for consumers. Unfortunately, in many broadband markets, healthy competition is rare.

A second argument Comcast is likely to make is that wireless internet is increasingly becoming a substitute for wired broadband. Although wireless broadband speeds have increased and prices have declined, for most consumers wireless represents more of a complement than a substitute. A very small percentage of customers get their internet exclusively from wireless, and many of these do so because they cannot afford high-speed broadband. The DOJ defined residential broadband as a separate product market in 2012, and will likely define the market that way again.

In sum, what Brian Roberts said in 2011 remains true in 2014. Comcast has one broadband competitor. That competitor is present in only some of Comcast's geographic markets. And that situation is unlikely to change in the next few years.

That is not the end of the antitrust inquiry, however. The question still remains: How does the merger with TWC lessen competition? We can think of several candidate theories, including most notably creating price discrimination opportunities that were not possible before, and putting Comcast into a position to pick winners and losers among innovative tech companies that rely on high-speed broadband. Professors Spencer Weber Waller, Brett Frischmann, and others have argued that the internet is a form of infrastructure (Professor Crawford compares it to electricity or water) and the essential facilities doctrine still has a legitimate role to play to protect economic innovation in such infrastructure industries.

III. WHERE IN THE WORLD ARE THE CONTENT COMPANIES AND NETFLIX?

Where are the traditional content companies (Disney, Fox, CBS, and Viacom) in all of this? Without a serious and sustained effort by at least one significant content company in opposition to the Comcast/TWC merger, the chances of it being blocked would appear slim. Why? Because one likely candidate theory of harm is that the merger increases Comcast's buyer power and adversely affects content providers. If the "victims" of this harm sit on the sidelines, or offer at most tepid opposition to the merger, then it will be harder for DOJ to enjoin the merger.

Here we can see Comcast perhaps going one step further today than it did in its NBCUniversal playbook. In that merger, Comcast apparently made concessions to parties who were unhappy enough to complain to the DOJ or FCC. Network affiliates, independent producers, and others proved that the squeaky wheel gets the oil. This time around, Comcast would likely be inclined to a more proactive strategy: Don't wait for complaints, but use a carrot and stick approach to lower the number and volume of complaints the agencies are likely to receive. The carrot? Offer deals (sweetheart or otherwise) to likely would-be complainants. The stick? A reminder that it is probably not a good idea to be on Comcast's bad side. Witness how companies invoking the NBCUniversal remedies have faced a lengthy and uncertain path through arbitration and the courts. That should serve as a warning.

Netflix illustrates this point as Netflix was, very likely, a potential complainant. But Netflix recently cut its own deal, and reportedly will pay Comcast "for faster and more reliable access to Comcast's subscribers." Because the terms of the recent deal between Netflix and Comcast have not been fully disclosed, it may or may not have been a carrot held out to Netflix. But the deal looks like a carrot given the announcement's timing and the fact that it is a long-term deal.

Why was Netflix a likely complainant? In investigating Comcast's deal with General Electric that ultimately enabled Comcast to control NBCUniversal, DOJ discussed various ways Comcast could disadvantage the emerging OVDs. Netflix and other OVDs rely on internet service providers like Comcast and TWC to deliver their television shows and movies to subscribers. Thus the growth of OVDs, as the DOJ found, "depends, in part, on how quickly [internet service providers] expand and upgrade their broadband facilities and the preservation of their incentives to innovate and invest." For its part, Netflix had raised concerns in the past about "Comcast either discriminating against Netflix traffic or trying to increase Netflix's operating costs." In acquiring TWC, Comcast would have even more power to thwart Netflix or other emerging OVD rivals by impairing or delaying the delivery of their content.

Further, based on Netflix's statements in its prior SEC filings and the DOJ findings, it appears that Netflix has much to lose from this merger. Netflix represents the most successful OVD to date, and thus poses a significant threat to bundled cable service over the long haul. But Netflix needs to get into customers' homes, which means it needs Comcast and TWC. In the best of all worlds, broadband would be delivered by companies whose incentives align with those of consumers and OVDs, like Netflix. Ideally the OVDs' incentive is to innovate and unbundle so as to entice customers to switch from cable. This would spur both cable companies and OVDs to better serve consumers. In the real world, however, OVDs have to reach many homes through Comcast, a company that (a) is threatened by OVDs over the long term; (b) can affect the consumer experience negatively; and (c) has an overwhelming incentive to sell broadband, cable, and telephone in a bundle as opposed to individually. The Comcast/TWC merger more likely worsens, rather than improves, these problems.

Netflix's deal with Comcast should not be viewed as removing Netflix as a complainant in the medium- or long-term. Indeed Netflix called the deal an "arbitrary tax" that demonstrates Comcast's "leverage." (For its part, Comcast characterized the Netflix deal as "an amicable, market-based solution.") Generally companies that make deals with merging parties do not complain immediately thereafter to the DOJ or FCC. It makes more sense for the company to see

whether other firms take the lead and incur the cost to hire antitrust lawyers (and economists) to persuade the agency of the likely anticompetitive effects. Thus its multi-year deal with Comcast may reduce Netflix's incentive to attack the merger. Indeed, Netflix may have the ticket to survive, while other OVDs perish.

And then there is the stick. Another reason content companies and others may stay quiet is out of fear of retaliation, notwithstanding the behavioral conditions that the FCC and DOJ imposed as part of the Comcast/NBCUniversal transaction. Companies have reason to fear retaliation if the TWC merger goes through—even with additional conditions. The multiyear legal battle by *Bloomberg News* to be carried in the vicinity of other news stations (including those owned by Comcast) is an obvious example. And the apparently ill-fated decision by Project Concord to seek arbitration under the FCC Order is another example. It would not be surprising if some media companies see the Comcast/NBCUniversal decree and order as providing weak protection to companies that complain.

If the agencies' current behavioral conditions are ineffective and if the threat of retaliation by Comcast is real, then the content providers may prefer to negotiate a deal with Comcast and stay quiet. So some content providers' silence—or hope that the government will "look carefully" at the merger, as one has put it—may not reflect their approval of the transaction, but their fear.

Beyond this carrot and stick approach, it is worth asking whether the content suppliers are likely to complain. Perhaps some will, but there are reasons to think that others will not. One reason is to compare their experience with Comcast and TWC and their experience with technology companies and other innovators. Occasionally war breaks out between the content providers and cable companies—most recently the disagreement between CBS and TWC. But those flare-ups tend to be infrequent, partly due to some "mutually assured destruction" when they happen. And, at least in its recent battle with CBS, TWC came out the loser by one measure, losing approximately 306,000 cable (but not broadband) subscribers. Indeed, that battle may have contributed to TWC's decision to sell.

Contrast this with some of the innovation (and litigation over such innovation) that is starting to appear in the internet world and that may represent a bigger threat to content companies. Aereo captures free broadcast-TV signals, distributes them over the internet, and avoids paying retransmission fees. This represents a major threat to the networks' business model, and the Supreme Court will soon be weighing in. DISH's Hopper allows subscribers to skip over ads, representing another threat. Meanwhile, Cablevision has sued Viacom over alleged tying between must-have and less desirable programming. The suit, if successful, may lead to unbundling of content. And of course Viacom sued Google's YouTube for looking the other way and enabling copyright violations. That suit only recently settled.

So which is worse from the content companies' perspective: a merger that strengthens Comcast's negotiating power and extends its broadband monopoly, or keeping Comcast and TWC separate, and thus potentially making it easier for online businesses like Apple, Google, Amazon, Hulu, and Netflix to gain more traction, and smaller distributors like Cablevision to push for unbundled programming or a legislative change to the retransmission consent rules? It's a tough call. CBS, for example, could lose if the merger goes through as it reportedly receives lower fees from Comcast than from TWC. But CBS also reportedly has solid relations with

Comcast. CBS Chief Executive Leslie Moonves recently praised Comcast for believing in "paying fairly for content." Other content suppliers may not mind a larger Comcast if they can all agree to divide the spoils (by perhaps charging consumers even more). So some of the large content suppliers may reasonably decide that a bigger monopoly, like Comcast, is the lesser of two evils.

In sum, one potential problem, from the government's standpoint, is that several prominent companies who are adversely affected by the increase in bargaining power brought about by the merger may be unlikely to lead the charge against it. Sprint led the charge in opposing the AT&T/T-Mobile merger, and contributed legal and economic firepower to the DOJ's case. Without a committed opponent, the government may be less likely to litigate. And smaller cable systems, independent content providers, or start-up OVDs are unlikely to successfully navigate the investigatory process to make up the difference.

But the fact that most of the major content suppliers may choose not to oppose the merger (or to mute their opposition) does not mean that the deal is pro-competitive or even competitively neutral. The DOJ's recent success in the *Bazaarvoice* litigation shows that a merger can be successfully challenged in court as anticompetitive even though few speak up against it. Even if the voices that should be speaking out are mute or muted, if the merger—as the facts reflect—violates the Clayton Act, the DOJ should challenge it.

IV. THE COMCAST/NBCUNIVERSAL DECREE AND ORDER—NOT A GOOD BLUEPRINT

The FCC's Order approving Comcast/NBCUniversal tried to accomplish quite a few things. According to the FCC's announcement:

> As part of the merger, Comcast-NBCU will be required to take affirmative steps to foster competition in the video marketplace. In addition, Comcast-NBCU will increase local news coverage to viewers; expand children's programming; enhance the diversity of programming available to Spanish-speaking viewers; offer broadband services to low-income Americans at reduced monthly prices; and provide high-speed broadband to schools, libraries and underserved communities, among other public benefits.

The companion DOJ consent decree required the Comcast/NBCUniversal joint venture to make available to OVDs the same package of broadcast and cable channels that it sold to traditional video programming distributors. In addition, the joint venture was required to offer OVDs broadcast, cable, and film content that was similar to the content the online distributor received from one of the joint venture's programming "peers." Comcast also agreed to relinquish its management rights in Hulu.

The FCC order and the DOJ consent decree and their reliance on behavioral remedies and conditions were, and remain, controversial as solutions to competitive problems. Comcast's willingness to extend the conditions to TWC heightens the concern that the remedies, in hindsight, do not appear to have been particularly effective.

We'll focus on a couple of features that may be most relevant to the present deal: (i) the FCC's requirement that Comcast "offer standalone broadband Internet access services at reasonable prices and of sufficient bandwidth so that customers can access online video services

without the need to purchase a cable television subscription from Comcast" and (ii) DOJ's provision for online video services to get the same rates as Comcast's "peers."

Mandating that Comcast sell stand-alone high-speed internet service necessarily injected the FCC into the issues of what speed to require and how much Comcast could charge. It also created a need for ongoing oversight. But neither the FCC nor DOJ know what a competitive market can bring. That is a fatal flaw of behavioral remedies. Comcast continues to deliver expensive and (according to some critics) inferior broadband. In the United States, Comcast is as much as 100 times slower than Google Fiber and other state-of-the-art internet service providers. And there will be even less incentive for Comcast, after acquiring TWC, to innovate and compete.

Moreover, the problems that arose in how the FCC order was implemented show why a partially regulatory solution that is at odds with a company's business strategy is unlikely to work, except as a temporary fix. When Comcast failed to comply fully with its obligations to offer stand-alone broadband, the FCC's recourse was to insist on more training of the Comcast sales force, negotiate a civil penalty (euphemistically called a "voluntary contribution to the United States Treasury"), and extend the requirement for a year.

What was new about the DOJ case against Comcast and NBCUniversal was its focus on innovation—in this case, innovation by OVDs like Hulu, Netflix, Apple, and others that offer consumers ways to access professional, full-length content on demand over the internet. OVDs have a variety of business models, including ad-supported programming that is free to the user (Hulu), unlimited streaming for a monthly subscription fee (Netflix), and the purchase or rental of an individual show (Apple).

According to the DOJ, these OVDs are relatively recent entrants into video distribution. They have grown in popularity, especially among younger viewers who want on-demand viewing and choice among devices. The DOJ noted that dozens of companies are innovating and experimenting with online video distribution, with new developments occurring "almost daily."

The DOJ found that "[t]oday, some consumers regard OVDs as acceptable substitutes for at least a portion of their traditional video programming distribution services" and either buy smaller content packages from traditional distributors or are "cutting the cable cord" altogether. The DOJ added that while OVDs have a "de minimis" share of the overall market, growing demand would likely strengthen the competitive challenge they pose to traditional distributors.

The DOJ consent decree was designed to protect early stage competition by OVDs, with a view that those firms may represent the "next big thing." And while it may be fair to say that the DOJ (and consumers) had hoped for more OVD expansion by now, still there are bright spots that suggest this form of delivery of full-length video programming is developing. Amazon Prime, YouTube's original content, DISH Network's over-the-top deal with Disney, and Apple's desire to enter the market all reflect positively on what may be coming down the pike.

So it may be too early to judge the success or failure of the DOJ decree on protecting this nascent competition. However, one thing that does seem clear is that the Comcast/TWC merger could stifle these bright spots. Already, following Netflix's example, we are hearing rumors of other OVDs considering cutting deals with Comcast. The existing DOJ consent decree was inadequate to protect Netflix from Comcast's power to impose an "arbitrary tax." After acquiring

TWC and even more pathways into consumers' homes, Comcast, it appears, will have greater power to arbitrarily "tax" other OVDs.

V. CONCLUSION

It is noteworthy that Senator Obama, while a presidential candidate, spoke against media consolidation and the prior administration's failure to block anticompetitive media mergers. However, President Obama may be presiding over not one but two mega-media mergers by Comcast that have significant competitive consequences for how Americans get their news, video programming, and information. To Comcast, acquiring rival cable and broadband providers is business as usual. It's just the size of the check that is bigger this time.

Fifty-two percent of Americans in one recent Reuters/Ipsos poll believed that deals such as Comcast/TWC result in less competition and are bad for consumers (with only 22 percent believing that such mergers will allow cable and internet providers to be more efficient and provide better service to consumers). Those with college degrees were even more negative of the deal (62 percent). Forty-two percent disapproved of the government's efforts in preventing monopolies and ensuring competition.

Notwithstanding Comcast's and TWC's assertions, combining two monopolies does not yield better service, lower retail prices, more innovation, and greater choices for consumers. Nor should the DOJ and FCC simply extend the prior behavioral remedies to this merger. Behavioral remedies are a poor substitute for market competition. Comcast and TWC have not overcome the presumption of illegality for this merger and are unlikely to do so. As was the case with AT&T/T-Mobile, DOJ should just say no.

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Beneficence Is Beside the Point: The Antitrust Realities of the Comcast/Time Warner Cable Merger

Geoffrey A. Manne
International Center for Law and Economics

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Beneficence Is Beside the Point: The Antitrust Realities Support the Comcast/Time Warner Cable Merger

Geoffrey A. Manne[1]

I. INTRODUCTION

Critics of Comcast have long discussed the cable company as if it were sinister monster aiming at complete dominance of American media by consuming all competitors.[2] The merger between Comcast and NBCUniversal was thought to be a tipping point in consolidation that would allow Comcast to choke competition in the cable, content, and broadband markets. All evidence indicates these fears were exaggerated, to say the least.

Nonetheless, and keeping with tradition, the "big-is-bad" critics have again come out against Comcast's proposed acquisition of Time Warner Cable ("TWC"). But while the merger is significant in size, it doesn't give rise to any plausible theory of anticompetitive harm under modern antitrust analysis.

In a recent essay, Allan Grunes & Maurice Stucke pose a thought experiment: If Comcast can acquire TWC, what's to stop it acquiring all cable companies?[3] The authors' assertion is that the arguments being put forward to support the merger contain no "limiting principle," and that the same arguments, if accepted here, would unjustifiably permit further consolidation. In a second essay in this volume, Grunes & Stucke anticipate defenses of the merger, and argue each fails to give good reason to allow it.[4] But there *is* a limiting principle: competitive harm. Size doesn't matter, as courts have repeatedly reiterated.[5]

This overwhelming concern about Comcast's apparent dominance is indicative of a troubling status quo bias.[6] We need to take a longer view of the market. In 2008, everyone

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[1] Geoffrey A. Manne is Executive Director of the International Center for Law and Economics.

[2] *See, e.g.*, SUSAN CRAWFORD, CAPTIVE AUDIENCE (2013).

[3] Allen P. Grunes & Maurice E. Stucke, *Crossing the Rubicon*, GLOBAL COMPETITION REVIEW (Feb. 25, 2014), *available at* http://geyergorey.com/crossing-rubicon-comcasttime-warner-merger-blocked-global-competition-review-25-february-2014/.

[4] Allen P. Grunes & Maurice E. Stucke, *The Beneficent Monopolist*, 4(1) CPI ANTITRUST CHRON., (April, 2014) (earlier version was available on SSRN).

[5] And they have done so even *before* the advent of modern economic analysis in antitrust: "The characterization of a company as a 'large conglomerate' should not impose a presumption of anti-competitive guilt. Section 7 of the Clayton Act nowhere so provides." *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 538 (3d Cir. 1969).

[6] A problem that afflicts many critics of cable/broadband markets. For example, Susan Crawford last year declared fiber to be "future proof" for the next 50 to 100 years. See http://thedianerehmshow.org/shows/2013-01-10/susan-crawford-captive-audience/transcript. She could conceivably end up being right, but it's extremely unlikely. *See, e.g.*, Adam Thierer, *The Rule Of Three: The Nature of Competition In The Digital Economy*, FORBES, (Jun. 29, 2012), http://www.forbes.com/sites/adamthierer/2012/06/29/the-rule-of-three-the-nature-of-competition-in-the-digital-economy/ ("The graveyard of tech titans is littered with the names of many other once-mighty giants. Schumpeter's 'gales of creative destruction' have rarely blown harder through any sector of our modern economy.").

worried about fiber's dominance, dismissing the threat of cable. Now the concern is about the dominance of cable. Five years from now it will be wireless—or something we haven't even heard of yet. Apocalyptic visions about market dominance have nearly always been proved wrong in time. And with the remarkable pace and extent of technological innovation in broadband and video markets in particular—DOCSIS 3.0, DSL vectoring and bonding, LTE Advanced, IP multicasting, and perhaps even satellite broadband—the relentless focus on historical market conditions and the status quo to make claims regarding competitive effects in these markets is simply unjustified.

As always, understanding the competitive effects of economic activity requires understanding extremely complex market dynamics that extend far beyond the simplistic counting of similar competitors.[7] Properly understood, the proposed Comcast/TWC merger presents no competitive concerns.

II. THE HORIZONTAL ISSUES

A. You Can't Get Comcast in Albany, Anyway: Consumer Video and Broadband Markets

It is well understood at this point that Comcast and TWC don't compete directly for subscribers in any relevant market; in terms of concentration and horizontal effects, the transaction will neither reduce competition nor restrict consumer choice. To the contrary, the transaction should enable the combined firm to take advantage of scale and other efficiencies and, as Comcast described in its Public Interest Statement, will likely enhance competition in key market segments like business services. TWC consumers will receive the immediate benefits of Comcast's faster internet speeds, advanced video products like X1, Comcast's video-on-demand and TV Everywhere, and an upgraded network based on DOCSIS 3.0, which will progress to DOCSIS 3.1 in the near future.[8]

In the multichannel video programming distributor ("MVPD") market, Comcast faces competition almost everywhere from Dish and DirecTV, as well as from Verizon FiOS and/or AT&T U-verse in many markets. Nowhere does it have a monopoly—and nowhere does it compete with TWC.

Claims that Comcast faces only one "real" broadband competitor, or that wireless is not a viable source of competition, are irrelevant for purposes of analyzing this merger. Even if Comcast *were* a true monopolist provider of broadband service in certain geographic markets, the DOJ would have to show that the merger would be substantially likely to lessen

[7] For a comprehensive assessment of the video marketplace and its regulation, see Geoffrey A. Manne, *The Future of Video Marketplace Regulation*, Testimony before the House Energy & Commerce Committee, Communications & Technology Subcommittee, Jun. 12, 2013, *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Manne-CT-Satellite-TV-Law-2013-6-12.pdf.

[8] James B. Stewart, *A Vision Beyond Cable for Comcast After Merger*, NEW YORK TIMES (Mar. 28, 2014), available at http://www.nytimes.com/2014/03/29/business/a-vision-for-comcast-in-a-post-merger-world.html; David L. Cohen, *Comcast and Time Warner Cable File Applications and Public Interest Statement with the FCC*, COMCAST VOICES (Apr. 8, 2014), http://corporate.comcast.com/comcast-voices/comcast-and-time-warner-cable-file-applications-and-public-interest-statement-with-fcc.

competition—a difficult showing to make where Comcast and TWC are neither actual nor potential competitors in any of these markets.

But the reality is that Comcast does face significant and increasing competition in broadband—just not from TWC. Instead, not only Verizon FiOS, but also U-verse, Google Fiber, Dish, and a host of other providers offer substitute services for Comcast's high-speed internet. And for antitrust purposes, not only actual competition, but potential competition is relevant. Recent technological advances have made DSL, satellite, and wireless broadband increasingly viable competitors for high-speed internet service, and these technologies have only just begun rolling out.[9]

When critics of this merger toss out market shares, those numbers seem never to include competitors other than those offering broadband service via coaxial cable or fiber; DSL and other technologies with a lower average top-end speed are excluded. So are satellite broadband services like Exede, even though satellite broadband is becoming increasingly fast (Exede, for example, offers its service at 12 Mbps) and reliable.[10]

While "high-speed" may be an amorphous term, for policy purposes it has a well-defined definition: at least 4 Mbps down/1 Mbps up.[11] Netflix helpfully explains that its content "will work on internet connection speeds of 0.5 Mbps, but we recommend 1.5 Mbps or higher for the best experience. For HD movies Netflix recommends 5 Mbps."[12] Claims that only [fill in your preferred, higher minimum speed requirement for "sufficient" streaming capability] Mbps service presents real competition are easily refuted: Netflix notes that the average speeds at which the major internet Service Providers ("ISPs")—ranging from fiber to DSL—stream its content don't differ significantly, and even the fastest, Google Fiber, comes in at only 3.74 Mbps.[13] In other words, there are plenty of services capable of meeting this threshold.

But whatever market power Comcast may currently possess, the proposed merger simply does nothing to increase it, nor to facilitate its exercise. The absence of any reduction in competition should end the inquiry into any potentially anticompetitive effects in these consumer markets resulting from the horizontal aspects of the transaction.

B. Seventy Percent of Us Will Still Pretend We Don't Watch The Bachelor *on Networks Other than Comcast: The Input Market for Video Content*

Critics repeatedly assert that the combined entity will gain bargaining leverage against content providers from the merger, resulting in harm (here, lower content prices) to

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[9] For the increasing significance of wireless broadband, see the *16th Mobile Wireless Competition Report*, 28 FCC Rcd. 3700 ¶ 371 (2013) ("[M]obile wireless providers have made substantial progress in upgrading their networks with higher-speed technologies and expanding coverage with these technologies. In some cases mobile broadband networks are being used as a replacement for wireline last-mile solutions.").

[10] The FCC, for example, included satellite broadband in its most recent Measuring Broadband America Report. *Measuring Broadband America Report* (Feb. 2013), *available at* http://www.fcc.gov/measuring-broadband-america.

[11] FCC, *Eighth Broadband Progress Report*, 27 FCC Rcd 10342, ¶¶ 18-19 (2012).

[12] Netflix, *How Fast Should My internet Connection Be to Watch Netflix?*, *available at* https://help.netflix.com/en/node/306.

[13] *See* Netflix, *USA ISP Speed Index, February 2014*, *available at* http://ispspeedindex.netflix.com/usa.

programmers. These claims are offered without economic support and appeal instead to some sort of intuition about the dynamics of bilateral negotiations. The reality is far more complicated.[14]

After the transaction, Comcast will serve fewer than 30 percent of total MVPD subscribers in the United States. This share is insufficient to give Comcast market power over sellers of video programming.

The FCC has tried to impose a 30 percent cable ownership cap, and twice it has been rejected by the courts. The D.C. Circuit concluded more than a decade ago—in far less competitive conditions than exist today—that the evidence didn't justify a horizontal ownership limit "lower than 60%" on the basis of buyer power.[15] In 2009 the court again concluded that the "justification for the 30% cap is even weaker now than in 2001…."[16] And this was before telco providers made significant inroads in the MVPD marketplace, taking significant share from the cable companies.

Perhaps even more significantly, the recent exponential growth in online video distributors ("OVDs") like Google, Netflix, Amazon, and Apple gives content providers even more ways to distribute their programming. This further undermines any idea that Comcast somehow controls the video distribution marketplace. Programmers have more ways to reach viewers than even before and this transaction doesn't alter that.

Meanwhile, as Greg Rosston and Michael Topper aptly point out in their Declaration accompanying Comcast's Public Interest Statement, Comcast and TWC don't compete for programming because they don't compete for customers. And, at the same time, programming is non-rivalrous—meaning Comcast's purchase of programming doesn't affect TWC's (or any other distributor's) ability to purchase the same programming. Thus the merger simply won't affect Comcast's market power over the supply or cost of programming.[17]

In fact, greater concentration among cable operators has coincided with an enormous increase in output and quality, in this case of video programming:

1. The total number of cable channels available to consumers increased from 565 in 2006 to approximately 800 in 2013,[18] an increase of about 42 percent.
2. Total spending on programming increased 29 percent in inflation-adjusted dollars during this period.[19]

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[14] In fact, the transaction may actually reduce the combined entity's bargaining power because, among other things, counterparties will have an increased incentive to resist concessions that would apply over a greater number of consumers. *See* Tasneem Chipty & Christopher M. Snyder, *The Role of Firm Size in Bilateral Bargaining: A Study of the Cable Television Industry*, 81 REV. ECON. & STAT. 326 (1999).

[15] Time Warner II, 240 F.3d 1126, 1136 (D.C. Cir. 2001).

[16] Comcast Corp. v. FCC, 579 F.3d 1, 9 (D.C. Cir. 2009).

[17] Rosston & Topper Declaration, ¶ 177-78.

[18] NCTA, *Industry Data*, https://www.ncta.com/industry-data.

[19] Meg James, *Cable TV Networks Feel Pressure of Programming Costs*, LOS ANGELES TIMES (Dec. 8, 2011), http://articles.latimes.com/2011/dec/08/business/la-fi-ct-cable-economics-20111208.

3. Indeed, 2010 inflation-adjusted programming expenditures increased by 2.3 percent[20]—more than the average cable price.[21]

Moreover—not to sound like a broken record—because the merger doesn't alter the competitive make-up of any relevant consumer market, Comcast will have no greater ability to threaten to withhold carriage of content in order to extract better terms. This is because it will face exactly the same risk post-transaction of losing subscribers to competitors if it doesn't carry the programming as it does today—and that risk is substantial.[22]

Finally, programmers with valuable content have significant bargaining power and have been able to extract the prices to prove it.[23] None of that will change post-merger.

III. THE VERTICAL ISSUES

A. Competing Networks Will Still Show Shows, and Comcast Will Still Air The Bachelor *(Not that Any of Us Watches It)*

At the outset, it bears repeating that the merger would represent only 30 percent of the national market (for MVPD services), with 70 percent of the market still available for content distribution. But even this significantly overstates the extent of possible foreclosure. Over-the-Top ("OTT") providers increasingly vie for the same content as cable (and satellite). Netflix alone has as many customers as Comcast will have after the merger and this provides an added avenue of distribution and revenue stream for programmers.

For regional content the analysis is somewhat different. Instead of a national market, for obvious reasons, regional content (like that provided by regional sports networks ("RSNs")) is a local issue. But once again, the transaction doesn't alter the extent of direct competition within any local market.

Nevertheless, in a few markets the shift from non-vertically integrated TWC to Comcast may change the extent of vertical integration, which could in turn affect the firm's incentive to license its own content to competing distributors. But in the past when regulators have considered this issue—in the 2005 Adelphia/Comcast/TWC deal, under far less competitive conditions—the antitrust agency (the FTC in that case) found no substantial threat of anticompetitive harm.[24] And while the FCC did identify a potential risk of harm in its review of

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[20] *Id.* (*citing* SNL Kagan).

[21] FCC, *Report on Cable Industry Prices*, MM Docket No. 92-266 at 9, Table 3 (Mar. 9, 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-377A1.pdf.

[22] TWC reportedly lost 300,000 subscribers in its recent retransmission fee battle with CBS. *See* Hillary Lewis & Alex Ben Block, *Time Warner Cable Loses 306,000 TV Subscribers Amid CBS Dispute*, THE HOLLYWOOD REPORTER (Oct. 31, 2013), *available at* http://www.hollywoodreporter.com/news/time-warner-cable-loses-306000-652131.

[23] Meg James, *Cable TV Networks Feel Pressure of Programming Costs*, LOS ANGELES TIMES (Dec. 8, 2011), http://articles.latimes.com/2011/dec/08/business/la-fi-ct-cable-economics-20111208.

[24] *See* Michael Salinger, *Prepared Statement of the Federal Trade Commission on Sports Programming and Cable Distribution: The Comcast/Time Warner/Adelphia Transaction*, Before the Committee on the Judiciary United States Senate (Dec. 7, 2006) ("After careful consideration, the staff concluded for various reasons that the evidence did not indicate that the proposed transaction was likely to make exclusive contracts profitable for either Comcast or TWC in the geographic markets impacted by the transaction.… The Commission majority concluded that the investigation did not produce evidence that indicated that the transaction was likely to reduce competition. Indeed,

the Adelphia deal, its solution was to impose arbitration requirements for access to this programming—which are already part of the NBCUniversal deal conditions and will be extended to the new territory and new programming from TWC.[25]

This shouldn't be surprising. Comcast already licenses its content to and from TWC (as well as the range of other competitors) in essentially every market where it owns RSNs. There is little to suggest that vertical integration in a local market actually matters to the decision whether to license RSN content, and the FCC rules and the Comcast-NBCUniversal merger conditions provide plenty of additional safeguards.[26]

Most significantly, the dynamic realities of the market should put these issues to rest. Almost immediately upon the announcement of the merger there were suggestions that the merger would drive independent content providers further into the arms of OTT providers like Netflix and Amazon, which would mean more intense competition between OTT providers and cable. The availability of such outlets and the prospects for enhanced competition arising from market changes like the proposed merger demonstrate both the complexity of these markets and the concomitant unreliability of unsophisticated analyses based on simplistic assessments of market structure.

B. Netflix Will Be Just Fine: The Market for Broadband Interconnection

The argument that the merger will increase Comcast's incentive and ability to impair online video content or other edge providers is similarly without merit. Fundamentally, Comcast benefits from providing its users access to edge providers, and it would harm itself if it were to constrain access to these providers.

Content providers, even as they (sometimes) work to hamstring distributors through regulation, recognize the symbiotic relationship. Reed Hastings, Netflix's CEO, recently noted that

> Consumers purchase higher bandwidth packages mostly for one reason: high-quality streaming video. ISPs…are working closely with us and other streaming video services to enable the ISPs' subscribers to more consistently get the high-quality streaming video consumers desire.[27]

Some have argued, of course, that Comcast's vertical structure would nonetheless make foreclosing access to edge providers profitable, suggesting that the company could make up in sales of its own video content (either through cable subscriptions, video-on-demand, or Xfinity

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under certain circumstances, exclusive arrangements may have procompetitive benefits for consumers by helping firms differentiate themselves and compete more effectively.").

[25] *Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia*, 21 FCC Rcd. 8203 (2006).

[26] One analysis does suggest that prices may be higher for integrated RSNs, but only minimally so (4-7 percent of the mean license fee per subscriber per month). Moreover, the data do not support a conclusion that the effects are anticompetitive. Kevin W. Caves, Chris C. Holt & Hal J. Singer, *Vertical Integration in Multichannel Television Markets: A Study of Regional Sports Networks*, 12 REV. NET. ECON. 61 (2013).

[27] Reed Hastings & David Wells, *Netflix Q4 2013 Shareholder Letter* at 6 (Jan. 22, 2014), *available at* http://files.shareholder.com/downloads/NFLX/2913616374x0x720306/119321bc-89c3-4306-93ac-93c02da2354f/Q4%2013%20Letter%20to%20shareholders.pdf.

services) what it might lose from impairing its broadband offerings. But these arguments don't stand up to scrutiny, either.

In the first place, foreclosure effects would be limited. On a national level, the combined firm would have only about 40 percent of broadband customers (excluding mobile broadband, which, when included, would leave the combined firm with much a lower share of broadband customers).[28] This leaves at least 60 percent—and quite possibly far more—of customers available to purchase content and support edge providers reaching minimum viable scale, even if Comcast were to attempt to foreclose access.

Some have also argued that because Comcast has a monopoly on access to its customers, transit providers are beholden to it. But that's not quite true. The transit market through which edge providers bring their content into the Comcast network is highly competitive. Edge providers can access Comcast's network through multiple channels, undermining Comcast's ability to deny access or degrade service to such providers.[29] The transit market is also almost entirely populated by big players engaged in repeat interactions and, despite a large number of transactions over the years, marked by a trivial number of disputes.

Netflix's decision to connect with Comcast directly and bypass the middleman (e.g., Cogent or Level 3) was a business decision, the price of which deserves no special regulatory treatment.[30] As it had done previously, Netflix (like all edge providers) could have continued to purchase transit from any of the many companies that peer with Comcast, or it could have continued to use (as it had also done previously) a CDN service from a multitude of providers, all of which have interconnection agreements with Comcast. Instead, Netflix chose to interconnect directly with Comcast under an arrangement that offered an economically attractive alternative to indirect transit and provided it with more control over its service.[31]

The recent Comcast/Netflix agreement demonstrates that the sophisticated commercial entities in this market are capable of resolving conflicts—conflicts that appear to affect only the distribution of profits among contracting parties but not raise anticompetitive concerns:

> Thus, although peering is often misrepresented as zero-price interconnection, it is more properly regarded as a form of barter and is conditional on an even exchange.... [Netflix] would prefer it if the ISPs bore as much of the burden of the additional costs of carrying this traffic as possible.... As in the typical case, both

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[28] Jim Edwards, *Check Out How Much Of The US Market Comcast Will Control After The Time Warner Deal*, BUSINESS INSIDER (Feb. 13, 2014), *available at* http://www.businessinsider.com/comcast-market-after-time-warner-deal-2014-2

[29] *See, e.g., Global Crossing & Level 3 Application for Consent to Transfer Control*, Memorandum Opinion, 26 FCC Rcd. 14056 ¶¶ 28-29 (2011).

[30] And, for what it's worth, neither does Netflix itself, as Scott Hemphill noted recently in the New York Times. *See* James B. Stewart, *A Vision Beyond Cable for Comcast After Merger*, NEW YORK TIMES (Mar. 28, 2014), available at http://www.nytimes.com/2014/03/29/business/a-vision-for-comcast-in-a-post-merger-world.html.

[31] Dan Rayburn, *Here's How the Comcast & Netflix Deal is Structured, With Data & Numbers*, STREAMINGMEDIA (Feb. 27, 2013), http://blog.streamingmedia.com/2014/02/heres-comcast-netflix-deal-structured-numbers.html; *see also* Richard Bennett, *Paid Peering and the internet of Video Things*, HIGH TECH FORUM (Mar. 28, 2014), http://www.hightechforum.org/paid-peering-the-internet-of-video-things/.

sides reached an interconnection agreement that divides the costs.[32]

Even if we take as given Netflix's preferred transit model, there is still no reason to believe that Comcast has any ability to exercise welfare-reducing market power, and even less reason to think this merger would affect that ability. Among other things:

- Transit agreements are usually determined based on expected throughput, so there is no reason it should cost Netflix more to serve 30 million users if they are split between two networks than if the same number is concentrated in one.
- If anything it might cost less, as some of Netflix's interconnection points with Comcast's existing network might be close enough to serve former TWC customers where previously they might have been served through a separate interconnection point (and a separate agreement).

If Netflix does end up paying more to access Comcast's network over time it won't be because of market power or this merger. Rather, it's an indication of the evolving market and the increasing popularity of OTT providers.

There are also under-appreciated pro-competitive justifications for such arrangements. Charging Netflix allows Comcast to better distinguish between the high-usage Netflix customers (two percent of Netflix users account for 20 percent of all broadband traffic) and everyone else. This should lower cable bills on average, improve incentives for users, and lead to more efficient infrastructure investments by both Comcast and Netflix.[33]

C. Rivals and Unaffiliated Programmers Will Be Just Fine, Too: The Market for MVPD Video Content

Critics have alleged that the vertically integrated Comcast may withhold its content from MVPDs or OVDs, or deny carriage to unaffiliated programming. In theory, by denying competitors or potential competitors access to popular programming, a vertically integrated MVPD might gain a competitive advantage over its rivals. Similarly, an MVPD that owns cable channels may refuse to carry at least some unaffiliated content to benefit its own channels.

As a preliminary matter (once more) these issue are not transaction specific. In fact, the issues were exhaustively addressed and resolved in the NBCUniversal proceeding; it is unclear why that resolution would now be deemed inadequate. But, regardless, Comcast will not be able to engage in successful foreclosure strategies following this transaction.

Comcast does not have market power as either a buyer or a seller of programming. The transaction has no effect on Comcast's share of national programming. And while it will have a larger share of national distribution post-merger, as noted above (and as the courts have

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[32] Christopher S. Yoo, *Testimony before the United States Senate Committee on the Judiciary, Hearing on "Examining the Comcast-Time Warner Cable Merger and the Impact on Consumers,"* Apr. 9, 2014, *available at* http://www.judiciary.senate.gov/imo/media/doc/04-09-14YooTestimony.pdf.

[33] *See* Jim Cicconi, *Who Should Pay for Netflix?*, AT&T PUBLIC POLICY BLOG (Mar. 21, 2014), *available at* http://www.attpublicpolicy.com/consumers-2/who-should-pay-for-netflix/. *See also* Berin Szoka, *Killing Net Neutrality Helps Underdogs Succeed*, WIRED (Feb. 17, 2014), *available at* http://www.wired.com/2014/02/oh-cries-net-neutrality-comcast-time-warner-merger/.

repeatedly found), a 30 percent market share is nonetheless insufficient to confer buyer power in today's highly competitive MVPD market.

Moreover, the programming market is highly dynamic and competitive, and Comcast's affiliated programming networks face significant competition. As Rosston & Topper explain:

> [F]oreclosing other MVPDs' access to Comcast's national cable networks would not benefit Comcast's MVPD service as it would not only cause the networks to lose revenues but also would likely not lead to many subscribers of other MVPDs switching to Comcast.[34]

For much the same reason (the prevalence of, and demand for, competing content), Comcast already has no ownership interest in the overwhelming majority of content it distributes. This will not measurably change post-transaction.

Even if there were any concern here, the FCC's existing program access and program carriage rules, as well as the NBCUniversal conditions, provide plenty of safeguards, and there is no indication that these safeguards have failed to work since Comcast acquired NBCUniversal.

IV. THE PRO-COMPETITIVE BENEFITS

While the proposed transaction doesn't give rise to plausible anticompetitive harms, it should bring well-understood pro-competitive benefits from increased scale, expanded geographic reach, and improvements to TWC's technology and governance.

Most notably, the transaction will bring significant scale efficiencies in a marketplace that requires large, fixed-cost investments in network infrastructure and technology. And bringing a more vertical structure to TWC will likely be beneficial, as well. Vertical integration can increase efficiency,[35] and the elimination of double marginalization often leads to lower prices for consumers.[36]

Let's be clear about the baseline here. Remember all those years ago when Netflix was a mail-order DVD company? Before either Netflix or Comcast even considered using the internet to distribute Netflix's video content, Comcast invested in the technology and infrastructure that ultimately enabled the Netflix of today. It did so at enormous cost (tens of billions of dollars over the last 20 years) and risk. Absent broadband we'd still be waiting for our Netflix DVDs to be delivered by snail mail, and Netflix would still be spending three-quarters of a billion dollars a year on shipping.

The ability to realize returns—including returns from scale—is essential to incentivizing continued network and other quality investments. The cable industry today operates with a small positive annual return on invested capital ("ROIC") but it has had cumulative negative ROIC over the entirety of the last decade. In fact, on invested capital of $127 billion between 2000 and

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[34] Rosston & Topper Declaration, ¶ 223.

[35] Thomas W. Hazlett, *Vertical Integration in Cable Television: The FCC Evidence* at 5 (Oct. 19, 2007), *available at* http://www.arlingtoneconomics.com/studies/vertical-integration-in-cable-television.pdf.

[36] Gregory L. Rosston, *The Proposed Comcast-NBCU Transaction: Response to Comments and Petitions Regarding Competitive Benefits and Advertising Competition*, (Jul. 21, 2010), http://www.comcast.com/nbcutransaction/pdfs/REDACTED%20Rosston-Topper%20Reply%20Report%20-%20FINAL.pdf ("the reduction in double marginalization...is based on empirical evidence").

2009, cable has seen economic profits of negative $62 billion and a weighted average ROIC of negative 5 percent.[37] Meanwhile Comcast's stock has significantly underperformed the S&P 500 over the same period and only outperformed the S&P over the last two years.

V. CONCLUSION

In sum, the fears about anticompetitive effects arising from the proposed Comcast/TWC merger are unfounded. Although at times plausible-sounding, the alleged problems just don't stand up to scrutiny. In most cases they are also not transaction-specific and have no place in an appropriate merger review. Unless and until further analysis reveals as-yet unidentified, transaction-specific harms, the merger should pass antitrust muster.

[37] Larry Dignan, *Broadband Networks: Returns on Invested Capital Stink*, SEEKING ALPHA (Dec. 23, 2010), http://seekingalpha.com/article/243441-broadband-networks-returns-on-invested-capital-stink.

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The Comcast-TWC Merger: Limit the Government's Options

Jarod Bona
Bona Law PC

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The Comcast-TWC Merger: Limit the Government's Options

Jarod Bona[1]

I. INTRODUCTION

The antitrust world is abuzz as the Antitrust Division of the Department of Justice ("DOJ") reviews Comcast Corp.'s $45.2 billion bid for Time Warner Cable, Inc. The transaction and its competitive implications have captured antitrust and general public attention in part because it involves multiple complex markets that are developing at the accelerated rate of the underlying technology itself. Whatever the DOJ decides to do, it will affect important markets for years to come.

Comcast and Time Warner are the two largest companies to offer internet, phone, and cable television services to consumers throughout the United States. In a typical deal between the top two companies in the same market, it is an easy decision for an antitrust agency to say no. But this isn't the typical deal, and the action isn't even in these consumer markets.

Comcast and Time Warner have the largest market shares in these markets, but they don't really compete. Their overlap is quite minimal—nothing a quick divestiture wouldn't solve. The issues are on the other side of these markets: the companies as buyers of content for cable and as controllers of the increasingly crowded bridge to customers—broadband. It is here where the DOJ should and will spend its energy and resources.

II. SOMETIMES FEWER OPTIONS ARE BETTER THAN MORE OPTIONS

The heading does not refer to the number of cable channels we have to flip through to find a good one. Nor am I about to jump into a common insight from behavioral economics about how too many choices often just overwhelm people.

No, I am instead describing the remedies available to the DOJ to serve the goal of protecting competition in addressing the proposed merger. More specifically, the DOJ's toolbox overflows with several shiny, but odd-shaped, gadgets that would tempt anyone, but often don't work or end up creating more damage. These tools are called behavioral or conduct remedies.

Although the mainstream media often approach the DOJ's decision on a merger as a binary thumbs-up or thumbs-down, it is much more complicated than that. While one question for the DOJ is whether to file a lawsuit challenging it or not, that is just a single step in an elaborate back-and-forth between the businesses and the government.

The DOJ has many remedies or tools at its disposal and it will likely negotiate with the parties on an agreement that will incorporate some of these remedies into a final deal. The DOJ could just say no, then challenge it, but that doesn't happen much anymore. And the current

[1] Jarod Bona is Principal of Bona Law PC, specializing in antitrust law. You can follow his commentary at www.TheAntitrustAttorney.com.

consensus—which, although it can be wrong, is usually right—is that the deal will go through in some form.

So what are these possible remedies? In 2011, the DOJ published a *Policy Guide to Merger Remedies*, updating a previous guide from 2004, explaining possible remedies.[2] Besides trying to kill the deal altogether with a legal challenge under Section 7 of the Clayton Act, the DOJ can seek or negotiate structural remedies, conduct remedies (also known as behavioral remedies), or devise some combination of the two.

A structural remedy is a one-off solution that changes the actual composition of the combined entity by forcing it to divest certain assets or business units. This may occur, for example, where merging parties compete in multiple geographic markets and would collectively achieve market or monopoly power in a particular region through the merger. The government will often insist that the parties sell or transfer certain business units to a third-party that can maintain the competition after the transaction. It is likely that the Comcast-TWC merger, if approved, will, at the least, include divestitures related to the minimal consumer overlap of the two parties.

Conduct remedies, also known as behavioral remedies, permit integration, but place operating rules on the combined entity going forward. According to the DOJ, "[t]ailoring a conduct remedy to the particular competitive concern(s) raised by a vertical merger can effectively prevent harmful conduct while preserving the beneficial aspects of a merger."[3] This is a worthy goal, but antitrust enforcers don't easily achieve it. At first exposure, these remedies sound like a great idea—we can keep the merger (and attached efficiencies), but strip it of any anticompetitive harm. If only it were that easy.

III. THE DANGER OF CONDUCT AND BEHAVIORAL REMEDIES

The predictable problems, of course, are that the conduct remedies (i) don't always work, (ii) are costly to administer, and (iii) often create more harm than good. At the same time, these remedies look quite alluring to an antitrust body reviewing a proposed transaction.

Despite the teams of economists and specialized nature of antitrust and competition law, the government's decision on a transaction is, at its core, a political decision. No matter how much antitrust and economic jargon fills the reasoning submitted with the decision, the enforcer is (i) choosing among alternatives based upon incomplete evidence about the future and (ii) making what are ultimately normative judgments about how to structure competition going forward.

Strong political judgments cost political capital, particularly when the consequences are great, as they are in the Comcast-TWC deal. Lobbyists and stakeholders (and even senators) line up on both sides of the issue and, no matter how professional its attorneys, the DOJ must feel the heat. Indeed, here, the Department of Justice, of course, is ultimately controlled by the President and his appointees. Deciding one way or another is going to upset people.

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[2] U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES, (June 2011), "Merger Remedies."

[3] Merger Remedies, 13.

The beauty of a conduct remedy from the perspective of a political actor is that it can approve the transaction, but tell the merger's opponents "don't worry," we forbid them from doing anything harmful. And, at the beginning, the parties and government may genuinely believe it will work just how they wrote it down. But, as time goes on, problems inevitably arise. That is because the conduct remedies restrain natural competitive activity with "laws" that apply only to the merged entity. As the markets and its players change, the company will see opportunities it wants to exploit, large parts of its business will grow smaller and small parts will grow larger, new competitors will emerge and others will disappear, and the conduct remedies become an unwanted vestige that limits the company from competing. This is as inevitable as change itself.

The company will likely test the agreed-upon restraints, which become cloudier in different market conditions. The antitrust agency—perhaps even controlled by a different administration—will then reappear, negotiate, and possibly seek court enforcement of the prior conditions, which may or may not make sense in the current market structure. This dance, which may repeat itself during the remedy's lifetime, is unlikely to lead to optimal competitive conditions.

An even more significant (and underappreciated) problem, however, is that the conduct remedies—and a company's future attempts to manage around them—disturb the natural competitive flow and allocation of resources that would normally occur in a competitive market. The antitrust enforcer becomes a puppet-master of important markets into the future, as strings they pull today cause significant market changes months and years into the future. These decisions limit competition's ability to effectively allocate resources and undercut the basic purpose of our antitrust laws.

The decision to challenge or defeat a merger, or to require asset or business-unit divestment will also affect how competition develops, but in a very different way. That remedy will determine the structural starting point of a market, but won't interfere with how it develops in the future. A conduct remedy, by contrast, directly inhibits the merged entity's decision-making and how it allocates its resources. A lot can happen in a market over a short period of time, and these strings can tangle an important player as it tries to adjust to those changes. This resource misallocation harms our economy. Indeed, the merged entity, in a way, becomes a public-private partnership as the government is a partner in the company's decision-making.

Unfortunately, these remedies create costs that don't have an obvious victim that can hire a lobbyist, and they are diluted enough that only a few economists or philosophers will point them out. But they are real and go to the core of what antitrust law seeks to achieve and prevent. In the name of protecting competition, the government can thwart it. In fact, it would serve competition and antitrust if the antitrust agency didn't have the option of the shiny, but dangerous, tool known as a conduct remedy.

IV. THE COMCAST-TWC MERGER

Conduct remedies will tempt the DOJ in the Comcast-TWC merger. For example, "net neutrality" and other non-discrimination concepts are favored by some, and were part of the DOJ settlement with Comcast in its previous deal with NBC Universal.

Interestingly so far, some of the likely complainants to the deal, like Netflix and other online video programming distributors, have remained relatively quiet. They are likely to lose negotiating power, as the combined Comcast-TWC would have greater negotiating strength in a regime that allows broadband conduits like the cable companies to charge these distributors for accessing customers. The DOJ should not, however, interpret this quiet as any sort of competitive signal, as it would be rational for the merging parties to cut deals with these distributors before the merger that would lock in lower pricing than the cable companies' market power would typically reflect. That is, it would not be surprising to see the video distributors split the monopoly profits in some fashion as payment to limit their complaints, at the ultimate expense of consumers and future video programmers or other competing technologies that don't receive the benefit of the lower-cost structure from the deal.

In other words, if a company like Netflix thinks the DOJ will likely approve the Comcast-TWC deal (even with conditions), it is a smart business move for them to cut a long-term deal with the cable companies that would lock in a lower cost-structure than their own competitors and future competitors, even if they have to pay more than they are paying now. That deal, combined with the DOJ merger approval, would raise entry barriers for their competitors and future competitors and could lock-in some market power.

The DOJ should examine the evidence and make a decision to either approve the Comcast-TWC deal with or without divestitures, or should challenge it. Then let competition run its course, instead of manipulating markets years into the future with the dull hands of government.

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Analysis of Changes in Bargaining Power in DOJ/FCC Review of Comcast/Time Warner

Jamillia Ferris & Amanda Wait
Hunton & Williams LLP

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Analysis of Changes in Bargaining Power in DOJ/FCC Review of Comcast/Time Warner

Jamillia Ferris & Amanda Wait[1]

I. INTRODUCTION

On February 13, 2014, Comcast announced that it had entered into a definitive agreement to acquire Time Warner Cable for more than $45 billion. Concurrent with the announcement of the deal, Comcast executives publicly touted the transaction's efficiencies, including a larger and more efficient national platform that would benefit from economies of scale and scope. Almost as quickly, competitors, consumers, and legislators began expressing concerns about the combination. Since that time, both the Antitrust Division of the Department of Justice ("DOJ") and the Federal Communications Commission ("FCC") have confirmed reviews of the transaction—DOJ under an antitrust/consumer welfare standard and FCC under a "public interest" standard, which also considers competitive effects of the transaction.

Much of the initial reaction to, and criticism of, the proposed transaction has focused on the post-merger size of the combined company in terms of the number of subscribers. However, as Comcast was quick to note, while Comcast and Time Warner both serve pay television and broadband internet customers, they do not compete with each other for customers in any of the same zip codes anywhere in the United States.

Given this absence of a horizontal overlap in the companies' existing distribution footprints, the DOJ and FCC (the "agencies") likely will focus their reviews of potential anticompetitive effects from the proposed merger on how the expansions of the pay television and broadband networks affect Comcast's incentives in dealing with content providers, i.e. a bargaining theory analysis. Since 2011, Comcast has controlled pay television and broadband internet distribution networks, as well as access to NBC Universal content (such as NBC, CNBC, and The Weather Channel, among others), making it both a competitor to—and upstream distributor for—other content providers.

The agencies likely will consider the effect of Comcast's expanded pay television network (after the merger) on Comcast's leverage in future negotiations with downstream content providers. In addition, the agencies likely will investigate whether the expansion of Comcast's broadband network increases its incentive and ability to thwart competition and stymie innovation by competitor Online Video Distributors ("OVDs") such as Netflix and Amazon Prime.

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[1] Ms. Ferris and Ms. Wait are partners in the Global Competition Practice of Hunton & Williams LLP. The authors acknowledge helpful research assistance from Mark G. Weiss in preparing this article.

II. LEVERAGE VIS-À-VIS CONTENT PROVIDERS

Pay television is a two-sided market with content providers on one side, providing content to distributors Time Warner and Comcast, among others, and with consumers purchasing such content from distributors on the other side. In pay television, Comcast's existing regional cable monopolies give it negotiating leverage vis-à-vis content providers. While alternate means of content distribution exist, such as satellite and internet-based options, cable networks remain essential for many consumers. Thus, an analysis of the competitive effects of the Comcast/Time Warner acquisition should include an investigation of whether Comcast's increased pay television network will affect its bargaining with competing content providers, and how that change in bargaining leverage will affect pay television subscribers.

However, leverage is a two-way street, as content providers may also have leverage in negotiating with the networks that carry their content. A content provider's negotiating power is determined by its ability to produce and offer an attractive package consisting of TV channels, television shows, and/or movies. For example, the more attractive the content package to consumers, the more consumers might cancel their Comcast pay television subscriptions if that package does not appear in Comcast's cable line-up, creating more leverage for the content provider in its negotiations with Comcast.

Such a theory is suggested by CBS's pricing dispute with Time Warner in late 2013 in which CBS withheld its content as a means of leveraging its negotiating power against Time Warner. Time Warner reportedly lost over 300,000 subscribers during that period and conceded to CBS's demands. A similar dispute was reported between the AMC Network, whose content includes popular TV shows such as *Mad Men* and *Breaking Bad,* and the satellite distribution provider Dish Network.

For the purpose of the competition review, a bargaining theory analysis would require the agencies to determine whether Comcast/Time Warner and content providers are more likely to come to a mutual agreement after the merger than before. As a broader pay television subscriber network could affect both sides of the bargaining dynamic, the analysis would need to answer two questions: (i) whether the broader distribution network would make it more profitable for Comcast to discriminate in favor of its own content, and (ii) whether Comcast's increased cable or broadband scope makes its distribution network more indispensable to content providers, forcing these providers to accept lower licensing fees.

For example, Comcast may have more to gain from discriminating against competing content providers if the result is its own NBCU content gaining a broader audience; but may also risk losing a larger number of subscribers if it excludes competing provider content from its pay television network. Content providers also may have more to gain (in the form of increased subscriber access to their content) and more to lose (in the form of an increased number of subscribers precluded from their content) when negotiating with the combined Comcast/Time Warner.

Aviv Nevo, DOJ's Deputy Assistant Attorney General for Economics, discussed this general bargaining theory in a recent speech at the Stanford Institute for Economic Policy

Research and the Cornerstone Research Conference on Antitrust in Highly Innovative Industries.[2] He explained that bargaining leverage should be measured by the factors that change the likelihood of agreement relative to disagreement. The important factors are the negotiating parties' bargaining power and leverage. Influencing the analysis are consumer preferences, market structure, the relative value of various content, and the documents and data provided by the parties and by third-parties during the course of the agencies' investigations. A merger will be neutral or pro-competitive if the value of an agreement, relative to the value of a disagreement, either remains steady or increases.

Whether the combined Comcast/Time Warner could exert bargaining leverage over content providers was a topic of discussion during the Senate Judiciary Committee hearings on the proposed merger which took place on April 9. This further underscores the importance of these considerations during antitrust review.

III. DEALING WITH COMPETING OVDS

Also relevant to the agencies' antitrust analysis is whether the combined company's expanded broadband network changes Comcast's incentives in dealing with OVDs. Broadband connections are essential to the emerging OVD industry. OVDs, such as Netflix and Amazon Prime, compete with Comcast and Time Warner's cable networks as well as with Comcast's and Time Warner's own OVD services. At the same time, OVDs rely on Comcast and Time Warner to transmit OVD content to consumers via high-speed, broadband internet.

Thus, whether or not the proposed Comcast/Time Warner merger increases the combined company's incentive and ability to harm the growth of OVD providers is an important consideration as the agencies investigate the proposed transaction. The agencies likely will consider whether Comcast would have an incentive (or an increased incentive) to discriminate against competing content being transmitted over its broadband internet network. Indeed, commentators have expressed concern that Comcast may slow the transmission speed of competing OVDs in order to encourage customers to switch to Comcast's own OVD programming or its pay television network.

Concerns about changing incentives resulting in bottlenecks to customer access to content and diminished OVD innovation were at the core of the conditions Comcast agreed to in order to secure the agencies' approval of its acquisition of control over NBCU content in 2011. That transaction resulted in the vertical integration of NBCU content and Comcast pay television and broadband distribution.

The agencies ultimately cleared the transaction but only after Comcast agreed to certain commitments and restrictions on future conduct. Comcast agreed to license the NBCU content and programs to OVDs in a non-discriminatory manner and at a reasonable price and to relinquish its management rights in the NBCU-controlled OVD services Hulu and Hulu Plus.

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[2] Aviv Nevo, Deputy Assistant Att'y Gen. for Economics, Antitrust Div., Dep't of Justice, Remarks at the Stanford Institute for Economic Policy Research and Cornerstone Research Conference on Antitrust in Highly Innovative Industries: Mergers that Increase Bargaining Leverage (Jan. 22, 2014).

The obligations arising from the DOJ and FCC review of the Comcast/NBCU transaction will remain in effect until 2018 and Comcast has publicly conceded that these existing obligations will apply to Time Warner if the current deal is approved. Whether or not that extension is sufficient to remedy any of the agencies' concerns about the Time Warner transaction and its effect on OVD competition remains to be seen.

IV. CONCLUSION

Although the outcome of the DOJ's and FCC's reviews of the proposed acquisition of Time Warner by Comcast remains uncertain, the antitrust review will require a detailed analysis of market dynamics derived from documents and substantial data produced to the agencies by Comcast, Time Warner, and many third parties. Any change in Comcast's incentives to bargain and deal with its downstream rivals through the expansion of its pay television and broadband internet distribution networks will be important to this analysis. The predicted outcome of those future negotiations based on Comcast's new network positions will include assessments on the effect on consumers—and could be central to the agencies' ultimate conclusion.

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Widgets All the Way Down

Adam J. Miller
Fredrikson & Byron, P.A

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Widgets All the Way Down

Adam J. Miller[1]

The Comcast/Time Warner Cable deal is a useful jumping off point for consideration of a less common theory of potential anticompetitive harm. While most transactions are challenged because they are alleged to have unilateral or coordinated effects, whether this cable deal is challenged may turn on vertical issues.

I can't claim to be an expert on the markets for the sale and distribution of entertainment content, so I don't want to discuss the cable deal in too much specific detail. I just don't have the facts. But DOJ will make itself expert in these markets, if it has not already, and the DOJ staff has already given us some insight into what they think in the materials filed with the consent agreement that imposed conditions on the Comcast/NBC Universal joint venture. But first, let's talk a bit about vertical issues in general.

Most of the time, when we're talking about ways that a merger can lead to reduced competition, we're talking about horizontal issues. Gaining too large of a market share may give the merged firm the power to increase prices, or may lead to the upward pricing pressure that is the namesake of my blog.[2] Those are unilateral effects. As the name implies, they create market power for the individual merged firm.

In other cases, the reduction in the number of competitors that a merger entails will make it easier for the remaining competitors to coordinate (tacitly or otherwise) their competitive conduct. For example if a merger reduces the number of competitors from four to three and removes the one competitor that had historically been particularly aggressive on price, perhaps the transaction will make it easier for the remaining players to play nice. This type of scenario has been creatively named "coordinated effects."

As you can see, both unilateral and coordinated effects are horizontal concerns—they relate to competition across the same level of the chain of distribution. There's a whole set of guidelines from the FTC and DOJ that set out how they analyze these issues and nearly every merger challenge hinges on a horizontal theory.

But there can also be vertical concerns—concerns that the transaction will reduce competition across two or more levels of distribution. The basic idea underlying vertical concerns is foreclosure—that something about how the transaction will rearrange the market structure will allow the merged entity to stifle competition by foreclosing competitors' access to the market. For example, if a deal combines a vertically integrated manufacturer/distributor with

[1] Adam is of counsel in Fredrikson & Byron's Antitrust and Trade Regulation, Corporate and Litigation Groups.

[2] http://upwardpricingpressure.com/blog/.

a large rival at the distribution level, perhaps the combined firm would have the ability and incentive to remove access to its powerful distribution network to a competing manufacturer.

I often think of vertical concerns as a bit secondary. For there to be much concern about vertical issues, the merged firm likely also has to have horizontal market power on at least one level. So if the deal at all enhances that existing market power, that's the more straight-forward case to make. For example, our hypothetical vertically integrated manufacturer/distributor likely would need to have market power at the distribution level before there is too much concern. So maybe a way to sum up the most typical vertical concern is to think about an entity with market power on one level of distribution becoming vertically integrated via acquisition.

And that's where a case like the cable deal comes in.

Rather than delve into the specifics of that combination, let's do a stylized thought experiment first. Let's imagine a world before the internet (or even mail order) and convenient delivery service. Let's imagine in this world that there are two, large, dominant retailers that sell widgets, one on either side of the Mississippi. Let's imagine further that, in its infinite wisdom, Congress has enacted a statute that prevents retailers from operating locations on both sides of the river. So what we have is Retailer A, monopolizing the retail sale of widgets on the eastern part of the country and Retailer B, monopolizing on the western part.

Now let's say I'm a manufacturer of retro spinning neon widgets located in Minneapolis. Despite my location straddling the great river, I've never had a relationship with Retailer B. But that's okay, I sell all my production through Retailer A in the east, who has enough demand to take all of my capacity, so I'm golden. Retailer B, meanwhile, gets his widgets from my myriad competitors located throughout the country.

Now let's say that the two retailers have gotten smart lawyers involved who figure out that co-ownership by a single holding company does not violate the Congressional ban on retailers on both sides of the river, so the two companies agree to combine under common ownership, with Retailer B's management running the show. They announce the combination in perfect confidence that the antitrust agencies can't bother them, because not only do they not currently compete, there's a federal statute that prevents them from doing so even if they remain separate. No problem, right?

Well, not so fast. The new combined entity, in our hypothetical world, is the only outlet to the market for widget manufacturers. What's to stop them from cutting me off? And if they cut me (and others situated like me) off, will there be adequate competition in widget manufacturing going forward?

Sadly, even those facts may not be enough to ground a strong vertical case. After all, I, as a poor lowly widget maker, was always at the mercy of one or the other retail monopolist. But what if last year, before the current deal, Retailer B had made the decision to vertically integrate upstream and acquire its own widget maker? Well, now we have a vertically integrated firm with an incentive to use its market power at the retail level to advantage its widget manufacturing business. That could be something. It could be that the deal has the effect of raising my costs (or any other widget maker's costs) if I would have to also enter at the retail level to continue to compete, thus raising barriers to entry in the widget industry.

And, finally, what about the cable industry? Does it resemble my hypothetical widget industry? Well, Comcast and Time Warner have certainly made no secret that they do not currently compete with each other in cable distribution, because there are no zip codes in which both offer service. As I understand it, that's often the result of local ordinances that prevent such direct competition, making each a local monopolist (setting aside, for the moment, competition from other forms of distribution). And one of them recently vertically integrated via the Comcast/NBC Universal JV.

After reviewing that transaction, DOJ alleged that the joint venture would substantially lessen competition in the market for "the timely distribution of professional, full-length video programming to residential customers." Or, in other words, distributing shows and movies to home viewers. One way to distribute video content is through cable television distribution, but a growing alternative way is to stream it directly to viewers over the internet. Much of the streamed internet content is also carried into our homes by the cable companies, who are major providers of broadband. In its Competitive Impact Statement, DOJ said there was "an inherent conflict…between Comcast's provision of broadband services to its customers… and its desire to sell them [cable] services."

That conflict is explicitly about vertical concerns, i.e. the threat that online, streamed content poses to traditional cable distribution and the incentive that the newly vertically integrated Comcast would have to use its portfolio of content to stifle online competitors.

Does the new transaction heighten those concerns? And, if so, are those concerns so great as to justify blocking the current proposed transaction? Or is the existing remedy, which imposes restrictions on the JV's licensing practices, adequate?

Vertical cases are rare, and tend to be about the initial vertical integration (i.e., Retailer B buying the widget manufacturer) not about potential vertical effects from a subsequent horizontal merger. Nonetheless, Comcast further expanding its distribution footprint could create concerns about its vertical integration that weren't there when it was smaller.

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Beyond Comcast-Time Warner Cable: The Fragmentation of the American Internet

Anant Raut

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Beyond Comcast-Time Warner Cable: The Fragmentation of the American Internet

Anant Raut[1]

I. INTRODUCTION

The fate of Comcast-Time Warner Cable is almost an afterthought for web content creators, who are facing a much more existential threat. The D.C. Circuit's decision in *Verizon v. F.C.C.*[2] seemed to sound the death knell for net neutrality, validating "pipe" owners' discretion to price discriminate the web content they carry. Unless the Federal Communications Commission ("FCC") moved quickly to take regulatory action, warned the commentators, broadband providers such as Comcast and Verizon would extort a toll from high-volume content providers such as Google, Netflix, and ESPN to ensure that their content loaded just as smoothly as their competitors', or, for an extra price, faster, essentially creating a protection racket under the guise of an economically efficient two-sided market.

Except the big content providers may not be as captive as we think. Over the years, hints have emerged that the most successful content providers have tried to reduce their dependency on the pipe owners: whether Netflix caching its content directly in the last mile through Open Connect; Google experimenting with running a lightning-fast fiber network; or Apple stitching together its own delivery network ahead of its rumored move into higher content offerings. Should the FCC fail to restore net neutrality rules, this may be the moment when the biggest content providers decide to disintermediate the pipe owners entirely and sell broadband service directly to consumers.

But a splintering of the neutral net into branded internets would only widen the digital divide in this country. Because of the capital costs of building and maintaining broadband architecture, the branded internets are likely to focus on dense, urban markets where the bulk of their users live. Left behind will be the rural, less affluent regions of the country that already have trouble getting more than one internet provider to compete for their business. If the FCC fails to reverse the D.C. Circuit's decision, then the market will find a way to correct itself; but in a way that only benefits the most profitable segment of the consumer market.

II. D.C. CIRCUIT EUTHANIZES THE OPEN INTERNET ORDER

In January's *Verizon* decision, the DC Circuit struck down the Genachowski-era net neutrality rules (the Open Internet Order[3]) for broadband providers, holding that the FCC lacked

[1] Anant Raut is an antitrust attorney in Washington, D.C. He is a former Antitrust Counsel to the U.S. House of Representatives, and previously practiced competition law and policy at the Federal Trade Commission and in private practice. He is currently serving as outside counsel to a coalition of wireless providers led by Free Press on competition issues. Mr. Raut is a graduate of Yale University and the Harvard Law School. The views expressed in this article are his alone.

[2] *Verizon v. F.C.C.*, __ F.3d __ (D.C. Cir. 2014).

[3] *In re Preserving the Open Internet*, 25 F.C.C.R. 17905 (2010).

authority to mandate antidiscrimination rules because it had previously classified broadband internet as something other than a telecommunications service, which was necessary for the FCC to assert its common carrier authority[4].

The Open Internet Order had been issued by the FCC following an earlier defeat in the D.C. Circuit (*Comcast Corp. v. FCC*[5]) in which the D.C. Circuit had vacated an order imposed by the FCC upon Comcast Inc., mandating nondiscrimination in peer-to-peer networking applications, citing its authority under Section 706 of the 1996 Telecommunications Act. The D.C. Circuit held that the FCC had failed to point to any explicitly delegated authority from Congress to mandate open network management practices from broadband providers. In response, the FCC passed the Open Internet Order, reinterpreting its authority under Section 706, which empowers the FCC to remove barriers to infrastructure development and competition that would promote telecom development. The FCC reasoned that since content providers make people want to use the internet, Section 706 gave the FCC the authority to ensure broadband providers aren't stifling competition in telecommunications markets and investment in infrastructure by impeding the transmission of web content.

The Open Internet Order imposed three core principles of net neutrality onto broadband providers, requiring: 1) that mobile and fixed internet providers disclose their network management practices, 2) that mobile and fixed internet providers not block lawful content or applications, subject to reasonable network management, and 3) that fixed (but not mobile) internet providers not "unreasonably" discriminate in transmitting lawful content to a customer.

And though the Order ushered in the Golden Era of Cat Memes, and, secondarily, an efflorescence of web content, it was struck down. Right law, wrong argument, said the D.C. Circuit in *Verizon,* essentially holding that net neutrality obligations under the Communications Act apply to telecommunications services, not information services, which is how the FCC has previously classified broadband providers.

From a policymaker's perspective, striking down the Open Internet Order was no big loss—it was a terrible bit of necromancy, an ungainly amalgam that tried to accommodate (i) the disparate interests of public interest groups that want broadband classified as a public good akin to electricity, and (ii) the broadband internet service providers ("ISPs") who argue that they should reap the reward for the private capital invested and business risks taken in creating the networks. The Open Internet Order was a bit like having two children who can't agree upon a movie, and compromising by sitting in the hallway between the theaters.

But in striking down the Open Internet Order, the D.C. Circuit gave broadband providers the green light to differentiate the pricing for content providers on their networks. It opened the door to favoring certain websites over others in terms of integrity or load speed, or blocking other websites entirely.

[4] Section 706 of the 1996 Telecommunications Act ("Communications Act").

[5] 600 F.3d 642 (D.C. Cir. 2010).

The reaction was swift, and the reaction was dire. Public advocacy groups ululated that the decision heralded the end of net neutrality as we knew it, and that judicial blessing had been given to the broadband companies to turn the internet into a two-sided market.

III. TWO-SIDED MARKETS: THE INFORMATION SUPERHIGHWAY TO HELL

While the decision was still being retweeted, the ramifications were already being felt.

In February, Netflix disclosed that its streaming speed had been declining significantly over Verizon's and Comcast's networks for months.[6] The reasons given for the slowing streams were a combination of network issues stemming from prime time congestion as well as Netflix's shift to higher-quality HD movies. And the fact that both Verizon and Comcast sell streaming movies to their customers in direct competition with Netflix, and would stand to benefit if customers became dissatisfied with Netflix, is absolutely, completely, totally, like, wow, -I-can't-believe-you-even-went-there not related.

When you're Netflix, and responsible for 1/3 of all broadband traffic in North American during prime time,[7] any degradation of service, no matter how slight, has serious business repercussions. When speed declines by almost 24 percent and customers are complaining that movies are freezing, difficult to load, or an otherwise unpleasant viewing experience, that becomes a serious threat to the survival of your company.

Fairly soon thereafter, Netflix made a deal with Comcast, the details of which are unknown, but which involve Netflix paying Comcast a hefty fee to allow it to continue streaming movies to customers without being "throttled." Streaming speed on Comcast has already picked up.

Commentators who view everything through a Comcast-Time Warner Cable lens see this as hush money, an attempt by Comcast to settle a dispute with a noisy complainant before its own case receives serious scrutiny from the Department of Justice's Antitrust Division and the FCC. They completely miss its significance. Comcast's leverage with Netflix existed *before* the attempted acquisition of Time Warner Cable, and before *Verizon*. It arises as a function of being a last-mile monopolist.

It must be noted that this leverage is not exclusive to Comcast, but enjoyed by each of Comcast's broadband competitors as well. The Open Internet Order never applied to interconnection, only to content once it was on the broadband provider's pipe. To the extent Netflix wants to interconnect with any broadband provider directly, it can expect the same roadblocks as it encountered from Comcast.

But the world has gotten a lot worse for the Netflixes since *Verizon*. Bear in mind, Comcast doesn't benefit from *Verizon* because it's under a net neutrality mandate through 2018

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[6] Timothy J. Seppala, *Netflix Report Suggests Comcast and Verizon FiOS Speeds Are Slipping*, ENGADGET.COM (February 12, 2014), *available at* http://www.engadget.com/2014/02/12/netflix-speed-report-comcast-verizon-drop/.

[7] Emil Protalinski, *Sandvine: Netflix Owns One-Third of North American Traffic at Peak, Has Doubled Its Mobile Share in 12 Months*, THENEXTWEB.COM (May 14, 2013), *available at* http://thenextweb.com/insider/2013/05/14/sandvine-netflix-owns-one-third-of-north-american-traffic-at-peak-has-doubled-its-mobile-share-in-12-months/.

as part of its deal with the Antitrust Division after acquiring NBCUniversal.[8] But all of the other broadband operators do benefit.[9]

The white flag raised with Comcast has undoubtedly whetted the appetites of Verizon and other broadband networks that see Netflix the way starving men see a fat, hobbled pig. Nearly 75 percent of Netflix's gross revenues are eaten up by licensing fees for its content;[10] now, a growing percentage of what lunch money remains will be taken by the other ISPs lurking on the playground. Eventually, the greed of the broadband networks will lead to a tipping point—one in which it makes more sense for Netflix to own its own network.

IV. INTERNET INFRASTRUCTURE: THE VAST, UNGLAMOROUS MIDDLE

To understand the logic, we'll need a quick run-through on how the internet actually works.

When you watch a YouTube video, jump onto Facebook, or send out a Tweet, in most cases the company you pay your internet bill to is not the one that owns the pipes all the way back to the California offices of Google/Facebook/Twitter. On their side, the content providers either connect to an ISP or (in the case of the big ones) act as their own. Your ISP typically just controls that crucial "last mile" of pipe that goes directly into your house. Intersecting with both, and where the bulk of internet traffic is carried, are the content delivery networks ("CDNs"). CDNs comprise the massive "backbone" infrastructure running underground across the country, and are operated by unsexy companies like Cogent and L3 that probably don't have cool cafeterias for their employees made from reclaimed wood.

The majority of content providers host their sites on ISPs that connect to a CDN like Level 3, which in turn connects to a different ISP like FiOS that runs fiber all the way to your house. There are only a handful of such major backbone networks, while there are hundreds more ISPs. As a customer, you pay your ISP for service, just like the content provider pays its ISP for service, and the two ISPs work out a deal with the backbone that allows the content to go from the provider, through its ISP, through the backbone, through your ISP, to your computer, tablet, or phone in one seamless transmission.

ISPs and backbones have traditionally agreed to connect to each other in a process known as "peering." In the early days, neither side even charged each other ("settlement-free peering"), the thought being that what goes around, comes around, and that an ISP receiving traffic from a backbone network would at some point need the backbone to accept a comparable amount of data from it.

The argument from the ISPs for the Netflix surcharge is that whereas settlement-free peering arose at a time when traffic was likely to flow both ways, Netflix sends waaaaay more traffic downstream than it takes back upstream. There's a straightforward fix—the big ISPs have more ports they can open to receive more data. But parse their response—they're not saying they

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[8] Comcast has also offered to make Time Warner Cable subject to the same time-limited net neutrality obligations as a condition of approval.

[9] Plus, 2018 isn't that far away.

[10] Mark Sweney, *Netflix to Spend $3bn on TV and Film Content in 2014*, THE GUARDIAN.COM (February 5, 2014), *available at* http://www.theguardian.com/media/2014/feb/05/netflix-spend-3-billion-tv-film-content-2014.

don't have the capability of opening up more ports for Netflix on the network. They're saying they plain don't feel like it.

The leverage point of the ISPs is that they are the drawbridge to that critical "last mile" of pipe to the customer. The end-around for the content providers lies in the vast, unglamorous middle.

V. RISE OF THE BRANDED INTERNETS

Hints abound that like doomsday preppers, the big content providers have been readying themselves for the nightmare Netflix-Comcast scenario, socking away alternate bandwidth on the internet.

In December 2013, the *Wall Street Journal* catalogued the various ways in which content companies have sought greater control over internet infrastructure, ranging from investing in marine and underground cables to developing their own networking hardware.[11] Google has pieced together over 100,000 miles of fiber worldwide (compare that to Sprint's U.S. network, which totals fewer than 40,000 miles).[12] Google is also part owner of a $300 million cable system linking California and Japan; has put down 6,000 miles of cable to connect six Asian countries; and purchased the private fiber optic routes linking its data centers to America's 12 biggest internet hubs.[13] Meanwhile, Microsoft has been building its own fiber routes and leasing long-term space on several trans-Pacific cables.[14] Facebook has stitched together its own fiber network across Europe.[15] Amazon has been investing in fiber networks and networking gear.[16] And Apple has been secretly stitching together a network of broadband, enough to send hundreds of gigabits of data each second from its data centers to the networks that connect to customers, most likely to support another iteration of its unpopular television product.[17]

And that last mile monopoly? The content providers are working around that too.

In the United States, Google has been studiously feigning casualness while experimenting with operating its own hardline service. Google has deployed two fiber networks in Kansas City, Kansas, and Provo, Utah, and is currently rolling out a third in Austin, Texas.

Watching the incumbent ISPs respond to the entry of Google Fiber was like watching the last samurai get introduced to the machine gun.[18] In Kansas City, Time Warner Cable started offering 100Mbps service, twice as fast as its previous offering, and heavily discounted all of its previously offered speeds. In parts of Utah where it faces no high-speed competition, Comcast offers a "triple-play" (internet, TV, and phone) package of $242/month with speeds less than

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[11] Drew Fitzgerald & Spencer Ante, *Tech Firms Push to Control Web's Pipes*, WALL ST. J. (December 16, 2013), *available at* http://online.wsj.com/news/articles/SB10001424052702304173704579262361885883936.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Drew Fitzgerald & Daisuke Wakabayashi, *Apple Quietly Builds New Networks*, WALL ST. J. (February 3, 2014), *available at* http://online.wsj.com/news/articles/SB10001424052702304851104579361201655365302.

[18] https://www.youtube.com/watch?v=XCtuZ-fDL2E, "The Last Samurai," Warner Bros. (2003). Seriously, they all died.

10Mbps; in Provo, Comcast offers a $120/month triple play with 105Mbps download speeds.[19] Meanwhile, Google Fiber regularly hits 600-700 Mbps via Ethernet, and 200 Mbps via wifi (compare to national average speeds of 5 Mbps via wifi).[20]

Facebook announced in April that it was working on a project, known as Facebook Connectivity Lab, to develop solar-powered drones that could beam internet service down to communities.[21] Google is experimenting with using solar-powered balloons ("Project Loon") to create a mesh network 20 kilometers above the ground, communicating to ground stations connected to internet providers.[22][23]

Now, imagine a world where for $150/month, you get Apple TV and wireless internet for the rest of your house. Or one in which you buy Amazon's new set-top box, the Fire, and for $60/month, you get an Amazon Prime subscription, which includes 2-day shipping and unlimited access to Amazon's library of streamable movies and TV shows, plus broadband for your entire house. Or for $120/month, perhaps you'd prefer Google TV and insane-speed Google fiber.

Under network management principles espoused by the FCC, the branded internets can make sure that their proprietary content (Amazon movie streaming, Google search results, Zagats reviews, YouTube videos, Apple iTunes, or iTV) bypass other internet traffic. Intrabrand products on the branded internets will get to you the fastest, and in highest quality. What effect does that have on competition? Well, if you're already paying for Amazon Broadband, and have the choice of a crisp, lightning-fast streaming movie through Amazon Prime, or taking your chance with streaming Hulu, which one, over time, are you likely to prefer?

But that shouldn't matter, because overall, customers will have many more choices than they have right now. If you value streaming sports games, get ESPN broadband; if you prefer movies, get Netflix broadband; if you prefer interoperability with devices you already own, get Apple broadband. The consumer can choose the bespoke internet service that's best for him/her, and everyone wins, right?

Well, not everybody.

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[19] Jon Brodkin, *Utah Bill Would Stop Regional Fiber Networks From Expanding*, ARSTECHNICA.COM (February 5, 2014), *available at* http://arstechnica.com/tech-policy/2014/02/utah-bill-would-stop-regional-fiber-networks-from-expanding/.

[20] Cyrus Farivar, *Google Fiber Is Live in Kansas City, Real-World Speeds at 700 Mbps*, ARSTECHNICA.COM (November 13, 2012) *available at* http://arstechnica.com/business/2012/11/google-fiber-is-live-in-kansas-city-real-world-speeds-at-700-mbps/.

[21] Cade Metz, *Facebook Will Build Drones and Satellites to Beam Internet Around the World*, WIRED.COM (March 27, 2014) *available at* http://www.wired.com/2014/03/facebook-drones/.

[22] Jon Brodkin, *Google Project Loon Internet Balloon Circled the Globe in 22 Days*, WIRED.COM (April 4, 2014) *available at* http://arstechnica.com/information-technology/2014/04/google-project-loon-internet-balloon-circled-the-globe-in-22-days/.

[23] And while wireless broadband isn't fast enough yet to be considered a true alternative to high-speed broadband (which has download speeds an order of magnitude faster than wireless), technological advancements suggest that the gap is narrowing with time, making the drawbridge to the home not the only entrance to the castle.

VI. THE RISE OF THE BRANDED INTERNETS WILL FURTHER THE DIGITAL DIVIDE

There's a catch in this rosy scenario—it only makes financial sense for these tech companies to create their private broadband networks in high-density metropolitan areas. The economics of building out high-speed broadband in rural, underserved areas are just as bad for the tech companies as they are for the cable companies.

The cost of building new infrastructure is staggering. By some estimates, Google has spent $100 million rolling out its fiber network in just two cities.[24] No figures are available yet on how much Facebook's satellite and Google's balloon networks will cost in upfront capital expenditures.

Therein lies the problem with allowing the market to decide the future of broadband in this country—the market isn't interested in rural, underserved areas. Average internet speeds in rural America are slower than in urban areas, and their median number of wireline competitors is fewer. Only 82 percent of Americans living in rural areas have access to broadband at speeds of 6Mbps or higher, whereas nearly every American living in an urban area does.[25] At higher speeds, the disparity widens: 84 percent of Americans in urban areas had access to broadband speeds of 50Mbps or greater, over twice the availability in rural areas (38 percent).[26]

I call it the "Kansas City Problem." Residents of Kansas City now have their choice of lightning-fast internet service or still-speedy, -all-things-considered internet service. About a one-hour drive south of Kansas City is Williamsburg, Kansas. There, residents have no wired broadband, and only a scattered assortment of satellite broadband options whose reliability is always subject to weather and topography, at download speeds a full magnitude less than in KC.

So what if someone in the Ozarks doesn't get to stream Netflix seamlessly, you say? Big deal—it's a luxury item. But, as Susan Crawford astutely points out,[27] take out the word "movies" and substitute "telemedicine," or MOOCs.[28] Now we're talking about a real quality-of-life difference between "have's and "have nots."

The citizens who benefit from the branded internets will be the ones who always benefit from internet advancements of any sort. Today, over 95 percent of the residents of Rhode Island, Connecticut, Washington D.C, New Jersey, Hawaii, Massachusetts, Delaware, and Washington have broadband at speeds of 20 Mbps or greater, compared to 23 percent or fewer of the

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[24] Ingrid Lunden, Analyst: *Google Will Spend $84M Building Out KC's Fiber Network to 149K Homes; $11B If It Went Nationwide*, TECHCRUNCH.COM (April 8, 2013) *available at* http://techcrunch.com/2013/04/08/google-fiber-cost-estimate/.

[25] White House Office of Science and Technology Policy and The National Economic Council, *Four Years of Broadband Growth*, 11 (June 2013) *available at* http://www.whitehouse.gov/sites/default/files/broadband_report_final.pdf.

[26] *Id.*

[27] *Latest Pew Study Shows 70 Percent of U.S. Has Broadband. But Access Is Still Unequal*, WIRED.COM (August 26, 2013) *available at* http://www.wired.com/2013/08/latest-pew-results-show-digital-divide-and-mobile-paradox-for-u-s-broadband/.

[28] Massive open online course.

residents of Wyoming, Vermont, Montana, and Alaska.[29] As New York and San Francisco approach Seoul-like speeds and mobile development, great swaths of the country will be stuck in 3G or worse environments, where slow and spotty service is the norm. The children in favored cities will grow up taking tutorials on their tablets; the children in the undeserved rural areas will line up at the public library just to check their email.[30] In the branded internet future, the single-most important factor in social mobility may be one's zip code.

VII. Conclusion

Historian Robert Caro, in documenting the state of America before Lyndon Johnson's rural electrification program, describes a countryside with no radio, TV, electric lights, electric water pumps, or washing machines. Electricity had become a fact of urban life by the 1930s, yet more than 6 million out of 6.8 million farming families didn't have it. They were behind the rest of the world, writes Caro, but they had no idea how *far* behind.[31]

The proposed Comcast-Time Warner Cable tie-up raises a number of competition concerns, for cable subscribers and cable companies, among others. But it poses no greater threat for web content providers than that which the companies already face thanks to the D.C. Circuit's decision to strike down net neutrality obligations. Left unremedied, that decision will drive the creation of branded internets, with far more profound societal consequences.

Comcast has already begun throwing out the prospect of branded internets as a screen for its own merger;[32] but these are not a counterbalance to a Comcast-Time Warner Cable monolith, these are evidence of a larger problem in need of repair. Branded internets will be great for the people who live in a technopolis, but not for those left behind. The FCC must take measures to preserve net neutrality, either by issuing a new order in response to *Verizon*, or finally classifying broadband providers as telecommunications services.

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[29] OSTP and NEC Report *supra* note 25 at 13.

[30] Kim Severson, *Digital Age Is Slow to Arrive in Rural America*, N.Y. TIMES (February 17, 2011) *available at* http://www.nytimes.com/2011/02/18/us/18broadband.html?pagewanted=all&_r=2&.

[31] ROBERT CARO, THE PATH TO POWER: THE YEARS OF LYNDON JOHNSON, VOL. 1, 514 (1982).

[32] Jon Brodkin, *Comcast: Without Time Warner Cable, We Can't Compete Against Google, Netflix*, ARSTECHNICA.COM (April 8, 2014) *available at* http://arstechnica.com/tech-policy/2014/04/comcast-without-time-warner-cable-we-cant-compete-against-google-netflix/.

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On the Relationship Between Media Plurality Legislation and Competition Law

Martin Cave

Imperial College Business School & the U.K. Competition Commission

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On the Relationship Between Media Plurality Legislation and Competition Law

Martin Cave[1]

I. INTRODUCTION

Recent events in the United Kingdom, including the furor surrounding the newspaper "phone hacking" scandal which led to the Leveson report,[2] have focused attention on possible new legislation concerning media plurality. These events follow an inquiry in the European Union that is longer lasting but less likely to bear legislative fruit.[3] Broad questions are raised in these debates, but the focus here is upon the relationship between legal provisions for media plurality and competition law and, in particular, upon such questions as:

- To what degree does competition law include consideration of media plurality issues?
- To what degree can competition law be expected to promote the goals of media plurality?
- Are measurement approaches used in competition law likely to be of help in measuring plurality?
- To what degree are there similarities between remedies applicable under competition law and remedies applicable under actual or prospective plurality legislation?
- Does the process by which competition law has been enacted and grown to maturity have any lessons for a similar development in the area of the case of media plurality?

Although some of these questions are of general application, others can only be answered within the context of a particular country's legal system. In the present article, that country is chosen as the United Kingdom.

II. CURRENT U.K. COMPETITION LAW AND MEDIA PLURALISM RULES

Until recently, the general test applied by U.K. competition authorities in implementing the law was a public interest one. This went back to the original Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, which left the task of defining that public interest to the relevant authority. This practice was followed in the Fair Trading Act 1973, although in 1984 the then government enunciated the so-called Tebbit doctrine, which stipulated that henceforth merger references to the competition authorities would primarily be made on competition grounds.[4]

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[1] Imperial College Business School and the U.K. Competition Commission. The views expressed here belong to the author alone, but he is grateful to Richard Collins for advice and comment.

[2] LORD JUSTICE LEVESON, REPORT INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS (November 2012).

[3] *See* R. Collins & M. Cave, *Media pluralism and the over-lapping instruments needed to achieve it*, 37 TELECOMMUNICATIONS POL'Y 311-320 (2013).

[4] http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/our_role/speeches/pdf/freeman_singapore_15010, p. 3.

The focus on competition was embodied formally in the Enterprise Act 2002, which defined public interest cases as an exception to the general rule of determining cases on competition grounds, expressly identifying national security as a public interest issue—to which media plurality and financial stability were subsequently added. In such cases (and only in such cases), the final decision would rest with the Secretary of State and not the competition authority.[5]

The principal media plurality case carried to a conclusion under the Enterprise Act arose when BSkyB, the satellite pay-TV company, bought 17.9 percent of ITV, the U.K.'s main free-to-air advertiser-financed station. The U.K. Competition Commission found that the proposed acquisition did not trigger plurality concerns but did raise competition concerns.[6] The Secretary of State supported these decisions and endorsed the remedy, which was that BSkyB should be required to sell down its stake to 7.5 percent.[7] Then, in 2010, News Corporation sought to acquire the remaining shares in BSkyB. But the offer was withdrawn in 2011 before a reference to the Competition Commission could get under way.

The Employment and Regulatory Reform Act 2013 made certain minor changes to these arrangements, but left them largely intact.

Several decades before these events, the U.K. Parliament enacted a great deal of separate legislation limiting ownership or cross-ownership of broadcasting and other media. These have now shrunk to a restriction on the combined ownership of more than 20 percent of an ITV license and of national newspapers with a more than 20 percent market share.

Since 2011, radical proposals have been put forward for additional legislation to preserve or enhance media pluralism. These have included, from the U.K. Labour party, a proposal for a limit on a single firm controlling more than 30 percent of newspaper circulation or more than 15 percent of ownership of the media as a whole.[8] Rather than evaluating these proposals, the present article focuses on the relationship between media plurality and UK competition law.

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[5] The EU Merger Regulation ((139/2004/EC) also contains a provision for media mergers with a community dimension to be considered in Brussels for the competition test; it also permits Member States to take measures to protect "legitimate interests" including media plurality.

[6] Competition Commission, Acquisition by British Sky Broadcasting Group plc of 17.9 percent of the Shares of ITV PLC, 2007. The test in the Act is to satisfy "the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience."

[7] *See,* Final decisions by the Secretary of State for Business, Enterprise & Regulatory Reform on British Sky Broadcasting Group's acquisition of a 17.9% shareholding in ITV plc (29 January 2008), *available at* http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/inquiry/ref2007/itv/pdf/sky_berr_decision.pdf .

[8] http://www.theguardian.com/media/2013/jun/13/harriet-harman-media-ownership. An interesting account of the operation in the Netherlands of a rule of this kind based on newspaper circulation can be found in A. W. Hins, *Plurality of Political Opinions and the Concentration of Media*, accessed on SSRN. A report on media plurality (to which the present author gave evidence on which this article is based) has also recently been published by the House of Lords Communications Committee, Media Plurality, 2014, *available at* http://www.publications.parliament.uk/pa/ld201314/ldselect/ldcomm/120/120.pdf

III. DIFFERENCES BETWEEN COMPETITION LAW AND MEDIA PLURALITY RULES

Both the main terms in the above heading ("competition" and "plurality") are subject to multiple interpretations: especially the latter. For the present purposes, a definition of plurality borrowed from Ofcom is useful: plurality entails i) a diversity of viewpoints, and ii) the prevention of one media owner having too much influence.[9] These are not the same, of course. It is possible to conceive cases of "internal pluralism," in which a single media outlet or a group of co-owned outlets espouses radically different points of view—though this would carry the obvious risk that the firm might adopt a new business policy that would lead to ideological uniformity. As the discussion below shows, it becomes important to decide how to handle such cases—in other words to decide whether the two requirements noted above are alternatives or are cumulative.

The three conventional dimensions of media plurality are: the availability of, consumption of, and impact of, media outlets.[10] Of these the first, though important as a precondition, does not seem related closely enough to either of the above-noted notions of pluralism, for the obvious reason that available media which few consumers choose to consume are unlikely to add to diversity or to impinge upon a dominant owner's influence. Equally, the impact or influence of a firm's media outlets on consumers, though an excellent yardstick in theory, is exceptionally difficult to measure.

It is a problem with consumption measures of pluralism that, usually, they are made only in aggregate terms, neglecting the structure of an individual's consumption. Half the population being exposed to A and the other half to -A is less "pluralistic" than the whole population being exposed on a smaller scale to both A and -A. But taking individual multi-sourcing into account is complex.

Competition law, by contrast, is concerned with the presence or absence of constraints on a firm's capacity to exploit its customers or exclude its competitors in a market. In some circumstances, an important constraint can be provided by the presence of successful rivals for customers' spending; in others, exploitation can be deterred by the mere potential availability of substitutes. The focus is less on consumption than on availability of products on level terms. If the bulk of customers faced with an unconstrained choice opt for one option, this is not a problem in itself, although it may become so if the supplier attains and abuses a dominant position. While many people believe that high market shares are automatically a major competition problem, modern competition law does not take this view, even as it recognizes that large market shares can create opportunities for abuse.

In competition law, what determines the set of alternatives to which priority is given in the analysis is, broadly, consumers' behavior in the face of the options available. It is substitution between options by the totality of individual consumers which defines the market within which most of the analysis is conducted. This bottom-up method sits in contrast with pluralism discussions, where it is normally the assessor (e.g. the relevant regulatory authority) that decides top-down which media products to "count." In future, some method of induction from

[9] Ofcom, *Measuring Media Plurality*, 8 (June 2012).

[10] *Id.* at 17.

consumer behavior might take over from this top-down approach, but since the currency of pluralism is not dollars of expenditure but consumption of opinions, developing such a process would prove difficult.

The relationships among quantities, quality, and impact operate differently in the market place for goods and the marketplace for ideas. A high quality product can have an impact disproportionate to its level of consumption, with volume measures failing to capture its effects (think of the iPhone). In competition law quality differences can partly be captured in market shares by value. To adopt a similar approach in relation to plurality, quality/enhanced impact effects would have to taken into account in some way.

In short, the discussion so far suggests the presence of two mechanisms which operate with different goals and yardsticks: a consumer welfare standard in the case of competition law, and a variegated consumption standard in the case of pluralism. We return to the question of the congruence of these concerns after a digression into measurement of media pluralism.

IV. ARE THERE ANALOGIES IN MEASUREMENT?

Two key competition law concepts are "dominance" (the ability to behave to an appreciable extent independently of customers and competitors) and "substantial loss of competition" or "SLC" (used to appraise mergers). The indicators underlying a judgement of dominance are many, including market share of the candidate dominant firm(s), changes in share, countervailing buyer power, etc.

There is no generally accepted percentage threshold that establishes dominance. This reflects the more general proposition that competition law analysis focuses not on share but on absence of constraint; and, in some circumstances, firms in highly concentrated markets can constrain one another most effectively. Hence, as noted above, competition law does not look unfavorably on a large market share won "on the merits." It is the process by which such market shares are gained or protected which usually comes under scrutiny.

In Ofcom's view, plurality focuses both on the conduct of rivalry and on the outcome, as it requires i) the prevention of one media owner having too much influence and ii) a diversity of viewpoints. If it were the case that influence is a zero sum game, so that proprietors are competing for a fixed quantum of influence, then plurality would depend upon different firms' **shares** of relevant impressions, and be independent of the absolute level of media consumption.

It is hardly surprising that it is impossible to capture in a single number the multi-dimensional complexity of the structural conditions and behavioral factors inherent either in a competitive market or in a pluralistic media universe. Merger policy in some jurisdictions sometimes uses the Hirschman-Herfindahl index ("HHI") as a summary statistic describing the distribution of firm size in the relevant market. This is calculated by taking the square of each firm's market share and adding up the sum of the squares. It ranges for 0 in perfect competition to 10,000 (100 squared) in a monopoly. As the index can be calculated over a series of years, comparison over time is possible.

In purely economic terms, under certain not very plausible conditions, it can be shown that the profit margin (more exactly, the mark-up over marginal cost) varies in direct proportion with the HHI.[11] It should be recognized that the HHI gives (by its "market share squaring" procedure) an enhanced weight to large firms and to increases in the share of large firms. However, the HHI (or changes in the HHI) is used in competition analysis at most as a screen to decide whether further analysis of a merger is needed, not to settle the question of whether the merger should be cleared, which requires consideration of a multitude of indicators.

Because it captures the overall spread of consumption, the HHI may seem more useful as a plurality measure.[12] However, it does not capture the range of views available. In a market, product homogeneity can sharpen competition. In small numbers markets, there may also be tendencies towards either convergence of rivals' product characteristics or the proliferation of brands by a single firm seeking to deter entry by a competitor. [13]

Casual observation suggests that while commercial media companies differentiate their products by the age, affluence, and gender of the consumer, even when (like newspapers in the United Kingdom and broadcasters and newspapers in the United States) they are free of impartiality rules, they do not seem to pursue a general policy of proliferating viewpoints on the same issue—that is, they do not generally display internal plurality. It is not clear what is the purely commercial motive for this absence of full internal diversity, nor whether its origin lies with the demand or the supply side.

In summary, there seems to be some role for the HHI as a measure of plurality, even if its use in the enforcement of competition law—for which it was designed—is now limited. However, a separate check would have to be made on whether the various media firms are, individually or collectively, promulgating different viewpoints.

V. THE CONGRUENCE BETWEEN COMPETITION LAW AND PLURALITY GOALS

It was noted above that competition law and media plurality rules have different objectives. At the broadest level, they are both concerned with monopoly but in different senses of the word—the one with control of the commercial market place, the other with control content.

It may be helpful to visualize the relationship in terms of a simple Venn diagram. The left hand circle in Figure 1 contains the universe of media activities captured by a chosen pluralism measure in which competition problems may be detected. The right hand circle contains those media activities in which plurality issues may be considered to arise. Firms in areas A and C can

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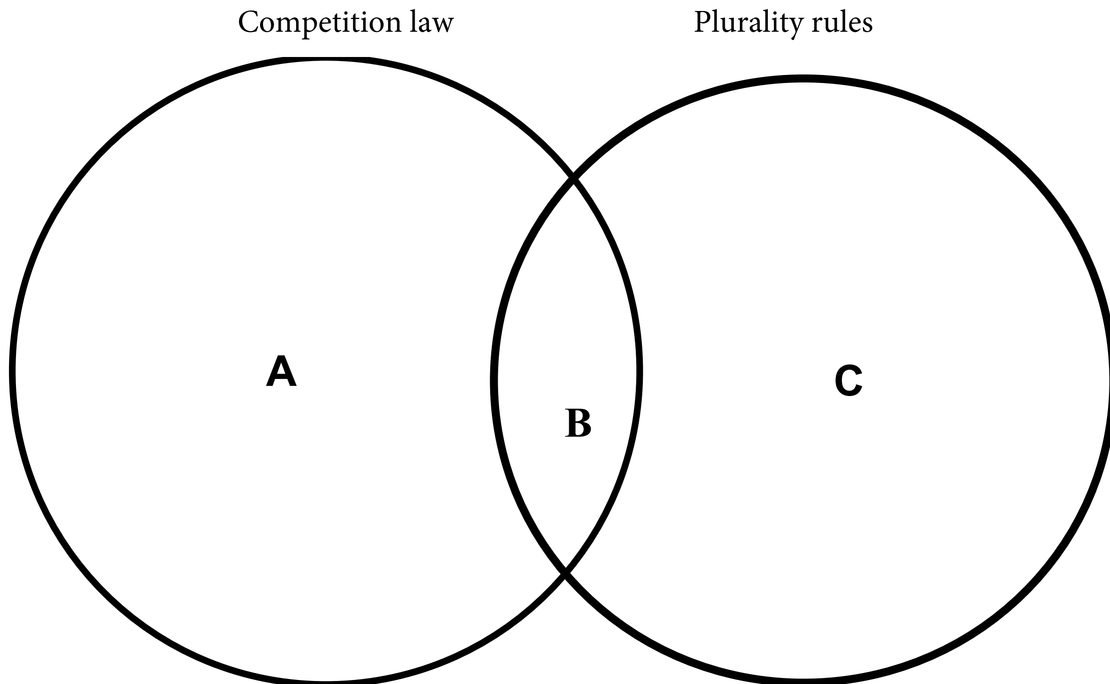
[11] This provides a weak economic justification of the formula. *See* P. BELLEFLAMME & M. PEITZ, INDUSTRIAL ORGANIZATION: MARKETS AND STRATEGY 58-59 (2010).

[12] As discussed in op. cit., *supra* note 3.

[13] As a famous illustration of the tendency for (spatial) convergence, consider two ice cream sellers offering the identical product to a group of customers sun-bathing on a beach, with each person buying one ice cream from the nearest seller. The two competitors will end up back to back in the middle of the beach. (This is the only stable outcome as otherwise one of the sellers could take business from the other by moving to face the majority of bathers.) Similar arguments are used to explain why two political parties may both end up in the middle ground. Proliferation of offerings in the product space seems to be popular in some context, such as detergents, pet food, and mobile phone tariffs.

comfortably be investigated under their relevant statutes. But what about area B, where both arise?

Figure 1:



The general principle governing policy interventions is that if there are two objectives—the maintenance of competition and of plurality—then two instruments are needed;[14] only by a fluke, where the same intervention happened to work with equal success on both objectives, would one instrument be enough. Is that situation likely to arise?

Consider the following possibilities:

1. A media firm dominates the sector and behaves in an anticompetitive fashion to exploit consumers and exclude rivals; its proprietor enforces a single ideology on all outlets: this case sits in area B in figure 1;
2. As in 1) above, but the strong position of the successful firm has been won "on the merits": area C in figure 1;
3. As in 1) above, but the firm does not impose a uniform ideology, practicing internal pluralism: this case sits in area B in figure 1, unless internal as well as external pluralism is counted in the pluralism assessment;
4. There are two media firms, each enforcing the identical ideology on its outlets, but they compete vigorously in commercial terms: area C in figure 1, unless separate ownership is considered enough by itself to avoid the charge of lack of pluralism.[15]

[14] J. Tinbergen, On the Theory of Economic Policy (1952).

[15] To simplify, this situation characterized the U.K. newspaper industry in 1931, leading the then Conservative leader, Stanley Baldwin, to rail against the two proprietors of the leading newspapers in the following way: "The

Outcome #1 fails under both heads, leading to a situation in which correction of both defects may be amenable to the same divesture remedy (discussed below). In Outcome #2 the competition test is passed but the plurality test is failed. Moreover, a divestment measure to achieve pluralism would deprive the firm in question of rewards to which, under the competition regime, it would be entitled. In Outcomes #3 and #4, the key question is whether the two limbs of the plurality test (diversity of viewpoints and no excessive control by one firm) are both required, or whether the first or the second alone will suffice to satisfy the plurality rule. The same issues arises in Outcome # 4; there is no excessive control but also uniformity of viewpoint.

It is thus clear that competition law goals and plurality rules can be congruent, but can equally be opposed. Thus there is no single silver bullet that can, in all cases, solve both problems.

VI. ARE THERE ANALOGIES IN REMEDIES?

In the United Kingdom, the repertoire of competition law interventions has three components.[16] The first, antitrust, deals with anticompetitive conduct, such as abuse of dominance or illegal agreements. The second deals with mergers, using the standard of whether a proposed merger will lead to a substantial lessening of competition.

The third, which is confined to the United Kingdom and a small number of other countries, permits market investigations, which seek to establish if there are features in a market that have an adverse effect on competition. If so, the authority can remedy them. Here the focus is not on the behavior of one firm but on the overall functioning of the market under investigation. This mechanism gives the authority a purchase on a situation where there may be no merger and no abuse under antitrust law, but a situation in which the market is not operating to the benefit of end users.

Antitrust remedies include fines. In the case of mergers, remedies range from prohibition to acceptance of undertakings. These remedies quite often involve divestment and may also include behavioral commitments. The firms involved presumably want the deal to go ahead, so tend to co-operate once their other legal options have been exhausted. Remedies available in market investigations can also be either behavioral or structural, including divestments.

A key issue for plurality legislation (not considered here) is whether it kicks in only in the case of a merger, or whether an examination of plurality, with application of possible remedies, can occur even in the absence of a proposed combination—say at regular intervals, or triggered by another event.

In either case, it is not fanciful to imagine a similar range of remedies being employed in pursuit of plurality goals as are now employed in the case of competition law. In the case of

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newspapers attacking me are not newspapers in the ordinary sense," Baldwin said. "They are engines of propaganda for the constantly changing policies, desires, personal vices, personal likes and dislikes of the two men. What are their methods? Their methods are direct falsehoods, misrepresentation, half-truths, the alteration of the speaker's meaning by publishing a sentence apart from the context...What the proprietorship of these papers is aiming at is power, and **power without responsibility – the prerogative of the harlot throughout the ages."** (emphasis added).

[16] There is a fourth, enforced by the European Commission—State aids. It is worth noting that public subsidy or enforced cross-subsidy is an additional measure which can promote plurality. This is discussed in Collins & Cave, *supra* note 3.

mergers, this might include an outright prohibition of the merger, or the acceptance of undertakings to maintain plurality in the place of prohibition—both of which have been used in the U.K. media pluralism context.

Such undertakings might include partial divestment or a behavioral remedy. While in competition law such a behavioral remedy sometimes includes control over prices, in a plurality context it might involve arrangements to prevent the owner from imposing a particular editorial policy on the media outlet. Thus, in 1981, as a condition for not referring the acquisition by Mr. Murdoch's News International of the *Times* and the *Sunday Times* to the then U.K. competition authority (the Monopolies and Mergers Commission), the Government imposed conditions on the acquirer relating to the maintenance of editorial independence by the newspapers' editors.[17] (It is a separate question whether such measures are effective.)

The divestment remedy is quite widely utilized in U.K. competition law, and guidelines have been prepared for its use.[18] These identify various risks to the attainment of the divestiture objectives that should be avoided—notably (i) the risk of choosing a divestiture package that would not create an effective competitor, (ii) the risk of sale to a weak or ineffective purchaser, and (iii) the risk of deterioration of the assets to be divested before the sale. In relation to the purchaser, broad criteria are set out: the purchaser should be independent of the seller, be capable and committed to the relevant market, and not be subject to competitive or regulatory concerns.

These concerns are likely to be as pertinent in the case of divestment imposed as a remedy to maintain plurality as they are in the case of a remedy to restore or enhance competition.

VII. WHAT IS THE RELATIONSHIP BETWEEN COMPETITION AND PLURALITY LEGISLATION AND ENFORCEMENT?

Competition law developed gradually in the United Kingdom in the post-war period. There are legislative landmarks such as the U.K. Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, the Fair Trading Act 1973, the U.K. Competition Act 1998, the Enterprise Act 2002, and the Employment and Regulatory Reform Act 2013. Membership of the European Union from 1973 brought with it the competition articles of the Treaty of Rome. There have also been vital U.K. and European Court judgments such as the 1977 definition of dominance by the European Court of Justice, and important changes in administrative practice. A recent development applicable to plurality discussions is using behavioral economics to better understand customer choice and craft remedies.[19]

There have also been innovation failures, including attempts to define a "bright line" market share standard for dominance. The development process is Darwinian in nature, with

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[17] HAROLD EVANS, GOOD TIMES, BAD TIMES Chs. 7-10 (1983).

[18] Merger Remedies: Competition Commission Guidelines, 17-23 (November 2008); Competition Commission, Guidelines for market investigations: their role, procedures, assessment and remedies, 91-97 (April 2013).

[19] *See* BEHAVIOURAL ECONOMICS IN COMPETITION AND CONSUMER POLICY, (Judith Mehta, ed., 2013) *available at* http://competitionpolicy.ac.uk/documents/107435/4503876/CCP+economics+book+Final+digital+version+-+colour.pdf/fca104c5-1248-4e7f-87b7-c9ac57f575b0. It is worth noting, however, that some of the concepts envisaged in such analyses (such as "nudging" consumers) may have a worryingly Orwellian ring in application to media consumption.

powerful interests (firms involved in competition law proceedings, their advisers, competition authorities themselves) seeking to test or displace certain precedents and practices or to change legislation. Despite this, there is a fair degree of consensus among practitioners as to how competition law should be constructed at a high level, co-existing with disagreement as to how it should be applied in an individual case.

There seems ground for hope that a similar process can begin, and that a similar outcome can be achieved, in relation to plurality. It is reasonable to assume that any major conclusion or remedy would be subject to appeal in the courts or judicial review, so that precedents would be established. Ideally the process would take account of concurrent international work. For this process of "learning by doing" to take effect, there would need to be persistent interest in monitoring and promoting plurality.

In relation to substance rather than process, the above-noted difference in the objectives of competition and plurality policy (respectively, consumer welfare and the consumption of different viewpoints) defines the different arenas within which the analyses take place (respectively, a set of goods which are close substitutes and a range of media services determined by the investigator) as well as the different desirable outcomes. This limits the usefulness of applying one mode of analysis for both situations. Thus, the difference between objectives of the two activities produces an unavoidable disjunction between the design and application of the relevant instruments. The notion that one legal instrument can generally substitute for the absence of another seems illusory.

It has become apparent from the previous discussion, however, that at the level of measurement, and, particularly, in the choice of remedies, there are lessons to be learned from competition law which can be applied to the regulation of plurality.

Equally, the processes of birth, infancy, and increasing maturity of competition law—which has involved learning from experience, trial and error, and an expanding area of application and growing prestige (despite the occasional waning of influence)—plot a course which exponents of pluralism legislation may wish to copy.

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Does Ofcom Offer a Credible Solution to Bias in Media Public Interest Mergers in the United Kingdom?

David Reader

University of East Anglia Law School

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Does Ofcom Offer a Credible Solution to Bias in Media Public Interest Mergers in the United Kingdom?

David Reader[1]

I. INTRODUCTION

In the wake of a high-profile public inquiry into media culture and an on-going court case regarding phone-hacking, the state of the U.K. media has rarely featured so prominently on the political agenda. One of the key debates to have emerged regards the ownership of the British media and, in particular, how ownership can be regulated in a way that facilitates diversity and media plurality.

On February 4, 2014, the Communications Committee of the House of Lords—the Second Chamber of the U.K. Parliament—published a report, *Media plurality* ("Media Report"), in which it proposes a number of changes to the regulation of media ownership in the United Kingdom.[2] Among the most notable of these is the proposal to grant decision-making powers to the national media regulator, Ofcom, in respect of mergers that raise potential media plurality concerns. At present, this power is conferred on a government minister—the Secretary of State for Culture, Media and Sport.

However, owing to some recent controversies, the ability of politicians to undertake this role impartially has been called into question.[3] The *NewsCorp/BSkyB* case, in particular, is a testament to the potential for politicians to be exposed to undue influence and bias in the media sector. Re-allocating the decision-making role to Ofcom could overcome this risk of capture,[4] but it could equally amount to substituting one problem for another. This article therefore explores the current assessment relating to media mergers in the United Kingdom and proceeds to scrutinize the House of Lords' proposals to amend this procedure.

II. MEDIA MERGERS IN THE UNITED KINGDOM

As a default position, media mergers in the United Kingdom are assessed on the same basis as any other merger transaction that meets or exceeds the specified turnover thresholds.[5]

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[1] David Reader is a PhD Researcher and Research Assistant at the ESRC Centre for Competition Policy and the University of East Anglia Law School in Norwich, United Kingdom.

[2] Communications Committee, *Media plurality* (HL 2013–14, 120–I), *available at* www.publications.parliament.uk/pa/ld201314/ldselect/ldcomm/120/120.pdf (accessed February 5, 2014).

[3] *See*, for example, Andreas Stephan, *The Hunt/Murdoch Affair: Why a Secretary of State should have no role in merger control*, COMPETITION POLICY BLOG (April 2012), *available at* *www.competitionpolicy.wordpress.com/2012/04/30/the-huntmurdoch-affair-why-a-secretary-of-state-should-have-no-role-in-merger-control* (accessed February 7, 2014).

[4] For these purposes, "capture" is afforded its political science definition, broadly referring to an instance where policy-makers and regulators are, in one way or another, influenced to apply their policies in a way that serves their own private interests or the interests of the firms they regulate.

[5] *See* Enterprise Act 2002, section 23 for the turnover thresholds required for a relevant merger situation.

The merger control regime established under the Enterprise Act 2002 requires a merger to be assessed according to whether or not it "has resulted, or may be expected to result, in a substantial lessening of competition" within the relevant market.[6] This "substantial lessening of competition" ("SLC") test provides the foundations for the strict economic effects-based approach to merger control that the 2002 Act envisaged.[7] As a consequence, mergers will almost always be assessed according to their likely impact on competition and not in relation to wider social and non-economic interests. The SLC test itself is applied as part of a two-stage assessment by the Competition and Markets Authority ("CMA"), the U.K.'s new independent competition agency.[8]

However, a departure from this default economics-based approach is possible if the merger in question raises certain "public interest" concerns relating to national security, financial stability, or media-specific conditions.[9] Of these media-specific conditions, the most important to this discussion is "the need for a sufficient plurality of media owners."[10] Where such concerns arise, the Secretary of State has the power to intervene in the merger assessment process and assume the decision-making powers of the CMA.[11]

This is not to say, however, that the CMA's competition assessment is halted. Indeed, under the current regime, if the Secretary of State decides to make a public interest intervention on—for example—media plurality grounds, he or she will receive advice from the CMA Board and Ofcom on issues relating to competition and media plurality, respectively.[12] The minister is under a statutory duty to accept the CMA's competition findings, but is under no such obligation with regards to Ofcom's findings on plurality.[13] The minister will then balance the competition and plurality concerns before deciding whether to refer the merger to the CMA Panel for a more detailed assessment on competition grounds or, alternatively, to permit or block the merger on media plurality grounds in lieu of a reference. It is this chain of intervention, balancing, and decision-making that embodies the quasi-judicial role undertaken by the Secretary of State.

It is not altogether clear what is expected of the Secretary of State when he or she performs this quasi-judicial role. According to *The Leveson Inquiry: Report into the culture, practices and ethics of the press* ("Leveson Report")—a document recording the findings of a major public inquiry into the culture and ethics of the British press, headed by Lord Justice Leveson—a number of expectations are placed on ministers who undertake this type of role.[14] In among these expectations, the Leveson Report clarifies that the Secretary of State's decision must

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[6] *Id.*, §22(1)(b) for completed mergers and section 33(1)(b) for anticipated mergers.

[7] Manifestations of the SLC test are also present in the merger regimes of, *inter alia*, the United States and Canada, as well as in EU Member States such as France, Malta, and the Republic of Ireland.

[8] The CMA replaces the previous institutional arrangement in U.K. merger control, with the CMA Board performing the Phase 1 assessment previously undertaken by the Office of Fair Trading ("OFT") and the CMA Panel replacing the Competition Commission (CC) at Phase 2.

[9] Enterprise Act 2001, §58.

[10] *Id.*, §58(2C).

[11] The Secretary of State derives this power under section 42(2) of the 2002 Act.

[12] *Id.*, §§44(1) and 44A.

[13] *Id.*, §54(7).

[14] L.J. Leveson, *The Leveson Inquiry: Report into the culture, practices and ethics of the press* (2012), *available at* www.official-documents.gov.uk/document/hc1213/hc07/0780/0780.asp (accessed February 7, 2014).

be his or her own rather than that of the collective Ministerial Cabinet,[15] and confirmed that any decision would be subject to an objective test for bias.[16] Significantly, it was also noted that the Secretary of State is entitled to have a prior opinion on the proposed merger, so long as he or she is able to put this opinion to one side during the decision-making process.[17] This requirement is of particular relevance to the events of the proposed *NewsCorp/BSkyB* merger in 2010, which posed many questions on the potential for ministerial bias within the quasi-judicial decision-making process.

In the early stages of the *NewsCorp/BSkyB* assessment, Vince Cable MP—the Business Secretary initially tasked with assessing the merger—was stripped of his decision-making role upon having his intentions to "declare war on Rupert Murdoch" recorded by undercover journalists.[18] His replacement, the then Culture Secretary Jeremy Hunt MP, was known to have expressed sympathy towards the merger which, of course, was perfectly permissible, provided he did not allow this opinion to influence his final decision. Controversially, however, a special advisor to Mr. Hunt was also in direct private contact with Frédéric Michel—News Corp's Director of Public Affairs and a chief lobbyist on the takeover bid—throughout the assessment process. Ultimately, although the Leveson Report praises Mr. Hunt for his scrutiny of the evidence in the case, it was concluded that, by allowing himself to become too close to Mr. Michel, Mr. Hunt had exposed himself to objective bias and had thereby compromised the quasi-judicial procedure.[19]

The *NewsCorp/BSkyB* case certainly exposes some of the pitfalls and sensitivities of undertaking the quasi-judicial role within the media sector. The distinctive characteristics of the media industry, including its reliance on communication and journalistic sources, make it an ideal environment in which to lobby decision-makers and expose them to undue influence. The saga prompted Lord Leveson to recommend that Parliament revisit the role of politicians in such cases; a call that was duly answered by the House of Lords.

III. PROPOSALS TO ASSIGN DECISION-MAKING POWERS TO OFCOM

Under the House of Lords' proposals, the institutional arrangement would vary considerably.[20] According to the Media Report, the quasi-judicial decision-making role would be removed from the Secretary of State and reassigned to Ofcom. By virtue of this, Ofcom would have the discretion to make interventions in mergers raising media plurality concerns, which would—in turn—trigger two separate assessments of competition and media plurality running in parallel (the former undertaken by the CMA and the latter by Ofcom itself). Should a conflict arise between the findings of the CMA and Ofcom on whether or not to permit the merger, the

[15] *Id.* at 2.16.

[16] *Id.* at 2.14. The objective test is that adopted in *Porter v Magill* [2002] 2 AC 357, ¶103.

[17] *Id.* at 2.15.

[18] Robert Winnett, Andrew Porter, & Holly Watt, *Vince Cable stripped of responsibility for media competition after Rupert Murdoch comments*, THE TELEGRAPH (London, 21 December 2010), *available at* www.telegraph.co.uk/news/politics/liberaldemocrats/8218006/Vince-Cable-stripped-of-responsibility-for-media-competition-after-Rupert-Murdoch-comments.html (accessed March 7, 2014).

[19] Leveson Report, *supra* note 14, volume 3, chapter 6, [at 5.197].

[20] A helpful illustration of the proposed procedure features on page 65 of the Lords' Report, *supra* note 2.

Ofcom Board—quite literally Ofcom's Board of Directors—would be tasked with balancing the conflicting interests and reaching a final decision. This is where the integrity of the proposed new regime begins to unravel.

By arranging the assessment procedure in this way, the final decision of the Ofcom Board is essentially a straight choice between the advice of the CMA and the advice of the Board's fellow personnel within Ofcom. The House of Lords has itself recognized this potential conflict of interest, suggesting that it may be alleviated by (a) preventing the Ofcom Board members from taking part in the initial plurality assessment, and (b) ensuring the Board is mindful of the potential for judicial review. Whether these conditions would provide an effective safeguard is debatable but, in any case, it is somewhat contradictory that such a recognizable risk of bias should exist within a proposal that seeks to overcome the perceived subjectivity of ministerial decision-making.

This is not to say that Ofcom is necessarily as prone to bias as the Secretary of State. For example, the multi-member nature of the Ofcom Board allows for group decision-making, meaning that direct lobbying—such as that observed in *NewsCorp/BskyB*—becomes much less workable. Equally, the Board would feel under no pressure to pursue personal ambition or short-term political goals, such as re-election.[21]

Yet it would be naïve to assume that Ofcom is immune to regulatory capture. A significant proportion of its staff have experienced working within the media industry, which potentially leaves Ofcom prone to the "revolving door" dilemma, whereby its former industry workers (who appreciate the unique attributes of the market) may be biased in favor of making decisions that benefit the media industry, rather than the public at large. Indeed, at the time of writing, six of the eight sitting members of the Ofcom Board had previously held a private position within the media sector. On this basis, even if the Ofcom Board were to conduct itself in accordance with the requirements of the quasi-judicial role, there nonetheless exists an inherent perception of bias owing to the membership of the Board. To an extent, this has the effect of negating the procedural transparency that the House of Lords envisioned in its proposals.

IV. CONCLUSION

Taken as a whole, the House of Lords' Media Report establishes some solid foundations for further Parliamentary discussion. Indeed, this article does not allude to the Media Report's proposals for a periodic review of media plurality, which warrants praise for addressing some of the key questions raised by media law scholars.[22] There is a fear, however, that the Media Report underplays the risk of regulatory capture that Ofcom would face during the decision-making process. The type of influence may not be as observable or newsworthy as that which is associated with ministerial decision-making, but it may nonetheless have the effect of preventing a thorough balancing of the competition and plurality aspects in a case. Rather than seeking to

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[21] For a useful overview *see* Michael E. Levine & Jennifer L. Forrence, *Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis*, 6 J. L. ECON. ORG. 167 (1990).

[22] *See*, for example, Michael Harker, *Ofcom's Report on Measuring Media Plurality—The Outstanding Questions*, COMPETITION POLICY BLOG (July 2012), *available at* www.competitionpolicy.wordpress.com/2012/07/02/ofcoms-report-on-measuring-media-plurality-the-outstanding-questions (accessed February 8, 2014).

replace the Secretary of State as a decision-maker, there may be value in considering further ways to protect ministers from capture in the future. Certainly, given the inherent role of the media in facilitating a democratic society, the constitutional significance of elected representatives should not be understated.

Moreover, although the House of Lords' proposals refer solely to mergers in the media sector, one cannot help but feel that they have the symbolic potential to alter perceptions of the role of political decision-making in U.K. public interest mergers more generally. If these proposals were to be enacted by Parliament, it would surely mark a retreat from the idea that politicians are best placed to rule on matters affecting the public interest.

Indeed, if there exists an inherent lack of confidence in the ability of ministers to remain impartial during the assessment process, would the House of Lords not also champion an agency-based approach to public interest mergers in other industries? To analogize with the U.K. banking sector, for example, should the Prudential Regulatory Authority—the regulator tasked with ensuring the stability of financial services firms—be given the final decision over banking mergers in cases where financial stability concerns are raised? It is an interesting proposition, but not one that is likely to be realized. Rather, it is more likely that the Lords' proposals are a reflection of the potential for undue influence that is ingrained in media markets and which, in turn, would appear to warrant special measures.

Fundamentally, the House of Lords' proposals add another voice to the on-going debate regarding "politician *versus* agency" in the context of public interest mergers. On the one hand, there continues to be a widespread appreciation for the democratic and constitutional legitimacy of allowing elected politicians to have the final say on matters involving the public interest. On the other hand, there is a strong case for delegating a role to regulatory agencies who—by means of their openness, consistency, and expertise—should bring greater transparency and credibility to the decision-making process.[23] But regardless of whether the United Kingdom ultimately assigns decision-making powers to a politician, an agency, or a combination of the two, the continuing risk of regulatory capture must be appreciated in any instance.

[23] Mark Thatcher, *Regulation after delegation: independent regulatory agencies in Europe*, 9(6) J. EUR. PUBLIC POL'Y 954, 958 (2002).