POSITIVE LAW VS. GOOD INTENTIONS

The Legality of the Comcast-Time Warner Cable Merger

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IN 2014, A MERGER PROPOSAL WAS SUBMITTED TO THE U.S. DEPARTMENT OF JUSTICE BY COMCAST CORPORATION AND TIME WARNER CABLE. THE PROPOSED MERGER HAS INCITED POPULAR OPPOSITION DUE TO CONCERNS THAT IT WOULD LEAD TO THE APPLICANTS' MONOPOLISTIC CONTROL OVER THE INTERNET DISTRIBUTION MARKET. CONSEQUENTLY, APPEALS HAVE BEEN MADE IN FAVOR OF ENFORCEMENT OF ANTITRUST LAWS IN THIS CASE. WHILE IT MAY BE SYMPTOMATIC OF A NEED FOR THE LAWS TO CHANGE, THERE IS CURRENTLY NO LEGAL FOUNDATION FOR THE OPPOSITION, AND IT WOULD BE FULLY LEGAL FOR THE DEPARTMENT OF JUSTICE TO SUPPORT THE MERGER. IN ANY CASE, EITHER VERDICT WILL LEAD TO A PROFOUND LEGAL PRECEDENT.

INTRODUCTION

In February of 2014, Comcast Corporation publicly announced its intention to acquire Time Warner Cable, Inc.. As per antitrust statutes, this proposed transaction is currently under review by the U.S. Department of Justice, which is responsible for the regulation of mergers that substantially limit competition in a given market.[1] The Department of Justice considers two primary aspects concerning horizontal mergers — the lessening of competition and the over-consolidation of market share that confers a monopoly.[2]

In the case of the merger submitted by the Applicants (Comcast Corporation and Time Warner Cable, Inc.), the Department of Justice considers the change in competition caused when two companies in the same market merge and the increased market share they will control as both a Multichannel Video Programming Distributor (MVPD) and an Internet Service Provider (ISP). These concerns are mostly addressed in Comcast's merger proposal fact sheet that contains several claims that this paper will analyze.[3]

Notably, there has been a substantial public outcry against the proposed merger of the Applicants. Opponents of the merger claim that the Applicants are attempting to consolidate an ISP market share well beyond reason, potentially conferring monopolistic powers. Moreover, they believe that the current anti-competitive and anti-consumer tactics of both companies obligate the Department of Justice to deny this merger in order to prevent any further marginalization of consumer interests.

HISTORY OF HORIZONTAL MERGER REGULATION

1890-2009

The history of positive antitrust law in the United States began with the Sherman Antitrust Act of 1890.[4] Considered to be the founding document of antitrust statutes in the U.S., the Act regulates the sort of anti-competitive business tactics that engendered the Gilded Age.[5] The Clayton Antitrust Act and Federal Trade Commission Act of 1914 followed the Sherman Antitrust Act, addressing and amending gaps in antitrust statutes—such as price fixing—as well as formally establishing a body to preside over alleged anti-competitive behavior of corporations.[6,7]

JOHN SHERMAN WAS THE PRINCIPAL AUTHOR OF THE 1890 SHERMAN ANTITRUST ACT. (*COURTESY OF THE LIBRARY OF CONGRESS*)

The Department of Justice and the Federal Trade Commission issued the first Horizontal Merger Guidelines in 1992 according to sections of the three aforementioned Acts. These Guidelines were revised in 1997 to "reflect the ongoing accumulation of experience at the Agencies."[8]

2010-Present

The new Horizontal Merger Guidelines, issued August 19, 2010 by the Department of Justice and the Federal Trade Commission, constitute the current guidelines for horizontal mergers. These Guidelines are based upon the statutes in Section 7 of the Clayton Antitrust Act, Sections 1 and 2 of the Sherman Antitrust Act, and Section 5 of the Federal Trade Commission Act.[9] Most pertinent is Section 7 of the Clayton Antitrust Act, "[prohibiting] mergers if in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly."[10] For the purpose of this article, the Guidelines namely state what market share concentration and market definition are, address how they relate to the prevention of anti-competitive horizontal

mergers, and establish standards for the extent to which a merger may legally reduce competition.

ANALYSIS

In the case of a merger review, the Department of Justice must decide whether or not the merger is pursuant to its horizontal merger guidelines. That fact depends on whether the lessening of competition or conference of a monopoly is a reasonable outcome of the proposed merger.[11,12]

The Applicants would argue the following in support of the merger:

- As the Applicants do not compete in any markets directly, their merger does not represent a direct reduction of actualized competition in any way.[13]

- After the divestiture of the Applicants proposed in the merger fact sheet, the merger will result in a net 8 million MVPD (Multichannel Video Programming Distributor) subscriber gain. This divestiture sufficiently addresses the increased market share, as they remain below the 30 percent threshold instituted by the MVPD market definition.[14,15]

- Any complaint as to the anti-consumer nature of the Applicants' service is unfounded, as the Applicants compete in a market where other options are available to consumers; in such a market, the interests of the Applicants, should they wish to remain competitive, must be aligned with pro-consumer policies.[16]

- The exclusive access that the Applicants maintain with certain parts of the ISP and MVPD markets are a result of the Applicants' maintenance of a natural monopoly that is not per se illegal because no entity can provide the same service with better efficiency in the same circumstances. The market can be best served by only the Applicants in some cases.[17]

The Applicants respond to concerns regarding over-consolidation of market share and problems they believe are readily pertinent in the merger review process. They point to divestment statistics that keep their market share below the Department of Justice's indicated threshold for the MVPD market and maintain that the proposed merger puts the Applicants in a better position to provide improved service to its customers in establishing economies of scale, as ISP and MVPD markets can vastly increase operating efficiencies given a higher subscriber base.[18]

Opponents of the merger would focus their arguments on the following:

- After the proposed merger, the Applicants will control "approximately... 35.5% of the fixed ISP market." This data also accounts for Digital Subscriber Line (DSL) providers on the market, a service that is significantly slower to the point where it should be considered an entirely different product from cable and fiber offerings.[19] Although the ISP market is not explicitly defined per the Department of Justice's own classifications and there is therefore no fixed amount of market share under which the Applicants must remain, the Department of Justice has a duty to reject the merger on this ground alone: 35.5% of a market (without account for deflation) has the potential to give the Applicants monopolistic power over the ISP market. The opponents would therefore argue that the Applicants have an obligation to divest in order to quell monopolistic concerns.[20]

- While the poor service which engenders the Applicants' conduct in MVPD and ISP markets is not *per se* illegal, the exclusive nature with which they possess both cable and Internet resources as a "natural monopoly" (that is, a market which functions most efficiently with one provider) creates a dangerous precedent because control over Internet service providing is not actually a natural monopoly. Therefore, the Applicants' control of the market, considering products and service that are not exceptional in nature and their use of tactics that amount to an attempt to competitively exclude, constitute an illegal monopoly.[21]

The opponents' arguments focus on the Applicants' control of the ISP market, calling the Department of Justice to investigate what constitutes unfair market share in the ISP market. The opponents believe such an investigation would conclude that the Applicants control too large a share of the market. The ISP distribution statistics from 2013, which are deflated as a result of the inclusion of mobile and DSL providers, reveal that the Applicants controlled a total of 33.7% of the diluted market. Although this statistic may be clouded by the inclusion of information not pertinent to the actualized market, the opponents of the merger claim that its diluted numbers alone and growth over the past year are sufficient reason to worry.[22,23] They also point to the fact that the Applicants failed to discuss their ISP market share in their merger fact sheet despite the reality that, should the merger be approved, the Applicants would become the single largest ISP in the United States.

The key issue that arises in the analysis of the merger is the extent to which the Department of Justice is allowed to protect consumer interests. The opponents focus on the potential for those interests to be harmed by further consolidation of a market that they already identify as anti-consumer; however, the Applicants claim that they are acting in good faith and are not violating the standards set forth by the current Horizontal Merger Guidelines, and, as the Department of Justice has not brought suit against the Applicants for violation of consumer interests in any way, it is assumed that it does not believe that this market is anti-consumer. While the Department of Justice seeks to protect consumer interest, the concentration of market share in the IDP market that is yet to be defined is hard to address until a proper investigation is held. Before that definition is reached, the Department of Justice has no obligation to block the merger on grounds of consolidation so long as they are not grossly negligent.[24]

The opponents of the merger would refute the claim that the market should first be defined before attempting regulation by analogizing the case to United States v. Microsoft Corp., in which the D.C. Circuit Court ruled against Microsoft's assertion that the industry required "direct proof of market power."[25] The opponents would argue that, similarly, the Department of Justice doesn't need direct proof of market power; precedent dictates that they can rely on "circumstantial evidence" alone.[26]

The Applicants' defense of this claim would focus on the wording of the case ruling, specifically in the Circuit Court's reference to the software market in question, as "uniquely dynamic."[27] The Applicants would emphasize that the ISP market is a service market and is neither particularly unique nor dynamic. Furthermore, while the concerns of exclusionary behavior on the part of the Applicants to protect a hegemony over the ISP market should, in the opinion of the merger's opponents, force the hand of the Department of Justice in taking an active role to address the purportedly anti-competitive tactics, that obligation does not extend into the process of a merger review when it falls outside of its jurisdiction.

Essentially, the problems that the opponents point out all fall outside of the realm of regulation imposable by the Department of Justice. While they correctly identify that, at some ends, the ISP market lacks competition because of a concentration of resources on the part of the Applicants, that fact alone is insufficient reason for blocking the merger. The Applicants claim that this concentration is the result of significant capital expenditure as well as of the nature of the ISP market functioning most efficiently when served by one provider in certain cases, but the opponents point out that the Applicants have lobbied to prevent local municipal broadband and fiber networks as the reason for this continued exclusive access in certain markets rather than an existing infrastructure or ideal efficiency.[28]

According to the opponents, the Applicants' efforts in denying local ISP initiatives constitute competitive exclusion. The actual issue, however, isn't so black and white.[29] While local initiatives can serve to increase access and quality of service for individuals as well as stimulate competition, there are several reasons, by which the Applicants swear in their defense of lobbying initiatives working to legislate against local broadband and fiber networks, why these efforts should not be considered natural competition that is being excluded.[30] Local municipal networks use taxpayer money and, while they have been successful (even highly successful in some cases, regarding ISP service decades beyond the FCC's proposed standard), they have the realized potential to fail and absorb taxpayer money unnecessarily.[31] Even in a best-case scenario, successful local broadband initiatives had the tendency to reduce overall competition, since the service for the local initiative far exceeded that of competitors. This shows that, in certain situations, one provider alone can offer the best service.[32]

In addition to potential concerns for failure, there is the argument against government involvement in private af-

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COMCAST AND TIME WARNER CABLE LOGOS (*COURTESY OF WIKIMEDIA COMMONS*)

fairs. Indeed, although the Internet is viewed by many as a public utility that should not be controlled with such ease by private interests, Internet access is not classified as such. As a result, its access is not free from private interests, in part because it was those private interests that made widespread access to the Internet possible in the first place. While President Barack Obama has urged the Federal Communications Commission to reclassify broadband service as a "public utility," no decision has been made. As one telecommunication group has claimed, that "reclassification... will guarantee harm to consumers." Another has claimed much the opposite, that the impact of such a move is unclear.[33]

Despite the consumer interest that the Department of Justice must support, opponents of the merger suggest that the Department of Justice should over-regulate in the case of this merger to protect consumers from companies like the Applicants, whose consolidation of resources in order to produce an economy of scale has made access widespread in the first place.[34] Moreover, the opponents urge the Department of Justice to address claims that are outside of its jurisdiction. However, the Department of Justice cannot reclassify broadband service nor regulate municipal broadband, as those duties fall on the Federal Communications Commission and Congress, respectively. Even if it did fall under their jurisdiction, over-regulation of a private sector of business can preemptively have disastrous effects on a market, even if well-intentioned.[35]

PERSONAL STATEMENT AND CONCLUSION

Opponents of the merger point out flaws in a market that has been long overdue proper market identification by the Department of Justice in order to clarify the extent at which market share consolidation becomes dangerous. However, they offer little in terms of actionable regulation. The proposal of the Applicants, notwithstanding a sudden market classification indicating a threshold below 35.5% share count, is within the legal parameters set forth by the Horizontal Merger Guidelines. All claims of the opponents are unanimously issues yet to be addressed by their respective bodies and remain irrelevant to this merger. Businesses must have clearly defined rules within which they can operate in order to function efficiently, and jeopardizing that relationship for no clear benefit is shortsighted at best.

Furthermore, while complete abstinence from public initiatives for broadband may not be the ideal solution for a growing populace where broadband access is becoming ever more important, this merger is not the means by which that solution should be predicated. Instead, the Department of Justice and the Federal Communications Commission should undergo an investigation as to how viable these local initiatives and, pending the result of that investigation, should determine the accuracy of claims of the Applicants' exclusionary business tactics in seeking to support legislation against those initiatives.[36] It is also worth noting that extensive and reactionary government involvement in areas such as ISP markets should be advised against because of the dangerous precedent and incentives that could be established as a result. As it stands, the Applicants are within their rights to merge. Policymakers, including administrative and executive agencies, must be careful in considering business incentives in major decisions of policy. In the same way that it is important for corporations not to possess a monopoly over the Internet, it is essential that the government does not intervene in a major, potentially financially crippling way that interferes with private interests without mandates to change.

However, it is important to note that while the Applicants are within their rights to merge, this right is extended by the current state of broadband service, a state that necessarily needs to be investigated by the proper agencies, if not reclassified and adjusted. Just because no government mandate for change has occurred doesn't mean it shouldn't; the Department of Justice and the Federal Trade Commission have themselves admitted that current regulation is the result of an "ongoing accumulation of experience," correctly asserting that regulation is both an iterative process and a reflection of what was thought to be correct at its time of issuing rather than concrete fact.[37] While the Applicants fall within their legal rights to merge, the opponents correctly point out that the U.S. ISP market has been falling behind other countries, perhaps as a result of exclusivity that has not been infringed upon by the government and corporate scale used to exploit rather than compete.[38] Indeed, despite having the second highest number of Internet users as of February 2014 (a total of 194.7 million users), the United States doesn't even make the top ten list in terms of average Internet speed.[39,40] The Federal Communications Commission continues to define an initiative in its "[Goal] for a High Performance America" as "4 Mbps downstream and 1 Mbps upstream," allowing U.S. ISP providers to advertise speeds on the absolute lowest quality of service from previous years as proper broadband.[41,42] Upon analysis, it becomes clearer and clearer that the weakly worded guideline presented by the Federal Communications Commission does not hold the ISP market to proper standards in the coming years, and instead allows it to stagnate. Especially if mergers like the one proposed by the Applicants are approved, providing those corporations with the advantage of economies of scale and network effects as a result, companies like those of the Applicants are indeed poised to provide immense "pro-consumer" benefits as touted in their fact sheet.[43]

However, companies like the Applicants have failed to produce the results that they claim make the proposed merger necessary. They attempt to squeeze out every dollar and maintain the status quo within the market instead of actively competing to provide better service. Action must be taken on the part of the Department of Justice and the Federal Communications Commission in the form of stricter broadband guidelines to ensure that agreements, such as the one proposed by the Applicants, promote both business interests and innovative interests in the future, rather than ones that may aim only to retain an illegitimate hegemony over a market. A bigger Comcast isn't a bad thing *per se*; it just happens to be in the current state of broadband.

ENDNOTES

1. U.S. Department of Justice and the Federal Trade Commission.
2. Ibid.
3. Comcast and Time Warner Cable (13).
4. Peritz.
5. Ibid.
6. Ibid.
7. Due to time constraints and lack of immediate pertinence, this article will not address the Robinson-Patman Act of 1936 or the Celler-Kefauver Act of 1950.
8. U.S. Department of Justice and the Federal Trade Commission.
9. Ibid.
10. Ibid.
11. Ibid.
12. It is worth noting that the United States legal system uses a four-part test to determine the legality when a monopoly is concerned, but this article will not address that process due to time constraints and the lack of established net of the Applicants as controlling a monopoly in any market.
13. Comcast and Time Warner Cable (13).
14. Ibid.
15. U.S. Department of Justice and the Federal Trade Commission.
16. Comcast and Time Warner Cable (13).
17. Ibid.
18. Ibid.
19. Zachem.
20. Ibid.
21. Blum-Smith, et al.
22. Statista, "U.S. Internet Service Provider Market Share Q4 2013."
23. Zachem.
24. Twomey and Jennings.
25. Weinstein (273).
26. Ibid.
27. Ibid.
28. Blum-Smith, et al.
29. Engebreston.
30. Blum-Smith, et al.
31. Engebreston.
32. Ibid.
33. Wyatt.
34. Weinstein (273).
35. While network effects in market economies may be important to the analysis of the benefits of the proposed merger, due to time constraints, this article does not address those aspects of the merger.
36. Although worth noting, due to time constraints this article does not address the issue of a business' use of lobbying a form of free speech.
37. U.S. Department of Justice and the Federal Trade Commission.
38. Blum-Smith, et al.

39. Statista, “Number of Intenet Users in Selected Countries.”
40. Statista, “Countries with the highest average Internet connection speed as of 2nd quarter 2014 (in Mbps).”
41. Federal Communications Commission.
42. It is necessary to note that in the Internet Service market, different upload and download speeds have no inherent difference in cost and any difference is simply a directly imposed throttling: i.e. where four megabytes per second download speeds can be found, there is no technical limitation on providing the exact same speed for uploads.
43. Comcast and Time Warner Cable (13).

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