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The Proper Context for Assessing the AT&T/Time Warner Merger

by

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I. Introduction and Summary

The Department of Justice has challenged the proposed merger of AT&T and Time Warner and is seeking to force the merging companies to sell off some or all of the Time Warner video channels or some of AT&T programming distribution businesses before the merger can go forward. The trial is set to begin March 19, 2018, in federal court. As of now, it appears that the trial will proceed as scheduled. On January 31, 2018, AT&T CEO Randall Stephenson stated in an earnings call that "we do expect this case will ultimately be litigated in court… and we remain very confident that we'll complete this merger." That the merging parties appear unwilling to settle is not surprising. Put simply, what the Department of Justice is seeking would be unprecedented relief in the modern antitrust era for a vertical merger.

Time Warner is a programming content provider, through its CNN, HBO, and Turner channels and its Warner studios. AT&T provides distribution "pipes" for delivery of video content through its DirecTV satellite service as well as its broadband and mobile services. The two companies do not compete directly in any significant line of business, so the proposed combination is a "vertical" merger between a company that provides programming content and another that delivers it. Vertical mergers – as opposed to "horizontal" ones involving direct competitors – are rarely challenged under the antitrust laws, but the prominence of these companies is attracting more public scrutiny than has been the case with other vertical mergers.

Consistent with the Free State Foundation's general practice, the purpose of this *Perspectives* is not to specifically support or oppose the proposed AT&T/Time Warner merger. Rather it is to discuss the context and legal standard for the case the Department of Justice appears likely to present in court in order to increase understanding of the issues. Most significantly, the consumer choice and dynamism that characterize video content and distribution markets should inform any antitrust review of the competitive effects of the proposed merger. This increasingly dynamic competition, the general rule that vertical mergers produce procompetitive or at least benign effects, and the economic efficiencies that will be created by the proposed merger are all important factors that must be considered in assessing the proposed merger.

U.S. antitrust agencies before the 1980s were harshly criticized by economists and legal scholars for their hostility to vertical mergers based on dubious theories of economic harm. The U.S. antitrust agencies took notice of the criticism, and since then they have employed more rigorous economic analysis when reviewing vertical mergers.

Since 1972, every vertical merger challenge by the federal government was either unsuccessful or was settled out of court, usually with behavioral restrictions rather than structural changes. This means that there is very little recent legal precedent to support the vertical theories of harm that might be raised by the government. Departing from past merger review practices has other costs as well, including sending a chill through a marketplace that has evolved under antitrust enforcement practices that have been followed, predictably, by administrations of both political parties.

The DOJ is insisting that behavioral remedies would not be effective and structural relief is needed, which might mean selling off DirecTV or the Time Warner channels that are central to the merger transaction. Thus, the DOJ is facing the additional burden of not only having to prove that the proposed merger will lead to anticompetitive harm, but also that these anticompetitive concerns are sufficient to justify the first court-ordered structural relief in a vertical merger case since 1972.

Importantly, the merger includes no transfer of broadcast licenses, so it is not being reviewed by the FCC under its vague "public interest" standard. Instead, the review is being conducted by the Justice Department under Clayton Act standards. The focus of the Clayton Act is on the economic effects of the merger, while under the broader "public interest" standard the FCC can consider factors other than competitive effects. Perhaps even more importantly, the burden of proof standard is also different. The DOJ must prove to a court why a transaction should be blocked, while the FCC can block a transaction by refusing to give its approval.

The DOJ's claim under the Clayton Act essentially is that the merged company will leverage the Time Warner channels to harm the market for content distribution services. The alleged anticompetitive impact would arise if the merged company starts to consider the effects of its programming pricing decisions on DirecTV and AT&T's Internet services. Under this theory, this would lead to profit maximizing prices for Time Warner content that are different, and higher, because of the benefits for DirecTV and AT&T's Internet services. If the combined company raises its rates for Time Warner programming, some program distributors would then pay more for the channels, which means more revenue for the company. Other rival programming distributors may choose not to pay.

Before the merger, losing those distributors would mean more lost revenue to Time Warner than would be gained from charging the higher prices for programming. But after the merger, according to the DOJ's theory, the combined company can expect to recapture at least some of these revenues when some subscribers who want the Time Warner channels switch to other programming distributors, including DirecTV. Again, under DOJ's theory, the combined company wouldn't need all of these switchers to subscribe to DirecTV, only a portion large enough to make such a price increase more profitable after the merger.

The DOJ lawsuit lays out a similar theory for how a price increase for Time Warner channels could harm competing Internet-based video distribution businesses. If the combined company raises its prices for Time Warner channels and some cable, satellite, or on-line distribution systems do not pay the higher prices, they could be expected to also lose subscribers. In this way, competing Internet-based video distribution services may find it more difficult to establish themselves if they do not have access to the Time Warner channels, which, according to the DOJ theory, would be another way AT&T's video distribution businesses would benefit from Time Warner price increases.

DOJ's characterization of the possible anticompetitive harms may be plausible in theory, but it suffers from many shortcomings. First, it is possible to describe equally plausible theoretical ways in which the anticompetitive strategy described by the DOJ would harm the merged parties more than it would help them, which DOJ will have to disprove in order to make its case before the court.

Second, there are also good reasons to believe that changes in the market, many of which have occurred since the 2011 FCC challenge to the Comcast/NBC merger, make it much less likely that anticompetitive strategies that may have worked in the past would work today. For example, consumers are now far more willing to cut the cord and look to Internet platforms for information and entertainment. By early 2017, Amazon Prime subscriptions climbed to 80 million and Netflix surpassed 50 million, and 64% of TV households subscribed to Amazon Prime, Hulu, or Netflix. In this era of media abundance, anticompetitive strategies are now much less likely to be as profitable due to the likely losses of subscribers to other platforms.

Finally, AT&T and Time Warner will be able to point out certain economic efficiency benefits that would be created by the transaction and passed on to consumers, and DOJ will have the burden of showing that these efficiency benefits are less than the cost of any anticompetitive effect DOJ can demonstrate.

In sum, the Justice Department will have to clear several hurdles if it is to prevail in this case. It will have to show how this merger would cause harm to consumers in an increasingly dynamic communications and media marketplace with more alternatives available to consumers for receiving information and entertainment programming than ever before. Then it will have to explain why this vertical merger case deviates from past antitrust enforcement precedent in which, at most, behavioral conditions were deemed sufficient remedies. And it will have to do all of this without having any legal precedent after 1972 to support the vertical theories of harm being raised by the government.

II. The Parties and the Proposed Merger

In October of 2016, AT&T and Time Warner announced they had entered into an agreement under which AT&T will acquire Time Warner for $85.4 billion, or $108.7 billion if assumed debt is included, in a stock-and-cash transaction.[1] AT&T and Time Warner do not directly compete in any significant way, making this a vertical merger of a major multichannel video programming distributor and a major provider of programming, with no meaningful horizontal overlap between the companies.

Over a year later, on November 20, 2017, the Department of Justice announced that it was challenging the merger as a violation of the antitrust laws.[2] The trial is scheduled to begin March 19, 2018.[3] The parties recently extended the termination date for the merger agreement to June 21, 2018.[4] If the court does not decide the case by that date, or no settlement is reached, the parties will have to decide whether both want to agree to extend the agreement longer. It now appears that a settlement is unlikely. AT&T CEO Randall Stephenson stated in a January 31, 2018, earnings call that "we do expect this case will ultimately be litigated in court… and we remain very confident that we'll complete this merger."[5]

AT&T is a major programming distributor through its DirecTV satellite service and its U-Verse service over its AT&T fiber. AT&T is also the second-largest wireless carrier and offers a new DirecTV Now service over both its own and any other wireline or wireless connections. AT&T acquired DirecTV in 2015, and now bundles it with its other product offerings at a discounted price to its customers.[6]

Time Warner is primarily a media and entertainment content provider. Time Warner owns CNN (multiple channels), HBO (multiple pay channels), the Turner Broadcasting System (TBS, TNT, truTV, TCM, Cartoon Network, Boomerang, Turner Sports, et.al.), Warner Brothers (Warner Brothers Pictures, Warner Brothers Theaters, Warner Brothers Television Group, DC Comics, and other assets), shares of several joint ventures (*e.g.*, NBA Digital, including NBA League Pass, 10% of Hulu), and other assets.

The Time Warner does not include Time Warner Cable, a horizontal competitor of DirecTV. Time Warner sold its cable operations in 2009.[7] Time Warner Cable was later acquired by

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[1] "AT&T to Acquire Time Warner," AT&T Newsroom (October 22, 2016), available at http://about.att.com/story/att_to_acquire_time_warner.html.
[2] "Justice Department Challenges AT&T/DirecTV's Acquisition of Time Warner," Press Release, U.S. Department of Justice (November 20, 2017), available at: https://www.justice.gov/opa/pr/justice-department-challenges-attdirectv-s-acquisition-time-warner.
[3] David McLaughlin and Andrew M Harris, "AT&T Commits to Time Warner Deal Even as Judge Delays Deadline," Bloomberg (December 7, 2017), available at: https://www.bloomberg.com/news/articles/2017-12-07/at-t-judge-says-he-will-hold-march-19-trial-on-time-warner-deal.
[4] "AT&T, TWI Extend Merger-Closing Deadline Again," TR Daily, Telecommunications Reports International, Inc., TR Daily (Dec. 22, 2017), available at: http://www.trdailyonline.com/online/trd/2017/td122217/index.htm.
[5] Ben Munson, "AT&T Braces for Court Battle with DOJ over Time Warner Merger," FierceCable, February 1, 2018, available at: https://www.fiercecable.com/video/at-t-braces-for-court-battle-doj-over-time-warner-merger.
[6] *See*, *e.g.*, Chris Mills, "AT&T Is Basically Giving Away Cable TV to Wireless Customers," BGR (June 2nd, 2017), available at: http://bgr.com/2017/06/02/at-t-directv-now-deal-best-cordcutting-service/.
[7] "Time Warner Cable Separation Information," Time Warner, Inc. (visited November 17, 2017), available at: http://ir.timewarner.com/phoenix.zhtml?c=70972&p=irol-twcseparation.

Charter Communications, which has rebranded it as Spectrum in many markets. Time Warner also sold off the AOL Internet content service in 2009[8] and spun off Time, Inc., the magazine company that publishes the magazines *Time* and *Fortune*, among others, in 2014.[9]

Groups opposed to the merger have identified only one possible horizontal overlap: AT&T's DirecTV Now is an online video service that may compete with Time Warner's existing HBO Now.[10] But DirecTV is a newly-launched service that is one of many Internet-based video distribution services. Moreover, HBO Now is a stand-alone service that allows anyone with an Internet connection to obtain access to HBO channels and content.

Importantly, the merger includes no transfer of broadcast licenses, so it is not being reviewed by the FCC under its vague "public interest" standard. The merger avoided FCC review when Time Warner sold a television station it owned in early 2017, leaving no Time Warner assets that required FCC approval for the transfer of license.[11] Instead, the review is being conducted by the Justice Department under Clayton Act standards. The Clayton Act antitrust standards focus on economic effects of the merger, while under the broader "public interest" standard the FCC can consider factors other than competitive effects. Some of the factors the FCC has considered in the past have included "whether the transaction would protect service quality for consumers, accelerate private sector deployment of advanced telecommunications services, ensure diversity of information sources and viewpoints, [and] increase the availability of children's programming and Public, Educational, and Government programming."[12]

Perhaps even more importantly, the burden of proof standard is also different. The DOJ must prove to a court why a transaction should be blocked, while the FCC must give affirmative approval for the transaction.

III. Antitrust Enforcement of Vertical Mergers in the Modern Antitrust Era

Vertical mergers – as opposed to horizontal ones involving direct competitors – are rarely challenged under the antitrust laws, and for good reason. U.S. antitrust agencies before the 1980s were harshly criticized by economists and legal scholars for their hostility to vertical mergers based on dubious theories of economic harm. The U.S. antitrust agencies took notice of the

[8] Yinka Adegoke, "Time Warner to spin off AOL on December 9," Reuters (November 19, 2009), available at: https://www.reuters.com/article/us-aol/time-warner-to-spin-off-aol-on-december-9-idUSTRE5AF5JT20091116.
[9] "Time Warner Inc. Completes Spin-Off of Time Inc." (Press Release, June 9, 2014), available at: http://www.timewarner.com/newsroom/press-releases/2014/06/09/time-warner-inc-completes-spin-off-of-time-inc.
[10] Alliance for Community Media, Common Cause, Consumer Action, Consumer Federation of America, Consumers Union, Courage Campaign, Free Press, Media Alliance, National Hispanic Media Coalition, Open MIC, Open Technology Institute at New America, Public Knowledge, The Utility Reform, and The Writers Guild of America West, "Coalition Letter to Attorney General Sessions on AT&T-Time Warner Merger" (July 13, 2017), available at: https://www.publicknowledge.org/documents/coalition-letter-to-attorney-general-sessions-on-att-time-warner-merger.
[11] Jon Brodkin, "FCC Helps AT&T and Time Warner Avoid Lengthy Merger Review: Time Warner Sells a TV Station to Avoid Public Interest Review of AT&T Deal," ARSTechnica (April 18, 2017), available at https://arstechnica.com/tech-policy/2017/04/atttime-warner-merger-is-one-step-closer-to-government-approval/.
[12] Alexander Maltas, Tony Lin, and Robert F. Baldwin III, "A Comparison of the DOJ and FCC Merger Review Processes: A Practitioner's Perspective," The Antitrust Source (August, 2016), at 2, available at: https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug16_maltas_8_5f.authcheckdam.pdf.

criticism, and since then they have employed more rigorous economic analysis when reviewing vertical mergers.

The last vertical merger challenged in a contested court proceeding by U.S. antitrust agencies was in 1979, when the Federal Trade Commission lost its challenge to truck trailer manufacturer Fruehauf's acquisition of a brake component supplier.[13] The last vertical merger successfully challenged by the government was in 1972, when Ford Motor Company bought a supplier, Autolite, and was forced to sell off some of the assets after DOJ challenged the merger.[14]

Since 1979, U.S. antitrust enforcers consistently have allowed vertical mergers to proceed or have negotiated for behavioral changes rather than suing to seek major divestitures. Former FTC Commissioner J. Thomas Rosch found in his 2007 study that the federal government had only challenged 23 vertical mergers since the unsuccessful 1979 Fruehauf merger challenge. Of those, three were abandoned by the parties, and the others were all approved, most with behavioral conditions to address the alleged harms.[15]

Some recent vertical mergers have involved large and prominent companies, including media companies, so they, like the AT&T/Time Warner merger, have attracted more scrutiny than other vertical mergers. For example, Comcast's 2011 acquisition of NBC and NewsCorp's 2004 acquisition of DirecTV raised similar alleged competitive issues as the AT&T/Time Warner merger, and both were settled with behavioral restrictions that allowed the mergers to proceed without structural changes. In 2017, Amazon's acquisition of Whole Foods also attracted considerable media attention and objections based on alleged concentration of power over retail sales, but this merger was allowed to proceed about a month after its filing with the U.S. antitrust agencies without any court challenge or consent decree settlement.[16]

Because all of the vertical merger cases since 1972 were either unsuccessful challenges or were settled out of court, there is very little recent legal precedent to support the vertical theories of harm that might be raised by the government. Departing from past merger review practices has other costs as well, including sending a chill through a marketplace that has evolved under antitrust enforcement practices that have been followed, predictably, by administrations of both political parties.

Adding to the challenge for the DOJ is that video content and distribution markets and technology are much different now than even in 2011, when the Comcast/NBC merger was settled. These market changes will be discussed below. The problem the DOJ will have to overcome in proving its case is that it is seeking relief that goes beyond what the FCC imposed

[13] Fruedhauf Corp. v. FTC, 603 F.2d 345, (2d Cir. 1979), available at: https://openjurist.org/603/f2d/345/fruehauf-corporation-v-federal-trade-commission.

[14] Ford Motor Co. v. United States, 405 U.S. 562 (1972), available at: https://supreme.justia.com/cases/federal/us/405/562/case.html.

[15] J. Thomas Roach, "The Challenge of Non-Horizontal Merger Enforcement," (Speech, New York, NY, September 28, 2007), available at: https://www.ftc.gov/sites/default/files/documents/public_statements/challenge-non-horizontal-merger-enforcement/070927-28non-horizontalmerger_1.pdf.

[16] David McLaughlin and Spencer Soper, "Amazon's Whole Foods Deal Wins Swift U.S. Antitrust Approval," Bloomberg News (August 23, 2017), available at: https://www.bloomberg.com/news/articles/2017-08-23/amazon-s-whole-foods-deal-wins-fast-track-u-s-antitrust-nod.

for the 2011 Comcast/NBC merger, as the market has become even more dynamic, with consumers becoming far more willing to "cut the cord," that is, to discontinue their subscriptions with a traditional cable or satellite multichannel video programming distributor (MVPD) and look to Internet platforms for information and entertainment. Most often, the new online offerings now competing with traditional MVPDs offer so-called less costly "skinny bundles" or individual channels.

IV. Structural vs. Behavioral Remedies

DOJ's legal challenge to the proposed merger highlights the issue of what kind of relief is appropriate to address any anticompetitive effects that may arise from a particular merger. A court in a merger case could conclude, if the facts support it, that no relief other than preventing the merger is sufficient to prevent the harms demonstrated by the government in an antitrust challenge. More typically, however, a court will consider whether relief that falls short of outright blocking the merger is sufficient, and may even be a superior solution if such relief can both address the harm and preserve consumer welfare-enhancing efficiency benefits that could be achieved from the merger.

Such relief falls into two categories: behavioral remedies and structural remedies. Behavioral remedies allow the parties to integrate fully, but then impose certain operating rules on their business behavior aimed at preventing certain potential harms to competition that may result from the merger. Having AT&T and Time Warner agree to conditions that Time Warner content be made available to other video providers on reasonable terms would be behavioral relief. Requiring the merging companies to sell CNN and other Warner channels, or alternatively, sell DirecTV, would be structural relief.

The advantage of behavioral remedies is that they allow the merger to go forward, and generally achieve the resulting efficiency benefits from the merger while imposing restrictions on the conduct of the merged company that may give rise to antitrust concerns. The advantage of structural relief is that, unlike behavioral relief, it does not require ongoing regulatory oversight after the divestiture is completed, although structural relief may prevent some of the efficiency benefits from occurring.

The FCC and the parties to the 2011 Comcast/NBC merger agreed to behavioral remedies to address the concerns raised by the FCC. However, the current head of the DOJ's Antitrust Division has stated that he is skeptical about behavioral conditions and strongly prefers that any relief be structural.[17] As noted above, the FCC reviews mergers under its broader public interest standard, which also means that the FCC has available to it a much broader array of remedies than under Clayton Act antitrust challenges.[18]

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[17] Makan Delrahim, "Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Fall Forum," (Speech, Washington, DC, November 16, 2017), available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar.

[18] *See, e.g.,* Alexander Maltas, Tony Lin, and Robert F. Baldwin III, "A Comparison of the DOJ and FCC Merger Review Processes: A Practitioner's Perspective," The Antitrust Source (August, 2016), at 3 ("For example, the FCC has required merging entities to offer standalone, discounted Internet services for low-income customers, without finding that bundled services would violate the antitrust laws or that Internet prices would rise absent the

Some media reports claimed that DOJ demanded that the merging parties sell off CNN, perhaps along with all of the Warner television programming, or else DirecTV, in order to receive DOJ's blessing to let the merger proceed without a challenge. DOJ has not confirmed this claim, but it stated that the agency presented AT&T with several options by which it might be willing to satisfy antitrust concerns.[19]

If DOJ continues to insist that behavioral remedies are not effective and structural relief is needed, it will have to explain why this merger case requires deviation from past DOJ practices and precedent in which behavioral conditions were sufficient remedies for similar mergers. Given the lack of recent judicial precedent, the DOJ is facing the additional burden of not only having to prove that the proposed merger will lead to anticompetitive harm, but also that these anticompetitive concerns are sufficient to justify the first court-ordered structural relief in a vertical merger case since 1972.

V. Harm Alleged in the Media by Opponents of the Merger

Before the announcement that DOJ was challenging the proposed merger, various parties opposed to the merger raised several different objections. Many of these objections raise concerns that fall well outside the scope of the antitrust laws and of the lawsuit filed by the DOJ. All of these alleged theories of harm, other than the political concern, essentially are about the combined AT&T/Time Warner company controlling both the creation and the distribution of media and entertainment content. The deal would put Time Warner's content under the same corporate umbrella as AT&T's content delivery services. These alleged harms are essentially the following:

1. Harm to the content distribution market: Some of the leading opponents of the merger claim the combined entity will place content distributors that compete with DirecTV, U-Verse, or AT&T wireless services at an unfair disadvantage "by delaying or denying access to content, to DVR capability, and to device availability. These sorts of restrictions, in addition to simply demanding more money for Time Warner content, would enable AT&T to raise its rivals' costs and make their products less attractive to consumers."[20]

2. Foreclosure of content providers that compete with Time Warner: Similarly, opponents argue that AT&T could also favor Time Warner content by giving it "favorable treatment that it does not make available to its rivals, including exempting its own services from data metering or prioritizing its own service's traffic, a possibility made all the more real by the threat of the FCC's reversal of its current Open Internet Order. These discriminatory actions could allow

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condition"), available at: https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug16_maltas_8_5f.authcheckdam.pdf.

[19] *See, e.g.*, Michelle Fox, "AT&T CEO Stephenson Says He Never Offered to Sell CNN and Is Ready to Litigate Time Warner Deal," CNBC (November 9, 2017), available at: https://www.cnbc.com/2017/11/09/att-ceo-randall-stephenson-i-have-never-been-told-that-the-price-of-getting-a-deal-done-was-selling-cnn.html.

[20] Alliance for Community Media, Common Cause, Consumer Action, Consumer Federation of America, Consumers Union, Courage Campaign, Free Press, Media Alliance, National Hispanic Media Coalition, Open MIC, Open Technology Institute at New America, Public Knowledge, The Utility Reform, and The Writers Guild of America West, "Coalition Letter to Attorney General Sessions on AT&T-Time Warner Merger" (July 13 2017), available at: https://www.publicknowledge.org/documents/coalition-letter-to-attorney-general-sessions-on-att-time-warner-merger.

AT&T to utterly dominate this new market, depriving consumers of choice while raising costs."[21]

3. Loss of diverse viewpoints: Opponents also claim that having Time Warner "would also give AT&T an incentive to discriminate against independent programmers on its online platforms, potentially shutting off programming creators from important new avenues of distribution. Consumers—and citizens—benefit from having access to diverse voices and multiple points of view."[22]

4. Improper political interference: Some opponents, as well as some who favor the merger, have raised concerns that the DOJ is bringing this case after undue pressure from President Trump, perhaps in reaction to the coverage of the President by CNN.[23] AT&T and Time Warner also may argue in court that the merger challenge is motivated by political considerations. Such political objections are beyond the scope of this paper, and should be considered by a court to be irrelevant to its Clayton Act Section 7 review of the proposed merger and any remedies.

Of these claimed harms that are attributed to the proposed merger, the only one that is raised in the lawsuit filed by DOJ is the first one – harm to competitors of AT&T's content distribution services. The second type of harm, foreclosure of content programming content providers, might have been raised by DOJ under the Clayton Act, but DOJ did not allege harm to the content creation market. The other claims do not fit neatly into the antitrust law analytical framework or raise concerns that are recognized by the antitrust laws, although they may have received scrutiny under the "public interest" standard if the FCC were reviewing the merger. Therefore, the remainder of this analysis will address the claims made by DOJ in its suit, in light of the Clayton Act standards for showing harm to competition.

VI. The DOJ's Complaint and Theory of Anticompetitive Harm

In its Complaint filed in the D.C. District Court, the Department of Justice claimed that if the merger was allowed to go forward:

> AT&T/DirecTV would hinder its rivals by forcing them to pay hundreds of millions of dollars more per year for Time Warner's networks, and it would use its increased power to slow the industry's transition to new and exciting video distribution models that provide greater choice for consumers. The proposed merger would result in fewer innovative offerings and higher bills for American families.[24]

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[21] *Id.*
[22] *Id.*
[23] For example, former Representative Silvestre Reyes (D-TX), has called for an investigation of whether there was any improper influence by the President. "The White House May Be Interfering in an AT&T and Time Warner Deal for Political Gain," The Hill (November 18, 2017), available at: http://thehill.com/opinion/technology/361010-the-white-house-may-be-interfering-in-an-att-and-time-warner-deal-for. ("The merger between AT&T and Time Warner may or may not be a good deal for the American people. However, there is a possibility that the White House and the Department of Justice may have acted out of political payback against CNN and to potentially help their ally Rupert Murdoch acquire the cable network. In the interest of justice and transparency, an investigative unit of the federal government must get to the bottom of this matter immediately.")
[24] Complaint, US v. AT&T Inc., DIRECTV Group Holdings, LLC, and Time Warner Inc. (D.D.C. 2017) (No. 1:17-cv-02511), at 2, available at: https://www.justice.gov/opa/press-release/file/1012896/download.

While the DOJ Complaint spelled out its economic theory of how this would occur, it is notable that it provided very little evidence to support the theory. Most of the evidence the DOJ did provide were quotes from various documents from AT&T or Time Warner suggesting motive or conclusory claims about anticompetitive outcomes, but very little in the Complaint offered actual market evidence of how the harm would occur. Presumably the DOJ is preparing such evidence but did not offer much of a preview in the Complaint.

The DOJ Complaint appears to be generally following the analytical "roadmap" for vertical merger challenges laid out by Jonathan Baker, former FCC Chief Economist, following the Comcast/NBC merger.[25] Baker previously was a DOJ Antitrust Division economist. Baker's analysis also suggests the sort of evidence the DOJ may try to present in court. However, there are important reasons to believe that the types of evidence that were persuasive to the FCC in 2011 will not be as persuasive to a federal court today.

According to Baker:

> The FCC's extensive analysis of vertical foreclosure in evaluating the Comcast-NBCU transaction provides a template for courts and litigants considering similar issues in future transactions. The FCC adapted the modern economic analysis of exclusionary conduct to shape a roadmap for evaluating the foreclosure concerns arising from a vertical merger, and it relied on a range of economic methods in applying that roadmap to the facts of the transaction it reviewed. Notwithstanding the difference between administrative adjudication under a public interest standard and judicial decision-making under the Clayton Act, the structure of the legal analysis and the types of economic studies the Commission employed promise to influence the approach that antitrust tribunals will take in evaluating vertical mergers in the future.

DOJ's Complaint implicitly assumes that Time Warner has been offering its channels at the profit maximizing price before the merger, when Time Warner does not have to consider the effects of its pricing decisions on its programming distribution. This is a standard assumption in economic analysis and probably reasonable. The anticompetitive harm alleged by DOJ arises when the merged company starts to consider the effects of its pricing decisions on DirecTV and AT&T's Internet services, which leads to profit maximizing prices for Time Warner content that are different, and higher, because of the benefits for DirecTV and AT&T's Internet services.

Specifically, the Complaint lays out the following theory of why the combined company will have the incentive to charge more for Time Warner channels than it did before the merger. If the combined company raises its rates for Time Warner programming, some video programming distributors would then pay more for the channels, which means more revenue for the merged company. Other rival programming distributors may choose not to pay. Before the merger, losing those distributors would mean more lost revenue to Time Warner than would be gained from charging the higher prices for programming. But after the merger, according to the DOJ's theory, the combined company can expect to recapture at least some of these revenues when some subscribers who want the Time Warner channels switch to other video programming distributors,

[25] Jonathan B. Baker, "Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis," Antitrust, Vol. 25 No. 2 (Spring, 2012), available at: https://transition.fcc.gov/osp/projects/baker_vertical_mergers.pdf.

including DirecTV or AT&T's U-Verse offering. The combined company wouldn't need all of these switchers to subscribe to DirecTV or U-Verse, only a portion large enough to make such a price increase more profitable after the merger.

The Complaint lays out a similar theory for how a price increase for Time Warner channels could harm competing Internet-based video distribution businesses. As discussed below, the DOJ Complaint is correct that these Internet-based video distributors are offering "new and exciting video distribution models that provide greater choice for consumers." If the combined company raises its prices for Time Warner channels and some cable, satellite, or on-line distribution systems do not pay the higher prices, they could be expected to also lose subscribers. In this way, according to the DOJ Complaint, competing Internet-based video distribution services may find it more difficult to establish themselves if they do not have access to the Time Warner channels, which would be another way the AT&T video distribution business would benefit from Time Warner price increases.

Baker's paper claims that the FCC had the evidence to support its concerns about the 2011 Comcast/NBC merger. Baker claims that the FCC considered evidence from an econometric study that after NewsCorp acquired DirecTV at the end of 2003, it was more likely to charge more for Fox programming after the acquisition.[26] The FCC also considered a study by Professor Austan Goolsbee that found that before the merger, Comcast tended to favor its own content, and therefore was likely to extend that favorable treatment to NBC content.[27]

Presumably DOJ would conduct a study, or find similar studies, that it claims supports its theories. It likely would also cite the American Cable Association (ACA), which represents smaller cable operators. ACA alleges that the Comcast/NBC merger forced its members to pay prices for NBC programming that had to be passed on as higher fees to final customers, and the AT&T/Time Warner merger will do the same.[28] Of course, the American Cable Association members are competitors of DirecTV and U-Verse, so even though these claims describe potential harm to consumers, they will likely be viewed as somewhat self-serving.

The DOJ Complaint's characterization of the possible anticompetitive harm may be plausible in theory, but it suffers from many shortcomings. It is also possible to describe equally plausible theoretical ways in which the anticompetitive strategy described by the DOJ would harm the merged parties more than it would help them, which DOJ will have to disprove in order to make their case before the court. And there are also good reasons to believe that changes in the market, many of which have occurred since the 2011 FCC challenge to the Comcast/NBC merger, make it much less likely that anticompetitive strategies that may have worked in the past would work

[26] Baker, at 39.

[27] Baker, at 41 ("Goolsbee pointed out that an MVPD has the greatest ability to act anticompetitively in settings in which it faces the least competition from rival MVPDs. Accordingly, the Commission used econometric methods (logit regression) to identify the probability that Comcast carried four national networks in which it had a controlling interest, and to determine how those probabilities varied with the degree of competition in local markets. The study found that Comcast was more likely to carry the affiliated network the smaller the share of subscribers in the market that selected a rival MVPD rather than Comcast, indicating 'that Comcast favors its own programming for anticompetitive reasons.'").

[28] Jon Brodkin, "Comcast Found a Way to Raise *Other* Cable Companies' Prices, Rivals Say," ARSTechnica (October 12, 2017), available at: https://arstechnica.com/tech-policy/2017/10/comcast-found-a-way-to-raise-other-cable-companies-prices-rivals-say/.

today. Finally, the parties will be able to point out certain economic efficiency benefits that would be created by the transaction and passed on to consumers, and DOJ will have the burden of showing that these efficiency benefits are less than the cost of any anticompetitive effect DOJ can demonstrate.

VII. Anticompetitive Strategies to Help One Level Harm Operations at the Other Level

One important reason why vertical mergers have seldom been challenged on antitrust grounds is that the harm being alleged has tradeoffs for the merged entity, making the net losses much less clear. If, as DOJ alleges, the merged company decides to harm competitors of DirecTV by charging high rates for HBO and other Warner content, it also will have to accept a loss of viewers and revenues for Time Warner channels. It seems unlikely that AT&T would pay $85 billion for these channels only to damage their value by using them for leverage against video distribution competitors of AT&T. DOJ will have to show that the gains offset the losses, and will have to defend every assumption in its models. Proving such harm is more difficult than proving harm in a conventional horizontal merger case.

The DOJ might have claimed, but didn't, an alternative theory that the merged company could restrict access to DirecTV or AT&T Internet services to foreclose current content rivals of Time Warner, which would help the Time Warner channels but harm DirecTV and AT&T's Internet assets. This theory is just as plausible as the claims DOJ made about using the Time Warner channels to harm competitors of DirecTV and emerging broadband companies. But the two theories are at odds with each other – the merged company cannot use anticompetitive strategies for the benefit of its operations at one level in the supply chain without harming its business at the other level. Thus, DOJ will have to explain in court why it chose the theory that the combined company would favor its video distribution operations over its programming operation.

VIII. Harm to Competition vs. Harm to Competitors

It is important to note that the Clayton Act standards for reviewing mergers focuses on harm to competition, which is not the same as harm to competitors – despite what competitors would like to think. The Clayton Act is intended to encourage mergers that have pro-competitive effects, because then the merged company can better serve its customers, even if that may also harm competitors who find it difficult to compete with a more economically efficient rival. The latter is not a harm to competition, however, and would not be recognized as an antitrust harm under the Clayton Act.

In horizontal mergers that violate the Clayton Act, the injured parties will usually be the downstream customers or the upstream suppliers of the merging companies. Since they compete on different levels from the merging companies, it is usually fairly easy for a court to distinguish between harm to competition and harm to competitors. As a general rule, if customers or suppliers are being harmed by a horizontal merger, that probably indicates harm to competition, but if horizontal competitors are being harmed, that usually means the merger is pro-competitive on balance.

In vertical mergers, distinguishing between harm to competition and harm to competitors can be much more difficult. Some customers may be fully downstream from the merging parties, and some suppliers may be fully upstream, so their claims of harm can be analyzed much the same as the claims of harm alleged by customers or suppliers in a horizontal merger case. More typically, however, the alleged harms due to a vertical merger will be at the same level in the supply chain as at least one of the merging parties, so the harm alleged by the government will be harm to a competitor.

Much of the government's case when challenging a vertical merger is made through the complaints and evidence brought by parties who say they are being harmed by the merger. In such cases, the government and the court face the additional challenge of having to sort out why such parties claim to be harmed. Witnesses and documents from parties who are horizontal competitors must then be viewed with some skepticism by the court, because they may well be complaining about being harmed by having to face a stronger and more efficient competitor after the merger.

IX. The Time Warner Channels Are a Questionable Source of Leverage

Video content consumers currently have far more programming content available to them than they ever had before. Cable systems today offer hundreds of channels, and Internet-based distributors like Amazon Prime, Hulu, and Netflix are offering original content of their own. As a result, no particular channels, including the Time Warner channels, have the same value that they once had. That means that any threats or actions to withhold the Time Warner channels will be less effective than it might have been a few years ago.

The 2014 dispute over DirecTV's carriage of The Weather Channel (TWC) illustrates how content providers have less leverage than in the past. TWC announced that it was raising it rates and DirecTV balked at the rate increase. When no agreement was reached, DirecTV was forced to drop TWC in January of 2014. TWC responded with public statements and newspaper ads, among other actions, encouraging DirecTV customers to drop their DirecTV service and complaining that DirecTV would not waive early termination fees for customers who terminated their DirecTV service due to losing access to TWC.[29]

Notably, TWC is an NBC channel and this dispute took place after Comcast acquired NBC, so this could be seen as an example of a combined company using its leverage after a vertical merger to place competing content distributors at a disadvantage – the very type of anticompetitive conduct described in the present DOJ Complaint. Applying the theory from the Complaint, Comcast would have more incentive to raise rates for TWC and other NBC channels after the merger, because some of the lost revenues if a competing content distributor dropped its channel would be made up when a portion of those customers switched to Comcast.

That is not how it worked out for Comcast and TWC, however. DirecTV replaced TWC in its channel lineup with Weather Nation, a start-up rival to TWC. After three months, Comcast

[29] Cynthia Littleton, "Weather Channel Blasts DirecTV On Termination Fees," Variety (January 22, 2014), available at: http://variety.com/2014/tv/news/weather-channel-blasts-directv-on-termination-fees-1201066522/.

folded, and agreed to a lower rate for TWC, and TWC also agreed to change its programming to emphasize more weather and less reality shows, in response to demands from DirecTV.[30]

Of course, consumers value some programming more than other programming, so other channels may give a vertically-integrated company more leverage than The Weather Channel gave Comcast in 2014.

Arguably the most valuable Time Warner content that the combined company could use to place competing distribution services at a disadvantage is the suite of HBO channels. But those channels are already available in many different ways. HBO can be purchased as a premium service from cable and satellite providers, as well as through the online SlingTV and Hulu services. The HBO Now app is currently pre-loaded on all Apple TV for users of iPhones and iPads, and similar apps can be uploaded to Android, Amazon Fire, and Kindle devices.[31] Thus, if a competing cable service were to lose access to HBO, its customers likely could find it elsewhere, and at a similar price to what their cable service charged.

Moreover, the merged company must be aware of the possibility, and perhaps likelihood, of a backlash if it follows the strategy alleged by the DOJ. If the merged company tries to raise the price of the Time Warner channels and some video distribution competitors refuse to pay the increase, those distributors almost certainly will seek to blame the merger for the loss of the channels. Their customers who want the Time Warner channels don't have to turn to DirecTV or U-Verse to get them, and may deliberately choose not to reward the merged company for the price increases.

X. Consumers Have Much More Choice in the Content Distribution Market Today

As late as the early 1990s, the choice for most consumers was between one cable system and over-the-air television services received via their local antenna. In the 1990s, important competition emerged in the form of satellite television services. After the market for small dish satellite services shook out, the two major satellite services for approximately the last 20 years have been DirecTV, now owned by AT&T, and Dish Network, owned by Echostar. Most consumers could then choose between their local cable provider and two satellite services. Today, however, anyone with an Internet connection, whether fixed or wireless, has many more choices than that for receiving video content.

Data contained in the FCC's Eighteenth Video Competition Report (Eighteenth Report) clearly describes a dynamic video market in which video distribution is becoming more competitive as innovative new forms of distribution are emerging and even beginning to overtake more traditional distribution channels. The report categorizes video distribution services into three

[30] Ryan Faughnder and Joe Flint, "DirecTV and Weather Channel Ink Carriage Deal, Ending Dispute, Los Angeles Times (April 8, 2014), available at: http://articles.latimes.com/2014/apr/08/entertainment/la-et-ct-directv-weather-channel-deal-20140408.

[31] Dennis Restauro, "All the Ways to Watch HBO Without Cable, Grounded Reason (July 7, 2017), available at: https://www.groundedreason.com/watch-games-of-thrones-without-cable/.

groups – multichannel video programming distributors (MVPDs), broadcast television stations, and online video distributors (OVDs).[32]

Traditional MVPD services like DirecTV have been in decline for several years. The Eighteenth Report finds that "Total MVPD subscribers declined in 2013, 2014, and 2015. MVPDs lost about 1.1 million video subscribers in 2015. Specifically, cable MVPDs lost 599,000 subscribers and DBS [satellite] MVPDs lost 477,000 subscribers."[33] The Report also finds that at the end of 2015, cable accounted for 53.1 percent of all MVPD subscribers, down from 53.4 percent at the end of 2014. Satellite providers (DirecTV and Dish Network) accounted for 33.2 percent of MVPD subscribers at the end of 2015, slightly down from 33.3 at the end of 2014. Most of the rest were telephone company MVPDs, including U-Verse.[34]

Additionally, the Eighteenth Report identified the increasing popularity and growth of online video distributor (OVD) services:

> SNL Kagan projects that by the end of 2016, 65 million households will subscribe to at least one OVD service and collectively they will purchase 109.0 million subscriptions to OVD services. Netflix had 46 million subscribers at the end of the second quarter of 2016, up from 41.1 million subscribers in second quarter of 2015. Hulu had 11.3 million subscribers at the end of second quarter 2016, up from 9.3 million in second quarter of 2015. Amazon Prime reported 63 million subscribers, all of whom receive free access to Amazon Video, in the second quarter of 2016. Four out of five Amazon Prime subscribers use Prime Video and 40 percent of Amazon Prime subscribers used Prime Video at least weekly. Many households subscribe to more than one OVD. For example, roughly 38 percent of Netflix subscribers also subscribe to Amazon Prime and 25 percent of Netflix subscribers also subscribe to Hulu.[35]

New OVD entrants and services are being launched at a rapid pace. For example, T-Mobile just announced it is acquiring Layer3, which provides cable and Internet services in Washington, DC and several other markets, to launch "a disruptive new TV service" that will "bring real choice to consumers across the country." T-Mobile specifically cited AT&T's DirecTV Now as the streaming service it was targeting for competition.[36]

The dynamic changes in the video distribution market are not limited to OVD providers. This can be seen in expansion of device options and capabilities available to MVPD customers, which are further blurring any distinctions between MVPD and OVD services. Even customers who keep their MVPD services can now enjoy the benefits of IP-based, HD-capable set-top boxes, multi-room DVRs with home networking solutions, cloud-based interfaces, mobile viewing

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[32] Annual Report of the Status of Competition in the Market for the Delivery of Video Programming, Eighteenth Report ("Eighteenth Report"), MB Docket No. 16-247 (January 17, 2017), available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-17-71A1_Rcd.pdf.
[33] *Id.*, at pg. 3, ¶5 (internal citations omitted).
[34] *Id.*, at pg. 8, ¶19.
[35] *Id.*, at pg. 26, ¶63 (internal citations omitted).
[36] Michael Sheetz, "T-Mobile Announces Acquisition of Layer3 TV, Says It Plans to Launch 'Disruptive New TV Service' in 2018," CNBC (December 13, 2017), available at: https://finance.yahoo.com/m/bfd4ddb8-1a03-3392-af19-d647cacb3210/t-mobile-announces.html.

applications, gaming console viewing compatibility, portable media players, Internet-connected smartphones and tablet devices.

It should also be noted that most OVD entrants start out with an important advantage over cable MVPD providers. Cable systems are limited geographically by the physical reach of its wires. Most OVD services are distributed over Internet or broadband wireless connections, so they are available anywhere that has Internet service.[37] For this reason, entry is easier for many OVD services, because much of their infrastructure needs are being met by other services. Satellite services also are widely distributed, because the transmissions are received directly from a satellite, but they have to maintain their satellite infrastructure that is primarily dedicated to their video content distribution service.

Free State Foundation scholars have taken the position that traditional MVPD services and OVD services should be considered substitutes.[38] The FCC's Eighteenth Report had not quite, as of January 2017, endorsed the position that MVPD and OVD services are competing in the same market, but it did recognize that they can be substitutes for many customers and provide an important competitive constraint on the pricing and other market conduct of MVPD services:

> MVPDs may face increasing competition from OVDs. The interplay between MVPDs and OVDs is wide-ranging and may provide numerous benefits to consumers. For example, MVPD subscribers may be able to (1) cancel MVPD service entirely and substitute content from OVDs, possibly together with over-the-air broadcasters, (2) cancel their subscriptions to premium movie channels and substitute movies from OVDs; or (3) supplement their MVPD programming by adding OVD programming that may not be available from the MVPD. The consideration of substitutes and supplements is important to the analysis of competition in the market for the delivery of video programming because distributors seek to reach viewers, advertising dollars, and subscription revenue. . . .
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> And because consumers often differ in their video preferences for programming, they often have differing views as to whether an OVD service might be a suitable substitute service for their MVPD service, or simply a different service. Consumers subscribing to both an MVPD and OVDs likely view them as supplements, rather than substitutes.[39]

The extent to which the distribution market is competitive will be an important issue before the court. A more competitive market undermines the DOJ's theory of harm in two ways. First, a

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[37] *See, e.g.,* Eighteenth Report, at pg. 52-53 ("In contrast to a traditional MVPD, whose service area typically is tied to the provider's own facilities-based infrastructure, or a broadcaster, whose service area typically is defined by the station's signal coverage area and DMA, an OVD's geographic service area potentially covers all regions capable of receiving high-speed Internet service. Consumers can access online video via multiple Internet-enabled devices, including computers, smartphones, tablets, gaming consoles, television sets, and other equipment (citations omitted).")

[38] *See, e.g.,* Randolph May and Seth Cooper, "Comments of the Free State Foundation¸" In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 16-247 (August 21, 2016) ("For its upcoming Eighteenth Video Competition Report, it is time the Commission finally begin taking OVD services seriously as substitutes for MVPD services."), available at: http://www.freestatefoundation.org/images/FSF_Comments_Assessment_of_the_Status_of_Competition_in_the_Market_for_Delivery_of_Video_Programming_092116.pdf.

[39] Eighteenth Report, at pg. 25, ¶59 (internal citations omitted).

more competitive market means that DirecTV or AT&T's OVD services will get a smaller share of customers who may switch in response to their current provider dropping Time Warner channels after a hypothetical price increase. Second, more competition means that the AT&T distribution services will have less ability to raise prices at either the content or the distribution level, because customers will have more alternatives. Both of these effects of a more competitive market will make the future Time Warner price increase theorized by DOJ less profitable, and therefore less likely to happen.

Undoubtedly AT&T and Time Warner will argue at trial that the product market is very broad and includes the existing and emerging OVD services. The merging parties have a good chance to demonstrate such a broad market before the court. But even if the court does not accept MVPD and OVD as fully in the same market, the FCC's conclusion that many consumers subscribing to both an MVPD and OVDs likely view them as complements, rather than substitutes, is also helpful for AT&T and Time Warner. The Eighteenth Report further describes this complementary relationship as follows:

> In addition to offering TV Everywhere services, some MVPDs have entered into cooperative arrangements with OVDs (e.g., Netflix, Hulu, YouTube, and Vudu) and included access to third-party OVD services through the set-top receiver. According to SNL Kagan, it is not yet clear whether these arrangements will serve to retain MVPD subscribers or encourage further cord cutting. DISH Network offers a new universal search on its Hopper DVR that puts Netflix titles alongside linear and DVR recordings when their subscribers look for content. SNL Kagan explains that although most large MVPDs had not embraced integrated access to OVD services at the end of 2015, there were a few mid-sized MVPDs offering integrated OVD services using TiVo integrated DVRs. In April 2016, Comcast announced a partnership with Sony to offer Crackle original programming to Comcast video subscribers. In September 2016, Comcast beta-launched Netflix on its X1 platform. Consumers can access Netflix via the traditional Netflix app on the Comcast X1 set-top receiver without changing inputs. In addition, Netflix titles appear alongside Comcast's live linear and VOD content in the program guide and search results.[40]

As noted above, HBO is already available through many alternative distribution channels, so if customers lose access to HBO through their current MVPD provider, they now have plenty of alternatives that don't require switching from their MVPD provider to DirecTV or an AT&T OVD service. And having more complementary content available also weakens the leverage the merged company would have for raising the prices of any Time Warner channels not available through complementary OVD services, because many of them will simply choose different content, from the large and growing menu of alternatives, rather than switch providers.

XI. Merger Efficiencies

Mergers that raise possible anticompetitive concerns usually have mixed economic effects. The same merger in many cases may lead to both anticompetitive harms and to economic efficiencies

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[40] Annual Report of the Status of Competition in the Market for the Delivery of Video Programming, Eighteenth Report ("Eighteenth Report"), MB Docket No. 16-247 (January 17, 2017), at pg. 27, ¶¶64-65 (internal citations omitted), available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-17-71A1_Rcd.pdf.

that offer potential benefits to the customers of the merged entities. Thus, the court must consider the net effect of the merger, and only block the merger if the harms are not fully offset by the efficiency benefits.

Whether the proposed AT&T/Time Warner merger will lead to any anticompetitive harm is questionable. But even if the Justice Department can prove anticompetitive harm is likely, it will also have to show that this harm is not outweighed by efficiency benefits that enhance consumer welfare. In this case, the parties have some obvious efficiency benefits that should arise from the merger.

One category of efficiency benefits is fairly generic, and can be raised in almost any vertical merger. These include "(1) claims that the combination would enhance prospects for innovation by reducing the transactions costs associated with coordinating content development with the development of new forms of media distribution; (2) cost savings said to arise from the elimination of the double marginalization of programming costs; and (3) cost reductions claimed to result from increased economies of scale and scope."[41] In its review of the Comcast/NBC merger, Baker said the FCC found these general vertical merger efficiency benefits "to be plausible in principle, but in some respects speculative, overstated, or unsubstantiated."[42] As noted above, the FCC standards are not necessarily the same as those a court would apply under the Clayton Act. In any event, DOJ bears the burden of proof in rebutting any such efficiency defenses raised by AT&T and Time Warner.

AT&T and Time Warner have also raised some specific efficiencies due to the proposed transaction, which are direct rebuttals to the claim in the Complaint that the merger will lead to less market innovation. One is that having the content and distribution under one roof would result in more experimentation with mobile video ("interactive programming"), which would help meet the great demand for more premium content for mobile devises. A second is that the combined company could target content better for mobile customers, who may have different interests than video customers. An overall benefit they assert is that the combined company would be better able to target advertisers in competition with Google and Facebook, which currently dominate digital advertising.[43] These are all very plausible benefits, which presumably AT&T and Time Warner will be prepared to quantify in court, so DOJ will have to marshal its own evidence that these efficiency benefits are not sufficient to overcome the harm DOJ is claiming will result from the merger.

Moreover, DOJ will encounter another efficiency issue if it pursues one of the proposed remedies that it may have proposed to the merging parties. Some reports claim that DOJ proposed that if AT&T wants to acquire the Time Warner content, it will have to sell DirecTV.[44] Doing so would eliminate one of the major incentives for the merged company to raise prices,

[41] In the context of the Comcast/NBCU merger, Baker said the FCC found these general vertical merger efficiency benefits "to be plausible in principle, but in some respects speculative, overstated, or unsubstantiated." Baker, at 38.
[42] *Id.*, at 38.
[43] Alina Selyukh, "The AT&T-Time Warner Merger: What Are the Pros and Cons," National Public Radio (October 25, 2016), available at https://www.npr.org/sections/alltechconsidered/2016/10/25/499185907/the-at-t-time-warner-merger-what-are-the-pros-and-cons-for-consumers.
[44] Michelle Fox, "AT&T CEO Stephenson Says He Never Offered to Sell CNN and Is Ready to Litigate Time Warner Deal," CNBC (November 9, 2017), available at: https://www.cnbc.com/2017/11/09/att-ceo-randall-stephenson-i-have-never-been-told-that-the-price-of-getting-a-deal-done-was-selling-cnn.html.

according to the DOJ theory. But AT&T is offering various incentives for its customers to "bundle" DirecTV and AT&T wireless services.[45] Consumers taking advantage of discounts for this bundling will be made worse off by this proposed remedy, because they will lose their discount for bundling. To justify such a structural remedy, DOJ would have to prove not only that the merger will lead to anticompetitive harm, but also that the alleged harm will be greater than the clear harm that will result from the very remedy DOJ is proposing.

Finally, just as lines between MVPDs and OVDs are blurring, the video distribution systems described in the FCC's Eighteenth Report and other telecommunications companies are increasingly finding that they are competing against web-based Internet giants in a broader content delivery market. This point was made by Mark Cuban in his testimony before a Congressional Committee:

> The idea that TV is the dominant content delivery mechanism no longer is valid. Instead, we fill our time by consuming content from Facebook, Instagram, Snapchat, Messenger, WhatsApp and slowly from Virtual Reality companies like Occulus Rift. Combined, these apps reach more than 1.5 billion users a month. They can deliver any kind of content, in any manner the consumer would like to receive it, be it message, video, VR, post, ad, you name it, to populations around the world in a manner that dwarfs TV….
>
> Apple, Google, Amazon, MicroSoft, and Facebook are 5 of the 7 most valuable companies by market cap in the world. All have established their dominant positions in the app and content worlds by making important, strategic content acquisitions. That is exactly what the Time Warner acquisition is for AT&T, an important, strategic content acquisition. Alone, it will be very difficult, if not impossible for either AT&T or Time Warner to compete with any of the companies I've mentioned. Together it will be still be difficult, but a combined entity at least gives them a chance to battle the dominant players in the market.[46]

To the extent AT&T and Time Warner are starting to compete against these web-based Internet companies, Cuban's point is essentially that combining them could have the pro-competitive effect in a broader market of establishing another effective challenger in the broader content delivery market. If the court is willing to accept this broader market definition, AT&T and Time Warner will have a strong argument that they currently are not particularly large players and their merger will create important efficiency benefits in the overall content market.

Conclusion

In this era of media abundance, both the video distribution and video content markets are characterized by effective competition. The market has become even more innovative and dynamic since the 2011 Comcast/NBC merger as consumers are now far more willing to cut the cord and look to Internet platforms for information and entertainment. In short, anticompetitive

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[45] *See, e.g.*, Chris Mills, "AT&T Is Basically Giving Away Cable TV to Wireless Customers," BGR (June 2nd, 2017), available at: http://bgr.com/2017/06/02/at-t-directv-now-deal-best-cordcutting-service/.

[46] Peter Kafta, "Mark Cuban Tells Washington to Let AT&T Buy Time Warner, So It Can Compete with Google and Facebook, And Snapchat, and Apple, and Amazon, and Microsoft ...," Recode (December 7, 2016), available at: https://www.recode.net/2016/12/7/13868016/mark-cuban-att-time-warner-senate-hearing-facebook-google-amazon-apple.

strategies that might have worked in the past – perhaps even the recent past – will not be as profitable today, due to the increase in consumer choices and the likely losses of subscribers to other platforms.

The Justice Department will have to clear several hurdles if it is to prevail in this case. It will have to show how this merger would cause harm to consumers in an increasingly dynamic communications and media marketplace with more alternatives for consumers for receiving information and entertainment programming than ever before. Then it will have to explain why this vertical merger case deviates from past antitrust enforcement precedent in which, at most, behavioral conditions were deemed sufficient remedies. And it will have to do all of this without having any legal precedent after 1972 to support the vertical theories of harm being raised by the government.

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