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The Beneficent Monopolist

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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

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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.