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CROSSING THE RUBICON: WHY THE COMCAST/TIME WARNER CABLE MERGER SHOULD BE BLOCKED

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It seems fair to ask: Is this merger a done deal?

Quite a few financial analysts and some antitrust lawyers think so. They have publicly suggested that the Department of Justice and the Federal Communications Commission likely will approve Comcast Corp.'s acquisition of Time Warner Cable (TWC), subject to a few conditions, such as the extension of the Comcast-NBC Universal modified final judgment.

In a press call, both Comcast and TWC CEOs voiced confidence that the transaction would receive the necessary approvals, pointing to the absence of any break-up fee (or reverse break-up fee) as evidence of their confidence. Comcast has also argued that the combination would not reduce competition because the two cable providers do not compete in local markets. So is the only unanswered question what, if any, modifications will there be to Comcast's obligations under the existing NBC Universal Final Judgment?

One thought experiment is to suppose that the predictions are correct. Suppose the merger, while not sailing through the regulatory process, is likely to remain relatively intact. If true, ask the following question: If Comcast can acquire TWC, what prevents Comcast from extending its footprint across America by acquiring all the remaining cable companies?

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That was our initial query. And it seems difficult to discern a limiting principle, since the same justification for the Comcast/TWC transaction could easily be offered for a Comcast/TWC/Charter deal. Cable companies tend not to compete with one another for customers.

But upon closer examination, we wonder whether Comcast even would need to acquire other cable companies after acquiring TWC, which Comcast's CEO described as the "premier pure play cable company in the US." In acquiring TWC, according to one analysis, Comcast's services would become available to 70 per cent of the U.S. population (up from its current potential reach of 42 per cent of the U.S. population). After TWC, Comcast's remaining conquests are Nevada and even less populated regions, like North Dakota. With due respect to those states' citizens, why bother? But suppose Comcast later seeks to acquire a local cable company. After letting this merger through, can the DoJ seriously argue that Comcast's expansion into Iowa may somehow "substantially lessen competition or tend to create a monopoly?" Hardly. Thus this deal with TWC is critical. Comcast is crossing the regulatory Rubicon.

As noted, Comcast principally argues that it does not compete with TWC in the same geographic markets. Without any competitive overlap, according to Comcast, the acquisition does not really change anything. But this is wrong for several reasons.

First, a merger can violate Section 7 of the Clayton Act without the parties competing in the same geographic market. Suppose each state had its own cable monopoly. Comcast, under its logic, could legally acquire every cable company in the US. Even if New York consumers were unaffected when Comcast acquires other Midwest cable monopolies, Comcast's acquisition of local monopolies affects the overall competitive

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landscape. Moreover, if Comcast's rivals compete throughout the US, and if Comcast can disadvantage its rivals by raising their costs, then consumers can be adversely affected far beyond Comcast's local cable monopolies.

The intent under Section 7, as in other parts of the Clayton Act, is as courts recognised to cope with monopolistic tendencies in their incipiency – well before they have attained such effects as would justify a Sherman Act proceeding. Congress sought to prevent situations where "several large enterprises [were] extending their power by successive small acquisitions". Here Comcast is extending its power through a significant acquisition – one that expands its reach to most of the US population.

As the DoJ 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). At the end of 2012, 41 per cent of the homes and businesses in the geographic areas Comcast served subscribed to Comcast's video services; 36 per cent of the homes and businesses subscribed to Comcast's internet services. 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 US, Comcast extends 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. This aggregation of important local markets, we submit, has antitrust significance.

Second, the Congressional command for Section 7 is to "preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before the trend developed to the point that a market was left in the grip of a few big companies," as the Supreme Court said in *Von's Grocery*. It was fashionable before the economic crisis for antitrust technocrats to scoff at *Von's*, and at considering any trend toward concentration and the incipiency standard in merger review. But after the havoc caused by financial institutions too big to fail (or to criminally prosecute), the incipiency standard has reappeared in the DoJ and FTC's Horizontal Merger Guidelines. One potential consequence of this merger is to accelerate the trend toward concentration among content providers and cable companies. Indeed, the chairman of DISH Network reportedly commented that this deal, if approved, "certainly doesn't hurt the case for consolidation" of satellite TV providers, notwithstanding the fact that the US blocked a deal between Dish and DirecTV in 2002.

Third, one reason Congress sought to thwart a market dominated by a few firms is to prevent coordination or collusion. With fewer competitors, coordination, either express or tacit, becomes easier. We are already beyond that point. The DoJ and New York recently charged Comcast, TWC, Cox, and Bright House Networks of agreeing to restrain competition with Verizon. Basically the cable companies sought to extend their "triple play" of voice, video, and broadband services into a "quad play" that included Verizon's wireless services. Verizon, however, offered its competing "triple play" of voice, video, and broadband FiOS services. Under their agreement, in regions where Verizon's FiOS competed with the defendant cable companies, Verizon would have sold two "quad play" products--its own and its competitors. Verizon further agreed not to offer consumers a better price for its own quad play product. Not surprisingly the competitors' agreement, the DoJ alleged, would have diminished Verizon's incentives and ability to compete against Comcast, TWC, and the other cable providers. Why did Verizon hamstring itself? The cable companies agreed not to partner with a competing wireless company. And Verizon received a commission from selling its competitors' products. This recent enforcement action shows how highly concentrated markets are susceptible to coordination.

Fourth, 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. One concern that arose in the recent joint hearings between the DoJ and Department of Agriculture is anticompetitive buyer power, namely monopsony. The complaint was that tepid antitrust enforcement over the past 30 years has left farmers and ranchers at the whim of powerful buyers. The emerging academic scholarship suggests that monopsony power can occur at lower market shares than monopoly power. Thus another concern is how the acquisition increases Comcast's power to disadvantage sellers of television content (and raise the costs of Comcast's rivals).

Fifth, in investigating Comcast's deal with General Electric that ultimately enabled Comcast to control NBC Universal, the DoJ discussed various ways Comcast could disadvantage its traditional competitors (direct broadcast satellite and telephone companies) plus the emerging online video programming distributors (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." In acquiring TWC, Comcast will have even more power to thwart Netflix or other emerging OVD rivals by impairing or delaying the delivery of their content. (Although Netflix recently sought to contractually resolve this issue with Comcast, other OVDs may lack the clout.)

Comcast might respond that whatever these concerns' validity, its current Final Judgments with the DoJ ameliorate them. Comcast will likely extend net neutrality to TWC subscribers, promise to increase its broadband speed, and expand in rural and low-income areas. Comcast has also expressed a willingness to divest certain systems serving approximately 3 million managed cable subscribers, to be below 30 per cent of nationwide multichannel video subscribers. Why is that not good enough?

The FCC's 30-percent limit on nationwide multichannel video subscribers that any single cable provider can serve was vacated in 2009 by the U.S. Court of Appeals for the DC Circuit; in its recent 10-K, TWC "is unable to predict when the FCC will take action to set new limits, if any." So that is hardly a barrier. At what point does the DoJ become concerned and wonder whether its NBCU Final Judgment will protect suppliers and consumers? The judgment, for example, requires Comcast to maintain its internet access speed above a certain level. But the DoJ cannot know what a competitive market could bring. That is a fatal flaw of behavioural remedies. Comcast continues to deliver expensive and (according to some critics) inferior broadband. In the US, it lags Google Fibre and other internet service providers. And there is less incentive for Comcast, after acquiring TWC, to innovate and compete.

AT&T, like Comcast, described its proposed acquisition of T-Mobile as somehow pro-consumer, pro-innovation, and pro-investment. AT&T apocryphally predicted that if its merger in a highly concentrated industry were blocked, consumers would suffer from lower output, worse quality, and higher prices. But AT&T and T-Mobile abandoned their merger after the DoJ's challenge, and consumers now benefit from the competition by T-Mobile. Generally, antitrust views competition, not its reduction, as the remedy for allocating scarce resources. This deal is by no means done.