Concentrating Cable: Comcast to Acquire 3/4 US Cable Broadband Market

Commenting on the imminent merger between US Cable operators Comcast and Time Warner, ***Ellen Goodman*** *from the Rutgers University School of Law explains the issues in this case in which media ownership concerns meet the net neutrality debate.*

Philadelphia-based Comcast is set to acquire New York-based Time Warner Cable. If the deal is approved by the FCC and the Department of Justice, this will give Comcast nearly three quarters of the U.S. cable broadband market with about 30 million subscribers. This amounts to about 33% of the entire subscription TV broadband market, which is shared with satellite and telco competition.

Public interest groups are lining up against the deal, arguing that it will reduce competition and raise prices for subscription TV and broadband. But the argument is not at all straightforward. Comcast and Time Warner do not compete in local markets – where Time Warner provides cable, Comcast does not. It is for this reason that the FCC's earstwhile caps on the percentage of subscribers a cable company could serve nationwide (30%) were thrown out in court. Comcast challenged the cap and in 2009 won in the D.C. Circuit Court of Appeals, which held that the FCC had "failed to demonstrate" that exceeding the 30% cap "would threaten to reduce either competition or diversity in programming."

The argument for limiting horizontal cable ownership in order to preserve outlets for program creators – in other words, the argument against cable's monopoly buying power — is weaker today. Programmers seeking distribution outlets have more options, such as Netflix or YouTube, and competing broadband providers like Verizon are stronger. On the other hand, the argument for limiting the power of a broadband infrastructure owner is stronger. Whoever owns that broadband pipe has ultimate control over the distribution of Netflix or any other edge provider. The larger the pipe owner, the more subscribers its decisions affect and the more power it has in negotiating carriage agreements with edge providers. The acquisition of Time Warner gives Comcast this increased power by virtue of the horizontal growth of subscribers. Time Warner's vertical interests in HBO and other content properties might also stimulate an appetite for control over competing data flows.

Vertical interests were the cause for concern in 2011 when Comcast acquired NBC Universal. In approving the deal, the FCC imposed "open Internet" conditions that essentially obligated Comcast to net neutrality until 2018. It is likely that the FCC will at least require that any Comcast-Time Warner combination be subject to these same conditions. But this is also an opportunity for the public interest community to push to extend those conditions further out in time. Given the recent decision vacating key parts of the FCC's open Internet rules, the FCC is looking for ways to ensure Internet non-discrimination. Merger conditions provide one way.

There has been a movement from the right to divest the FCC of the power to impose merger conditions of this kind. That might be alright if the FCC were given more explicit regulatory authority to protect the public interest. But in the absence of that authority, merger conditions provide a flexible regulatory tool to protect the public while allowing efficient transactions to proceed.

I must confess to a regional bias on the merger. As a Philadelphian, it's hard not to cheer on Comcast's ambitions in the entertainment industry. Not to mention it's ambitions with respect to

the Philadelphia skyline.

This post gives the views of the author, and does not represent the position of the LSE Media Policy Project blog, nor of the London School of Economics

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