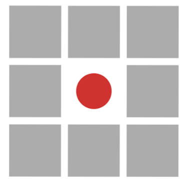

Public Knowledge

Testimony of
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On Behalf of Public Knowledge and Consumer Federation of America

Before the
U.S. Senate
Committee on the Judiciary

Subcommittee on
Antitrust, Competition Policy & Consumer Rights

Hearing on:
Examining the Competitive Impact of the AT&T-Time Warner Transaction

Washington, D.C.
December 7, 2016

The proposed merger of AT&T and Time Warner could create a number of competitive harms, leading to higher costs and fewer choices for video services, and lower-quality and less diverse programming. The vertical integration of programming and distribution would give AT&T the incentive and ability to restrain competition by raising the costs its rivals must pay for Time Warner programming. This is in addition to the existing vertical integration, for some customers, of AT&T's access services (its wireless and wireline internet access businesses) and its online video distribution services. AT&T can already harm its video distribution competitors by making it more difficult to reach customers on its networks; acquiring Time Warner programming would increase AT&T's incentive to harm rivals in this way.

The online video marketplace, despite a number of established players like Netflix and Youtube, is still relatively nascent, and services like DISH's Sling TV and AT&T's DirecTV Now could benefit consumers significantly. Head-to-head competition between major services could drive prices down, and move more viewers to a world that breaks free of the traditional cable bundle and gives them more customizable and à la carte options. Allowing viewers more choice over the programming they want will ensure that programming that people actually want to see gets funding, creating more opportunities for diverse and independent programmers. And online viewers, if not Multichannel Video Programming Distributor (MVPD) subscribers, may finally be free of the rented set-top box.

But the fact that the technology and business models of online video may allow for a better world for consumers is no guarantee that it will actually happen. If a single company is able to control many of the key inputs to online video, from content production to last-mile transmission, then the competitive promise of this new market could be snuffed out, or at least limited, as familiar names seek to turn online video into Cable 2.0.

Of course, a large-scale media merger such as this one also raises serious concerns that go beyond the economic-focused lens of modern antitrust. Specifically, this merger raises concerns for its effects on media pluralism, diversity, and democratic discourse, as well as concerns about the collection and use of sensitive consumer information. In considering the implications of this deal, policymakers should take into account not just the effects on competition, but the effects on consumer access to information, as well.

Time Warner is the "[l]argest film and TV studio with leading franchises, production scale and content library,"[1] controlling 3 of the top 5 basic cable networks and a vast library of premium content. It controls HBO, CNN, TBS, TNT, Cinemax, Cartoon Network, Warner Brothers Pictures (which includes New Line Cinema and Castle Rock Entertainment), Warner Brothers Television, and DC Comics—and it owns 50% of The CW Network. With these assets, Time Warner controls some of the most popular, must-see programming[2] in the market today.

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[1] AT&T Time Warner Analyst Call, AT&T to Acquire Time Warner (Oct. 24, 2016), https://www.att.com/Investor/Earnings/3q16/10_24_16_analyst_call.pdf.

[2] In the video marketplace, market power should be measured not only by how popular or widely distributed programming is, but whether it is "must-have" programming—that is, whether a significant number of subscribers might choose to drop their subscriptions if the programming was no longer carried. A widely-viewed network might not necessarily have market power if it is easily substitutable, while a lesser-viewed network with unique programming might.

AT&T is a close second among nationwide wireless providers, with 133 million subscribers in the United States. Since the acquisition of DirecTV, it is the country's largest MVPD, with 25 million video subscribers. AT&T is also a major wireline ISP, with 16 million subscribers.[3] This merger would create a company with interests in the creation, transmission, and retail delivery of video programming, highly vertically integrated with the ability to use different aspects of its business to benefit the others, at times to the detriment of competition and consumers. Indeed, the very amount that AT&T proposes to pay ($85.4 billion, a 36% premium over Time Warner's announcement day market value[4]) will put enormous pressure on AT&T to maximize its revenues, including in ways that could raise rivals' costs and consumers' bills.

This proposed merger comes on the heels of a series of mega-mergers that have reshaped the communications landscape. Comcast acquired NBCUniversal, making the largest cable and broadband provider in the country also one of the major programmers. Charter acquired Time Warner Cable, creating a new cable giant of massive scale. AT&T purchased DirecTV, combining one of the major wireless carriers and a major landline ISP with one of the largest pay-TV providers. All of this happened in the context of a communications marketplace that is in general highly concentrated. As Mark Cooper observed in a recent paper, "Four firms (AT&T, Verizon, Comcast and Charter) dominate these four markets [wireline and wireless ISP service, MVPDs, and broadband data services], forming ... a 'tight oligopoly on steroids.' Not only is each market highly concentrated, with these four firms accounting for over 70 percent of the sale in each, but, to a remarkable extent, they have avoided head-to-head competition over the 20 years since the passage of the Telecommunications act of 1996."[5] The media marketplace is also highly concentrated, with just a few firms controlling the majority of production, including the "Big Six" (Comcast, Disney, Fox, Time Warner, CBS, and Viacom[6]) controlling a large percentage of television programming.[7] To highlight this, the "Big Six" currently control 72% of the ownership interests in the top 50 most-viewed basic cable networks, for a 73.19% weighted average.[8]

With this is a background, the ways that this merger could restrain competition, as well as harm democracy, and violate consumer privacy, is all the more apparent.

In recent days, AT&T has launched a new online streaming service, DirecTV Now. It joins a handful of other services like Playstation Vue and Sling TV that are offering a true

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[3] *Id.* at 7.

[4] AT&T Time Warner Analyst Call, AT&T to Acquire Time Warner (Oct. 24, 2016), https://www.att.com/Investor/Earnings/3q16/10_24_16_analyst_call.pdf.

[5] Mark Cooper, *ATT-Time Warner Merger Bad for Consumers*, Consumer Federation of America (Oct. 26, 2016), http://consumerfed.org/press_release/att-time-warner-merger-bad-for-consumers/.

[6] It may be more accurate to say that just *five* media companies control 90% of the marker, since CBS and Viacom have a common controlling shareholder and may try to merge soon.

[7] Free Press, Who Owns the Media?, http://www.freepress.net/ownership/chart.

[8] Public Knowledge analysis based on ratings information from Tony Maglio, *Top 50 Top Basic Cable Channels of 2015*, The Wrap, http://www.thewrap.com/50-top-basic-cable-channels-of-2015-espn-tbs-tnt-usa-disney-fox-news-tv-ratings.

alternative, rather than complement to, traditional cable and satellite TV packages online. Public Knowledge is, of course, happy to see more competitive alternatives to cable emerge.[9]

Aspects of how DirecTV Now is vertically integrated with other AT&T products raise competitive concerns on their own, but are exacerbated by the proposed acquisition of Time Warner. AT&T is a wireless and wireline broadband provider. By putting caps on the amount of data its broadband customers can use in a billing period, and then exempting its own services from metering—a practice commonly known as "zero-rating"—it can give its own services a significant competitive advantage over those of competitors. AT&T has made it clear that it plans to zero-rate DirecTV Now for its wireless customers. The FCC has recently made it apparent that this form of zero-rating is anticompetitive, imposes high costs on rivals, and harms consumers.[10]

The proposed acquisition of Time Warner by AT&T adds another dimension to this. First, when programming is owned by the same company that runs a distribution service like DirecTV it has mixed incentives. Rather than offering its customers the best programming possible, including programming from independent creators, it has the incentive to instead prioritize offering its own programming. Additionally, when the same company that creates popular programming that it sells to various distributors also offers a distribution service, it has the incentive to charge these other distributors, who are its direct competitors, above-market rates or to insist on anti-competitive contractual terms.

Complicating this still further is the relationship between the vertical integration of content and zero-rating. To the extent, of course, that one concludes that zero-rating gives an unfair advantage to AT&T's video distribution service, the ownership of Time Warner programming would give additional unfair advantages to AT&T—AT&T would be internalizing more the benefit of its actions, and keeping more of the revenue its service generates. Beyond that, however, there are implications on how AT&T makes zero-rating available to other providers. It has claimed[11] that it will offer zero-rating to third parties under terms that match its internal accounting. This is already a nearly impossible commitment to verify. To the extent that AT&T now controls a notable segment of the programming it makes available via DirecTV now,

[9] Cable television providers have long had the commercial and technological ability to start offering such nationwide services that use the Internet for distribution, rather than maintaining the arbitrary geographic boundaries, which are rooted in the technological limitations of the earliest community antenna services of the 1940s. However, offering such services would mean that cable television providers would have to start competing with each other, instead of maintaining the gentleman's agreement that keeps them from entering each others' territories, and would risk cannibalizing their existing customers. It is therefore not surprising that AT&T, DISH, Sony, and others are taking the opportunities that cable has declined. The commercial, regulatory, and technological scale of such undertakings likewise makes it unsurprising that these services are being offering by incumbents in other or related industries with significant resources. However, ideally, online video should be open to truly new entrants.

[10] Jon Wilkins, Federal Communications Commission, Letter to AT&T (Dec. 1, 2016), https://cdn.arstechnica.net/wp-content/uploads/2016/12/Letter-to-R.-Quinn-12.1.16.pdf.

[11] Robert W. Quinn Jr., AT&T, Legal Analysis to FCC, at 5 (Nov. 21, 2016), https://cdn.arstechnica.net/wp-content/uploads/2016/11/White-paper-on-sponsored-data-Mon-PM.pdf.

attempting to use AT&T's internal accounting as a basis for what it charges third parties seems like more an exercise in imagination than economics.

Nor would this proposed merger be the last. In the expectation of a more lenient antitrust environment in the Trump administration, some analysts are already expecting a wave of yet more mergers. If this deal goes through, what's next? In recent days, for instance, a UBS analysis has advocated for a merger between Comcast and Verizon.[12] Companies like CBS, Viacom, Charter, Verizon, T-Mobile, DISH and 21st Century Fox could all feel pressure to combine or vertically integrate. Consumers might find that must-see programming is scattered across a plethora of different services, each of which works differently on different devices and networks. In short, an already-oligopolistic marketplace could become even more concentrated, and a few companies with strategic control over programming and infrastructure could leverage it to gain dominating positions in the new world of online video. The promise of the internet as a platform that could finally free consumers from the MVPD bottleneck would be quashed, and we could even see the rise of a single online video platform with a market share like that of Google in search or Facebook in social networking. The technology and business models exist to finally give customers more choice, but not if antitrust enforcers are asleep at the switch.

Finally, it bears remembering that the regulatory environment is likely to change in coming months, meaning that policymakers cannot point to industry-wide protections as a basis for a more hands-off approach to merger review. The incoming FCC may roll back Title II for broadband if not net neutrality generally, and an environment of less enforcement of video discrimination rules seems likely. The Comcast/NBCUniversal consent decree, which expressly sought to protect emerging video competition from the harms vertical integration can cause, is also about to expire. This makes a fact-specific analysis of the competitive harms this deal could cause all the more vital, and remedies, including blocking the deal, all the more necessary.

This is the time for antitrust authorities to send a message that competition, not anticompetitive consolidation, is the way to produce lower prices and better services for consumers. This deal, however, could represent a step in the wrong direction.

These manifold harms are difficult if not impossible to remedy with behavioral remedies. Behavioral remedies, in fact, are all the more risky given the possible rollback of Title II for broadband, net neutrality and privacy rules, and other protections by the upcoming administration, as well as the upcoming expiration of the Comcast/NBCUniversal merger conditions. Given these concerns, the simplest way for authorities to prevent this merger's consumer harms may be to block it.

[12] John C. Hodulik, US Telecom and Pay TV: What if? A comprehensive look at sector M&A, UBS (Nov. 28, 2016), https://neo.ubs.com/shared/d1fuuUyliQUc/?off_id=AC201611E190241062W1174756857&ma=X434A644664786C44&camp_id=EM:UNKW:2016-11:28:U.

Media mergers like this one can harm democratic discourse

As Barry Lynn has reminded us, one of the original purposes of competition law was to "preserve democracy through the careful distribution of economic power."[13] It is widely recognized that media industries have a particular impact on democratic values. As Werner A. Meir and Josef Trappel explain,

> Media diversity is one of the main preconditions ensuring political and cultural pluralism and effective citizen participation in democratic decision-making processes. Media diversity and media pluralism are prerequisites for effective freedom of expression and information...[t]he potential risks to diversity of ideas, tastes, and opinions caused by media concentration is certainly an old problem but with new dimensions and severe effects on society.[14]

As the OECD has cataloged, public interest factors such as "plurality of media" are commonly considered as a part of merger review in developed countries.[15] In the United States, the role of ensuring that media mergers that involve license transfers are in the public interest often falls to the FCC.[16] However, all policymakers and government officials are broadly charged with promoting the public interest.

An understanding of how media consolidation harms democracy is hardly confined to one political viewpoint. As a candidate, President-elect Trump reacted to the proposed AT&T/Time Warner merger under consideration today by stating "Deals like this destroy democracy. And we'll look at breaking that deal up and other deals like that." Of the Comcast/NBCU vertical merger, he stated "This should never ever have been approved in the first place."[17] Policymakers today and members of Congress should recognize, and respond appropriately, to the broad consensus that an ever-consolidating media marketplace is not only incompatible with free markets, but with a free society.

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[13] Barry C. Lynn, Antitrust: A Missing Key to Prosperity, Opportunity, and Democracy, at 6, http://www.demos.org/sites/default/files/publications/Lynn.pdf.

[14] Euromedia Research Group, Media Policy: Convergence, Concentration & Commerce 38 (Denis McQuail & Karen Siune eds., 1998).

[15] Aranka Nagy, Secretariat, Public Interest Considerations in Merger Control, OECD, at 4 (June 30, 2016), http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)3&docLanguage=En.

[16] The FCC must ensure that other public interest goals are protected as well, such as access to advanced telecommunications and information services across the country and encouraging deployment to all Americans; ensuring quality services available at just, reasonable, and affordable rates; promoting the development of the Internet and preserving the competitive free market for its provision; encouraging the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet; and preventing unjust or unreasonable discrimination. Petition to Deny of Public Knowledge and Open Technology Institute at 16-17, In the Matter of Comcast Corp., MB Docket No. 14-57 (2014).

[17] Ryan Knutson, Trump Says He Would Block AT&T-Time Warner Deal, WALL STREET J. (Oct. 22, 2016), http://www.wsj.com/articles/trump-says-he-would-block-at-t-time-warner-deal-1477162214.

This merger raises clear antitrust concerns

AT&T's business is complex and this merger has horizontal as well as vertical aspects—for instance, Time Warner offers HBO Now, a standalone online streaming service that partially competes with DirecTV Now. However, the most concerning competitive effects that would result from this merger arise from its vertical aspects: the combination of Time Warner programming with two nationwide and one regional video distribution services (DirecTV, DirecTV Now, and U-Verse TV); a nationwide wireless internet provider, and a regional fiber, DSL, and fixed wireless internet provider.

The Department of Justice and Federal Trade Commission both have a long history of closely examining and challenging vertical mergers that may harm competition, including many recent examples. The essential question is whether the claimed efficiencies and procompetitive benefits of the merger are real, and whether they outweigh potential harms. Examining the facts of this merger, it is apparent both that any claimed pro-competitive effects are either small or readily achievable through other means (e.g., contracting). It is also apparent that the threats to competition are real and could harm consumers and hold back new competition in an evolving marketplace.

AT&T would be able to raise costs on its rivals

AT&T's entry into the online streaming market could benefit consumers by offering them an interesting new choice that could pose a competitive threat to cable TV incumbents. AT&T's argument for this merger is predicated, in part, on its claim that acquiring Time Warner programming will help it compete even better with cable, and offer a better service at competitive prices. It is a matter of textbook antitrust analysis that vertical mergers, at times, can create efficiencies and allow the merged companies to compete more effectively with their rivals on the merits. However, the question is whether these purported procompetitive benefits are outweighed by anticompetitive harms, and whether the means that the merged company would use to compete with its rivals are in some way unfair. With respect to this merger, it appears that the harms to competition may substantially outweigh any purported benefits or other efficiencies.

One common way that vertical mergers may harm competition is through "input foreclosure"—that is, a vertically-integrated company may control an "input" its competitors need to offer service. As Deputy Assistant Attorney General Jonathan Sallet put it, "[i]nput and customer foreclosure theories arise from the fact that vertical transactions can create opportunities and incentives for firms to handicap rivals[.]"[18] Or, in the words of then-FTC Commissioner Christine Varney, "vertical integration can foreclose rivals from access to needed inputs or raise their costs of obtaining them."[19] In other words, when a merger creates a company that has the incentive and ability to restrict its competitors' inputs, it becomes more likely that

[18] The Interesting Case of the Vertical Merger, Justice News, Department of Justice (Nov. 17, 2016), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-jon-sallet-antitrust-division-delivers-remarks-american.

[19] Christine A. Varney, Vertical Merger Enforcement Challenges at the FTC, Federal Trade Commission (July 17, 1995), https://www.ftc.gov/public-statements/1995/07/vertical-merger-enforcement-challenges-ftc.

the merger would reduce competition, rather than promoting it. In this case, AT&T would have the incentive to restrict access to Time Warner programming to its competitors—other online video distributors as well as traditional MVPDs. These restrictions may not take the form of an outright refusal to sell access to the programming, but above-market rates, contractual conditions, and delays could have the effect of raising its competitors' costs, reducing the quality of their offerings compared with its own, or both. Because this merger would give AT&T the ability to raise the costs of its direct competitors, it presents a classic example of a case where antitrust authorities may challenge a vertical deal.

The standard objection to this claim would be that Time Warner currently tries to sell its programming to all comers and maximize its value, and that AT&T would have the incentive to do the same. However, post-merger, this would only be true if the lost value AT&T would suffer by restricting access to Time Warner programming exceeds the benefit it would gain by advantaging its own video distribution services. As the Department of Justice put it in its analysis of the Comcast/NBCU merger, a "merged firm may find it profitable to forego the benefits of dealing with its rivals in order to hobble them as competitors to its own downstream operations."[20] There is good reason to believe, in this case, that the benefit that AT&T would obtain by restricting access to Time Warner programming exceeds the costs. Online video delivery is a growth market, and AT&T has the potential to win significant market share by taking customers from cable and existing online video subscription services like Netflix and Sling TV. The benefit from capturing this relatively new and promising market almost certainly exceeds whatever value AT&T might leave on the table by restricting access to Time Warner programming.

In this context it bears considering that AT&T also controls other valuable "inputs" as well. As a video programmer, a post-merger AT&T/Time Warner would compete directly with other programmers, large and small. But because AT&T is also a video distributor, it controls an input those competitors need to do business—access to customers. AT&T would, of course, ensure that Time Warner programming gets favorable distribution and promotion on its own video distribution services. To the extent that Time Warner programming competes with other programming for attention, advertising, and subscription revenue, AT&T would have the incentive to restrict its programming competitors' ability to obtain distribution on favorable terms on its own services. It might decline to carry certain channels, for example, or insist on paying less for them, or bury competing programming in unfavorable neighborhoods or disadvantage it in its recommendation algorithms or in its user interface, or even insist on unfavorable contractual terms. Not only would its programming competitors suffer, customers nationwide would lose the benefit of a fully competitive programming marketplace, and even AT&T's own customers would be harmed if AT&T has the incentive to promote its own programming over possibly-superior programming its customers might actually prefer.

Additionally, as an internet service provider, AT&T controls a vital input that rival online video distributors need to access to reach customers. Similarly to the dynamics described above, AT&T would have the incentive and ability to restrict access to this input to its rival online video service providers. These restrictions could take the form of what are currently, but may soon not

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[20] Competitive Impact Statement at 20, United States v. Comcast Corp., 808 F.Supp. 2d 145 (2011).

be, violations of the FCC's Open Internet rules, manipulation of interconnection agreements, or discriminatory zero-rating. Of course, to an extent, this particular incentive would exist even if AT&T did not buy Time Warner. Even before it announced its plans to buy Time Warner, AT&T indicated that it intended to zero-rate its own video services on at least some of its access services. However, the merger could exacerbate these harms. But after acquiring Time Warner AT&T would internalize more of the benefit that its video distribution services like DirecTV Now acquire by being zero-rated or otherwise favored. Thus, the merger would, at least, increase AT&T's incentive to engage in anti-competitive behavior, even if its ability arises from its existing control of access networks.

Considering all the various methods AT&T can employ to raise its rivals' costs, this merger represents a serious harm to competition and a threat to consumers. They work together, not merely additively but qualitatively, giving a single company the ability to manipulate the prices and terms of various inputs to disadvantage its competitors in ways that may be difficult for outsiders to trace. Given the already concentrated and vertically-integrated nature of the programming and distribution markets, allowing AT&T to obtain these new abilities represents a serious threat.

This merger could harm innovation in a nascent market

As the Department of Justice described in its Comcast/NBCU Competitive Impact Statement, antitrust law not only "protects consumers from anticompetitive conduct" but also "ensures that firms do not acquire the ability to stifle innovation."[21] As the DOJ put it, citing a noted legal scholar, "restraints on innovation 'very likely produce a far greater amount of economic harm than classical restraints on competition,' and thus deserve special attention."[22] This is because "[a] merged firm can more readily harm competition when its rivals offer new products or technologies whose competitive potential is evolving."[23]

Congress expressly directed antitrust authorities to have an eye toward nascent and future competition, as well as existing competition. As the Supreme Court found,

> To arrest [the] "rising tide" toward concentration into too few hands... Congress decided to clamp down with vigor on mergers. It both revitalized § 7 of the Clayton Act by "plugging its loophole" and broadened its scope so as not only to prohibit mergers between competitors, the effect of which "may be substantially to lessen competition, or to tend to create a monopoly" but to prohibit all mergers having that effect. By using these terms in § 7 which look not merely to the actual present effect of a merger but instead to its effect upon future competition, Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies.[24]

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[21] *Id*. at 20.

[22] *Id*. at 21 (citing Herbert Hovenkamp, Restraints on Innovation, 29 Cardozo L. Rev. 247, 253-54, 260 (2007)).

[23] Competitive Impact Statement, Comcast Corp. at 21.

[24] United States v. Von's Grocery Co., 384 US 270, 276-77 (1966).

Again, Christine Varney's remarks on these points are instructive. In a speech discussing the competitive and innovative potential of "the Internet, the general convergence of technologies for voice, data, and video services," she noted that "[a]ccess and content will drive the demand for these new technologies," but that "[t]he content will be meaningless if the path is unfairly blocked by anticompetitive activities." She thus noted that policymakers such as the FTC should "ensure that consumers have the benefit of choices created by competition.... by attacking anticompetitive activities in markets, whether they take the form of anticompetitive mergers, or practices which lead to anticompetitive results."[25]

Of course, applying these principles to a given merger is a highly fact-specific inquiry. But here, an initial factual analysis indicates that many innovative markets would be affected by AT&T's acquisition of Time Warner and its programming—in particular, the market for the online delivery of video programming, particularly in forms like DirecTV Now that are directly competitive with traditional MVPD offerings. AT&T is a new entrant in the online video space and it has put forward quite a powerful offering that could win consumers from existing services like Sling TV or even persuade cable TV customers to "cut the cord." The benefits of winning this market could far exceed the costs of withholding or restricting Time Warner programming. At the same time, because the market is still young, AT&T's actions could not only unfairly disadvantage existing competitors but also create new barriers to entry that prevent new competitive alternatives from emerging—and all at little cost to AT&T. As the DOJ explained, "Nascent competitors may be relatively easy to quash. For example, denying an important input, such as a popular television show, to a nascent competitor with a small customer base is much less costly in terms of foregone revenues than denying that same show to a more established rival with a larger customer base."[26] Magnifying these harms, AT&T *also* has the ability, as an internet service provider, to harm its rivals in other ways.

Allowing a single firm to have such strong incentives and capabilities to restrain competition in an emerging market could cause significant consumer harm. The consumer benefits of online video do not just arise from a more modern distribution method that allows a provider to offer a nationwide service without first building out a nationwide last-mile infrastructure, or to watch programming on mobile phones and other general purpose devices. Benefits also arise from a market structure that is inherently more competitive than the legacy MVPD model. Policymakers should enable this competition to develop unfettered instead of allowing a single firm to restrict it.

AT&T would be able to use commercial information to harm competitors

It is also widely recognized that vertical mergers can create anticompetitive effects and harm consumers by giving the newly merged firm access to new kinds of information. For instance, Steven C. Salop and Daniel P. Culley write that "[a] vertical merger can lead to information transfers from rivals to the merging firm that might be misused strategically by the downstream division of the merged firm to preempt and thereby deter procompetitive actions by

[25] Christine A. Varney, Commissioner, Fed. Trade Comm'n, Remarks at the 1994 Conference on Business and Economic Policies, The Manufacturers Alliance (Dec. 1, 1994).

[26] Competitive Impact Statement, Comcast Corp. at 21.

non-merging firms," and that a "merger could provide the downstream division of the merged firm with access to sensitive competitive information of its competitors from the upstream division of the merged firm, which the downstream firm can use to more rapidly respond to or even preempt competitive moves by these competitors…."[27]

These effects appear likely in this merger. By acquiring Time Warner, AT&T will be able to use information it gains from Time Warner's operations to benefit its video distribution service. Additionally, AT&T would be able to use the information it gains from its distribution and access services to benefit Time Warner programming over competing programming. For instance, AT&T would know how much it pays, and the terms of carriage of other programmers on its video distribution service. It could use this information strategically in determining the terms and price under which it makes Time Warner programming available to other distributors, which could aid a strategy of using Time Warner programming to raise the costs of its distribution rivals, or allow it to benefit Time Warner programming over that of programming rivals.

Additionally, post-merger information exchanges can make collusion with other firms easier. Analyzing another vertical merger (GrafTech/Seadrift), the DOJ noted that "[t]he ability of a vendor to verify current commercial terms granted by a competitor could facilitate a tacit understanding on price or output and provide a means to detect cheating on such an understanding, increasing the likelihood of coordination. Accordingly, as the merger would remove a significant barrier to collusion, it likely would lead to anticompetitive effects."[28] A similar situation could obtain here, where the information AT&T would gain access to by acquiring Time Warner would make it easier for it to collude with programmer and distribution rivals to raise prices or otherwise harm consumers on an industry-wide basis. In this context, it is relevant that the DOJ is currently in litigation with AT&T over a collusion scheme in the video marketplace,[29] making similar harms post-merger more likely.

Finally, this merger would affect AT&T's incentive to use other information—the amount it "pays itself" to zero-rate its own video services on its access networks—in strategic ways to harm competition. AT&T has argued to the FCC that it is permitted to zero-rate its own video services, citing "decades of authority entitling telecommunications carriers to provide inputs to their affiliated entities so long as they offer to sell the same inputs to unaffiliated entities on nondiscriminatory terms—as AT&T does here."[30] It also argues that it is permitted to "charge any unaffiliated edge provider the same nondiscriminatory rates that it charges its

[27] Steven C. Salop & Daniel P. Cully, *Potential Competitive Effects of Vertical Mergers: A How-To Guide for Practitioners*, GEO.L. SCHOLARLY COMMONS, at 14, 22 (2014), http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2404&context=facpub.

[28] Competitive Impact Statement at 2, United States v. Graf'Tech International Ltd., Case: 1:10-cv-02039 (2010).

[29] Justice Department Sues DIRECTV for Orchestrating Information Sharing Agreements with Three Competitors, Press Release, Department of Justice (Nov. 2, 2016), https://www.justice.gov/opa/pr/justice-department-sues-directv-orchestrating-information-sharing-agreements-three

[30] Robert W. Quinn Jr., AT&T, Legal Analysis to FCC, at 2 (Nov. 21, 2016), https://cdn.arstechnica.net/wp-content/uploads/2016/11/White-paper-on-sponsored-data-Mon-PM.pdf.

affiliates for use of the same telecommunications inputs."[31] However, the question of how much AT&T charges its affiliates is entirely an accounting matter internal to AT&T, and it has the ability to manipulate that figure, with the result that it can make zero-rating available to third parties under terms that are purportedly "nondiscriminatory" but in reality uneconomic. As discussed earlier, since acquiring Time Warner would cause AT&T to internalize more of the benefit it would gain from zero-rating services such as DirecTV Now, this merger would increase AT&T's incentive to use its commercial information in anticompetitive ways such as these.

Consolidation is not the solution to consolidation

A chief argument in favor of media consolidation in recent years has been that companies need to merge in order to counter other media giants—for instance, Comcast/NBCUniversal. However, this argument is flawed in several respects. First, of course, at some point the government must take steps to promote competition and put a stop to a consolidation arms race, which can lead only to a marketplace with fewer choices and higher prices for consumers. Perhaps it should have done so already—but now is a good time to start. After all, as the Supreme Court has noted, "where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever-increasing concentration through mergers."[32]

Additionally, even if this merger would permit AT&T to counter Comcast in some way, the benefits of this, such as they are, would be limited and outweighed by other competitive harms. First, head-to-head competition between AT&T and Comcast for video customers would be limited to Comcast's current geographic footprint. Furthermore, even assuming that potential retaliation from Comcast (from whom AT&T must purchase programming, and whose last-mile infrastructure it must use to reach many customers) would prevent AT&T from behaving anticompetitively toward Comcast (and vice versa), a market with two vertically-integrated programming/access/distribution giants at equipoise with each other is no model of competitive health.

Making matters worse, this state of affairs makes collusion, or at least parallelism of some kind, all the more likely. Collusion between these two large industry players could simultaneously harm competition in the access, programming, and video distribution markets, increasing the incentive for such behavior. The risk of this collusion outweighs the purported benefits of further concentration.

Finally, it is true that the Comcast/NBCUniversal consent decree expires shortly. However, the response to this by antitrust authorities should not be to allow new mergers as some sort of counterweight. Rather, they should re-open and extend that decree if the competitive harms it seeks to alleviate would still be likely to occur in its absence.

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[31] *Id.* at 7 (emphasis added).
[32] United States v. Von's Grocery Co., 384 US 270, 277 (1966).

This merger could cause other harms, as well

This testimony is not intended to be exhaustive because a merger of the scale and scope of AT&T/Time Warner raises competition and public interest issues in many areas. For example, through its control of distribution infrastructure (both its access services and its online video services), AT&T will have a comprehensive window into consumer internet use and viewing behavior. It will be able to use this data to target advertisements to customers more effectively and to track them across different devices and networks. This not only gives it an advantage over non-vertically integrated programmers, distributors, and advertising platforms, but could also violate customers' privacy expectations—just as the FCC's privacy rules are in danger of being rolled back. Both the effects on the advertising market and the effects on consumer privacy merit consideration by policymakers.

Behavioral remedies are an uncertain tool to remedy competitive harms

Public Knowledge believes that this merger should be blocked if the authorities determine that is the only way to prevent the likely harms to consumers that would result from this latest in a long series of media mergers. Short of outright blocking a merger, there are limited ways to try to alleviate the competitive and public interest harms the merger could cause. The remedies "take two basic forms: one addresses the structure of the market, the other the conduct of the merged firm. Structural remedies generally will involve the sale of physical assets by the merging firms."[33] But as the DOJ explains, allowing anticompetitive mergers to go through and subjecting them only to behavioral conditions is fraught with peril:

> Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market.... A conduct remedy, on the other hand, typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent.

The DOJ continues,

> Conduct remedies suffer from at least four potentially substantial costs that a structural remedy can in principle avoid. First, there are the direct costs associated with monitoring the merged firm's activities and ensuring adherence to the decree. Second, there are the indirect costs associated with efforts by the merged firm to evade the remedy's "spirit" while not violating its letter....Third, a conduct remedy may restrain potentially procompetitive behavior....Fourth, even where "effective," efforts to regulate a firm's future conduct may prevent it from responding efficiently to changing market conditions. For all of these reasons, structural merger remedies are strongly preferred to conduct remedies.[34]

There do not appear to be any structural remedies that could eliminate the harms this merger would create, since requiring AT&T to "spin off" Time Warner programming would simply amount to blocking the deal. This is the course the DOJ should take unless it can be certain that

[33] Department of Justice, Antitrust Division Policy Guide to Merger Remedies, at 7 (2004).
[34] *Id.* at 8.

simple, clear, and enforceable conduct remedies would eliminate all of the harms this deal would create. As recent experience with the Comcast/NBCU deal demonstrates, this may be a difficult task.

The conduct remedies the DOJ imposed on Comcast were designed to remedy the anticompetitive harms its acquisition of NBCUniversal would create. While these conditions, and the attendant scrutiny of Comcast's business practices that accompanied them, may have induced Comcast to behave less anticompetitively than it otherwise would have, its record with certain of those conditions demonstrates that ensuring compliance can be difficult[35]—and that for some parties, the conditions fell well short of expectations.[36] What's more, the one of the things that any conditions would likely seek to address—program carriage agreements—contain highly confidential information, and can vary from one distributor to another, and one programmer to another. It is difficult for an outside agency to ensure compliance with conditions in this context.

Finally, whatever the efficacy of conditions may be, the fact remains that they are time-limited remedies for marketplace problems that may have no expiration date. For instance, the Comcast/NBCUniversal conditions will expire in 2018, but Comcast's ability to leverage its programming, cable, and broadband activities to restrain competition are as real today as ever and should be revisited before they expire.

Thus, the DOJ should err on the side of consumers and innovation and, if necessary to protect competition, block this deal. The costs of getting this wrong are simply too great.

Conclusion

For these reasons, I urge the members of this Committee to support a careful review of this merger by the expert agencies, and to encourage them to block or challenge it if that is the best way to protect competition.

[35] Petition to Deny of Public Knowledge and Open Technology Institute at 56, In the Matter of Comcast Corp., MB Docket No. 14-57 (2014).

[36] *Id.* at 57.