Testimony of Gene Kimmelman
President and CEO
Public Knowledge

Before the
U.S. Senate
Committee on the Commerce, Science, and Transportation

Hearing On:
At a Tipping Point: Consumer Choice, Consolidation and the Future Video Marketplace

Washington, DC
July 16, 2014

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After years of suffering from enormous rate increases and poor service from incumbent cable providers,[2] a vibrant broadband economy is just beginning to show that there can be alternatives to subscription television.[3] Everything from new devices -- like Roku, Xbox, Amazon's Fire, and AppleTV -- to new video services -- like Amazon Prime, YouTube, Netflix, and Aereo -- are demonstrating that online video can compete with some elements of traditional cable TV.

These new competitors may begin to help consumers avoid overpriced large "tiers" or bundles of channels, many of which force customers to purchase access to channels

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[1] Public Knowledge is a public interest nonprofit dedicated to the openness of the Internet and open access for consumers to lawful content and innovative technology. Public Knowledge has a long history of opposing mergers and other transactions that reduce choice and competition in the telecommunications sphere, including those between Comcast and NBCU-Universal, AT&T and T-Mobile, and Verizon and SpectrumCo.

[2] *See* Free Press, *Comcast Gets Bigger, You Get Poorer*, http://www.freepress.net/sites/default/files/resources/Free_%20Press_Comcast-TWC%20Infographic_Video_Price_Hikes_0.pdf; *see also* Bureau of Labor Statistics, Consumer Price Index.

[3] While some consumers have the option to choose between cable and satellite providers, very few have viable options if they wish to bundle both television and broadband services. At one time, wireline telecommunications companies appeared to be a potential competitor in the combined subscription TV and broadband space, but both Verizon's FiOS and AT&T's U-Verse are currently offered in a relatively small geographic area. Even if AT&T and DirecTV merged, the combined entity would gain only a marginally improved ability to compete with Comcast due to substantial labor and equipment costs related to installing new customer equipment of combined services. Satellite continues to lack a meaningful broadband option to make it a competitor to cable broadband. Google has only committed to a limited number of small experiments. Finally, mobile broadband is a complement, not a substitute.

they do not want simply to access the channels they do want.

But while online video and connected devices are a success story, their competitive effect is still somewhat limited. At the moment, they are not driving down cable prices because anti-competitive practices and outdated policies have relegated them to being a supplement to cable and satellite, not a replacement. Incumbent providers control both the content and the infrastructure that new competitors need to provide service to viewers. Incumbents either control video content outright or are able to use most-favored nation (MFN) contracts to limit the independent content that can appear on online services. Online video is often tied to a cable subscription—for instance, it's impossible to pay HBO directly for an HBO Go subscription; viewers must first pay for an entire pay TV package before adding HBO. Incumbents can use data caps and, possibly, interconnection deals to disadvantage online video as a whole. Incumbents even control the devices people can use with their TVs—for example, by only supporting their proprietary set-top boxes, or by failing to "authenticate" certain applications on third-party devices.[4]

New video services and their investors are also carefully watching the national policy debate over maintaining strong rules to protect an open Internet, which they need to thrive. A new wave of broadband and media company mergers threatens to further limit the few choices consumers have to access the Internet, while giving just a handful of companies gatekeeper power over content, infrastructure, and devices. In a world of limited access choices, strong open Internet rules become dramatically more important to protect the ongoing virtuous cycle of investment and growth of Internet Protocol based networks.

The current structure and dynamics of the video marketplace didn't happen on their own. They are the result of decades of legislative and regulatory policy choices. In order for the marketplace to realize the potential for competition from online video both the Congress and regulatory agencies must act. Public Knowledge has supported (in whole or part) various proposals for video reform including aspects of former Senator DeMint's Next Generation Television Marketplace Act in 2011 and Senator Rockefeller's Consumer Choice in Online Video Act at the end of last year. We are also encouraged

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[4] Certain online video (e.g., "TV Everywhere") is only available to customers of traditional pay TV providers. This alone makes it a supplement to, rather than competitor to, pay TV. Compounding this, it is only available through apps that the customer's pay TV provider has specifically white-listed, or "authenticated." This means, for example, a customer of one pay TV provider might be able to watch online video on an Apple TV and a web browser but not a Roku or a game console. It might be the opposite for customers of another pay TV provider. This is not a technological limitation; it is solely in a pay TV provider's discretion to allow or not allow its customers to use particular devices for particular content. This has competitive implications.

by the bipartisan approach that Senators Rockefeller and Thune have taken to approaching video reform issues by jointly asking for public comment from stakeholders. It is through the hard work of policy making that we can provide online video creators, investors, and consumers with the certainty needed to build greater competition.

The Dangerous Wave of Consolidation

The current proposed Comcast-Time Warner Cable merger and the AT&T-DirecTV merger have placed the issue of the future of the video marketplace squarely in front of the Federal Communications Commission (FCC) and the Department of Justice (DOJ). American consumers are watching as these merger proposals foreshadow even greater mergers and consolidation to come, in order for the few existing broadband and video distributors to match the market power these mergers represent.

Public Knowledge believes the proposed acquisition of Time Warner Cable, the nation's second largest cable company, by Comcast, the nation's largest cable company and owner of all NBCU content, will threaten the viability of nascent competitors and endanger the emergence of innovative new video and other types of services delivered over the Internet. The proposed transaction is inconsistent with antitrust policy, the goals of the Communications Act, and the broader public interest. Therefore, it should not be approved.[5]

As a result of the merger, Comcast will control nearly 50 percent of high speed Internet access in this country, over 30 percent of Multi-Channel Video Programming Distributor (MVPD) subscribers and almost 60 percent of cable subscribers.[6] Comcast will also have a significant presence in 16 out of 20 of the largest DMAs in the country.[7] This unprecedented accumulation of market power, combined with Comcast's vertical integration into content, creates the incentive and enormous leverage for Comcast to:

> (1) stifle slowly emerging competition from rivals such as Netflix and Amazon that require high speed Internet access to deliver quality service to their customers,

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[5] Public Knowledge testified in fuller detail on the specific statistics and market concerns around the Comcast-Time Warner Cable merger in a hearing specifically on that merger before the Senate Judiciary Committee, April 9, 2014.

[6] Mark Cooper, *Buyer and Bottleneck Market Power Make the Comcast-Time Warner Merger "Unapprovable"*, Consumer Federation of America, at 6 (Apr. 2014), *available at* http://www.consumerfed.org/pdfs/CFA-Comcast-TW-Merger-Analysis.pdf.

[7] Filing by Comcast Corporation, SEC File No. 001-32871, at 5 (Feb. 13, 2014), *available at* http://www.sec.gov/Archives/edgar/data/1166691/000095010314001082/dp44005_425-it.htm ("Comcast SEC Filing").

thwarting not only competition from existing rivals but discouraging investment in new innovative services delivered over the Internet;

(2) slow the pace and dictate the direction of equipment, device, and service innovation to lock in maximum revenue for Comcast's own infrastructure and business model;

(3) pay content suppliers less than the market value of their products and services, driving up the cost of programming to other distributors and increasing prices to consumers;

(4) artificially raise the prices of Comcast-owned programming to Comcast rivals hampering their ability to compete and raising prices to consumers; and

(5) position itself as the dominant gatekeeper for all new services (both video and non-video) that rely on fast, reliable broadband connections to reach customers.

The Department of Justice (DOJ) recognized the competitive dangers inherent in Comcast's vertical integration into content with its merger with NBC-Universal:

> Comcast has an incentive to encumber, through its control of the [Joint Venture], the development of nascent distribution technologies and the business models that underlie them by denying OVDs access to NBCU content or substantially increasing the cost of obtaining such content. As a result, Comcast will face less competitive pressure to innovate, and the future evolution of OVDs will likely be muted. Comcast's incentives and ability to raise the cost of or deny NBCU programming to its distribution rivals, especially OVDs, will lessen competition in video programming distribution.[8]

That transaction proceeded after Comcast committed not to unfairly discriminate against either traditional video distributors or emerging online competitors. The proposed merger of Comcast and Time Warner Cable, however, presents competitive dangers that far exceed traditional regulatory policing practices. As new threats arise to Comcast's business interests, it has at its disposal myriad ways of slowing down its competitors, degrading their services, and increasing their costs in ways that cannot be effectively monitored and prevented.

[8] *United States v. Comcast*, Case No. 11-cv-00106, Compl. at ¶ 54 (D.D.C. Jan 18, 2011), *available at* http://www.justice.gov/atr/cases/f266100/266164.htm.

By expanding its customer base to control almost one-third of all subscription TV households in the country and almost one-half of all the high speed broadband customers in the U.S., Comcast would position itself to dictate how much consumers must pay, determine what packages of services customers must buy, and influence what devices people can use to receive the type of video content they want. Through vertical control of NBCU's "must have programming" and its enormous customer base, a combined Comcast-Time Warner Cable could become the dominant Internet gatekeeper and choke point for innovative video services and products, inflating prices and preventing millions of consumers from receiving these services and products at competitive market prices.[9]

While the Comcast-Time Warner Cable merger is the more dangerous of the two mergers, AT&T-DirecTV raises concerns as well. AT&T and DirecTV claim their proposed merger may in a limited fashion enhance the combined company's ability to compete with Comcast and Time Warner (or Comcast/Time Warner) in the market for video, broadband, and voice bundles. Yet thus far, AT&T and DirecTV have failed to make a compelling case that their proposal will not harm competition or that it will result in significant public interest benefits.[10] Public Knowledge therefore, based on the current record, recommends that the DOJ and FCC reject this proposed transaction.

Congress Has The Power To Promote Competition

Congress and the American public faced a marketplace challenge over two decades ago when satellite television became a viable competitor. The technology was there, but the existing regulations did not allow for new entrants to compete with local cable monopolies. The 1992 Cable Act opened up the market for satellite to compete by ensuring access to "must see" programming at a reasonable rate. The benefits are evident today with Dish and DirecTV attracting about 34 million subscribers.

This moment in time is similar to what we faced in 1992, but with greater potential for true competition. Congress and the FCC can help online video develop into a full competitor in three ways. First, Congress can clear away some of the outdated rules that slow down the evolution of the video marketplace. Examples of outdated rules include the dysfunctional retransmission consent system, as well as protectionist policies like the prohibition on distant signal importation.

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[9] *See* Cooper, *supra* note 4, at 6 (HHI analysis showing Comcast-Time Warner Cable firm share of True Broadband at 49 percent, Wireline Cable of 54 percent, and MVPD of 35 percent).

[10] Testimony of John Bergmayer, Public Knowledge, U.S. House of Representatives Committee on the Judiciary, June 24, 2014.

Congress should be cautious not to eliminate parts of statute that promote competition and choice. For example, section 629 of the Communications Act allows for the FCC to enforce rules that create innovation in set-top boxes and competition against high priced cable boxes. Congress and the FCC should continue to enforce the current CableCARD implementation of that statute while moving to a more modern implementation that fixes some of CableCARD's shortcomings.

Second, Congress can extend the successful policies that protect providers from anticompetitive conduct to certain online providers. For example, if a large cable system would be prohibited by law from acting anti-competitively towards a satellite provider, there is no reason why it should be able to take the same actions against an online video provider. We are pleased to see a section of Senator Rockefeller's Consumer Choice in Online Video Act devoted to updating the program access rules in order to include protections for online video as a competitor to traditional Multichannel Video Programming Distributors (MVPD). This includes the requirement that television broadcasters negotiate with online video distributors.

Measures such as program access and program carriage rules are designed to mitigate this form of market power by certain large video providers. These rules should be extended to online video and should not be repealed until effective competition develops. In light of the Supreme Court's *Aereo* decision, which found that an online video system such as Aereo bears an "overwhelming likeness" to traditional cable systems, it has become increasingly untenable to afford online systems that offer linear channels an entirely different regulatory treatment from traditional pay TV providers. However, Senator Rockefeller's bill provides an alternative and simpler approach to new technologies such like Aereo. This approach recognizes the obvious differences between cable systems and antenna rental services, legally clearing the way for the new distribution model to flourish.

Third, Congress and the FCC can protect Internet openness and prevent discriminatory billing practices that hold back online video. In addition to supporting the FCC in preserving Open Internet rules, Congress should encourage the FCC to examine whether discriminatory data caps hold back online video competition. This will increase competition, meaning lower prices, better services, and more flexibility and control for consumers.

Conclusion

The technology exists that could eliminate the physical, bottleneck control of video distribution that has existed in various forms for decades. If policymakers have the courage to reject anti-competitive merges, and take some simple steps to facilitate the development of competitive online video now, Congress may eventually be able to disengage from regulations that were designed to counter the effects of this bottleneck control. However, if we fail to do this, it is likely that incumbents will be able to continue to shape the development of the video market and extend their current dominance indefinitely. While the Internet provides grounds for hope that the future of video will be better for consumers, policymakers have to make the policy choices to create this reality.