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Half a Loaf Is Not Enough: The DOJ's Approval of a Cable Cartel Will Harm Consumers

David Balto (Law Offices of David A. Balto) · Tuesday, August 28th, 2012

Recently the DOJ announced its approval, with conditions, of the complex set of commercial agreements entered into by a cadre of cable companies (Comcast, Time Warner Cable, Bright House Networks, and Cox Communications) and Verizon Wireless, 55 percent of which is owned by the cadre's competitor Verizon Communications. While some may try to portray the DOJ's decision as some sort of continuation in vigorous antitrust enforcement, nothing could be further from the truth. The reality is that the modest concessions made by the parties is nothing more than garnishment on a series of deals that eliminates competition in many critical video and broadband markets, facilitates collusion by companies with a history of predatory and anti-consumer practices, and implicitly accepts the monopolization of access to high-speed information and media services.

What has been presented to the world as a complex transaction to create unique synergies is really nothing more than a cartel in disguise. The facts are straightforward. Verizon's FiOS is the major rival to incumbent cable systems in many areas and where they compete consumers benefit from significantly lower prices, faster speeds, and greater innovation. Verizon and the cable companies knew any merger would be DOA at DOJ so they proposed a complex arrangement that had the same effect of cutting off competition. Without this deal Verizon would continue to expand its market and spur competition. Now it has agreed to lower its sword and enter into a sweetheart deal where in return it acquired spectrum at a bargain basement price. It is no surprise that this transaction spurred comments from nearly 50 members of Congress and countless local officials and consumer advocates.

The DOJ's modest settlement is disappointing on two levels. First, although the DOJ recognized the critical importance of competition it only took action where FiOS either already exists or Verizon has legally binding agreements to build, effectively abandoning consumers in the Verizon wireline footprint who would have benefited from the continued competition as FiOS expanded to compete with the cable companies. Perhaps the DOJ accepted at face value Verizon's 2009 claims that it did not intend to further deploy FiOS. The DOJ ignores the obvious when it listens to these self-serving declarations: FiOS is a profitable endeavor, and one that Verizon would likely pursue if not for these deals. However, strategic redlining by Verizon as it has expanded FiOS has left many particularly susceptible locations without this important alternative. Millions of consumers in Albany, Baltimore, Boston, Buffalo, Syracuse, and Wilmington will likely never know the benefits of competition because the DOJ action fell short of addressing the harm to competition.

Second, even where the DOJ attempted to take a stand and preserve FiOS where is already exists, its actions may fail because of the numerous and extensive loopholes and carve-outs contained in the proposed final order. The DOJ restricts Verizon Wireless marketing Cable companies' products to consumers in the FiOS footprint, but allows the party to do so if it is part of a "national or regional" campaign. Verizon Wireless may not sell any Cable Service to an address in the FiOS footprint or through a Verizon Wireless store in the FiOS footprint, but Verizon Wireless may service, distribute, support, and provide information about the availability of Cable Services in these locations. The DOJ restricts Verizon entities and cable companies from entering into future contracts, or encouraging or facilitating understanding relating to price, terms, availability, or expansion, but they permitted loopholes that swallowed the restriction: It permits further collaboration and agreements in the ordinary course of business for the commercial agreements, for video programming content, concerning any interconnection agreement, or concerning any agreement "with broad-based industry technology development consortia or standards setting organizations."

At the end of the day consumers must wonder. The cable companies are among the most disliked businesses in the country because of the rapidly increasing costs and often poor service. Consumers Union reports that 44 percent of consumers are highly satisfied with their cable TV providers, 55 percent with phone providers, and 45 percent with ISPs. This is in comparison to a median percent highly satisfied of 70 percent across all consumer products. Now the best hope for competition to improve this already deteriorating service has been extinguished.

The FCC had the opportunity to protect consumers by requiring more effective conditions, closing the loopholes created by the DOJ's inconsistent proposed final judgment, and imposing FiOS build-out conditions. However I fear that these regulators too will fail to truly consider the impact this merger in sheep's clothing will have on consumers and the economy as a whole.

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This post originally appeared on the Huffington Post.

This entry was posted on Tuesday, August 28th, 2012 at 7:29 pm and is filed under U.S. Department of Justice
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