Class 22

12. Vertical Mergers

Professor Dale Collins
Merger Antitrust Law
Georgetown University Law Center

November 10, 2026

Efficiencies in vertical mergers

- EDM: The clock example before the merger



Firm	Profit per month
Manufacturer	$12 × 300 = $3,600
Retailer	$6 × 300 = $1,800
Combined	**$5,400**

Two markups. The manufacturer adds $12 to its cost; the retailer then adds its own $6 on top of a cost that already includes the $12.

The question. What happens when the manufacturer buys the retailer?

Efficiencies in vertical mergers

- EDM: The merger removes the $12 markup

Retailer's cost: $8 + $4 = $12 (was $24)

Best price: $30 − ($12 ÷ 2) = $24 (half the cost cut is passed on)

Clocks sold: 300 + (50 × $6) = 600

	Before	After
Retailer's cost per clock	$24	$12
Retail price	$30	$24
Clocks sold per month	300	600
Combined profit per month	**$5,400**	**$7,200**

After: ($24 − $12) × 600 = $7,200

Efficiencies in vertical mergers

- EDM: Why $24?

Price	Clocks sold	Margin (price − $12)	Profit
$30	300	$18	$5,400
$28	400	$16	$6,400
$26	500	$14	$7,000
$24	**600**	**$12**	**$7,200**
$22	700	$10	$7,000

$26 → $24: +100 clocks × $12 = +$1,200; −$2 × 500 = −$1,000. Profit **+$200**.

$24 → $22: +100 clocks × $10 = +$1,000; −$2 × 600 = −$1,200. Profit **−$200**.

Each cut adds 100 clocks but lowers the price on the clocks already selling.

Efficiencies in vertical mergers

- EDM: Who gains

Per month	Merged firm	Customers	Total
300 existing clocks	−$1,800	+$1,800	$0
300 added clocks	+$3,600	+$900	+$4,500
Total	**+$1,800**	**+$2,700**	**+$4,500**

Existing clocks: the $6 price cut moves $6 × 300 = $1,800 from the firm to customers.

Added clocks: the firm earns $12 × 300 = $3,600; new buyers would pay $24 to $30, so each gains $3 on average ($900).

The real gain comes from the added clocks: buyers value them at more than the $12 they cost.

Efficiencies in vertical mergers

- Cannibalization: The cost the firm prices on

Suppose **half** the added clocks would otherwise be bought from rival retailers that pay the manufacturer $20. Each of those sales costs the manufacturer its $12 margin.

Cost the firm prices on: $8 + $4 + (50% × $12) = $18

Best price: $30 − ($24 − $18) ÷ 2 = $27

Clocks sold: 300 + 50 × $3 = 450 (150 added; 75 cannibalized)

	No cannibalization	50% cannibalized
Cost the firm prices on	$12	$18
Retail price	$24	$27
Clocks sold per month	600	450
Added clocks (cannibalized)	300 (0)	150 (75)

Efficiencies in vertical mergers

- Cannibalization: Why $27, and who gains

Price	Clocks	Retail division (price − $12) × clocks	Lost on rivals $12 × cannibalized	Combined
$28	400	$6,400	−$600	$5,800
$27	**450**	**$6,750**	**−$900**	**$5,850**
$26	500	$7,000	−$1,200	$5,800
$24	600	$7,200	−$1,800	$5,400

Each $1 cut: added clocks × margin − cannibalized × $12 − $1 on clocks already selling
$28 → $27: +50 × $15 − 25 × $12 − 400 × $1 = **+$50**
$27 → $26: +50 × $14 − 25 × $12 − 450 × $1 = **−$50**

Who gains: the firm +$450 a month; customers +$1,125 ($3 × 300 existing = $900, plus $1.50 × 150 new = $225).

Ignore cannibalization and price at $24: combined profit $5,400, so no gain.

Efficiencies in vertical mergers

- EDM: Cannibalization from 0% to 100%

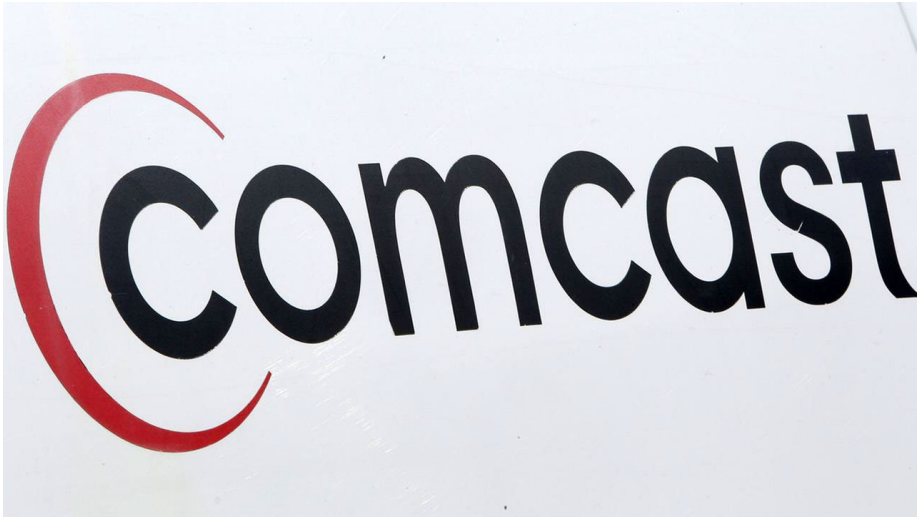
Cannibalization	Retail price	Firm's gain	Savings to existing customers
0%	$24.00	+$1,800	$1,800
25%	$25.50	+$1,012.50	$1,350
50%	**$27.00**	**+$450**	**$900**
75%	$28.50	+$112.50	$450
100%	$30.00	$0	$0

The price cut and customer savings shrink in proportion as cannibalization rises.

The firm's gain shrinks faster: at 50%, it is one-quarter of $1,800.

At 100%, the lost margin offsets the removed markup: no EDM.

Comcast/NBCUniversal





Comcast/NBCUniversal

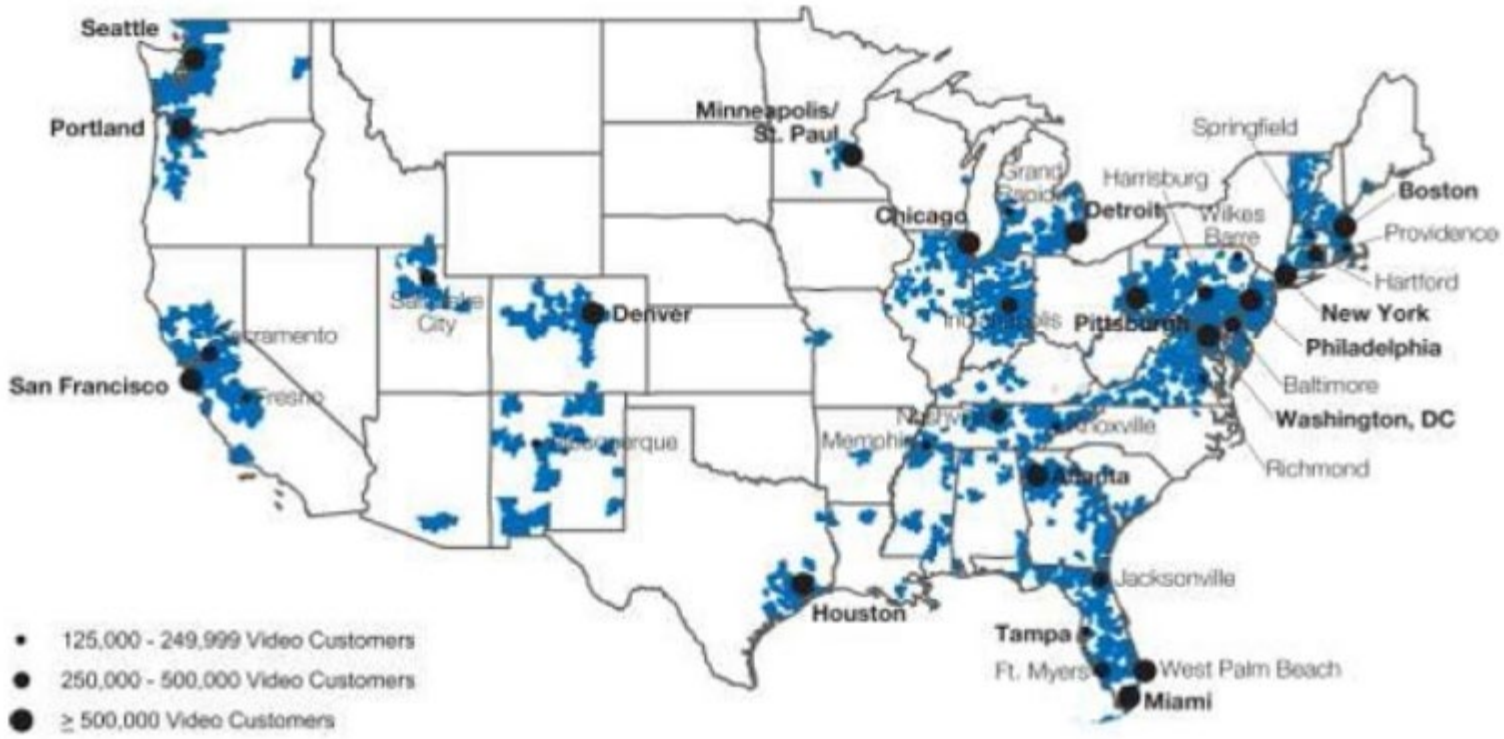
- The deal
  - Announced December 3, 2009
  - GE and Comcast would create a new joint venture containing NBC Universal and specified Comcast programming and digital assets
  - Comcast would own 51% and control the venture; GE would retain 49%
  - Transaction closed January 28, 2011

Comcast/NBCUniversal

- Comcast—leading U.S. cable distributor
  - Provided subscription television, high-speed Internet, and telephone service to residential and business customers
  - Served approximately—
    - 23.6 million video
    - 15.9 million Internet
    - 7.6 million telephone customers
  - Cable operations generated roughly 95% of company revenue
  - Also owned programming assets—including E!, Golf Channel, VERSUS, G4, Style, and regional sports networks—plus digital businesses such as Fandango and DailyCandy

Comcast/NBCUniversal

- Comcast cable service areas (2014)
  - Illustrates its geographic footprint

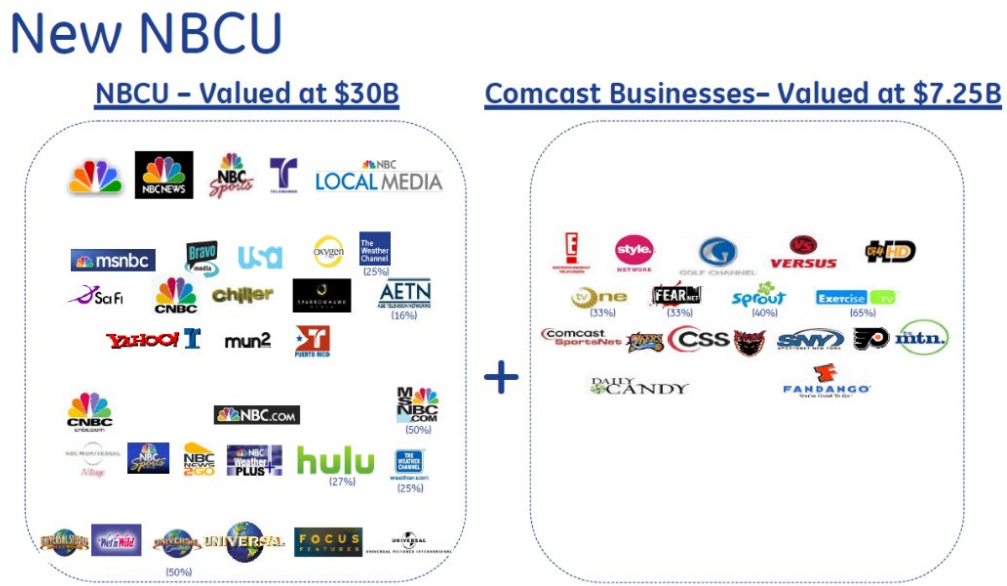


Comcast/NBCUniversal

- NBC Universal—major producer and supplier of media content
  - Controlled by General Electric at the time
  - Television
    - Operated the NBC and Telemundo broadcast networks
    - Owned local television stations
    - Produced television programming
  - Cable networks: Owned leading cable networks, including—
    - USA Network
    - Syfy
    - Bravo
    - Oxygen
    - CNBC
    - MSNBC
  - Filmed entertainment and theme parks
    - Produced and distributed films through Universal Pictures
    - Operated or licensed Universal theme parks

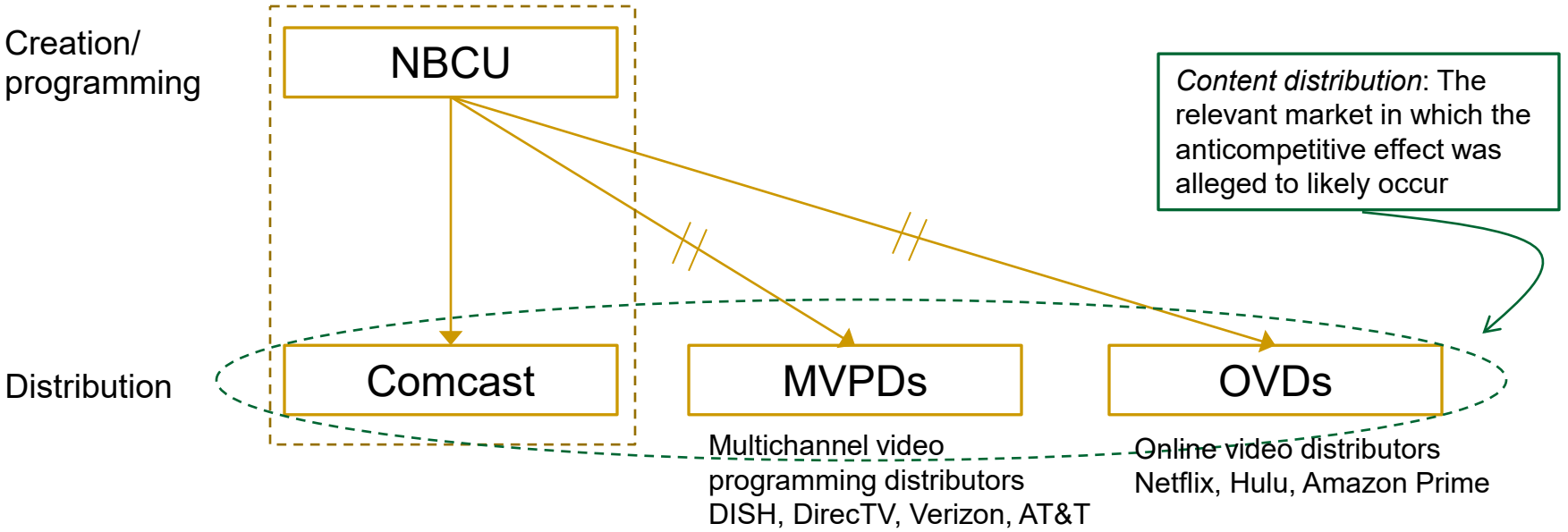
Comcast/NBCUniversal

- Transaction consideration
  - NBCU valued at approximately $30 billion
  - Comcast programming and digital assets valued at $7.25 billion
  - Comcast also paid GE approximately $6.5 billion in cash
  - Comcast's cable systems were not contributed to the joint venture



Comcast would control both its cable-distribution business and the joint venture's expanded programming portfolio

Comcast/NBCUniversal



- Premerger
  - NBCU has an incentive to deal with all content distributors
- Postmerger
  - Combined company has an incentive to withhold (or, more likely, increase the prices of) NBCU content to Comcast distribution competitors in Comcast service areas
    - NBCU-produced essential content
    - Local content produced by NBC's 10 O&O TV stations

"Related products" (in VMG terms)

Comcast/NBCUniversal

- DOJ vertical concerns
  1. JV gives Comcast control over NBCU's video programming
     - Comcast could limit competition with its cable systems by refusing to license (or, more likely, license at higher prices) NBC's essential programming content to—
       - Multichannel Video Programming Distributors (MVPDs),[1] and
       - Online Video Programming Distributors (OVDs)[2]
  2. JV gives Comcast control of NBC's 10 O&O TV stations and their local content
     - Comcast could raise fees for retransmission consent for the NBC O&Os or effectively deny this content to certain video distribution competitors of Comcast cable systems
- DOJ horizontal concern
  3. JV gives Comcast control over NBCU's 32% interest in Hulu[3]
     - Comcast could use its rights to impede Hulu's development as an OVD competitor

[1] Includes cable overbuilders (primarily RCN), direct broadcast satellite services (DirecTV and EchoStar DISH), and telephone companies (e.g., Verizon Fios).
[2] Includes "over the top" (OTT) services delivered over the Internet but not through a cable system set-top box.
[3] Premerger, Hulu was a joint venture among Fox, NBCU, Disney, and Providence Equity Partners.

Comcast/NBCUniversal

- Source of the threatened vertical anticompetitive harm:

The power to refuse to license highly consumer-valued content to programming and distribution rivals for which the rivals have no adequate substitutes

- *Solution*: Eliminate market power otherwise created by the vertical arrangement by providing for—
  - Mandatory licensing of content
  - Arbitration over pricing disputes

Comcast/NBCUniversal

- DOJ consent decree[1]
  1. Traditional competitors
     - Coordinated with the FCC—FCC order requires the JV to license NBCU content to Comcast's cable, satellite, and telephone company competitors
     - Not included in DOJ consent decree as redundant
  2. Online video distributor competitors
     a. Must make available the same package of broadcast and cable channels that JV sells to traditional video programming distributors
     b. Must offer broadcast, cable, and film content similar to, or better than, the distributor receives from JV's programming peers
        - NBC's broadcast competitors: ABC, CBS, Fox
        - Largest cable programmers: News Corp., Time Warner, Viacom, and Walt Disney
        - Largest video production studios: News Corp., Sony, Time Warner, Viacom, Walt Disney
     c. Requires commercial arbitration if parties cannot reach an agreement on license terms
     d. Prevents restrictive licensing practices and retaliation
     e. Prohibits Comcast from unreasonably discriminating in the transmission of an OVD's lawful traffic over Comcast ISP

[1] DOJ action joined by five state attorneys general: California, Florida, Missouri, Texas and Washington.

Comcast/NBCUniversal

- DOJ consent decree
  3. Hulu
     - Requires Comcast to relinquish voting and other governance rights in Hulu
     - Precludes Comcast from receiving confidential or competitively sensitive information about Hulu's operations
     - BUT allowed Comcast to retain NBCU's equity interest in Hulu



AT&T

TimeWarner

The deal

- AT&T to acquire Time Warner for $85.4 billion
  - Announced Saturday, October 22, 2016
  - Valued at $107.50 per share of TWX
    - About 35.7% premium over 10/19 closing price ($79.24)
    - Indicates a $22.2 billion premium over preannouncement market cap
  - Half cash/half stock
    - $53.75 per share in cash
    - AT&T stock valued at $53.75 per share
      - Subject to a collar:
        - 1.437 AT&T shares if below $37.411 at closing
        - 1.3 AT&T shares if above $41.39 at closing
  - TW shareholders will own about 15% of combined company
- Accretive within the first 12 months
- Synergies
  - > $1 billion in annual run rate cost synergies within 3 years of closing



Combined firm

Content Creation/Programming

TimeWarner

2016 revenues: $29.3 billion

HBO

$5.9 billion

- HBO
- HBO Now
- HBO Go
- Cinemax

Turner

$11.4 billion

- CNN
- TBS
- TNT
- Cartoon Network
- Adult Swim
- Bleacher Report
- Turner Sports
- Others

$13.0 billion

- Warner Bros. Pictures
- New Line Cinema
- Warner Bros. Home
- Warner Bros. Television Group
- Warner Bros. Digital Networks
- The CW
- Others

Content Distribution

AT&T

2016 revenues: $163 billion

AT&T

- 2d largest wireless: 138.8 million mobile subscribers
- 3.7 million TV subscribers (U-verse)
- 3d largest broadband: 14.3 million consumer broadband subscribers
- 10.3 million consumer voice subscribers

DIRECTV

- Largest MVPD:
  - 20.6 million satellite TV subscribers
  - 0.8 million IPTV subscribers (DirecTV Now)

Subscriber figures as of 2017 Q3 (U.S. only)

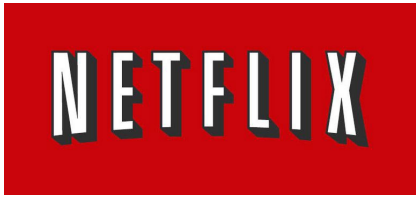
Business rationale

- The AT&T problem
  - Landline business in decline
  - Core wireless business had slowed with market saturation
  - Massive increase in wireless data usage straining network and creating serious public perception problems
- Aborted purchase of T-Mobile in 2011
  - Announced: March 20, 2011
    - $39 billion purchase price in stock and cash
    - Purpose: Relatively inexpensive way to add additional spectrum
  - Terminated: December 10, 2011 in the face of DOJ court action and FCC staff opposition
    - Paid antitrust reverse termination fee of $4.2 billion
- Purchased DirecTV in 2015
  - Nation's second-biggest pay TV provider (behind Comcast)
  - $48.5 billion equity value / $67.1 billion transaction value
    - Deal premium: About 30%
    - Generates about $2.6 billion in free cash flow annually for investment in mobile spectrum/infrastructure
    - Provides nationwide pay-TV footprint for bundles in an increasingly competitive "triple play" world
    - Increases scale when competitors are consolidating (see then-pending Comcast/TWC merger)
    - Cost synergies expected to exceed $1.6 billion annual run rate by year three



Business rationale

- Acquisition of DirecTV creates new problems
  - Created largest pay TV provider but owned little content
  - New content-driven companies causing declining video subscriptions for traditional pay TV business
  - Distribution competitors buying content companies (squeezing available content)
  - TV advertising revenues declining as advertisers increasing shifted to “targeted” advertising on Google, Facebook and other digital platforms



















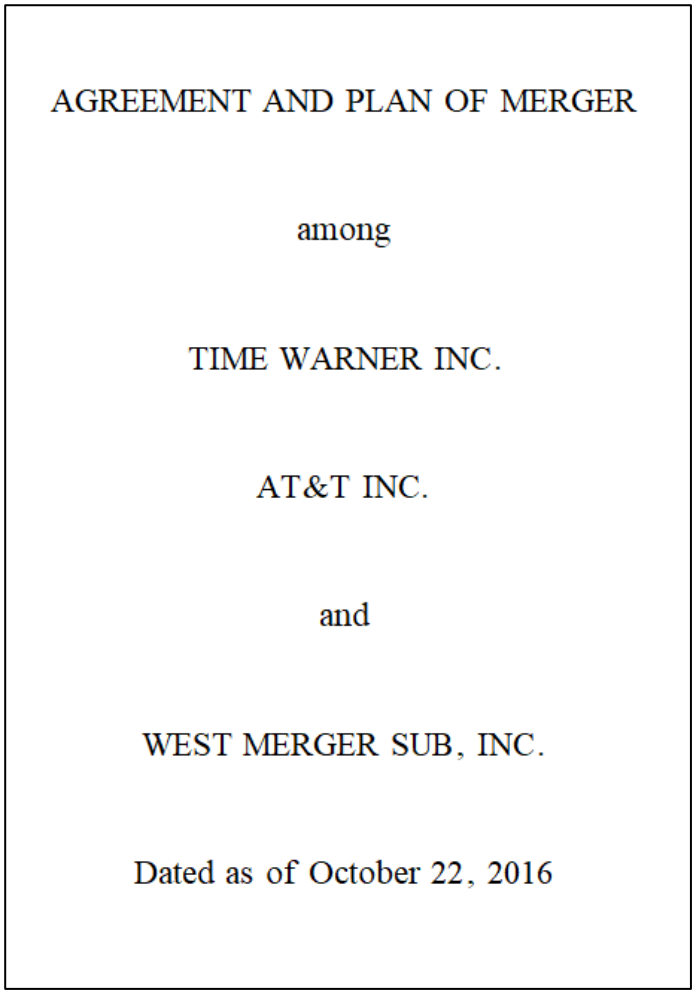


Deal rationale

- Solution: Buy Time Warner
  - Time Warner could provide AT&T with—
    - The Time Warner content libraries
    - Major networks (including TBS, TNT, CNN, HBO)
    - New and innovative content through Warner Bros.
    - The ability to experiment with and develop innovative video content
  - AT&T could provide Time Warner with—
    - Access to customer relationships
    - Valuable data about the consumers of its programming enabling more "targeted" advertising
  - Combined company could create sweeteners for AT&T's broadband, cable, and wireless bundles
    - E.g., discounted or free HBO
  - Combined company could use TW's annual net income of almost $4 billion and expected annual run-rate synergies of $1 billion to help—
    - Finance further investments in spectrum and infrastructure, *and*
    - Maintain AT&T's shareholder dividend



The AT&T/Time Warner purchase agreement



AGREEMENT AND PLAN OF MERGER

among

TIME WARNER INC.

AT&T INC.

and

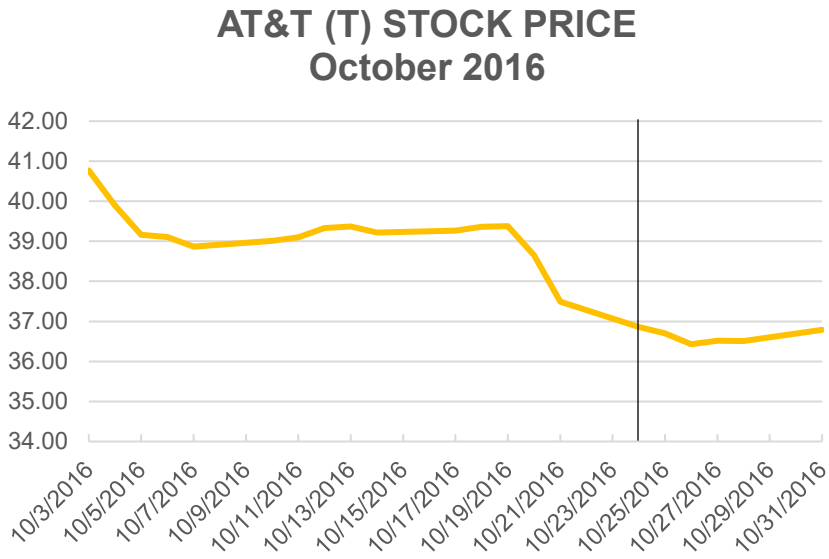
WEST MERGER SUB, INC.

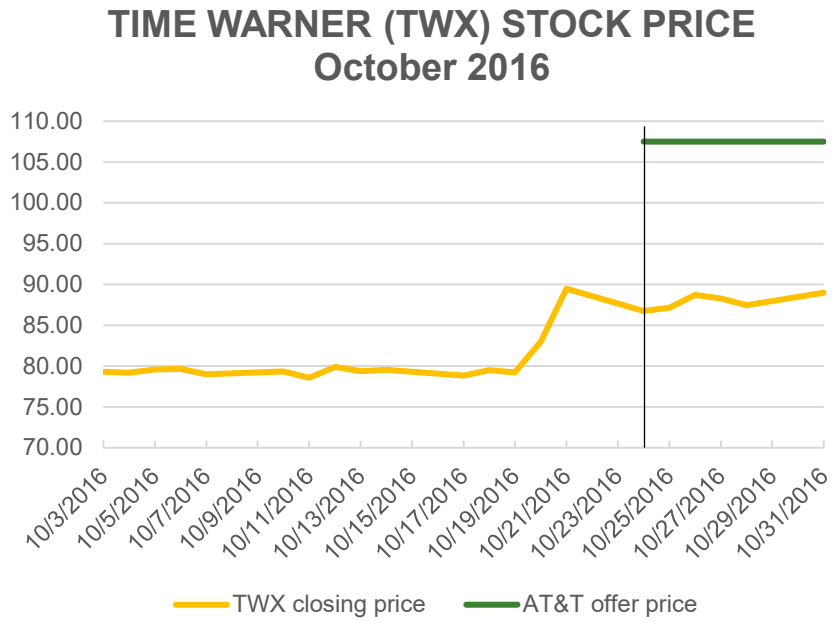
Dated as of October 22, 2016

- Covenants
  - "Reasonable best efforts" to consummate deal
  - Cooperation/consultation covenant (but no "buyer control" provision)
  - Litigation covenant
  - Qualified "hell or high water" (HOHW)—
    - No Combined Entertainment Group Effect
    - No Regulatory Adverse Material Effect
    - No increase in aggregate capital expenditures
- Conditions
  - HSR waiting period expiration or termination
  - Other merger control clearances
    - Brazil, Canada, China, the European Union, and Mexico
  - No government consent having a Regulatory Material Adverse Effect
  - No law or order enjoining transaction
- Termination
  - Termination date: October 22, 2017 (one year)
  - If antitrust conditions fail, may be extended by either party by written notice up to April 22, 2018 (six-month extension)
  - Antitrust reverse termination fee: $500 million
    - 0.6% of equity value ($85.4 billion)
    - Public deals over last three years: Mean: 4.7%; Median: 4.4%

Market reaction

- Market skeptical
  - Was this the second coming of AOL Time Warner?
  - Will the deal be blocked by antitrust concerns?

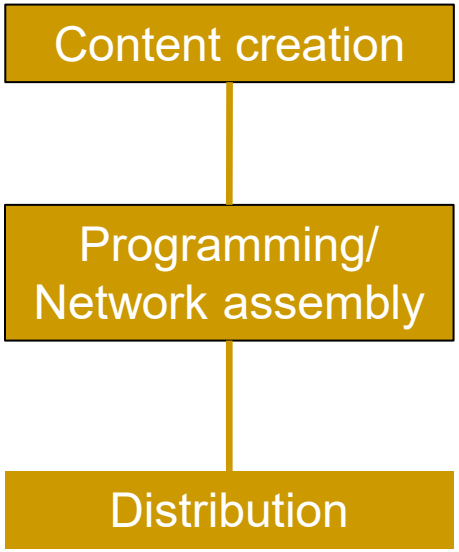




Announced Saturday, October 22, 2016

	AT&T		TW		
	Closing	%Δ	Closing	%Δ	Offer
October 19, 2016	39.38		79.24		
October 24, 2016	36.30	-7.8%	86.74	9.5%	-19.3%

AT&T/Time Warner as a vertical merger



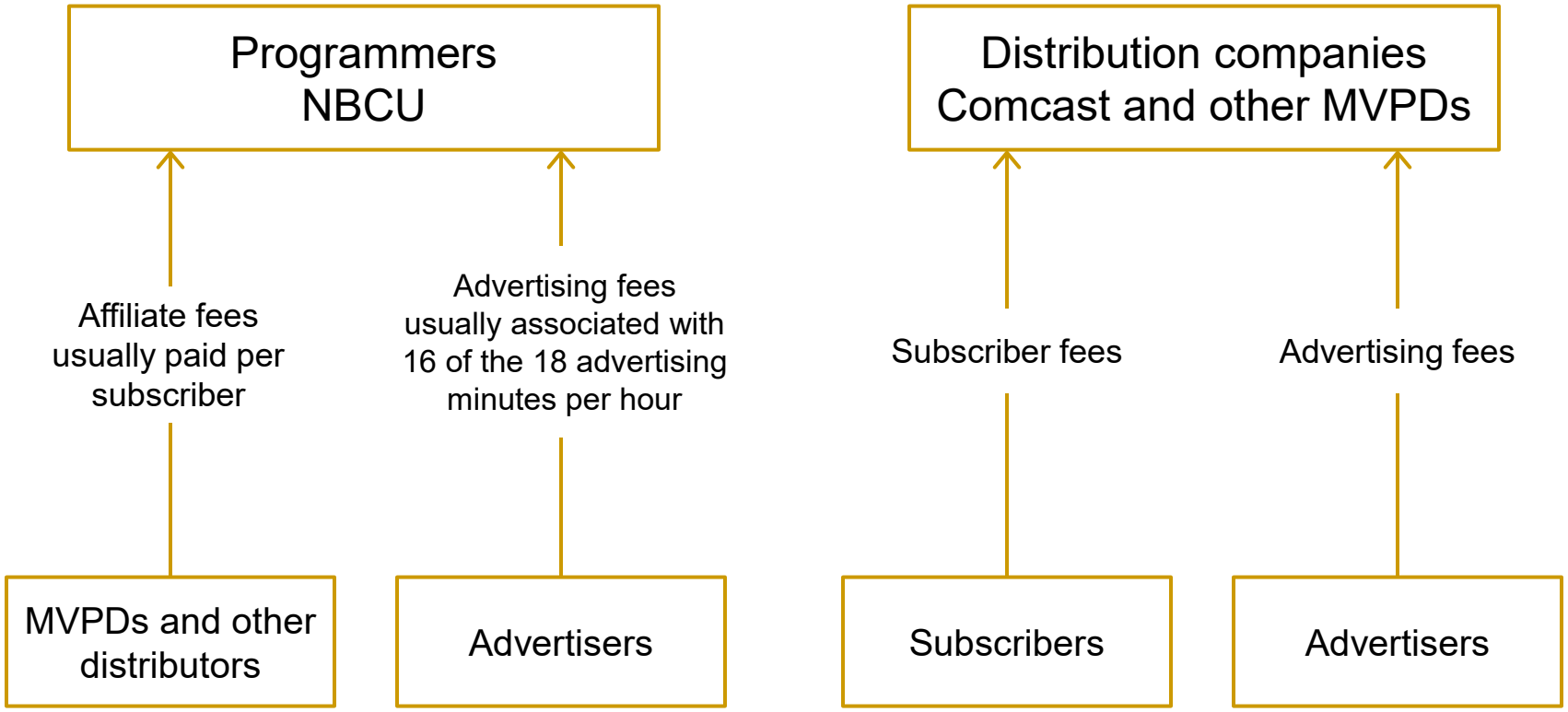
	Merged Company	Representative Competitors	
Content creation	Warner Bros.	Paramount Pictures	NBC
	+	21st Century Fox	CBS
		Columbia Pictures	ABC
		Lions Gate	
Programming/ Network assembly	HBO	Fox News Channel	Discovery Channel
	CNN	ESPN	Disney Channel
	TBS	USA Network	MSNBC
	TNT		Food Network
	+		
Distribution	AT&T/DirecTV	Comcast	Starz
	HBO Now	Charter/TWC	Google/YouTube TV
		Verizon (FIOS)	Showtime
		Dish Network	CBS All Access
		Cox	Sling TV
			PlayStation Vue
		Netflix	Facebook (?)
		Amazon Prime	Apple (?)
		Hulu	Disney (?)
		MLB.TV	

Revenue streams

1. Programmers
   a. Affiliate fees paid by distribution companies to display programmer's content (usually on a per subscriber basis)
   b. Advertising fees (usually involving 16 of the 18 minutes per hour of total advertising time)
2. Distribution companies
   a. Subscriber fees
   b. Advertising fees

Comcast/NBCUniversal

- Revenue streams

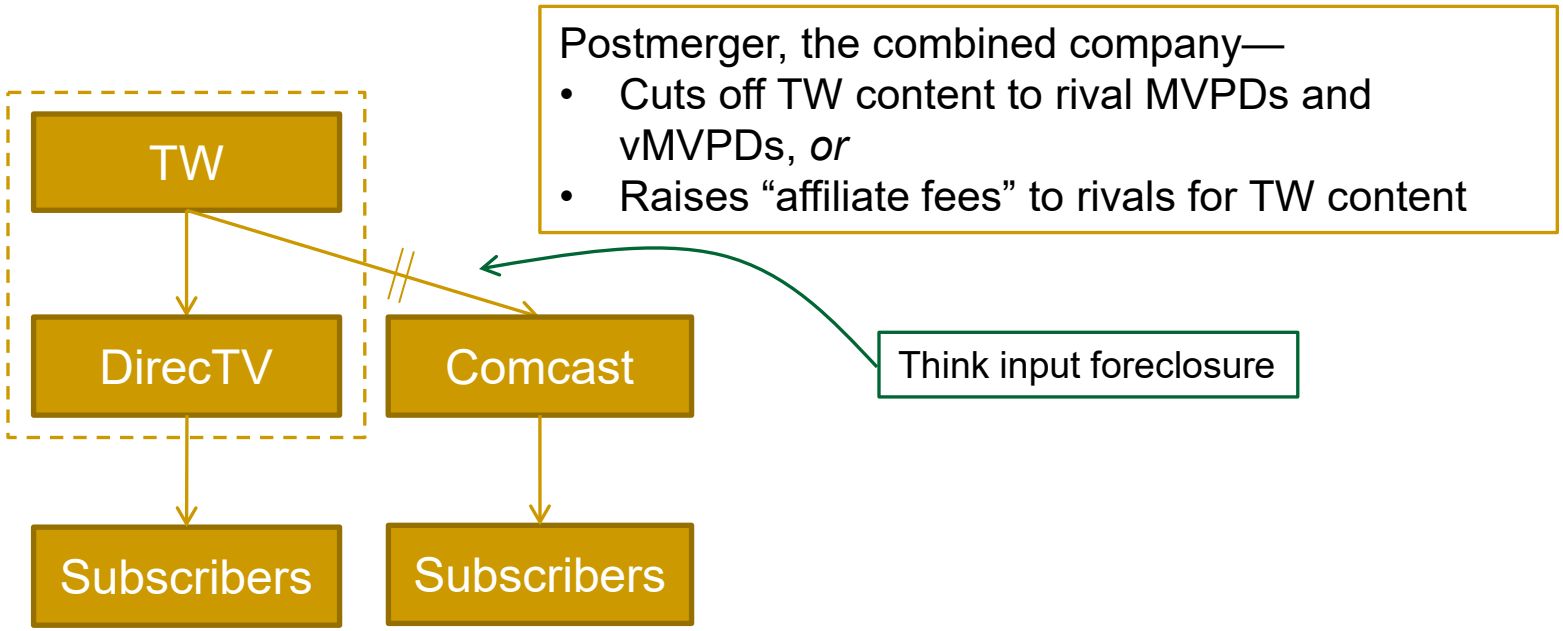


Arrows show the direction of payments

SO WHAT WAS THE PROBLEM?

The DOJ's three theories of harm

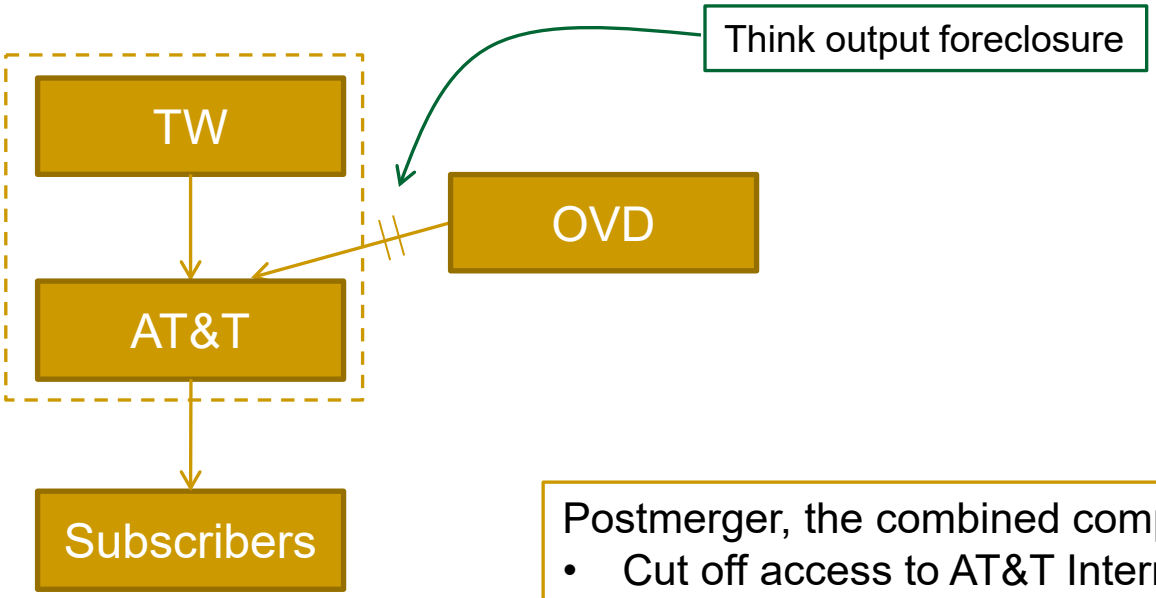
1. Foreclosure/raising rivals' costs (the "leverage theory")



Higher affiliate fees could be passed through as higher subscriber prices

The DOJ's three theories of harm

2. Impede disruptive emerging online competition



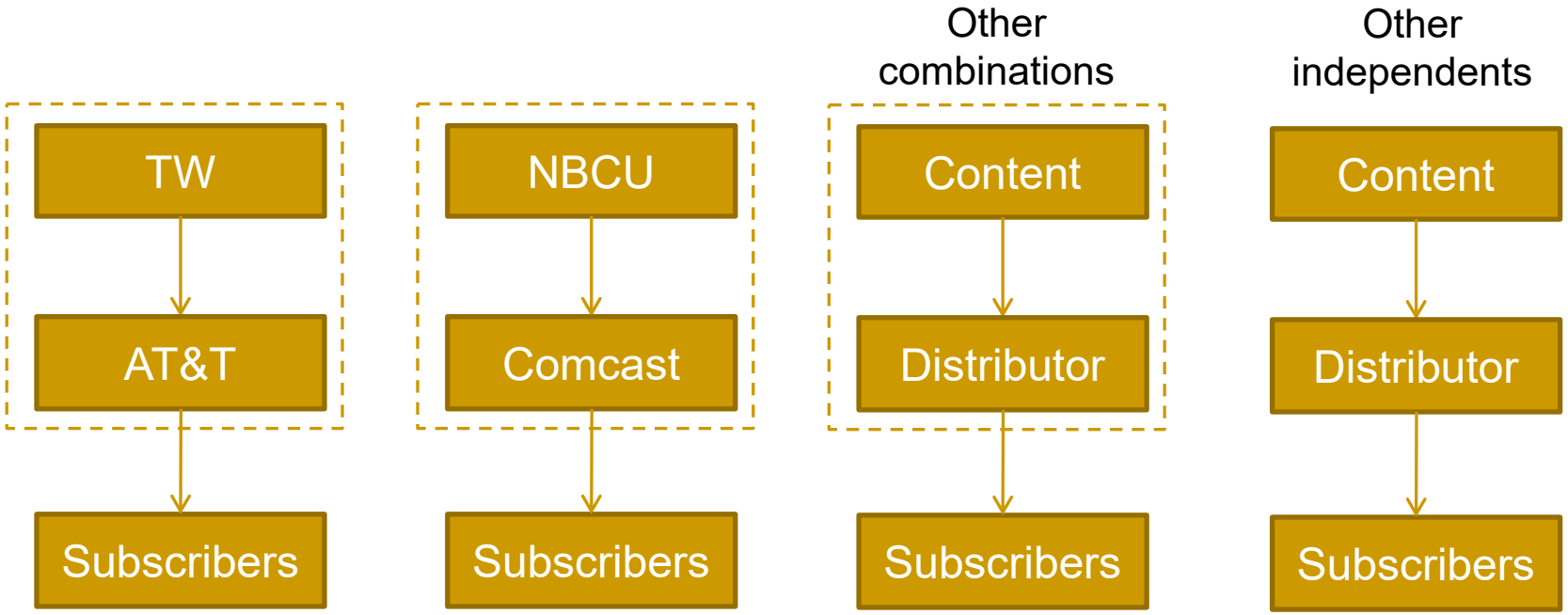
Postmerger, the combined company could—
- Cut off access to AT&T Internet "pipes," *or*
- Raise prices for access to AT&T Internet "pipes"*

* Mechanically, DirecTV would demand lower affiliate fees for content

Weaker competition from virtual OVDs means less innovation and higher subscriber prices

The DOJ's three theories of harm

3. Facilitate tacit coordination through greater firm homogeneity



More vertical integration leads to higher subscriber rates

DOJ concerns were easy to anticipate

- Comcast/NBCUniversal was analytically similar in its vertical aspects

Content

Comcast cable channels, inc.
- Versus
- The Golf Channel
- E Entertainment

+ pay G.E. $6.5 billion in cash

- NBCUniversal cable channels (including USA, Bravo, E!, SyFy, CNBC and MSNBC)
- NBC network
- Universal Studios

Distribution

Distribution

Posed similar concern re foreclosure/RRC of content for Comcast's rival MVPDs and OVDs

Comcast/NBCUniversal vertical solution

- Source of the threatened vertical anticompetitive harm:

The power to refuse to license highly consumer-valued content to programming and distribution rivals for which the rivals have no adequate substitutes

- *Solution*: Eliminate market power otherwise created by the vertical arrangement by providing for—
  - Mandatory licensing of content
  - Arbitration over pricing disputes
- Application to AT&T/Time Warner
  - Offer to accept the same mandatory licensing/arbitration provisions as in the Comcast/NBCUniversal consent decree and FCC order

SO WHAT HAPPENED?

The DOJ investigation: 13 months

October 22, 2016	Deal announced
November 4, 2016	HSR reports filed
November 8, 2016	Trump elected president
December 8, 2016	DOJ issues second request
July 7, 2017	Reports of Trump's opposition to deal
September 27, 2017	Makan Delrahim confirmed to head the Antitrust Division
November 7, 2017	Reports of DOJ settlement demands for asset divestiture*
November 20, 2017	DOJ complaint filed

20 Depositions
25 million pages of documents

WHY DID THE INVESTIGATION TAKE SO LONG?

* In a February 16, 2018, status conference, the DOJ revealed that it had made four settlement proposals to AT&T for the divestiture of various networks or DirecTV

Why did the DOJ reject the parties' fix?

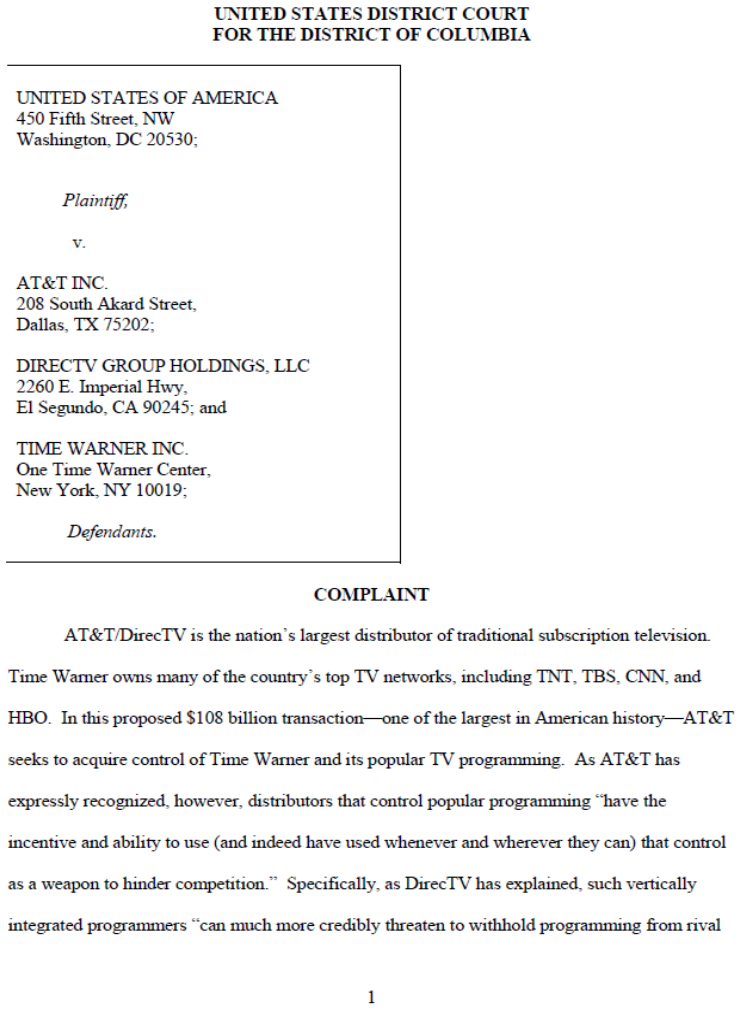
- AAG Delrahim took a surprisingly strong position against "behavioral" relief in antitrust cases generally and AT&T/Time Warner in particular:
  1. Makes the Antitrust Division a regulatory agency when it is a law enforcement agency
  2. Behavioral relief is difficult to enforce
     - The sanction is contempt of court
     - Requires—
       1. "Clear and convincing evidence"
       2. Of a "clear and unambiguous" violation of the consent decree
     - Behavioral relief in vertical cases is almost inherently are not "clear and unambiguous"
- Here, Delrahim would accept only divestiture relief and then only if AT&T divested either—
  - DirecTV, *or*
  - "Essential" Time Warner content (i.e., the Turner networks)

Designed to eliminate the vertical aspect of the transaction

- AT&T's response
  - Divestiture relief would eliminate all the reasons for the deal
  - Mandatory licensing/arbitration removes any possibility of anticompetitive harm
  - *"Litigate the fix"*: Make a binding mandatory licensing/arbitration contractual commitment to rival distributors and argue to the court that the deal is not anticompetitive with this fix in place

The DOJ complaint

- Filed November 20, 2017
  - Alleged the three theories of anticompetitive harm
- No states joined as plaintiffs
  - Compare Comcast/ NBCUniversal with five states



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
450 Fifth Street, NW
Washington, DC 20530;

Plaintiff,

v.

AT&T INC.
208 South Akard Street,
Dallas, TX 75202;

DIRECTV GROUP HOLDINGS, LLC
2260 E. Imperial Hwy,
El Segundo, CA 90245; and

TIME WARNER INC.
One Time Warner Center,
New York, NY 10019;

Defendants.

COMPLAINT

AT&T/DirecTV is the nation's largest distributor of traditional subscription television. Time Warner owns many of the country's top TV networks, including TNT, TBS, CNN, and HBO. In this proposed $108 billion transaction—one of the largest in American history—AT&T seeks to acquire control of Time Warner and its popular TV programming. As AT&T has expressly recognized, however, distributors that control popular programming "have the incentive and ability to use (and indeed have used whenever and wherever they can) that control as a weapon to hinder competition." Specifically, as DirecTV has explained, such vertically integrated programmers "can much more credibly threaten to withhold programming from rival

1

The DOJ complaint

- *Query*: Who in the Antitrust Division was not on the complaint?



Dated: November 20, 2017

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

MAKAN DELRAHIM
Assistant Attorney General for Antitrust

ANDREW C. FINCH
Principal Deputy Assistant Attorney General

DONALD G. KEMPF, JR.
Deputy Assistant Attorney General for Litigation

BERNARD A. NIGRO, JR.
(D.C. Bar #412357)
Deputy Assistant Attorney General

PATRICIA A. BRINK
Director of Civil Enforcement

BRYSON L. BACHMAN (D.C. Bar #988125)
Senior Counsel to the Assistant Attorney General

SCOTT SCHEELE (D.C. Bar #429061)
Chief, Telecommunications and Broadband Section

JARED A. HUGHES
Assistant Chief, Telecommunications and Broadband Section

CRAIG W. CONRATH
ERIC D. WELSH (D.C. Bar #998618)
SHOBITHA BHAT
ALEXIS K. BROWN-REILLY (D.C. Bar #1000424)
DYLAN M. CARSON (D.C. Bar #465151)
ALVIN H. CHU
ROBERT DRABA (D.C. Bar #496815)
ELIZABETH A. GUDIS
JUSTIN T. HEIPP (D.C. Bar #1017304)
ELIZABETH S. JENSEN
MATTHEW JONES (D.C. Bar #1006602)
MELANIE M. KISER
KATHRYN B. KUSHNER
DAVID B. LAWRENCE
DAPHNE LIN
CERIN M. LINDGRENSAVAGE
MICHELLE LIVINGSTON
BRENT E. MARSHALL
ERICA MINTZER (D.C. Bar #450997)
SARAH OLDFIELD
LAWRENCE REICHER
LAUREN G.S. RIKER
LISA SCANLON
PETER SCHWINGLER
DAVID J. SHAW (D.C. Bar #996525)
MATTHEW SIEGEL
CURTIS STRONG (D.C. Bar #1005093)
FREDERICK S. YOUNG (D.C. Bar #421285)
RACHEL L. ZWOLINSKI (D.C. Bar #495445)

United States Department of Justice
Antitrust Division
Telecommunications and Broadband Section
450 Fifth Street, N.W., Suite 7000
Washington, DC 20530
Telephone: (202) 514-5621
Facsimile: (202) 514-6381

The litigation: Preliminaries

- Tried in the District Court for the District of Columbia
- Bench trial before Judge Richard Leon
  - Appointed by George W. Bush
  - Assumed office on February 19, 2002
  - Began senior status on December 31, 2016
  - Same judge who entered the Comcast/NBCUniversal consent decree
  - Known for a sharp tongue and aggressive management of his courtroom



The litigation timetable

6.5 months	November 20, 2017	DOJ complaint filed
	November 27, 2017	Parties extend termination date to April 22, 2018 (latest date permitted by merger agreement)
	November 28, 2017	Parties file answer (includes commitment to arbitration solution to “litigate the fix”)
	December 7, 2017	Judge Leon sets trial to start on March 19, 2018 Expects decision in late April or May
	December 21, 2017	Parties amend merger agreement to extend termination date to June 22, 2018
	March 19, 2018	Six-week trial starts
	June 12, 2018	Decision announced dismissing complaint
	June 14, 2018	Deal closes
7.5 months	July 12, 2018	Notice of appeal filed
	July 19, 2018	Motion for expedited consideration granted
	December 6, 2018	Argued
	February 26, 2019	Decision announced affirming dismissal

The litigation: Burdens of proof

- Judge Leon applied same *Baker Hughes* three-step burden-shifting approach used in horizontal mergers—
  1. DOJ must prove a prima facie case of likely anticompetitive effect in a relevant market
  2. Burden of production shifts to merging parties to dispute the DOJ's prima facie case by showing sufficient evidence for the fact-finder to find that there was no anticompetitive effect
  3. Burden of persuasion returns to plaintiff to prove by a preponderance of the evidence that the transaction is in fact anticompetitive
- Other courts have followed Judge Leon in vertical cases[1]

[1] *See, e.g.*, Illumina, Inc. v. FTC, 88 F.4th 1036, 1048 (5th Cir. 2023) (Illumina/GRAIL); FTC v. Tempur Sealy Int'l, Inc., 768 F. Supp. 3d 787, 812 (S.D. Tex. 2025); FTC v. Microsoft Corp., 681 F. Supp. 3d 1069, 1084 (N.D. Cal. 2023) (Microsoft/Activision); United States v. UnitedHealth Grp. Inc., 630 F. Supp. 3d 118, 129 (D.D.C. 2022) (UnitedHealth/Change).

The litigation: Burdens of proof

- Judge Leon: Two initial observations on the DOJ's burden
  1. DOJ does not have the advantage of any presumptions in proving a prima facie anticompetitive effect
     - There is nothing like the *PNB* presumption outside of horizontal mergers
     - So Judge Leon modified Step 1 to eliminate reliance on the *PNB* presumption and generalized the requirement to prima facie proof of an anticompetitive effect in a relevant market
  2. Since market shares do not play a critical role in the analysis, the relevant market need not be as rigorously defined as in a horizontal merger, where market shares predicate the *PNB* presumption

The key litigation question

Would the merger increase the combined company's bargaining leverage enough to raise the affiliate fees rival distributors pay for Turner content and, ultimately, subscriber prices?[1]

- DOJ: Yes
  - Business documents say so
  - Rival distributors say so
  - Expert economic analysis says so

[1] The DOJ agreed at trial that the combined company would not completely foreclose rival distributors and that the content would be licensed. It only litigated the case on raising rivals' costs.

The key litigation question

Would the merger increase the combined company's bargaining leverage enough to raise the affiliate fees rival distributors pay for Turner content and, ultimately, subscriber prices?[1]



- AT&T/Time Warner: No
  - Transaction eliminates no competitors/increases no market shares
  - Any increase in prices could result only from an increased willingness to walk away from a licensing deal and withhold content
  - The incentive of the merged company is to license its content as widely as possible
  - The DOJ agrees that license agreements will be reached with all rival companies and the merged company will not withhold its content
  - The DOJ's evidence shows that there is a gross procompetitive savings of $352 million annually to DirecTV from the elimination of double marginalization
  - Prior vertical deals in industry did not result in increased prices
  - No customer testified that it would accede to higher affiliate fees postmerger