DEPARTMENT OF JUSTICE

Video Competition:
Opportunities and Challenges

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Thank you to Professor Benjamin for having me here this morning. I congratulate Duke for organizing this discussion of the future of video competition and the role that competition policy and antitrust enforcement plays in ensuring that consumers continue to benefit from the extraordinary innovation we are witnessing.

It is striking to step back and consider how innovation and competition have reshaped not only how, when, and where we receive video content, but also the content available to us. Our options today bear no resemblance to what any of us grew up with—no matter when that was. A handful of stations broadcast locally became hundreds of more-specialized networks distributed through cable and satellite. What now seem like primitive (and often futile) attempts to record shows using VCRs have yielded to DVRs and on-demand viewing. Think about what email looked like fifteen years ago as compared to today – plain text messages have evolved into transmissions of rich html text, images, and video.

With respect to video programming, the streaming option is transformative. Programmers now have the internet as an alternative to distribution over traditional broadcast, satellite and cable networks. "Over the top" programming via broadband internet connections increasingly competes with what consumers used to access solely from their cable or satellite provider. In 2009, there were two scripted original series delivered exclusively through online services – by 2014, there were twenty-seven. This new distribution option also lowers barriers to entry for non-traditional content, like YouTube and e-sports, and allows established programmers to deliver more tailored services. Networks can offer content a la carte, like CBS All Access and HBO Now, or expand programming through services like ESPN3.

Consumers are embracing these new options. More than half of the television shows watched are time-shifted in some way. More than half of each evening's internet traffic is devoted to video content. By 2019, estimates are that monthly video consumption via the internet will quadruple. And the pace of change is accelerating. It looks like the video equivalent to Moore's law—the prediction that the number of transistors in a dense integrated circuit doubles every eighteen months—is at work in these markets.

Competition drove these developments. Antitrust enthusiasts like to call this disruptive innovation. Some innovation comes from incumbents smart and nimble enough to take advantage of these new opportunities. But new entrants deserve a lot of credit, too. Companies like Netflix and Amazon offer consumers flexibility and control; established players like CBS and HBO have been forced to respond.

So what role does competition policy and antitrust enforcement have to play in all of this? We must not interfere with the market when it is working. That's axiomatic. But it is equally important that antitrust enforcement and advocacy address market imperfections and bad conduct.

There are some characteristics of the current landscape that complicate our antitrust enforcement efforts. One characteristic stands out most of all – today most consumers do not enjoy competition for high-speed internet access. As Chairman Wheeler put it, "as bandwidth increases, competitive choices decrease." Seventy percent of all homes have access to only one or to no broadband provider that meets the Federal Communication Commission's new standards for high-speed internet. Ensuring that consumers throughout the country have access to high-speed internet is a significant public policy objective of the FCC. Indeed, consumers deserve access to high-speed service and competition for their hard-earned dollars.

We know there are substantial barriers to entry and expansion for new broadband services. In some areas, telephone companies or others have built high-speed fiber services that put competitive pressure on cable companies. But building fixed broadband networks requires large sunk investments, and the economics may not work in many areas of the country where the low population density and the poor expected rate of return makes those investments unprofitable. And today wireless is too capacity-constrained and costly to provide a meaningful alternative for consumers.

So many consumers' only option for high-speed internet service is the cable company—the same cable company that also derives significant revenues from its cable television business. This means that as online video distribution increases the cable companies have both the incentives and means to use their gatekeeper power to slow innovation to protect their video profits. In this way, the high-speed internet market and the video distribution market are inextricably intertwined.

If we can overcome this bottleneck problem—through private innovation, sound antitrust enforcement, and smart procompetitive regulation—the benefits are potentially much greater than just creating even more video to watch and more ways to watch it. If we can prevent cable companies from exploiting their bottleneck in anticompetitive ways, a more competitive video entertainment market will also spur more broadband competition. With a robust array of online video options available to consumers, new broadband internet providers like Google Fiber can compete more effectively with incumbents' "double play" and "triple play" packages. This makes it more attractive and practical for new fiber entrants to make the significant upfront investments needed to compete head-to-head with cable companies.

This feedback effect between competition in the video market and competition in the broadband market creates the potential to unlock the "virtuous cycle" of innovation and broadband investment that the FCC has championed. And so when we speak about preventing broadband providers from using their control over bottlenecks to hamper video competition, we're also hopeful that this vigilance may help lower barriers to entry for broadband itself. As the Commission's "National Broadband Plan" put it, "[b]roadband is *the* great infrastructure challenge of the early 21st century." It enables improvements in healthcare, education, energy, and the "internet of things." My friend Tom Wheeler put it well when he said: broadband internet is part of the "table stakes" for our economy, and necessary to make us the "innovation leader for the 21st century."

These tensions in the video and broadband markets present challenges for antitrust enforcers and policymakers, to be sure—but they are challenges we have faced before in other markets. To take an example not too far afield, the wireless market shares some, though not all, of these obstacles to achieving effective competition. Like the bottlenecks in high-speed wired broadband, wireless broadband competition is limited by the availability of spectrum. And just as video and broadband providers must adapt to Moore's law-like increases in the pace of change, wireless providers must grapple with wireless data consumption increasing at near-exponential rates.

Given the high up-front costs of wireless infrastructure and spectrum, it's not surprising that wireless carriers here and throughout the world have been tempted to consolidate—and to emulate the more cozy market structure of their earthbound internet service provider counterparts. Due in part to our experience with bottlenecks in the video and broadband markets, we have been wary of wireless carriers' efforts to combine. Such efforts often do not lead to the promised market improvements but instead simply result in higher prices and less innovation for consumers. That is why the Justice Department and the FCC moved to block AT&T's proposed acquisition of T-Mobile in 2011. More recently, when

Sprint and T-Mobile publicly suggested they were exploring a combination that also would have reduced national wireless carriers from 4 to 3, the skepticism of DOJ and the FCC forced that idea off the drawing board. Today, consumers are continuing to benefit from four choices among carriers and increasing flexibility in their cell phone plans.

This vigilance against mergers that would reduce the number of competitive options for consumers is one step, but we have also recognized that the limited availability of high-quality spectrum presents a continuing bottleneck to competition. Just as historically dominant cable companies control the single pipe to consumers' homes, the larger wireless carriers reap rewards from controlling the lion's share of this scarce and essential pathway to mobile devices. For that reason, we have supported the FCC's efforts to make more spectrum available and to do so on terms that will promote opportunities for smaller players and new entrants to challenge the well-entrenched market leaders.

Our enforcement and policy efforts in wireless are instructive, but we recognize that the video and broadband markets present unique challenges. Video and broadband providers not only contract with residential customers to sell service, they also bargain with content companies to make content available to customers. For instance, established networks like Disney or Fox, not to mention new over-the-top providers like Netflix, depend on cable companies like Comcast to deliver their content—and to enable them to sell ads or obtain subscribers. The cable companies are essential gatekeepers to what customers watch, and how they watch it. If content companies don't think they have a way to get their product to consumers, they won't invest and won't innovate. Or if cable companies use control over the broadband pipe to increase the charges streaming services must pay to reach customers, then those new services may be less effective in competing with traditional video services.

These critical facts ultimately led the Justice Department and FCC to take tough stands on the now-abandoned Comcast/Time Warner merger. For the most part, Comcast and Time Warner did not compete to serve the same households. Most consumers were still going to be left with only one high-speed internet service provider with or without the merger. But for both agencies that was just the beginning of our analysis. We looked as well at the other end of the pipeline where Comcast and Time Warner do compete. The question we asked was basic: Would the merger make it more likely that Comcast would act as a gatekeeper between content providers of all kinds—think Fox, CBS, Disney, YouTube, Netflix—and the consumers that they are trying to reach? After a lengthy investigation, we believed that the answer to that question was yes.

Putting Comcast and Time Warner together risked disproportionately increasing the merged firm's bargaining leverage. The combined firm would have ended up with 30% of all pay television households. It would have had the majority of households in the largest cities most important to advertisers. And, it would also have controlled access to nearly 60% of the high-speed broadband subscribers in the U.S. This leverage would have left Comcast with too much control and with too few competitors when shaping the future of video competition and broadband internet service. Coupled with Comcast's understandable incentive to reduce the competitive threat posed by over-the-top programmers or streaming services, consumers would have been at risk.

In discussing competition and its importance to innovation in video markets, we share both space and point of view with the FCC. A year ago Chairman Wheeler remarked that since his first day as chairman his mantra has been consistent and concise: "Competition, Competition, Competition." As you might imagine, that particular call to arms resonates with antitrust enforcers. Both the Division and the FCC recognize that antitrust enforcement is not the only tool available for dealing with anticompetitive market structures. There is also a role for smart, procompetitive policies that can help prod change when competitive pressure is missing, or protect competition in situations that the antitrust laws can't easily reach.

One good example of smart policy prodding change is the FCC updating its benchmark for broadband download speeds to 25 Mbps. Higher speeds are necessary for consumers—and businesses—to take full advantage of all the things the internet can do. As Chairman Wheeler observed, taking turns to share bandwidth is as absurd as taking turns to use electricity. Billions of devices are coming online to improve everyday lives, but to make this "internet of things" a reality, we need the bandwidth.

The FCC also took smart and measured action to protect competition with its recent Open Internet Order. That Order set out some simple, bright-line rules: broadband providers may not block access to lawful content; they may not throttle lawful content; and they may not take money to favor some lawful content over others. The Order, which the Justice Department is proud to help defend in court, effectuates the public policy Congress mandated in 1996 by ensuring that cable companies or other broadband providers don't disadvantage competitors offering consumers video services via their broadband connections. This helps protect consumer choices and ensures that incumbents that sell both video and broadband internet do not use their control over broadband to suppress competition in video.

Sometimes the concern with undue restrictions on competition stems from incumbents seeking laws and regulations that would impede opportunities for rivals to challenge their control over the pipeline. We see that debate playing out in efforts by some internet service providers to seek state laws precluding local communities from encouraging alternatives to local broadband monopolies. The FCC, through its Municipal Broadband Order, targets those obstacles in order to allow municipalities to expand broadband availability. This helps bring greater competition to exactly the part of the industry that needs it the most.

I end pretty much where I began. The future of video competition should be left for the market to decide. Our role as antitrust enforcers and competition advocates is not to pick winners or losers. Our job is to make sure that existing bottlenecks are eliminated, that mergers don't create new ones, and that our enforcement and policy efforts let competition thrive and innovation continue for consumers' benefit.