

Unclassified

DAF/COMP/LACF(2009)13

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

28-Aug-2009

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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LATIN AMERICAN COMPETITION FORUM

-- Session IV: Competition Issues in Telecommunications --

Contribution from the United States

9-10 September 2009, Santiago, Chile

The attached document from the United States is circulated to the Latin American Competition Forum FOR DISCUSSION under session IV of its forthcoming meeting to be held in Chile on 9-10 September 2009.

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JT03268851

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**LATIN AMERICAN COMPETITION FORUM
-- 9-10 September 2009, Santiago (Chile) --**

Session IV: Competition Issues in Telecommunications

**Department of Justice Symposium on Voice, Video and Broadband
Observations and Conclusions for Competition Policy**

1. General Competitive Trends

1. Overall, the competitive trends in telecommunications services in the U.S. are positive. Companies continue to invest significant sums to build new facilities or upgrade existing ones, providing customers with better services and more choices. Landline facilities-based competition is available for most U.S. consumers in broadband and telephony and is beginning to spread in video as well. However, the extent and nature of competition varies substantially from one geographic area to another. While the available data make it possible to evaluate broad nationwide trends, it is considerably more difficult to evaluate the state of competition in any specific area. In addition, public data that would allow meaningful analyses of the effect of developments (such as bundled services), differences in the quality and quantity of service offerings, and substitution between formerly distinct categories of services (such as wireline and wireless) are often limited or unavailable.

2. ***Multichannel Video Programming Distribution (MVPD)***. The principal competitive alternative to the incumbent cable television companies remains satellite-based direct broadcast satellite (DBS) services. In an increasing number of areas, wireline MVPD competition is also available from telephone companies or overbuilders, though this option so far is available to only a small minority of U.S. residential consumers.

3. Consumers today are able to purchase video services that offer higher quality pictures, more channels, and other features. These improvements are in part a direct result of the entry of MVPD providers to challenge the cable companies. It is more difficult to draw definitive conclusions from the available information regarding the price benefits of competitive entry that has occurred in video services. Whether price benefits have been realized by consumers, and to what extent, may depend on various factors, including how to assess the value of quality improvements that have accompanied price increases

and whether consumers value bundled services. There is evidence that competitive entry has resulted in lower prices for some consumers, particularly bundled service users, even as other stand-alone prices have remained the same or continued to increase. Variations in offerings, the availability of special promotions, and other factors make such assessments complex.

4. **Voice Telephone.** Competition for residential consumers occurs primarily between the incumbent local exchange carriers (ILECs) and cable companies. In some areas, however, competition is supplemented by facilities-based overbuilders or companies that obtain last-mile connections from the incumbent telephone companies. Local telephone subscribers in many areas continue to experience increased choices, notwithstanding the loss of unbundled network element platforms (UNE-P) as a mode of entry. The success of cable operators is the best evidence that facilities-based competition is economically feasible for residential telephone service, at least for operators that have made the investment in wireline connections to the home that can be used to provide multiple services.

5. One major question is whether mobile or fixed wireless services are effective competitors to the incumbents' wireline telephone services. Although traditional mobile wireless services have taken considerable amounts of traffic from landline telephony and some customers, the available evidence does not establish that mobile services currently represent an effective competitive constraint on landline access pricing. Consistent with that observation, wireline telephone prices have remained relatively stable except where telephony is offered in a bundle with video and broadband.

6. **Broadband.** Competition for residential customers so far occurs primarily between two major providers, the cable company and the telephone company. In some areas, facilities-based overbuilders or companies obtaining last-mile connections from the telephone incumbents are also offering broadband, and fixed wireless broadband services are beginning to develop in limited geographic areas.

7. There are still rural areas where residential customers do not have access to terrestrial broadband services. In these areas, satellites are used to deliver broadband. However, satellite service providers are not effective competitors to landline broadband providers where both offer service because the price of satellite service is substantially higher. Satellite broadband service providers do not offer voice telephony or MVPD services over their own facilities.

8. Companies such as the new Clearwire joint venture are investing in wireless broadband service, and some believe that this technology is a promising way to provide a "third wire" to consumers' homes. However, it is unclear whether wireless broadband providers will have a substantial impact on the marketplace. New entrants may have a limited impact due to restraints on available spectrum, limitations of the technology, and the difficulty of competing against better-positioned incumbents that have first-mover and scale and scope advantages. Recent Federal Communications Commission (FCC) spectrum auctions have not resulted in the emergence of a new nationwide wireless provider.

9. **Bundling.** A potentially important competitive development in the marketing and pricing of telephony, broadband, video, and wireless has been the offering of "triple-play" or "quadruple-play" bundled services. These bundles, at least initially, have been priced attractively for many consumers compared with stand-alone services of the same provider, and they have reduced customer switching. Increasing numbers of consumers have been subscribing to triple-play bundles of video, voice telephony, and broadband. Some providers reported that more than 30 percent of their subscribers buy triple-play bundles. It is not yet clear how bundling of services will impact competition and consumer welfare.

2. Barriers to Entry

10. Symposium participants discussed a variety of possible barriers to entry in video, telephony, and broadband services. They differed in their views about whether significant barriers continue to exist. Given the continuing high cost of constructing networks, especially in rural areas, competition may continue to be limited in some areas. While inherent “natural” entry barriers of this kind can significantly affect markets, the barriers to entry highlighted in this report are those that result from regulatory policy or conduct of incumbent providers.

11. Some panellists contended that regulatory barriers remain in video franchising and have adversely affected consumers, including unreasonable demands by local franchising authorities and conduct by incumbents seeking to block or delay entry. Others, including cable companies and local franchising authorities, defended the role of franchising in consumer protection. FCC and state legislative action have reduced these barriers to some extent, but the DOJ believes that more can be done to ensure that video competition is not unreasonably precluded or delayed because of local franchising requirements.

12. A number of other concerns were raised about alleged actions by incumbent providers to preclude or limit new entry, such as exclusive contracts between cable companies and multi-tenant building owners and denial of access to “must-have” programming that is owned by incumbents. Depending on the facts, such conduct can violate antitrust law. However, exclusive dealing arrangements can also benefit consumers. For example, such an agreement may provide incentives for the provider to upgrade facilities in a building by ensuring that the costs can be recouped. Antitrust analysis needs to take into account the potential for both the positive and negative impacts from an exclusive agreement.

13. New video entrants have also sought action by the FCC to address these concerns. The FCC issued orders restricting the use of exclusive contracts between both cable operators and telephone carriers and building owners and extended the prohibition on exclusive contracts for programming owned by cable companies. The FCC is also considering whether to eliminate the “terrestrial loophole” for exclusivity arrangements in the program access rules. Whether such regulatory action is warranted depends upon the extent to which competition exists and whether such conduct is unreasonably and substantially precluding entry. Regulators also need to consider whether there are procompetitive reasons for incumbents to engage in such conduct and whether regulation would discourage beneficial behavior. The DOJ has in the past and will continue to investigate allegations that such conduct is anticompetitive and take enforcement action where appropriate.

14. Concerns were raised relating to whether incumbent telephone providers should be required to make portions of their networks, particularly last-mile connections, available to competitors to facilitate additional entry. Wireline providers that combine unbundled local loops with their own facilities to provide service questioned whether the FCC had failed to evaluate appropriately the current state of competition in proceedings evaluating the need for making these facilities available at cost-based prices. These providers argue that requiring these facilities to be made available encourages entry that would otherwise not occur due to the high cost of building last-mile facilities. Incumbent providers oppose the continuation of these regulations because they contend that in many areas there is already robust competition. In addition, these regulations require incumbent providers to incur expenses and discourage investment in new facilities. One expert discussed evidence that he contended showed that these types of regulations caused telephone companies to invest less in their networks than the cable companies, which did not face such requirements.

15. Wireless broadband providers consider spectrum critical to their ability to compete. Accordingly, during the Symposium various wireless operators and one expert reiterated the need to make more spectrum available. Some speakers also expressed concern about the perceived failure of the FCC

advanced wireless services and 700 MHz spectrum auctions to yield much new entry, as the bulk of spectrum auctioned went to incumbent providers.

3. Proposals for Further Action

16. The DOJ remains committed to enforcing the antitrust laws against conduct that harms competition in the telecommunications industry. When reviewing conduct raising competitive concern, the DOJ will continue to give particular attention to the effects of convergence and increasing substitution among services. Assessing the legality of conduct under the antitrust laws requires both an understanding of how customers view and use services and the impact of consumer behavior on pricing decisions. The DOJ recognizes that those assessments can be particularly complex in the telecommunications industry in view of technology and other changes and will continue to take them into account in its enforcement decisions.

17. To aid its ability to enforce the antitrust laws in the telecommunications industry efficiently and effectively, the DOJ will continue to monitor industry trends and developments. But effective review requires reliable data. Traditionally, regulators have obtained and reported data about telecommunications providers along the lines of distinct industry sectors. Consideration should be given to whether this is still an appropriate framework given the dynamic changes in the industry.

18. Increased efforts to obtain relevant data and further refine economic analysis would advance the DOJ's ability to evaluate competitive conditions. Potential subjects of future study include review of the competitive implications of bundled pricing, substitution patterns, and quality-adjusted pricing trends.

19. In its role as advocate for sound competition policy, the DOJ will continue to seek the removal of regulatory barriers that unreasonably impede competition. This advocacy remains of critical importance given the important role of regulation in shaping competitive conditions in the telecommunications industry.