

Kabletown? Overview of the Comcast-NBC Universal Merger

Noelle Croley

*Student Fellow, Institute for Consumer Antitrust Studies
Loyola University Chicago School of Law*

OVERVIEW

On January 18, 2011, the Department of Justice announced a settlement with Comcast Corp. and General Electric Co.'s subsidiary NBC Universal, Inc. (NBCU), allowing Comcast to proceed in the acquisition of a 51% stake of NBC Universal from General Electric Co. subject to conditions.¹ First announced in December 2009, the complex merger was completed by the end of January 2011, creating a \$30 billion media giant. The newly created joint venture, called NBCUniversal LLC, combines Comcast's programming and cable transmission assets with those of NBCU, including NBC broadcast stations, cable channels like Bravo, USA and E!, the Universal movie studio, and theme parks among other assets. Comcast chief executive Brian Roberts described the transaction as creating "the ideal entertainment and distribution company."²

The U.S. Department of Justice Antitrust Division (DOJ) worked side by side with the Federal Communications Commission (FCC) to thoroughly examine the competitive effects of the transaction. Assistant Attorney General Christine Varney highlighted the cooperation and "unprecedented coordination" between the two agencies, leading to a result that protects competition, allows businesses to bring new and innovative products to the marketplace, and

¹ U.S. Dep't of Justice, Press Release, *Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions* (Jan. 18, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/266149.htm (hereinafter DOJ Press Release).

² Yinka Adegoke & Dan Levine, *Comcast Completes NBC Universal Merger*, REUTERS, Jan. 29, 2011, available at <http://www.reuters.com/article/2011/01/29/us-comcast-nbc-idUSTRE70S2WZ20110129>.

provides consumers with more programming choices.³ She further stated that “[t]he FCC’s order made it unnecessary for the division to impose similar requirements on certain issues. This approach resulted in effective, efficient and consistent remedies.”⁴

On January 18, 2011, the DOJ, along with five state attorneys general (California, Florida, Missouri, Texas, and Washington), filed a complaint and proposed settlement in the U.S. District Court for the District of Columbia, and the settlement was announced the same day.⁵ In the complaint, the DOJ alleged that the transaction as originally proposed would have allowed Comcast, which is the largest cable company in the United States, to limit competition from traditional competitors such as broadcast cable services, satellite services, and telephone companies.

The DOJ’s complaint highlighted the proposed transaction’s potential anticompetitive effects, hypothesizing that the proposed deal would have significant market impact. The relevant product market affected by the transaction was defined as “the timely distribution of professional, full-length video programming to residential customers (‘video programming distribution’).”⁶ Furthermore, according to the complaint, the relevant geographic markets were viewed as the various local markets throughout the United States where Comcast is the current cable operator, covering over 50 million U.S. television households, and where Comcast would be able to withhold NBCU programming from, or raise the programming costs to, its rival distributors.

³ Christine Varney, Assistant Attorney General, Antitrust Division, U.S. Dep’t of Justice, *Remarks As Prepared for Delivery by Assistant Attorney General Christine Varney at Briefing on Comcast/NBCU Joint Venture* (Jan. 18, 2011), available at <http://www.justice.gov/atr/public/speeches/266156.htm> (hereinafter Varney Remarks).

⁴ *Id.*

⁵ Complaint, *United States v. Comcast Corp.*, No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), available at <http://www.justice.gov/atr/cases/f266100/266164.pdf> (hereinafter Complaint).

⁶ *Id.*

Specifically, the complaint alleged that the merger would have enabled Comcast to harm competition by either withholding or raising the price of NBCU content. As AAG Varney stated, the “transaction had the potential to stifle new online competition,” but the settlement “ensures that the transaction will not chill the nascent competition posed by online competitors – competitors that have the potential to reshape the marketplace by offering online services.”⁷ The DOJ also stated that the settlement would preserve new content distribution models that offer more products, greater innovation, and the potential to provide consumers access to programming on various devices in a broad selection of packages.⁸

The Federal Communications Commission (FCC) “determined that granting the application, with certain conditions and contingent upon enforceable commitments, is in the public interest.”⁹ In assessing the possibility of competitive harm, the FCC relied upon several economic models and empirical studies in addition to documentary evidence and the submissions of the applicants and complaining parties.¹⁰

To gain approval from the regulatory agencies, Comcast agreed to certain restrictions imposed by the DOJ and FCC aimed at preventing Comcast from providing unfair advantages to its television channels or online video programming. The parties also made various additional voluntary commitments, many of which the FCC adopted as conditions to the transaction’s approval.¹¹ The conditions imposed by the FCC address potential harms posed by the joint venture, including access and licensing issues, and the targeted conditions and commitments will

⁷ Varney Remarks, *supra* note 3.

⁸ DOJ Press Release, *supra* note 1.

⁹ Fed. Comm’n Comm’n, News Release, *FCC Grants Approval of Comcast-NBCU Transaction* (Jan. 18, 2011), available at <http://www.fcc.gov/> (hereinafter FCC News Release).

¹⁰ Memorandum Opinion and Order, Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign Licenses & Transfer Control of Licensees, MB Docket No. 10-56, FCC 11-4 (Jan. 20, 2011), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf (hereinafter FCC Order).

¹¹ FCC News Release, *supra* note 9. Most of these commitments work toward enhancing the public interest and include commitments regarding broadband adoption and deployment, localism, children’s programming, programming diversity, and public, educational, and governmental (“PEG”) programming.

generally remain in effect for seven years. On March 10, 2011, Senator Herb Kohl announced that the Subcommittee on Antitrust, Competition Policy, and Consumer Rights plans to investigate the Comcast-NBCU merger “to ensure that these conditions are being properly applied to foster competition, including competition from new forms of Internet delivery of video content.”¹²

CONDITIONS

The settlement order, which will remain in effect for seven years, sets forth specific conditions Comcast must meet to address the FCC’s four main areas of concern: the joint venture must (1) provide access to its programming to competitors; (2) protect the development of online competition; (3) provide access to Comcast’s distribution systems; and (4) protect diversity and local concerns.¹³

The FCC’s approval is structured to promote adoption of broadband in underserved communities; to increase broadband access to schools and libraries; and to increase news coverage, children’s television, and Spanish-language programming. The FCC praised Comcast’s voluntary commitments to broadband adoption and deployment, localism, children’s programming, programming diversity, as well as public, educational, and governmental programming.

The regulatory agencies were very concerned that an all-powerful Comcast might stifle competition from new online video competitors including Hulu, in which it now owns a stake.¹⁴ Several conditions addressed protection of Internet video and Hulu, but figuring out just how to sufficiently protect online video was difficult because the market is still taking shape. Although

¹² Molly McHugh, *Google, Comcast-NBC Merger Could Face Antitrust Hearings from US Senate*, DIGITAL TRENDS, March 10, 2011, available at <http://www.digitaltrends.com/computing/google-comcast-nbc-merger-could-face-antitrust-hearings-from-us-senate/trackback/>.

¹³ FCC Order, *supra* note 10.

¹⁴ Adegoke & Levine, *supra* note 2.

the FCC also acknowledged that the merger could create threats “to the development of innovative online distribution services,” FCC Chairman Julius Genachowski stated, “The conditions include carefully considered steps to ensure that competition drives innovation in the emerging online video marketplace.”¹⁵ He also said that the FCC “adopted strong and fair merger conditions to ensure this transaction serves the public interest.”¹⁶

Consequently, Comcast was required to terminate its management of the News Corp., NBC Universal, and Disney-owned video sharing site Hulu, although Comcast and NBC Universal can still maintain a financial stake in the site.¹⁷ AAG Varney stated the change was essential so that “Comcast cannot use NBCU’s partial ownership of Hulu to diminish its competitive significance.”¹⁸ To obtain government approval, Comcast also agreed to permit online rivals to license NBC programming and to not interfere with online video streaming over its network; thus, it cannot block or slow down its 17 million broadband subscribers from accessing video online through Netflix, Apple’s iTunes, and other services.¹⁹ Further, Comcast must sell stand-alone Internet access at a reasonable price, without tying it to a cable television package.

Although these requirements offer no guarantees, they aim to ensure that Comcast cannot hinder other online businesses. As the transaction was completed so recently, it is impossible to predict exactly how the online video market will evolve and respond to the merger. Ultimately, consumers will have to decide, but at least they have a choice. Further, while only Comcast and

¹⁵ Fed. Comm’n Comm’n, Statement of Chairman Julius Genachowski, Re: *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket 10-56, FCC 11-4, available at <http://www.fcc.gov/>.

¹⁶ *Id.*

¹⁷ DOJ Press Release, *supra* note 1.

¹⁸ Kristen Hamill, *U.S. Approves Comcast-NBC Merger*, CNN MONEY, Jan. 18, 2011, available at http://money.cnn.com/2011/01/18/technology/fcc_comcast_nbc/index.htm.

¹⁹ Joelle Tessler, *Comcast, NBC Deal Opens Door for Online Video*, ASSOCIATED PRESS, Feb. 28, 2011, available at <http://finance.yahoo.com/news/Comcast-NBC-deal-opens-door-apf-958071378.html?x=0&.v=6>.

NBCU are bound by these conditions, they could serve to pressure other media companies to make their programming available to online services as well. Also, as noted by Jonathan Baker, Chief Economist for the FCC, the conditions could serve as a model for future government merger reviews and for other large entertainment companies dealing with new online competition, and possibly even shape new FCC rules affecting the whole industry.²⁰

The settlement and FCC order also include other relief aimed at ensuring that Comcast cannot avoid the provisions designed to protect competition. For example, Comcast may not retaliate against any broadcast network or affiliate, cable programmer, production studio, or content licensee for licensing content to a competing cable, satellite, or telephone company or online video distributor; nor can it retaliate for raising concerns to the DOJ or the FCC.²¹ Also, Comcast may not require programmers or video distributors to agree to licensing terms that seek to limit online distributors' access to content.

In the event of a licensing dispute between Comcast-NBCU and an online video distributor, the DOJ may seek enforcement of the settlement by a court, or in its sole discretion permit the online video distributor to engage in a commercial arbitration procedure established under the settlement.²² The FCC order also provides an arbitration mechanism for resolving disputes. If timely arbitration is available for resolution of disputes under the FCC order, the DOJ will ordinarily defer to the FCC's arbitration process. In addition, the FCC order allows

²⁰ Jonathan Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis*, 25:2 ANTITRUST 36 (2011). "The Commission's recent decision to allow the transaction between Comcast and General Electric's NBC Universal (NBCU) affiliate to proceed subject to conditions helped to fill a gap in the contemporary treatment of vertical mergers. *Id.* "In its Comcast/NBCU Order, the FCC set forth a detailed legal roadmap for analyzing exclusionary harm from vertical merger." *Id.* at 37.

²¹ *Id.*

²² DOJ Press Release, *supra* note 1.

Comcast's traditional competitors, such as satellite and telephone companies, to bring arbitration proceedings at the FCC to resolve access and retransmission disputes.²³

OPPOSITION

Although the merger was approved by federal regulators, some consumer and media watchdog groups are still upset, mainly because Comcast is already the largest provider of cable television and services in the United States. According to the non-profit organization Free Press, “By controlling both information and the ways people access that information – by cable, broadcast and the Internet – Comcast-NBC can and will block competition, stifle innovation and silence independent, opposing viewpoints.”²⁴

As the sole dissenter to the merger, FCC Commissioner Michael Copps expressed similar concerns.²⁵ He conveyed his concern that the merger would limit communications choices and drive up costs to consumers. “At the end of the day, the public interest requires more – much more – than it is receiving,” Commissioner Copps stated.²⁶ Additionally, in response to the claim that the duration of the commitments made by Comcast-NBCU are longer than any that have been attached to previously approved mergers, Commissioner Copps said, “That may be true – but it is also true that power is patient and that big businesses can bide their time when they have to in order to reap the fullest harvest.”²⁷

Moreover, Comcast will own many channels, which Comcast-NBCU could potentially use as “bargaining chips” against other cable and internet providers who want to carry them.²⁸

Further, Comcast-NBCU will have the incentive and means to discriminate, and it could further

²³ FCC Order, *supra* note 10.

²⁴ Adegoke & Levine, *supra* note 2.

²⁵ The FCC voted 4 to 1 to approve the merger, with Commissioner Copps as the lone dissenter.

²⁶ Fed. Comm'n Comm'n, Dissenting Statement of Comm'r Michael J. Copps, Re: *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket 10-56, FCC 11-4, available at <http://www.fcc.gov/> (hereinafter Copps Dissent).

²⁷ *Id.*

²⁸ Adegoke & Levine, *supra* note 2.

restrict streaming content online. As a joint venture, there would be less incentive to distribute NBCU programming to Comcast's rivals than NBCU on its own, and it could cause Comcast's rivals and their customers to face higher prices. As Commissioner Copps stated, "Given the market power that Comcast-NBCU will have at the close of this deal over both programming content and the means of distribution, consumers should be rightfully worried."²⁹ Further, according to U.S. Senator Al Franken (Minn.), "With approval of this merger, the FCC has given a single media conglomerate unprecedented control over the flow of information in America. This will ultimately mean higher cable and Internet bills, fewer independent voices in the media, and less freedom of choice for all American consumers."³⁰

There is also concern that by allowing the merger to go through, it could lead to further media consolidation. Other service and content providers could merge to attempt to keep pace with Comcast-NBCU, further limiting competition and increasing the possibility of collusion, price-fixing, and rate increases as was observed in the late 1990's.³¹ Senator Franken also stated that he "fear[s] this is the first domino in a cascade to come. By approving this merger, the FCC may have just given a green light to AT&T and Verizon to pursue similar mergers"³²

CONCLUSION

There can be significant ramifications of a company with such a large share of the market, regardless of what the market is. Even if consumers are not Comcast subscribers, this merger can still have potential effects as a result of the vast amount of content Comcast now owns and could potentially own in the future. Thus, continued monitoring of compliance with

²⁹ Copps Dissent, *supra* note 26.

³⁰ Press Release, Sen. Franken's Statement on FCC's Approval of Comcast-NBC Merger, Jan. 18, 2011, *available at* http://franken.senate.gov/?p=press_release&id=1259 (hereinafter Sen. Franken's Statement).

³¹ Alex Chasick, *Why A Comcast/NBC Merger Is Bad News*, CONSUMERIST, Dec. 3 2009, *available at* <http://consumerist.com/2009/12/why-a-comcastnbc-merger-is-bad-news.html>. During this period, after media ownership rules were relaxed, companies hurried to buy as many stations as they could to remain on equal ground with each other.

³² Sen. Franken's Statement, *supra* note 30.

the conditions, such as is planned by the Subcommittee on Antitrust, Competition Policy, and Consumer Rights, will play an important role in ensuring the conditions and commitments are met and harm to consumers is in fact minimized. As AAG Varney commented, “This settlement demonstrates how the antitrust laws offer critical protection to nascent markets as well as consumers in the digital age. We will vigorously enforce the settlement to prevent harm to competition in video distribution.”

Combining the assets of NBC Universal with the content assets and technology expertise of Comcast will create many new opportunities for consumers. “The combination of these assets will allow us to bring the future of anytime, anywhere media faster to consumers in America and around the globe,” said Steve Burke, Chief Executive Officer of NBC Universal.³³ “The NBC Universal joint venture will be well positioned to compete, innovate, and bring new choices to consumers,” said Brian Roberts, Chairman and Chief Executive Officer of Comcast.³⁴

The combination of Comcast and NBC Universal is a complex and significant transaction that has the potential to provide benefits to consumers that, according to the regulating agencies, outweigh any potential harms. Thus, so long as the parties comply with the terms of the conditions imposed and the voluntary commitments, this merger should be expected to result in more benefits to consumers than harm.

³³ Comcast Press Release, *Comcast and GE Receive Regulatory Clearance for NBC Universal Transaction* (Jan. 18, 2011), available at <http://www.comcast.com/nbcutransaction/pdfs/Comcast-GE-Regulatory-Clearance-FINAL-11811.pdf>.

³⁴ *Id.*