Why the Comcast/NBC Merger Poses a Major Threat to Video Competition that Antitrust Authorities Cannot Ignore

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Introduction

Recently, much attention has been focused on the proposed merger between Comcast and NBC Universal (NBCU). Many Washington and Wall Street analysts have presumed that the merger would likely be approved by the relevant regulatory authorities, thereby implying that the union is a done deal. However, those who would claim that approval of the Comcast/NBC merger is a foregone conclusion have not undertaken the careful market definition and competitive analysis that the federal authorities must do pursuant to antitrust laws.

Far from being a cakewalk, this merger raises the most basic antitrust issues in an emerging space that the Obama administration has declared to be of particular importance. Moreover, given President Obama's criticism of the Justice Department's weak antitrust record during the previous administration,[1] vigorous oversight of anticompetitive conduct — particularly of that involving vertical mergers and innovation-focused industries — should be expected. Additionally, to the extent that this combination involves broadcast and cable issues, the Federal Communications Commission is also likely to scrutinize the public interest and competitive impact of the merger.

A vertically integrated Comcast/NBC would not only control marquee television and movie content, it would also control the primary avenues for distributing that content: a major television broadcast network, a major cable system operator and a major broadband Internet access provider. Because the merged entity would control both content and distribution, it would have both the incentive and the market power to limit the access of competing content to the distribution platforms it controls. It would also have the power to enforce anticompetitive bundling and pricing of its own programming, or in some cases, to deny its competitors access to its programming altogether.

A Comcast/NBC Merger Would Hurt Competition in Traditional Video Markets

A review by federal agencies should give a hard look at the extent to which a merger between the nation's No. 1 cable operator and residential broadband provider and a major content network threatens competitive rivalry and diversity in the video marketplace. A Comcast/NBC combination would wield enormous market power. Notwithstanding the growth of competition in the multichannel video distribution space, cable remains the dominant platform for the distribution of paid video content, holding a market share of about 60 percent — more than twice that of the closest rival technology. Similarly, the major television networks continue to be the dominant brand names in national video markets, accounting for well over half of all TV advertising. Even looking more broadly at electronic advertising (TV, radio, Internet), broadcast television is the largest component, with over one-third of the total.

Removing the competitive tension between a major multichannel video program distributor and a major video content producer, such as Comcast and NBC, would eliminate the hard bargaining for distribution and content that has historically occurred between these two entities. Instead, a Comcast/NBC cable provider would pay itself for its own content. In essence, it would simply take money out of one pocket and put it into another. Furthermore, a merged company would certainly leverage its control over content to charge rivals, such as DirecTV or Verizon Fios, anticompetitive rates to access Comcast/NBC programming. Of course, these costs would ultimately be passed onto the subscribers of Comcast/NBC's competitors, resulting in higher fees for consumers.

[1] Statement of Sen. Barack Obama at the American Antitrust Institute, available at http://www.antitrustinstitute.org/archives/files/aai-Presidential campaign - Obama 9-07_092720071759.pdf.

Not only would the merger increase costs for consumers, it would also substantially increase Comcast/NBC's market power, while decreasing the overall diversity of media ownership. Post merger, Comcast/NBC would own three distribution platforms — TV stations, cable systems and broadband Internet services — reaching all or part of the population in 11 TV markets, including New York, Chicago, Philadelphia, San Francisco, Boston, Washington, D.C., Houston, Miami, Denver, Hartford and Fresno. This would lead to an unacceptable level of concentration of video distribution and advertising market power at the local level.

A Comcast/NBC Merger Would Hurt Competition in the Emerging Online Video Market

Antitrust review should also examine the effects on competition and innovation in emerging markets. We are at a critical juncture in the nation's video marketplace, as video programming and audiences move online. Currently, there is opportunity for competition and choice in the online video realm — but such competition is not guaranteed. To that end, the greatest threat a Comcast/NBC merger poses to future competition stems from the fact that Comcast is not only the dominant multichannel video distributor in the nation, but also the No. 1 broadband Internet service provider. Additionally, in acquiring NBC, Comcast would obtain a substantial interest in Hulu, the No. 2 online video provider.

Antitrust authorities should be concerned that a merged company would have a powerful motive to starve competing online video sources by denying them access to valuable content. Furthermore, Comcast/NBC would attempt to protect lucrative cable subscription profits by moving Comcast/NBC online video content behind a pay wall tied to Comcast cable subscriptions. Placing content behind a pay wall that restricts access to NBC programming to Comcast cable subscribers would be a classic example of anticompetitive bundling. By tying the Internet product to the cable product, consumers who want Internet access to NBC programming are forced to buy the bundle of cable and Internet. This strategy has the effect of propping up cable's traditional profit model, while generating revenues from Internet access. Indeed, the threat of a "double-charge" model is not mere speculation. Already, we have seen movement in the cable industry to tie access to online video content to cable subscriptions through "TV Everywhere" initiatives.[2] Similarly, NBC has announced plans to limit access to live streams of the 2010 Olympic Games only to those users who can authenticate that they subscribe to a pay TV service.[3]

A Comcast/NBC Merger Is Likely to Trigger More Media Consolidation

Antitrust authorities should also examine how a Comcast/NBC merger is likely to trigger additional mergers by competitors. Consolidation does not occur in a vacuum, but rather sets the pace and terms of play for an entire industry. As we have seen repeatedly in the video market, a major merger at the top would trigger a merger wave throughout the top tier, as the remaining players in both the distribution and content markets seek to muscle-up to match the new threat that the vertically integrated giant poses. With diminishing competition and the elimination of competitive rivalry across the distribution-content divide, the likelihood of parallel behavior grows stronger, as does the threat of collusion. Consumer choice would be restricted, and prices would rise while oligopoly control prevents entry by new competitors.

[2] Om Malik, "Comcast, Time Warner Team Up to Control TV on the Internet," GigaOm, June 23, 2009, available at http://gigaom.com/2009/06/23/comcast-time-warner-team-up-to-control-internet-video/
[3] John Ourand, "Olympics a Test Case for Web Video?" *Sports Business Journal*, April 13, 2009, available at http://www.sportsbusinessjournal.com/article/62188.

The Comcast/NBC Merger: Just Say No

This merger's potential to foreclose competition and stifle innovation is significant and real. Therefore, we are confident that the relevant authorities will see the severe threat that this merger poses and will take the necessary measures to prevent harm to competition and consumers. The correct response to this merger is to just say no.

Nevertheless, we recognize that regulators may try to address threats to competition by placing "conditions" on the merger. However, in order to resolve these threats, such conditions must be strict and comprehensive. Because the merged entity would have a strong incentive to withhold or overprice its services, the conditions must bar a merged Comcast/NBC from discriminating in access to either Comcast cable systems or NBC content. Further, conditions must ensure that both content and services are made available on fair and reasonable terms.

If federal authorities determine that conditions in a consent decree can repair the competitive harm that would result from this merger, they should include the following terms:

In the "traditional" video distribution space

- Require divestiture of NBC's owned and operated broadcast stations.
- Require nondiscrimination in carriage of unaffiliated programming on cable systems owned by Comcast.
- Ensure availability of Comcast/NBC content on an unbundled basis to unaffiliated multichannel video programming distributors on fair and reasonable rates, terms and conditions.

In the Internet video distribution space

- Preserve Internet availability of NBC video content on non-Comcast/NBC Web sites at fair and reasonable rates, terms and conditions.
- Ensure access to non-affiliated content on Comcast Web sites at fair and reasonable rates, terms and conditions.
- Prohibit "double-pay" tying arrangements that force consumers to purchase both cable TV and Internet access subscriptions in order to watch Comcast/NBC content online.