Comcast/NBC Merger Unites Content and Conduits

By Joshua Green

10-12 minutes

Comcast's bid to acquire a 51 percent stake in NBC Universal has raised concerns about the future market conditions for US television and Internet services. The proposal was reviewed by Congress, the FTC, the DOJ, and the FCC, but looks set to be approved.

Here are five things you need to know about the Comcast/NBC merger:

1. Comcast's vision for a "premier entertainment company."

2. Approval of the merger is considered a done deal.

3. Concerns extend to Comcast favoring its own channels, restricting access to must-see programming, and flexing its muscle in retransmission disputes.

4. The merger raises net-neutrality concerns, and could restrict the development of online TV services.

5. Comcast has played hardball with independent channels in the past, notably groups as large as the NFL.

1. Comcast's vision for a "premier entertainment company."

In a presentation for investors on December 3, 2009, the Comcast management team provided details on the value Comcast sees in NBC's content properties and the role they would play in the new venture. The joint venture will have an Operating Cash Flow as large as that of Time Warner, 82% of which will be drawn from cable channels.

In testimony before congress, John Wells, president of the Writers Guild of America West, noted "the combined entity being discussed today will control 20% of television viewing hours."

Comcast's Investor Relations site provides a nutshell perspective on the assets of the new joint venture:

1. A world-class cable network portfolio
2. 234 NBC-affiliated stations; 10 owned and operated stations
3. A leader in multicultural programming with Telemundo Network
4. Attractive online portfolio of Internet properties
5. An Emmy Award-winning television production studio
6. NBC, one of the country's best known broadcast networks
7. One of the world's most successful movie production studios
8. 16 owned and operated Telemundo TV stations, mun2, and an interest in TVOne
9. A premier sports entertainment platform
10. Renowned theme parks in Orlando and Hollywood

2. Approval of the merger is considered a done deal.

Democratic members of Congress have raised concerns about consumers being worse off, citing NBC's poor Olympics coverage as a cause for concern. Senator Bernie Sanders, Independent from Vermont has opposed the deal on the grounds it "would lead to higher costs to consumers, would damage competition and would limit the diversity of voices in the media," a point Mark Cooper of the Consumer Federation of America raised as well. The fact that NBC and Comcast are not in direct competition would raise a significant challenge to any antitrust actions.

Despite some heated moments during the nearly 12 months of review from both the Department of Justice and the Federal Communications Commission, approval seems likely. At this point, the main question that remains concerns what restrictions are likely to be imposed on the new conglomerate. Indeed, in a November letter delivered to the FCC, Sanders chastised Comcast for naming a new management team before the merger has been approved:

> Although Comcast has done little to prove that the proposed merger is in the public interest, it has been busy measuring the drapes at NBC. Despite ongoing review, Comcast has on several occasions announced plans for replacing NBCU's executives with Comcast staff and restructuring of NBCU's senior leadership. These actions suggest a disregard for the important and ongoing agency reviews of the merger—or worse, a belief that Comcast has successfully controlled the federal review process.

3. Concerns extend to Comcast favoring its own channels, restricting access to must-see programming, and flexing its muscle in retransmission disputes.

A report prepared by the Congressional Research Service on February 2, 2010 considers four key issues for consideration by the DOJ and the FCC in approving the deal:

- whether Comcast would be able to use its vertically integrated position to deny rival distributors access to programming or to raise the cost of that programming;
- whether Comcast would be able to use its vertically integrated position to favor the programming of NBCU at the expense of independent programmers;
- whether Comcast would have the incentive to use the merger to change NBC into a cable network, at the expense of local programming;
- whether a combined Comcast-NBCU might have the unique ability to craft new business models that benefit consumers.

In June, a group of NBC affiliates agreed to support the merger on the condition that anti-siphoning rules are put in place to ensure big-ticket sports events aren't pushed to Comcast's cable business and that the company will not bypass local broadcast stations and deliver a same-day feed of NBC via cable in the event retransmission negotiations breakdown. In addition, a number of ABC, CBS and Fox affiliates lodged a submission with the FCC supporting the merger on the condition non-NBC affiliates were not disadvantaged in retransmission negotiations, that the quality of their signals were not lowered, nor their stations assigned a lower position on the dial.

Time Warner Cable has led the charge to petition the FCC for new rules on retransmission consent negotiations — Comcast is the only major cable provider that didn't join the petition. Comcast's conflict of interest in this area is causing it to keep quiet, even though the company has "promised to take a "constructive role" in retransmission consent negotiations – at the heart of providing affordable access to competitors."

(Read more – excerpt from Congressional Research Service report [pdf])

4. The merger raises net-neutrality concerns, and could restrict the development of online TV services.

> "I fear that this practice of locking up certain content only for pay-TV subscribers may be a preview of what is to come with respect to TV programming shown on the Internet, particularly in the context of the proposed Comcast/NBC Universal merger" — Senator Herb Kohl to Jeff Zucker

The merger will give Comcast an interest in Hulu.com, Fancast (Comcast's own online video service) and TV Everywhere, the cable industry's attempt to move into the online video space. Congress, activists, and commentators have all raised concerns about the significant power the merged entity could wield in the evolving online video space, as have Netflix and Boxee. As the *NY Times* wrote:

> Comcast, the country's largest cable operator, has already been using its considerable muscle to limit how many shows are

> available online, lest people think they can cancel their costly cable subscriptions and watch free online. Now the company — which, if the NBC deal passes government muster, will own a piece of the biggest site that threatens to undercut its core business [Hulu]— is looking for ways to charge for ubiquitous access to shows.

In their submission to the FCC, Public Knowledge, a non-profit focused on intellectual property rights, diversity in the digital market, and open standards, noted the new conglomerate could have enough power to squeeze out many new companies producing “over the top” technologies for online content delivery. They argue the merger could quash this nascent market.

However *The Wall Street Journal* reports insider speculation that both the FCC and the Justice Department will impose conditions on the deal designed “prevent Comcast from withholding, or threatening to withhold, NBC Universal's programming from competitors, including companies that distribute TV shows and movies over the Internet.” This last clause suggests the new conglomerate may be required to offer content deals to companies such as Apple (iTunes), Netflix, and others providing online access to content.

(Read more -- NY Times on the implications for web TV)

5. Comcast has played hardball with independent channels in the past, notably groups as large as the NFL.

Concerns Comcast could reduce diversity in the media space are buoyed by the claims of Andrew Jay Schwartzman, President and CEO of the Media Access Project, who points out Comcast has played hardball over access to independent channels in the past, notably with groups as large as the NFL. “There are scores of cable networks which have been unable to obtain carriage on Comcast and other cable systems,” he writes, before recounting the challenge the NFL Network had securing a reasonable place on Comcast’s network:

> "A case in point is the difference in treatment between the MLB Network and the NFL Network. For more than a decade, the National Football League’s NFL Network has fought for carriage on widely viewed cable tiers at fair prices. It has been unable to reach agreements with a number of major cable operators. By contrast, Versus, a competing but far less viewed sports channel owned by Comcast, has been placed on a basic tier. Finally, the NFL filed a Section 616 complaint against Comcast, alleging that Comcast would not place the NFL Network on the same tier that Comcast placed its own sports networks and that it had conditioned its willingness to carry the NFL Network upon receipt of a financial interest in NFL programming. After considerable delay, the FCC finally directed that a hearing be held. Eventually, a year after its complaint was filed, the delay and cost of the hearing forced the NFL to accept a settlement which provided inferior channel placement at a price far below what the NFL had sought. Even the NFL, with its vast resources, couldn’t crack the Comcast stranglehold without lawsuits, FCC proceedings, and years of uncertainty before it reached a negotiated settlement which was less than what it wanted.

> Major League Baseball learned from the NFL's experience, and took a different tack. When it created the MLB Network it did what the NFL has refused to do, and offered significant ownership interests to the major cable operators, including Comcast. Not surprisingly, from the moment of its launch, the MLB Network has been carried on the basic cable tier."

(Read more – excerpt from Andrew Jay Schwartzman's testimony [pdf])