Consumer Federation of America

Online Video Distribution and the Comcast-NBC Merger: Assessing the Impact of the DOJ Consent Decree and FCC Order

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January 2011

The Bottom Line: The Public Interest will be Served

The Comcast-NBC merger, with its substantial increase in horizontal concentration and vertical integration in the video product space, poses a severe challenge to federal authorities who must evaluate the merger under both the antitrust laws and the Communications Act. They must not only protect competition and prevent the abuse of the market power that would result from the merger, but they must also ensure that the merger promotes the public interest, while allowing the parties to pursue the legitimate economic value they believe will flow from the combination of assets.

- Working closely together, the Department of Justice (DOJ) and the Federal Communications Commission (FCC) have crafted a set of conditions that we believe achieves a substantial net gain for the public.

- As always, vigorous and effective enforcement of the conditions will be the key to delivering the benefits to the public and, here too, the agencies have created a framework that is a substantial improvement on the current enforcement mechanism.

As we understand the DOJ Complaint, Competitive Impact Statement and Consent Decree combined with the FCC Order, we believe that the post-merger marketplace with the conditions will be friendlier to Internet consumers and more supportive of video competition than if the FCC and the DOJ would have blocked the merger in three critical ways -- consumer access to broadband, distributor access to consumers, and the availability of programming on the Internet platform.

In Senate testimony about a year ago we reminded policymakers of the immense importance of this merger. "Over the past quarter century there have been a few moments when a technology comes along that holds the possibility of breaking the chokehold that cable has on the multi-channel video programming market, but on each occasion policy mistakes were made that allowed the cable industry to strangle competition. This is the first big policy moment for determining whether the Internet will function as an alternative platform to compete with cable. We all hope the Internet will change everything in the video product space, but it has not yet… If policymakers allow this merger to go forward without fundamental reform of the underlying industry structure, the prospects for a more competition-friendly, consumer-friendly multi-channel video marketplace will be dealt a severe setback… It is only by taking the approach I have outlined that Federal authorities can do more than just preserve the current industry structure, which is riddled with anticompetitive and anti-consumer institutions and practices, that they can improve the terrain of the American video marketplace. This merger is an opportunity to jump-start the industry reform process."

Our initial take was that the merger should be rejected, but the FCC and the DOJ have put together a set of conditions and enforcement measures that we believe will protect consumers and promote the public interest and provide the trigger for broader regulatory reform, while providing additional momentum for the development of the Internet as a platform for video competition. The conditions go well beyond current practice to restrict the post-merger company from withholding must have content, raising rivals costs, blocking the flow of content into the online market through restrictive of uneconomic contract terms, or discriminating against Internet delivered video.

Against these gains, policy makers and the public must balance the cost of allowing the largest cable operator and the largest broadband Internet service provider to merge with one of the three original broadcast networks. We readily understand that others can reach a different bottom line when totaling up the costs and benefits and we share the concern that the devil is not only in the details, the devil is in the enforcement. We will continue to work toward an industry-wide reform of practices in the video space to ensure that all stakeholders in the multi-channel video market, which now includes Internet distribution, behave in a manner that promotes the public Interest.

Consumer Access to Broadband Internet Access Service will be Improved

Consumers, particularly low income consumers, will have better access to broadband Internet access service.

- The program to increase broadband adoption among low income households will not only add millions of subscribers to the Broadband network in Comcast's service territory, it will serve as a model for the nation as we move into the implementation of the national broadband plan.

- Standalone broadband will be available at a price that cannot increase for three years.

- Adequate capacity to support multi-channel video will be available.

Distributor Access to the Broadband Internet will be Improved

Distributors of video content over the Internet will have better access to broadband consumers.

- The network neutrality conditions recently implemented by the FCC are secured for the largest broadband Internet access provider, regardless of the outcome of legislation or litigation.

- A minimum capacity adequate to support video distribution will be available for competing video is guaranteed.

- The Department of Justice asserts enforcement authority over the network neutrality conditions under the antitrust laws.

The Flow of Programming onto the Internet Platform will be Improved

The availability of programming for Internet distribution will be better.

- NBC will be required to match the best practices in making content available by independent programmers that are similar in size

- The contracting practices of Comcast and NBC will be constrained with respect to Internet distribution.

- Content providers are given greater protection against retaliation by Comcast should they make their content available on the Internet.

- The DOJ consent decree and the FCC order lay the foundation for ensuring that the Internet

TV enjoys the Communications Act protections from the abuse of market power in access to programming.

- The DOJ has tackled the problem of vertical integration in the video market more aggressively and effectively than has been the case in decades.

Enforcement will be More Effective

These conditions will be enforceable and the enforcement mechanisms have been strengthened in two ways.

- The Federal Communications Commission has outlined improvements in its complaint process to accelerate dispute resolution and give.

- Most importantly, the Department of Justice will have the ability to enforce a consent decree.

- These two improvements will work hand in hand. Since Comcast will have a strong incentive to avoid being hauled into the antitrust court, it will have an incentive to bargain in good faith and resolve disputes at the FCC.

- Comcast has committed to comply with the recent network neutrality rules adopted by the FCC even if the courts rule that it does not have the necessary authority under the Communications Act and the DOJ will be able to enforce those conditions under the antitrust consent decree.