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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

Contribution from the United States

-- Session II --

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COMPETITION ISSUES IN TELEVISION AND BROADCASTING

-- United States --

1. The lawsuit filed in 2011 by the Antitrust Division of the U.S. Department of Justice (Division) to block the formation of a joint venture between Comcast Corp. ("Comcast") and General Electric Co.'s subsidiary NBC Universal Inc. ("NBCU")[1] raised many of the issues that will be addressed in this roundtable. This paper summarizes the investigation, lawsuit and judicial consent decree in *Comcast/NBCU*. The Competitive Impact Statement[2] filed with the district court at the time of settlement describes in much greater detail the U.S. video distribution industry, the market for video distribution and competition from new business models, the anticompetitive effects of the proposed transaction, and the remedies incorporated in the final judgment issued by the court in 2011.

1. Comcast/NBCU

2. On January 18, 2011, the Division announced a settlement with Comcast and NBCU that allowed their joint venture to proceed conditioned on the parties' agreement (1) to license programming to online competitors to Comcast's cable TV services, (2) to subject themselves to anti-retaliation provisions, and (3) to adhere to Open Internet requirements. The Division stated that the proposed settlement would preserve new content distribution models that offered more products and greater innovation, and the potential to provide consumers access to their favorite programming on a variety of devices in a wide selection of packages.

3. The Division, along with five state attorneys general,[3] filed the civil antitrust lawsuit in U.S. District Court for the District of Columbia, to block the formation of the joint venture, alleging that the transaction would allow Comcast to limit competition from its cable, satellite, telephone and online competitors. At the same time, the Division and the five states filed a proposed consent decree reflecting the above-referenced settlement, later approved by the court, to resolve the competitive concerns in the lawsuit.

4. At the time of the lawsuit, Comcast, headquartered in Philadelphia, was the largest video programming distributor in the United States, with approximately 23 million video subscribers. Comcast wholly owned national cable programming networks (e.g., E! Entertainment, Golf, Style), had partial interests in other networks (e.g., MLB Network, PBS KIDS Sprout), and had controlling interests in regional sports networks. Comcast also owned digital properties such as DailyCandy.com, Fandango.com and Fancast, its online video website. In 2009, Comcast reported total revenues of $32 billion.

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1 *United States et al. v. Comcast Corp. et al.*, 808 F. Supp. 2d 145 (D.D.C. 2011); the court filings are all available at http://www.justice.gov/atr/cases/comcast.html.

2 Available at http://www.justice.gov/atr/cases/f266100/266158.htm.

3 The participating states were: California, Florida, Missouri, Texas and Washington.

5. GE is a global infrastructure, finance, and media company. At the time of the lawsuit, GE owned 88 percent of NBCU, a Delaware corporation, with its headquarters in New York City. NBCU was principally involved in the production, packaging and marketing of news, sports and entertainment programming. NBCU wholly owned the NBC and Telemundo broadcast networks, as well as 10 local NBC owned and operated television stations (O&Os), 16 Telemundo O&Os, and one independent Spanish language television station. In addition, NBCU wholly owned national cable programming networks[4] and partially owned A&E Television Networks (including the Biography, History and Lifetime cable networks), The Weather Channel and ShopNBC. NBCU also owned several film studios.[5] In 2009, NBCU had total revenues of $15.4 billion.

6. Throughout the investigation, the Division worked in close cooperation and coordination with the Federal Communications Commission (FCC) to reach a result that protected competition, allowing firms to bring new and innovative products to the marketplace, and providing consumers with more programming distribution choices. While the Division and the FCC have concurrent jurisdiction to review mergers involving the transfer of a telecommunications license, the statutory sources of their jurisdiction, standards of review, and burdens of proof differ. Under Section 301(d) of the Communications Act of 1934, the FCC reviews mergers to ensure they are in the public interest, convenience, and necessity.[6] Competition is an element of the FCC's analysis but not the only one. The Division, on the other hand, reviews mergers pursuant to Section 7 of the Clayton Act to determine whether the merger will result in a substantial lessening of competition in a relevant market.[7] The parties to a merger must convince the FCC that a merger is in the public interest, convenience, and necessity, whereas the Division bears the burden of proving to a Court that a merger violates Section 7.

7. On the same day that the antitrust lawsuit was filed, the FCC issued an order granting regulatory approval to the transaction under its public interest standard, subject to conditions, some of which were similar to those in the Division's settlement. The Division and FCC consulted extensively to coordinate their reviews and to create remedies that were both consistent and comprehensive.

8. The Division's complaint alleged that Comcast's traditional and online rivals needed access to NBCU programming, including the NBC broadcast network, to compete effectively against Comcast. The proposed joint venture would have less incentive than a stand-alone NBCU to distribute NBCU programming to Comcast's video distribution rivals, and could cause Comcast's rivals and their customers to face higher prices for that content. The Division said that the joint venture, as originally proposed, could substantially lessen competition for video programming distribution in major portions of the United States. The Division also said that the market would experience lower levels of investment, less experimentation with new models of delivering content, and less diversity in the types and range of product offerings.

9. Under the settlement and the FCC order, the joint venture must make available to online video distributors (OVDs) the same package of broadcast and cable channels that it sells to traditional video programming distributors. In addition, the joint venture must offer an OVD broadcast, cable and film content that is similar to, or better than, the content the OVD receives from any of the joint venture's programming peers. These peers are NBC's broadcast competitors (ABC, CBS and FOX), the largest cable programmers (News Corp., Time Warner Inc., Viacom Inc. and The Walt Disney Co.), and the largest video production studios (News Corp., Sony Corporation of America, Time Warner Inc., Viacom Inc. and The Walt Disney Co.).

[4] Bravo, Chiller, CNBC, CNBC World, MSNBC, mun2, Oxygen, Sleuth, SyFy and USA Network

[5] Universal Pictures, Focus Films and Universal Studios

[6] 47 U.S.C. § 310(d).

[7] 15 U.S.C. § 18.

10. In the event of a licensing dispute between the joint venture and an OVD, the Division may seek court enforcement of the settlement or permit, in its sole discretion, the aggrieved OVD to pursue a commercial arbitration procedure established under the settlement. The FCC order also required the joint venture to license content to OVDs on reasonable terms and included an arbitration mechanism for resolving disputes. In contrast to the consent decree's arbitration process, the FCC process contains a right of appeal. If timely arbitration is available for resolution of disputes under the FCC order, the Division ordinarily will defer to the FCC's arbitration process to resolve such disputes. The FCC order also allows Comcast's traditional competitors, such as satellite and telephone companies, to invoke arbitration at the FCC to resolve program access and retransmission consent disputes. The FCC has experience with arbitration involving programming disputes between traditional MVPDs, making it unnecessary for the Division to impose similar relief. OVDs are nascent competitors, however, and consistent with the Division's competition law mandate, the Division reserved the right to offer an alternative to the FCC's arbitration process to advance the competitive objectives of the settlement.

11. The settlement included other relief aimed at ensuring that Comcast cannot evade 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 OVD, or for raising concerns to the Division or the FCC;

- Comcast must relinquish its management rights in Hulu, an OVD. Without such a remedy, Comcast could, through its seats on Hulu's board of directors, interfere with the management of Hulu, and, in particular, the development of products that compete with Comcast's video service. Comcast also must continue to make available to Hulu NBCU content that is comparable to or better than the programming content Hulu obtains from its other media owners, Disney and News Corp;

- Comcast is prohibited from unreasonably discriminating in the transmission of an OVD's lawful network traffic to a Comcast broadband customer. Additionally, Comcast is required to give other firms' content equal treatment under any of its broadband offerings that involve caps, tiers, metering for consumption, or other usage-based pricing. Comcast must also maintain the high-speed Internet service it offers to its customers by continuing to offer download speeds of at least 12 megabits per second in markets where it has upgraded its broadband network; and

- Comcast may not, with certain narrowly defined exceptions, require programmers or video distributors to agree to licensing terms that seek to limit online distributors' access to content.

2. Conclusion

12. *Comcast/NBCU* is a good example of a complex transaction involving vertical theories where the Division concluded that the transaction, as proposed, would give rise to competitive harm. Although the Division was prepared to litigate the case, the parties agreed to conditions that addressed the Division's concerns while allowing the potential for procompetitive benefits of the deal to be realized. Decrees in these cases can include a variety of requirements, such as licensing and firewall provisions, reporting obligations, and the creation of complaint mechanisms, to name a few. These types of decrees are commonly referred to as "behavioral" or "conduct" remedies. The goal in these settlements is to address the competitive concerns without limiting the efficiencies of the proposed transaction.

13. As originally proposed, the joint venture between NBCU and Comcast would have allowed Comcast, the largest cable company in the United States, to limit competition by either withholding or raising the price of NBCU content and effectively stifling new competition in the online video market. The parties agreed to a consent decree that included a variety of conduct provisions that preserved existing and potential competition in the nascent online video market but without regulating how the market should work.[8]

[8] The Division hosted a Symposium in November 2007 focusing on competition among providers of video programming delivery, local telephone, and broadband services. *Voice, Video and Broadband: the Changing Landscape and its Impact on Consumers* (http://www.justice.gov/atr/public/reports/239284.pdf) is the report summarizing the views of industry executives, economists, analysts, and local government officials who participated in the Symposium. That report also addresses many of the questions and points for discussion listed in the Secretariat's Call for Country Contributions.