

FCC and DOJ Allow the Comcast-NBCU Joint Venture to Proceed with Conditions

01.19.11

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Yesterday, both the Department of Justice (DOJ) and the Federal Communications Commission (FCC) took actions that will allow Comcast to create and control a joint venture with NBC Universal, Inc. (NBCU). DOJ announced it would allow the transaction to move forward under a proposed Final Judgment that resolves DOJ's competitive concerns regarding the Joint Venture through imposition of several significant conditions. Similarly, the FCC announced it had approved all necessary license transfers to allow completion of the transaction, subject to its own set of conditions. The text of the FCC's order has not yet been released, but a news release outlining the FCC's conditions was made available yesterday afternoon.

The FCC approval order will require increased local and news programming on NBC broadcast stations, carriage of increased independent and diverse programming on Comcast cable systems, expanded availability of Comcast broadband to rural areas and to lower income customers, as well as a wide variety of other conditions and voluntary commitments offered by Comcast-NBCU (Joint Venture). However, of broader interest to the video programming and distribution industries are requirements contained in both the DOJ Final Judgment and the FCC's order relating to access to programming for online video distributors (OVDs), and well as the requirements relating to the manner in which Comcast carries such online video programming over its own Internet facilities.

Access to Comcast-NBCU programming for OVDs

Although the FCC order will contain conditions requiring Comcast-NBCU to license its content to traditional MVPD competitors (i.e. satellite and telephone companies), the FCC and especially the DOJ focus upon the manner in which OVDs can obtain access to video programming owned or controlled by Comcast-NBCU.

Programming provided to traditional MVPDs

First, any OVD may request that the Joint Venture make available all video programming provided by the Joint Venture to any traditional MVPD (with more than one million subscribers) on terms that are "Economically Equivalent" to the terms under which the Joint Venture provides such programming to traditional MVPDs. In this context, it is contemplated that the OVD will provide "linear" carriage of such programming and that the "economically equivalent" price, terms and conditions will take into account all reasonable differences in revenues earned by the Joint Venture in connection with the provision of such programming to traditional MVPDs as opposed to carriage by an OVD—specifically including differences in advertising revenues.

The Joint Venture is required to "provide any bundle of channels, and all quality formats (e.g. high definition, 3-D) and video-on-demand rights that [the Joint Venture] provides to any MVPD in the United States with more than one million subscribers." However, the Joint Venture may condition its provision of such video programming to an OVD upon a reasonable demonstration of the OVD's ability: (1) to meet its financial obligations; (2) to satisfy reasonable quality and technical requirements for display and to secure protection of the video programming and; (3) to limit the distribution to domestic subscribers.

OVD access to "comparable" programming

The second scenario in which an OVD may obtain access to Joint Venture programming occurs when an OVD can demonstrate that it has obtained "Comparable Video Programming" from a broadcast network, cable programmer, or production studio "peer" of the Joint Venture. In other words, if an OVD can establish that it has obtained "comparable" video programming from the ABC, CBS or FOX television networks or from the Time Warner, News Corp, Viacom, Sony, or Walt Disney production studios or cable programmers, then the OVD can seek comparable programming from the Joint Venture on "economically equivalent" prices, terms and conditions. In this context, economically equivalent means "price, terms, and conditions that, in the aggregate, reasonably approximate those on which the Peer provides Video Programming to the Qualified OVD, and shall take account of, among other things, any difference between the Value of the Video Programming the Qualified OVD seeks from the [Joint Venture] and

the Value of the Video Programming it receives from a Peer.” As to “comparable” programming, that is considered to be programming that is “reasonably similar in kind and amount to the Video Programming provided by the Peer considering the volume of the Video Programming and its Value.”

The DOJ proposed Final Judgment contains many criteria and qualifiers as to when, how much, and what kind of “comparable” programming may be requested by an OVD, but the essence of this requirement is based on the OVD having obtained comparable programming from one of the Joint Venture’s industry Peers.

OVD rights to commercial arbitration

Both the DOJ and FCC provide OVDs with rights to commercial arbitration if the OVD and the Joint Venture fail to agree upon the appropriate “economically equivalent” terms for programming that the Joint Venture has provided to traditional MVPDs. Commercial arbitration is also available for any failure to agree upon what constitutes “comparable” video programming or the “economically equivalent” terms for such programming when the OVD claims that it has obtained comparable programming from a Joint Venture Peer. DOJ has stated that as long as the FCC’s commercial arbitration process results in a timely resolution of disputes, it will defer to the FCC arbitration process. However, DOJ retains the ability to pursue the Joint Venture for failure to comply with the requirements of the Final Judgment.

Requirements concerning Comcast Internet facilities

The second area of broader industry interest pertains to the requirements and restrictions imposed upon Comcast’s Internet facilities. In the DOJ’s proposed Final Judgment, Comcast agrees to abide by the FCC’s recently enacted open Internet requirements—regardless of whether such FCC requirements are invalidated by future court action. The DOJ specifically acknowledges that Comcast may invoke caps, tiers, metering or other usage based pricing, but in so doing, Comcast may “not measure, count or otherwise treat [the Joint Venture’s] affiliated network traffic differently from unaffiliated traffic.” Further, DOJ specifies that “Comcast shall not prioritize [the Joint Venure’s] Video Programming or other content over other Persons’ Video Programming or other content.” Although the FCC’s order is not yet available, its “News Release” specifies that Comcast-NBCU may not “disadvantage rival online video distribution through its broadband internet access services and/or set-top boxes.” The Order may provide greater clarity as to what practices or actions might “disadvantage” competing online distributors.

As to affirmative requirements relating to Comcast’s Internet facilities, the FCC order will require Comcast to offer a reasonably priced stand-alone broadband Internet access service of sufficient bandwidth so customers may access online video services without having to purchase a cable television subscription. Further, DOJ requires that in all markets where Comcast has upgraded to a DOCSIS 3.0 or better provisioning standard, Comcast shall offer an Internet access service that can typically achieve download speeds of at least 12 megabits per second.

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The above described conditions in the Comcast-NBCU Transaction provide an interesting look into where the FCC and the DOJ are in their thinking regarding video programming and broadband competition in the future. Please let us know if you have any questions or would like further details regarding this matter.

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