The Comcast-NBC Merger: Why the FCC Should Be Held to a Higher Standard

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Question: *Two federal agencies review the same merger. Both agencies have jurisdiction to review the merger under U.S. law. The agencies review the merger during the same time period, and ultimately they reach the same decision – to approve the merger with conditions. One is right, the other is wrong. Why?*

This is not an SAT question – it really happened.

On Tuesday, the Department of Justice and the Federal Communications Commission both approved the merger of Comcast Corporation, the nation's largest cable and internet service provider, with NBC Universal, one of the country's largest and oldest content companies. With the blessing of both agencies, the new Comcast-NBC behemoth, will not only own a lot of the content you watch, (1 out of every 5 television viewing hours) -- but also the primary ways you watch it (broadcasting, cable and the Internet).

The DOJ and FCC have different responsibilities when it comes to merger review. The DOJ reviews mergers under the antitrust laws (namely, the Clayton Act), while the FCC examines proposed transactions under the public interest standard of the Communications Act. The distinction is a pretty big one: the DOJ cannot block a merger unless it would substantially decrease competition. Conversely, the FCC cannot approve a merger unless it enhances public interest goals like competition, diversity, and localism.

In reviewing the merger, the two agencies worked together to craft conditions to mitigate specific harms that would be caused in the market. The DOJ consent decree and the FCC merger order parallel each other in many important aspects. Both adopted Network Neutrality protections which prohibit Comcast from favoring delivery of NBC content online, as well as conditions preventing Comcast from refusing outright to sell NBC programming to competing Internet video distributors, like Netflix to starve them of content and run them out of business.

We can quibble elsewhere as to whether the DOJ could have done

more to protect competition. Suffice to say that, by adopting these conditions, the DOJ attempted to preserve the competitive environment that existed before the merger. The FCC, too, sought to maintain the pre-merger status quo.

The problem is that the FCC's job is to make sure that the merger is in the public interest -- not to simply preserve the status quo.

If you read the FCC's order approving the merger, you will search in vain for anything that says that the Comcast-NBC merger itself will result in more competition, lower prices, or more diversity. That's because it won't. Neither will our media system be better for this deal having gone through. Indeed, all signs points to the exact opposite outcome.

The FCC justified the merger on the grounds that the new company would have "potential flexibility for innovation and some efficiencies of scale and scope." Roughly translated, that means that Comcast can save itself some cash by streamlining its businesses. But don't expect those savings to get passed onto consumers. That's not exactly a ringing endorsement of any tangible public benefits.

The FCC claims that the conditions it is imposing will "neutralize the possible negative impacts" of the merger. But, even assuming that is true, it still falls far short of promoting the public interest. Conditions and commitments will expire and, when they do, the problems they were intended to fix will resurface.

True, the FCC did adopt Comcast and NBC's voluntary commitments, which include offering more local programming and cheaper broadband for a few years after the merger is consummated. Merger aside, these are good things. However, they will be difficult to monitor and enforce, and they don't begin to balance out the deeper harms to competition and media diversity caused by the merger.

Moreover, these promises have nothing to do with the merger. Comcast did not need to buy NBC in order to offer affordable broadband to subscribers. And NBC did not need to be bought by Comcast for its broadcast stations to offer better service to local communities. These commitments merely represent things that both companies should have been doing in the first place.

Protecting the status quo is not the FCC's mandate. What's more, given the current sorry state of the media industry, protecting the status quo is clearly not in the public interest. That's why, when all is said and done, and we look back on the negative impacts of this deal, the fault will rest squarely with the FCC.