Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis

BY JONATHAN B. BAKER

THE FEDERAL COMMUNICATIONS Commission's recent decision to allow the transaction between Comcast and General Electric's NBC Universal (NBCU) affiliate to proceed subject to conditions[1] helped to fill a gap in the contemporary treatment of vertical mergers. The existence of this gap was dramatized for me when, in drafting an antitrust casebook section on vertical mergers, I was unable to find a judicial opinion that assimilated the economic learning and antitrust commentary on exclusionary conduct from the last quarter-century.[2]

The FCC is not a court but is an independent agency, like the Federal Trade Commission, that issues adjudicative decisions concerning acquisitions within its jurisdiction based on an administrative record.[3] The FCC evaluates transactions under a public interest standard, under which it considers the effects of the transaction on competition—the same concerns as are at issue under the antitrust laws—as well as other aspects of communications policy. This article highlights the competition policy aspects of the FCC's approach to the Comcast/NBCU transaction, putting aside other issues the FCC's decision raises, such as the way the conditions imposed by the FCC addressed the concerns it identified or the implications of the FCC's order for the evolution of online video distribution.

In its Comcast/NBCU Order, the FCC identified the factors any judicial or administrative tribunal would likely consider today in evaluating the possibility of competitive harm from a vertical transaction through input or customer foreclosure. Moreover, in assessing these factors, the Commission relied upon several economic models and empirical studies in addition to documentary evidence and the submissions of the applicants and complaining parties. Together, the legal framework and economic evidence identified by the FCC provide the missing roadmap for the contemporary analysis of vertical mergers when the competitive concern involves exclusion.

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Background

The Comcast/NBCU transaction combined Comcast's programming assets—its interests in cable networks, including regional sports networks, the Golf Channel, and Versus—with those of NBCU, including the NBC broadcast network, the Universal Studios film library, and cable networks such as MSNBC, CNBC, Bravo, and USA Network—to form a joint venture controlled by Comcast. The transaction was mainly a vertical one:[4] NBCU was a major content provider, while Comcast mainly operated farther downstream, in the distribution of that content.

Comcast is the leading multichannel video programming distributor (MVPD) in the United States, with nearly one quarter of MVPD subscribers nationwide and more than 40 percent of subscribers in seven of the ten largest metropolitan areas. It is also a leading broadband Internet access provider. The transaction was technically not a merger—General Electric remained a minority owner of the programming joint venture—but it was reasonably viewed as an acquisition because Comcast would control the joint venture from its inception and had obtained the option to buy out GE's interest within eight years. In closely coordinated enforcement efforts, both the FCC and the Department of Justice permitted the transaction to proceed after imposing (the FCC) or accepting in settlement (the DOJ) various conditions.[5]

Anticompetitive conduct is generally divided into two broad categories, collusive and exclusionary, based on the nature of the effects.[6] But the two kinds of effects are closely related. When rival firms agree to act collectively, such as through tacit or express collusion, they can reduce output and raise price, as well as harm competition on non-price dimensions, including quality and innovation. Exclusionary conduct can harm competition by creating what is in effect an involuntary (or even coerced) cartel or monopoly. A firm or firms that would not voluntarily go along with a collusive arrangement can be induced to act the same way and to the same effect through exclusionary conduct by a dominant firm or group of coordinating firms. If some firms are led to reduce output and raise price involuntarily, while the remaining market participants do so voluntarily, the outcome for buyers is the same as if all firms participated in a marketwide cartel.

A vertical merger can harm competition by facilitating exclusion or collusion.[7] The exclusionary possibilities involve foreclosure of unaffiliated downstream rivals from access to the integrated firm's upstream product (input foreclosure), and foreclosure of unaffiliated upstream rivals from access to the integrated firm's downstream business (customer foreclosure).[8] In both of these cases, the term "foreclosure" is understood broadly to include price-raising strategies as well as complete exclusion.[9] The FCC's opinion addressed exclusionary concerns at both levels: the possibility that the integrated entity would harm competition in video distribution by foreclosing Comcast's video distribution rivals from access to the joint venture's programming, and the possibility that it would harm competition in video programming by denying rival programming networks access to Comcast's video distribution customers.

Analytical Roadmap

In its Comcast/NBCU Order, the FCC set forth a detailed legal roadmap for analyzing exclusionary harm from vertical merger. The Commission articulated its approach most clearly in the context of evaluating input foreclosure, i.e., the possibility that the transaction would allow Comcast to obtain or maintain market power in video distribution by preventing rival MVPDs from obtaining access to video programming or by raising the price of that programming. Its approach "adapt[ed] an analytical framework employed in antitrust law"[10] by examining, in separate steps, exclusion, harm to competition, and whether the transaction's benefits were likely to predominate over those harms.

Exclusion of Rivals. In its first step, the FCC evaluated whether the transaction would increase the ability and incentive of the integrated firm to exclude competitors, in this case by "giv[ing] Comcast an increased ability to disadvantage some or all of its video distribution rivals by exclusion, causing them to become less effective competitors."[11] Because this exclusionary possibility involved the foreclosure of programming, the rivals at issue were Comcast's downstream competitors in video distribution.

The Commission considered Comcast's ability to harm its distribution rivals by engaging in three possible exclusionary strategies: (1) permanently cutting off an MVPD rival from access to the joint venture's video programming, (2) temporarily withholding that access, and (3) raising rivals' costs by increasing the price of programming to video distribution

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competitors. All of these strategies involved forms of input foreclosure.[12]

The Commission found that Comcast could disadvantage downstream rivals by engaging in each of these strategies. The two withholding strategies could harm Comcast's rivals because the joint venture controlled "marquee programming" that was "important to Comcast's competitors and without good substitutes from other sources."[13] Without access to various broadcast and cable networks controlled by the joint venture, individually or in blocks, "other MVPDs likely would lose significant numbers of subscribers to Comcast, substantially harming those MVPD's that compete with Comcast in video distribution."[14] The Commission also found that the foreclosed rivals could not "practically or inexpensively avoid the harm by substituting other programming."[15] In addition, the FCC concluded that after the transaction, the joint venture would have an incentive and the ability to raise the price of joint venture programming, leading to an increase in programming costs for Comcast's video distribution rivals, because the transaction would improve the joint venture's bargaining position in negotiating the sale of its programming.[16]

Harm to Competition. Second, the FCC asked whether the exclusion of rivals, in this case the foreclosure of downstream video distributors, would result in harm to competition at that level. This step would be satisfied if the foreclosed rivals constrained the pricing of the remaining firms, but it would not be satisfied if, for example, the foreclosed rivals were collectively small and had limited ability to expand.[17]

The FCC concluded that successful exclusion employing any of the three input foreclosure strategies analyzed in the first step would likely permit Comcast to obtain or maintain market power downstream. It reached this conclusion in part though an analysis of market structure: "by defining video distribution markets, and finding that Comcast could use exclusionary program access strategies to reduce competition from all significant current and potential rivals participating in those markets."[18] The FCC defined the relevant video distribution market to be MVPD services within local cable franchise areas and found that "[e]very MVPD rival that participate[d] along with Comcast" in each relevant market "purchase[d] most if not all" of the joint venture's programming.[19] Accordingly, the joint venture would not only have the ability "to exclude all Comcast's rivals" from its programming, "whether by withholding the programming or raising its price," but also the ability to "harm[ ] competition in MVPD services in each of Comcast's franchise areas."[20]

Although the FCC's decision was predicated on its finding that the integrated firm could exclude all video distribution rivals, harm to *all* competitors was not a necessary condition for finding harm to competition. The Commission indicated that it could have found harm to competition if some but not all rivals were foreclosed. To do so, it would have to have found either that "the foreclosed rivals constrained Comcast's pricing" or that "the remaining rivals would go along with allowing output in the market to fall and the market price to rise rather than treating that outcome as an opportunity to compete more aggressively."[21] The first of these possibilities would presumably be satisfied if a horizontal merger among Comcast and the small group of excluded rivals would result in adverse unilateral competitive effects, as might be the case if competition is localized within the relevant market.[22] The second would arise if the remaining rivals would engage in parallel accommodating conduct, as might generate coordinated competitive effects.[23]

As part of the second step in its framework, the FCC analyzed whether each exclusionary strategy it considered—temporary or permanent withholding of programming or a cost-raising strategy—was likely to be profitable for Comcast after the transaction. A price-raising strategy would be profitable in all markets, the FCC found, because "Comcast's improved bargaining position would arise without additional expenditures."[24] By contrast, strategies involving withholding programming would be costly because they would require the integrated firm to give up revenues from the foreclosed MVPD. Hence such strategies would be profitable only if the gains from conferring market power on Comcast's video distribution businesses (or protecting existing market power from erosion) would exceed the costs associated with that foregone revenue. After extensive economic analysis, the Commission determined that permanent and temporary withholding strategies would be profitable in many markets.[25] The FCC also cited evidence in its record that Comcast had found it profitable to foreclose an MVPD rival from access to one of its networks in the past.[26]

The FCC analyzed an input foreclosure threat involving potential video distribution rivals the same way as it analyzed the possible foreclosure of MVPDs when it examined the joint venture's incentive to foreclose Comcast's nascent online rivals from access to video content. It viewed online video distributors (OVDs) as "a potential competitive threat to Comcast's MVPD service,"[27] and found that Comcast would have "the incentive and ability to discriminate against, thwart the development of, or otherwise take anticompetitive actions against OVDs."[28]

Evaluating Potential Benefits. The FCC identified the remedies that would prevent these harms before undertaking the third step of its analysis, i.e., evaluating the competitive benefits of the transaction claimed by Comcast/NBCU and comparing them with the harms to competition. This approach differs from the approach a court would be expected to take in considering a challenge to a merger under Section 7 of the Clayton Act, reflecting the different statutory frameworks for FCC review and antitrust review of proposed mergers. An antitrust tribunal is concerned only with protecting competition; thus it would be expected to compare the competitive benefits of the proposed transaction with the harms to competition before considering remedies, and only impose remedies if it concludes that the harms predominate.[29]

The FCC has a broader mandate. Before approving the Comcast/NBCU transaction, the FCC was obliged to find affirmatively that it served the public interest. In making that determination, the FCC considered not only whether the merger fostered competition[30] but also whether it advanced other communications policy objectives, such as ensuring that a diversity of information sources and viewpoints are available to the public, accelerating the private-sector deployment of advanced telecommunications services, and assuring attention to local community concerns. In its review of the Comcast/NBCU transaction, the FCC identified both competition-related and non-competition concerns and formulated conditions that would resolve both, before considering the potential public interest benefits of the transaction.[31]

In the FCC's review of public interest benefits, the Commission analyzed several possible efficiencies that would also be relevant in a competition analysis under the Clayton Act. These included (1) claims that the combination would enhance prospects for innovation by reducing the transactions costs associated with coordinating content development with the development of new forms of media distribution; (2) cost savings said to arise from the elimination of the double marginalization of programming costs; and (3) cost reductions claimed to result from increased economies of scale and scope. In general, the FCC credited these possibilities, but not to the extent claimed by Comcast. The FCC found them to be plausible in principle, but in some respects speculative, overstated, or unsubstantiated.[32] Of these efficiency claims, the double marginalization argument was subject to the most extensive economic analysis.[33]

Analysis of Customer Foreclosure

The FCC adopted the same general framework to analyze the threat of customer foreclosure—the possibility that Comcast would harm competition in the market for video programming by disadvantaging programming networks owned by upstream rivals that are close substitutes for networks in the joint venture through foreclosing their access to Comcast's distribution system.[34] The FCC considered a range of exclusionary strategies, including denying the rival programming network carriage on Comcast's distribution system, placing that network in a less advantageous tier, or making it more difficult for subscribers to find that network, as by giving it a less advantageous channel number. These strategies could harm the rival programming networks by reducing their viewership, thereby rendering them less attractive to advertisers and so reducing their revenues and profits. "As a result," the Commission concluded, "these unaffiliated networks may compete less aggressively with NBCU networks, allowing the latter to obtain or . . . maintain market power with respect to advertisers seeking access to their viewers."[35]

The FCC's conclusions were supported by several economic studies conducted by the FCC staff. The analytical approaches underlying these studies were not invented by the staff. They were employed in previous FCC merger cases or suggested by the outside economists participating in the Commission's review, whether working for Comcast or for other interested parties with concerns.

In reaching this conclusion, the FCC relied on an economic study suggesting that Comcast "may have in the past discriminated in program access and carriage in favor of affiliated networks for anticompetitive reasons."[36] The FCC also looked to "the consequences of [the] transaction for the structure of programming markets,"[37] finding in particular that the joint venture "will include networks that could be considered close substitutes for a much larger set of unaffiliated programming" than was the case for Comcast before the transaction.[38] For example, the FCC described the CNBC network, which would now become a part of the joint venture, as "likely a close substitute" for Bloomberg TV, a rival business news network.[39] The FCC recognized that if Comcast foreclosed Bloomberg TV from access to Comcast's video distribution system, the exclusion of that programming network could harm competition "by reducing a competitive constraint, with the adverse effect that increases with perceived substitutability."[40] In this case, the FCC concluded, "[b]y foreclosing or disadvantaging rival programming networks" like Bloomberg TV, "Comcast can increase subscribership or advertising revenues for its own programming content," which would include its post-transaction interest in CNBC.[41]

Economic Studies

The FCC's conclusions were supported by several economic studies conducted by the FCC staff. The analytical approaches underlying these studies were not invented by the staff. They were employed in previous FCC merger cases or suggested by the outside economists participating in the Commission's review, whether working for Comcast or for other interested parties with concerns. But they were refined in their application to the Comcast/NBCU transaction. Because the Commission relied upon them in evaluating this transaction, they are likely to be emulated in competition analyses of future vertical mergers threatening anticompetitive exclusion.

Foreclosure Profitability "Arithmetic." The FCC assessed the post-transaction profitability to Comcast of exclusionary strategies involving the temporary or permanent withholding of joint venture programming from rival MVPDs through modeling of the financial benefits and costs to Comcast of one specific exclusionary possibility: cutting off a rival MVPD from access to the programs airing on an NBC broadcast station owned by the joint venture.[42] Comcast would gain as some subscribers switch from the rival MVPD in order to receive the programming, thereby giving Comcast additional subscription fees on its own video distribution service, as well as additional profits if the new subscribers also sign up for Comcast's broadband or telephony services.[43] The costs of this strategy to Comcast would involve the lost advertising fees and re-transmission consent fees from those consumers that would remain with the rival MVPD.

The analysis was conducted under the conservative assumption (that is, an assumption by which foreclosure would be less profitable to Comcast) that successful foreclosure of a downstream rival would not lead Comcast to increase the subscription price to consumers or the retransmission consent fee it receives from other MVPDs.[44] Many parameters of the model, such as profits per subscriber and advertising rates per subscriber, were taken from party documents or proposed by Comcast's economists and accepted by the Commission.

The most extensive analysis concerned the determination of two key parameters: the fraction of subscribers of the rival MVPD that would depart for some other MVPD in the event the rival could not carry the NBC network ("departure rate"), and the fraction of those that would choose Comcast rather than some other MVPD ("diversion rate").[45] The Commission identified the departure rate through a "difference-in-differences" econometric study of the consequences of a retransmission dispute during which the DISH direct broadcast satellite distribution system lost the ability to carry a broadcast programming network for six months in multiple cities,[46] and identified the diversion rate by relying on both survey evidence submitted into the record by an MVPD concerned about the transaction and internal Comcast studies.[47] After conducting its profitability analysis for a number of geographic regions, the FCC concluded that post-transaction Comcast would "almost always" profit from a temporary foreclosure strategy and would "often" profit from a permanent foreclosure strategy.[48]

Bargaining Analysis of Programming Prices. The Commission assessed the likely magnitude of price increases arising from the vertical aspect of the transaction by calibrating an economic model of the bargaining between the joint venture and a rival MVPD over the price of programming.[49] Its analysis relied on the Nash bargaining model.[50] The Nash bargaining model explains the division of the gains from negotiation (the bargaining surplus) in terms of each party's best alternative to a negotiated agreement (BATNA) and the parties' relative patience or bargaining skill.

Suppose, for example, that a prospective seller and buyer have entered into negotiations for the sale of a house. The buyer would not be willing to pay more than $300,000, and the seller would be willing to sell as long as she receives at least $250,000. These "reservation prices" are determined by each side's preferences and alternatives. In particular, they depend on the parties' BATNAs. The seller's reservation price may be $250,000 because she knows that another buyer would be willing to pay that much for the house. The buyer's reservation price may be $300,000 because he could purchase a smaller house in a less attractive location for $275,000, and would rather buy the $275,000 house than pay more than $300,000 for the house being negotiated.

The difference between the two reservation prices, $50,000 in this example, represents the joint gain (bargaining surplus) from reaching a deal. But the split of the bargaining surplus depends on the price at which the transaction is made. At a purchase price of $290,000, the seller will receive most of the surplus ($40,000 out of $50,000). At a price of $260,000, the buyer will receive most of the surplus, while the parties split the surplus evenly at a price of $275,000. The Nash bargaining theory suggests that the lion's share of the bargaining surplus will go to the party that faces less time pressure to reach an agreement or has greater bargaining skill. In the house buying example, if the buyer is in no rush to complete the negotiations, while the seller needs to sell in a hurry, the seller will likely come down in price more quickly than the buyer will come up. As a result, the negotiated price is likely to be closer to $250,000 than to $300,000. The willingness and ability to delay gives the buyer bargaining leverage. By contrast, if both parties face similar costs of delay, they will have similar bargaining leverage and the negotiated price would likely end up close to $275,000.

In practice, neither negotiating party will know perfectly the other side's alternatives, degree of patience, or reservation price. But the Nash bargaining model is nevertheless commonly thought to provide a reasonable basis for predicting the bargaining outcome. In the Comcast-NBCU transaction, the model was originally proposed by economists working with rival MVPDs, and used (as well as criticized) by Comcast's economists.[51]

In applying the model, the Commission relied on evidence from a recent academic study to conclude that the joint venture would have roughly equal bargaining skill or patience as MVPDs other than Comcast (specifically satellite and telephone company providers) when negotiating over cable programming.[52] When the bargaining skill is even, the Nash model implies that any increase in the cost to Comcast of providing the programming to an MVPD would be expected to raise the negotiated price by half the cost increase.[53]

The merger can be thought of as raising the "opportunity cost" of programming to the joint venture—the value of the joint venture's next best alternative to selling the programming to a rival MVPD. The opportunity cost at issue is not an out-of-pocket production cost but reflects the value to Comcast as a video distributor of denying access to joint venture programming to its rival. Doing so could benefit Comcast by shifting subscribers and profits to Comcast's video distribution system. Accordingly, the per-customer opportunity cost of programming to Comcast equals Comcast's per subscriber MVPD profit margin times the probability that the customer would switch to Comcast in the event a rival MVPD loses access to the programming. That probability, which varies by MVPD, equals the product of the departure rate and the diversion rate employed in assessing the profitability of foreclosure.[54]

Applying the half-the-opportunity-cost-increase formula, the Commission calculated the likely increase in monthly per-subscriber prices for the bundle of NBCU programming contributed to the joint venture resulting from vertical integration with Comcast.[55] The Commission also calculated the likely increase in retransmission consent fees for the NBC broadcast network in areas where a broadcast station in the joint venture overlaps with Comcast's cable footprint. The Commission found that programming prices for the NBCU cable networks as a bundle, and for the NBC broadcast network individually, would be expected to increase for all Comcast's MVPD rivals.[56]

Empirical Analysis of Programming Prices. The FCC confirmed that vertical transactions between MVPDs and content providers tend to lead to higher programming prices to rival MVPDs through an empirical analysis of the change in affiliate fees following the vertical integration of Fox programming with the DIRECTV direct broadcast satellite video distribution system in the wake of the 2004 News Corp./Hughes transaction. The analysis employed a "difference-in-differences" regression model examining the affiliate fees MVPDs paid for national cable networks in which News Corp. had a controlling interest before and after the transaction, and comparing them with fees paid for networks that did not become more or less vertically integrated during the same period.[57] The study found that higher programming prices resulted from vertical integration. By introducing a variable to adjust for changes in program quality, the FCC was able to attribute the price increase to the change in the integrated firm's bargaining position, consistent with the predictions of its bargaining model.[58]

Past Anticompetitive Discrimination. A fourth economic study examined whether Comcast had favored its own programming pre-transaction and, if so, whether it favored its programming in order to harm competition or obtain efficiencies. To differentiate between foreclosure and efficiency hypotheses, the Commission adopted a method suggested by Professor Austan Goolsbee.[59] Goolsbee pointed out that an MVPD has the greatest ability to act anticompetitively in settings in which it faces the least competition from rival MVPDs. Accordingly, the Commission used econometric methods (logit regression) to identify the probability that Comcast carried four national networks in which it had a controlling interest, and to determine how those probabilities varied with the degree of competition in local markets. The study found that Comcast was more likely to carry the affiliated network the smaller the share of subscribers in the market that selected a rival MVPD rather than Comcast, indicating "that Comcast favors its own programming for anticompetitive reasons."[60] The Commission concluded that "these patterns of anticompetitive discrimination in carriage rates would likely extend to the carriage decisions related to NBCU networks."[61]

Conclusion

The FCC's extensive analysis of vertical foreclosure in evaluating the Comcast-NBCU transaction provides a template for courts and litigants considering similar issues in future transactions. The FCC adapted the modern economic analysis of exclusionary conduct to shape a roadmap for evaluating the foreclosure concerns arising from a vertical merger, and it relied on a range of economic methods in applying that roadmap to the facts of the transaction it reviewed. Notwithstanding the difference between administrative adjudication under a public interest standard and judicial decision-making under the Clayton Act, the structure of the legal analysis and the types of economic studies the Commission employed promise to influence the approach that antitrust tribunals will take in evaluating vertical mergers in the future. ■

1 Memorandum Opinion and Order, Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, MB Docket No. 10-56, FCC 11-4 (released Jan. 20, 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf [hereinafter Comcast/NBCU Order].

2 When analyzing vertical mergers, the antitrust enforcement agencies employ a contemporary economic analysis of exclusionary conduct, but they have not litigated any vertical merger challenges to a decision in the modern era. All such mergers have been permitted to proceed without a challenge, or challenges were settled by consent. The casebook excerpts a 1987 district court opinion, *O'Neill v. Coca-Cola Co.*, 669 F. Supp. 217 (N.D. Ill. 1987), but adds a note describing input and customer foreclosure and other possible theories of competitive harm that the opinion did not address. Andrew I. Gavil, William K. Kovacic & Jonathan B. Baker, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy 869 (2d ed. 2008). The note discusses two exclusionary theories (input foreclosure and customer foreclosure) and two collusive theories (information exchange and elimination of a disruptive buyer). For further discussion of these theories, see Michael H. Riordan & Steven Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 Antitrust L.J. 513 (1995).

3 Judicial review is available in the federal courts of appeals.

4 The transaction also had a horizontal element because both firms owned interests in cable programming networks. The FCC's conditions addressed competitive issues related to the horizontal elements of the transaction as well as the vertical aspects.

5 The two agencies have concurrent jurisdiction. The DOJ found that the transaction violated Clayton Act § 7, 15 U.S.C. § 18, and settled its complaint by consent. *See* Complaint, United States v. Comcast Corp., No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), *available at* http://www.justice.gov/atr/cases/f266100/266164.pdf; Competitive Impact Statement, United States v. Comcast Corp., No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011), *available at* http://www.justice.gov/atr/cases/f266100/266158.pdf. The FCC concluded that after imposing conditions, the license transfers advanced the public interest. The FCC's jurisdiction was based on its statutory charge to ensure that broadcast license transfers serve "the public interest, convenience, and necessity." 47 U.S.C. § 310(d). The licenses at issue were principally for the broadcast stations owned and operated by NBCU.

6 Gavil et al., *supra* note 2, at 45. *See* Frank H. Easterbrook & Richard A. Posner, Antitrust Cases, Economic Notes, and Other Materials (2d ed. 1981) (casebook framed around the distinction between collusion and exclusion).

7 *See generally* Riordan & Salop, *supra* note 2. A vertical merger can facilitate collusion through the exclusion of a "maverick" rival (either upstream or downstream), or through information sharing. In the latter case, the upstream firm may share with its new downstream affiliate information about the costs or business strategies of the downstream rivals that are customers of the upstream firm, or the downstream firm may share information about its upstream suppliers with its new upstream affiliate. This information may facilitate coordinated conduct at either level. A vertical merger can also harm competition by facilitating the evasion of regulatory constraints.

8 The Justice Department's 1984 Merger Guidelines, which govern vertical mergers, remain in force as a statement of DOJ enforcement policy. U.S. Dep't of Justice, Merger Guidelines § 4.2 (1984), *available at* http://www.justice.gov/atr/hmerger/11249.pdf. They set forth an exclusionary theory (raising "two-level" entry barriers) to explain how vertical mergers could harm competition, along with collusive and regulatory evasion theories. The U.S. enforcement agencies today consider a broader range of exclusionary possibilities than the theory mentioned in the 1984 Guidelines, as indicated by the DOJ's analysis of the Comcast/NBCU transaction. The European Commission employs a contemporary economic analysis of exclusionary conduct in vertical merger review. European Comm'n, Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2008 O.J. (C 265) (Oct. 18, 2008), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:EN:PDF.

9 For a discussion of how the courts have modernized the traditional "foreclosure" analysis outside the context of vertical merger review, see Gavil et al., *supra* note 2, at 843–51 ("Sidebar 7-5: Assessing the Contemporary Law and Economics of Exclusive Dealing").

10 Comcast/NBCU Order, *supra* note 1, ¶ 36. *See generally* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986).

11 Comcast/NBCU Order, *supra* note 1, ¶ 36.

12 *See id.* ¶ 34 n.77.

13 *Id.* ¶ 36.

14 *Id.* ¶ 37 (citation omitted).

15 *Id.* n.90. *Cf.* Omega Env'tl Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1177–78 (9th Cir. 1997) (anticompetitive customer foreclosure not possible when

excluded firms could readily switch to alternative forms of distribution).

[16] Comcast/NBCU Order, *supra* note 1, ¶ 37.

[17] This step addresses a concern of Chicago school critics of structural-era decisions governing vertical mergers. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX 231–45 (1978).

[18] Comcast/NBCU Order, *supra* note 1, ¶ 39.

[19] *Id.* ¶ 43.

[20] *Id.*

[21] *Id.* ¶ 39 n.94.

[22] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 6.1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

[23] *See id.* § 7.

[24] Comcast/NBCU Order, *supra* note 1, ¶ 44.

[25] *Id.*

[26] *Id.*

[27] *Id.* ¶ 86.

[28] *Id.* ¶ 78.

[29] *See* FTC v. H.J. Heinz Co., 246 F.3d 708, 720–21 (D.C. Cir. 2001). *Cf.* Hearing on Merger Enforcement, Panel on Treatment of Efficiencies, Antitrust Modernization Commission (Nov. 17, 2005) (statement of Jonathan B. Baker), *available at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Baker_Statement.pdf (discussing the appropriate allocation of burdens of production and persuasion for efficiencies in merger cases tried under the Clayton Act).

[30] In conducting its competitive analysis, the FCC has two advantages over generalist competition enforcement agencies: its industry expertise and broad public interest mandate. These advantages permit the FCC to take a longer view than would an antitrust enforcer. The FCC can often address potential competition issues more easily than the the antitrust agencies because it can be particularly hard to prove a potential competition case in court. *See generally* Jonathan B. Baker, *Sector-Specific Competition Enforcement at the FCC*, 66 N.Y.U. ANN. SURV. AM. L. (forthcoming 2011). *But cf.* Gregory J. Werden & Kristen C. Limarzi, *Forward-Looking Merger Analysis and the Superfluous Potential Competition Doctrine*, 77 ANTITRUST L.J. 109 (2010) (conventional horizontal merger analysis reaches the loss of potential competition to the extent the potential rivals are presently disciplining incumbent firms or will enter the market with reasonable probability in the not-too-distant future).

[31] Thus, in principle, the FCC's approach to fashioning merger remedies could lead it to adopt competition-related remedies that are either more or less restrictive of the merging parties than those that would be imposed by an antitrust tribunal. Usually, in adopting remedies, the FCC seeks to prevent any competitive harm. Since the FCC fashions competition-related remedies before considering the competition-related benefits of the transaction, it may insist that the merging firms adopt a "less restrictive alternative" in markets in which an antitrust tribunal might conclude that the transaction's potential benefits predominate in the aggregate, making the FCC's competition-related remedies comparatively more restrictive. On the other hand, under its public interest mandate, the FCC could accept some risks to competition in order to achieve a substantial public interest benefit, with the result that the competition-related remedies could be less restrictive than those that an antitrust tribunal would impose. In practice, however, the conditions adopted by the FCC to address the competition issues in the Comcast/NBCU transaction were similar to the ones imposed by the DOJ in settling its antitrust challenge to the transaction.

[32] Comcast/NBCU Order, *supra* note 1, ¶¶ 229, 237, 242. *Cf.* FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997) (rejecting claimed efficiencies on similar grounds). The Justice Department questioned all the claimed efficiencies, finding each negligible, not specific to the transaction, or not verifiable. Competitive Impact Statement, *supra* note 5, at 29–30.

[33] Comcast/NBCU Order, *supra* note 1, at App. B, ¶¶ 56–64. The DOJ doubted the potential for savings related to ending double-marginalization in particular, in part on the ground that programming was transferred at a price close to marginal cost prior to the transaction through complex contractual provisions so there was little double marginalization to eliminate. Competitive Impact Statement, *supra* note 5, at 29–30. The FCC instead accepted that the price of programming exceeded marginal cost and concluded that the benefits of eliminating double marginalization were likely to be substantially smaller than what Comcast claimed.

[34] Comcast/NBCU Order, *supra* note 1, ¶ 116.

[35] *Id.*

[36] *Id.* ¶ 117. *See also id.* at App. B, ¶¶ 65–71.

[37] *Id.* ¶ 117.

[38] *Id.* ¶ 119.

[39] *Id.* Even in a market with product differentiation, the Commission noted, "buyers may see some differentiated products as closer substitutes than others, so Comcast's ability to disadvantage or foreclose carriage of a rival programming network can harm competition." *Id.* As the FCC recognized, this analysis is closely related to the concern with unilateral competitive effects arising from a horizontal merger among sellers of differentiated products. *See id.* ¶ 119 n.287 (citing Horizontal Merger Guidelines sections).

[40] *Id.* ¶ 119.

[41] *Id.*

[42] *Id.* at App. B, ¶¶ 2–35.

[43] Comcast often offers its video distribution service bundled with these other services.

[44] Withholding the programming is like charging a price above what the MVPD would be willing to pay, which may not be the profit-maximizing pricing strategy for the joint venture. Hence withholding may be less profitable to the joint venture than a small increase in the price of programming.

[45] Many consumers can choose among multiple MVPDs, perhaps including a traditional cable provider like Comcast, two direct broadcast satellite providers, a telephone company offering video distribution over fiber optic cable, or a cable overbuilder.

[46] *Id.* at App. B, ¶¶ 30–34.

[47] *Id.* at App. B, ¶¶ 15–16.

[48] *Id.* at App. B, ¶ 35.

[49] *Id.* at App. B, ¶¶ 36–47.

[50] John F. Nash, Jr., *The Bargaining Problem*, 18 ECONOMETRICA 155 (1950). Nash derived the cooperative bargaining outcome that characterizes his model to satisfy various plausible axioms. The Nash bargaining solution also emerges from a non-cooperative interaction between bargaining parties that make an unlimited sequence of alternating counteroffers when the parties bear costs of delay (impatience), as the time period between offers (and hence the cost of delay) becomes small. Ken Binmore, Ariel Rubinstein & Asher Wolinsky, *The Nash Bargaining Solution in Economic Modelling*, 17 RAND J. ECON. 176 (1986).

[51] Comcast/NBCU Order, *supra* note 1, at App. B, ¶ 39, ¶ 39 n.38.

[52] *Id.* at App. B, ¶ 40. With respect to negotiations over carriage of the NBC broadcast network, the FCC made the more conservative assumption (one likely to suggest a smaller price increase) that the broadcast station had two-thirds of the bargaining skill.

[53] *See id.* at App. B, ¶ 39 (providing formula for a general bargaining parameter).

[54] *Id.* The connection to the foreclosure profitability analysis is not surprising, because bargaining party BATNAs depend on profits in the event of foreclosure.

[55] The departure rate for that bundle was inferred by applying the Nash bargaining model to explain the level of the affiliate fees received by NBCU pre-transaction. *Id.* at App. B, ¶ 46.

[56] *Id.* at App. B, ¶ 47.

[57] *Id.* at App. B, ¶ 51.

[58] *Id.* at App. B, ¶ 52.

[59] Austan Goolsbee, *Vertical Integration and the Market for Broadcast and Cable Television Programming*, FCC Media Ownership Study (2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-073470A10.pdf.

[60] Comcast/NBCU Order at App. B, ¶ 69.

[61] *Id.* at App. B, ¶ 70.