Comcast-NBCU Merger Approved By FCC, Justice Department

More than a year after announcing merger plans, Comcast and NBC Universal (NBCU) won FCC and Justice Department (DOJ) approval on Tuesday for their $28 billion union. The approval is subject to conditions that are intended to preserve competitive access to Comcast and NBCU programming and growth in the nascent online video services market. The FCC handed down its order by a 4-1 vote, with Commissioner Michael Copps dissenting and both FCC Republicans—Commissioners Robert McDowell and Meredith Baker—concurring. FCC endorsement of the deal, which gives Comcast a 51% majority stake in NBCU, is the first instance in which a cable operator has been granted control of a major U.S. television network. In addition to gaining control of television stations owned by the NBC broadcast network, Comcast will also emerge as a content powerhouse with control of NBCU’s extensive stable of programming and other media assets. To ensure that rival multichannel video programming distributors (MVPDs) maintain access to the merged entity’s programming, the FCC is requiring the post-merger Comcast to offer such MVPDs access to affiliated Comcast content at “fair market value and nondiscriminatory prices, terms and conditions.” That requirement also extends to online video distributors, such as Netflix, which must be offered access to Comcast-affiliated video programming “on the same terms and conditions that would be available to an MVPD.” Among other things, Comcast must also refrain from exercising managerial control over the Hulu online video streaming service owned jointly by NBC and other broadcasters. It must also offer its customers standalone access to broadband Internet services “at reasonable prices and of sufficient bandwidth so that consumers may access online video services without the need to purchase a cable television subscription.” Many of the FCC’s conditions are also mirrored in the DOJ consent decree, which also mandates that rival program content be given “equal treatment under any of [Comcast’s] broadband offerings that include caps, tiers, metering for consumption, or any other usage-based pricing.” Describing the conditions as “strong and fair,” FCC Chairman Julius Genachowski declared that the conditions adopted by the agency “ensure that this transaction serves the public interest.” Voting in favor of the transaction, FCC Commissioner Mignon Clyburn further observed that the merger order contains “robust and thoroughly vetted language that will safeguard journalistic independence . . . children’s programming and public access, [and] educational and/or governmental programming.” Charging, however, that the order “goes too far,” Commissioners McDowell and Baker complained in a joint concurring statement that many of the commitments agreed to by Comcast and the FCC “are not even arguably related to the underlying transaction.” Casting the lone dissenting vote, Commissioner Copps decried the merger as a “damaging and potentially dangerous” transaction that “confers too much power in one company’s hands.” As Comcast executive vice president David Cohen assured reporters that none of the merger conditions “will prevent us from executing on our business plans,” Comcast CEO Brian Roberts welcomed...
Supreme Court Questions AT&T On Privacy Claims

High court justices listening to arguments Wednesday in the Obama Administration’s appeal of a lower court privacy ruling concerning AT&T appeared less than sympathetic to AT&T’s claim that corporate entities may invoke the personal privacy provisions of the Freedom of Information Act (FOIA) in blocking disclosure of sensitive information provided to the FCC and other federal agencies. The Supreme Court case, Federal Communications Commission v. AT&T, Inc., centers upon the public release of FCC records on an agency probe into services provided by AT&T to a Connecticut school district under the Universal Service Fund E-Rate program. CompTel, a trade association for the competitive local exchange industry, petitioned the FCC under FOIA to release the records in question. Challenging the FCC’s decision to release those records, AT&T cited an exemption in FOIA that bars the public release of government records when such action could “constitute an unwarranted invasion of personal privacy.” Pointing to the legal definition of “person,” which also encompasses corporations, a three-judge panel of the Third Circuit struck down the FCC order in 2009. During Wednesday’s arguments, however, Justices Antonin Scalia and Stephen Breyer challenged AT&T to cite at least one example from newspaper clippings or from any other public source in which the interests of a corporation are equated with personal privacy. As counsel for AT&T admitted that he was unaware of any such example, he maintained that corporations depend upon the personal privacy exemption of FOIA to protect sensitive or damaging information that might be contained, for example, in interoffice e-mails between persons employed by the company. Chief Justice John Roberts, however, struck a skeptical tone as he observed, “I don’t think there is much to the argument that because ‘person’ means one thing, ‘personal’ has to have the same relation.” While voicing agreement with Roberts, a Justice Department attorney appearing on behalf of the Obama Administration emphasized that “the legislative history, the decisions of this court, point to the balance applying only to individuals.”

Verizon Seeks Court Review Of Net Neutrality Rules

Arguing that net neutrality rules recently adopted by the FCC exceed the agency’s statutory authority, Verizon Wireless asked the D.C. Circuit appeals court yesterday to strike down the agency order, which passed by a 3-2 margin last month. Verizon’s appeal is the first of several anticipated court challenges against the rules, which prohibit broadband Internet service providers (ISPs) from blocking or degrading lawful web content, applications and services except as needed for “reasonable network management,” and engaging in discrimination with respect to the transmission of Internet traffic. The order also bars mobile wireless broadband ISPs from blocking content and services that compete with their voice and data services. Last April, a three-judge panel of the D.C. Circuit overturned an earlier FCC ruling in which the FCC held Comcast liable for violations of the agency’s 2005 net neutrality principles in “throttling” transmissions from the BitTorrent web site. Although the court determined at that time that the FCC lacked statutory authority to enforce net neutrality principles that were not officially codified under the FCC’s rules, the FCC based last month’s order on the current classification of broadband services as a Title I information service and on the pursuit of existing statutory mandates that relate to the advancement of broadband and other advanced services. Notwithstanding the FCC’s rationale, Verizon told the court yesterday that last month’s net neutrality order “goes well beyond any authority provided by Congress, and creates uncertainty for the communications industry, innovators, investors and consumers.” In a press statement, Verizon also took issue with “the FCC’s assertion of broad authority for sweeping new regulation of broadband networks and the Internet itself.” Although the net neutrality order has yet to be published in the Federal Register, a Verizon spokesman said that the company decided to proceed with yesterday’s court filing out of “an abundance of caution.” Although net neutrality advocates criticized Verizon’s action, House Energy and Commerce Committee Chairman Fred Upton (R-MI) joined with other members of the House Republican leadership in applauding the appeal which, they observed, puts “a check on an FCC that is acting beyond the authority granted to it by Congress.”

Vimpelcom Board Approves Revised Orascom Merger Agreement

Over the objections of key shareholder Telenor, board members of Russian wireless conglomerate Vimpelcom have approved a revised agreement under which Vimpelcom would acquire Wind Telecom—the majority owner of Middle Eastern mobile phone firm
Orascom—for US$6.5 billion. Known formerly as Weather Investments, Wind is the holding company for African, Middle Eastern, Asian and Italian telecom assets owned or controlled by Egyptian entrepreneur Naguib Sawiris. If consummated, the proposed transaction would catapult Vimpelcom into fifth place among the top wireless carriers worldwide. As first proposed in October, the agreement was to provide Wind with $1.8 billion in cash, two seats on the merged entity’s board, and shares in the post-merger entity, valued at $4.9 billion, that equate to a 19% voting stake. After Telenor, the holder of a 36% voting stake in Vimpelcom, protested the merger on grounds that the purchase price was excessive and that the deal lacked “strategic or financial sense,” the parties agreed to shave $300 million off of the purchase price and to boost Wind’s economic stake to 31% in exchange for Sawiris’s pledge to sacrifice the two board seats that were promised to Wind previously. The revised agreement, which reduces Telenor’s voting stake from 36% to 25%, was approved by six of Vimpelcom’s nine board members on Monday. Remaining board members from Telenor, however, voted against the merger as an official of the Norwegian carrier complained that the revised deal “makes even less sense as the consideration now being offered.” A Telenor spokesman further charged that Altimo—an affiliate of controlling Vimpelcom shareholder Alfa—prevented Telenor from exercising its preemptive right to purchase shares that would offset the dilution of Telenor’s stake through Altimo’s recent purchase of shares in Orascom. Vimpelcom defended the Altimo share purchase as a related third-party transaction that was “clean and properly executed.” A shareholder vote on the merger is scheduled for March 17, at which time Telenor hopes to convince minority shareholders to vote against the deal.

**Corning Awarded $1.19 Billion Contract For Australian NBN**

A subsidiary of U.S. fiber optic cable maker Corning, Inc. is among three firms awarded contracts this week for deployment of the first phase of Australia’s National Broadband Network (NBN), which is slated to reach 93% of Australian homes and businesses within the next decade. Valued at US$1.19 billion, the five-year contract signed by Corning encompasses optical cable and associated hardware for the open access NBN that will support download speeds of 100 Mbps. Prysmian (formerly Pirelli) of Italy and Warren & Brown Technologies, a Melbourne-based firm, were also awarded contracts, valued at $300 million and $110 million, respectively, to supply additional cable and hardware. The contract also builds upon Corning’s track record as a participant in various fiber-to-the-home infrastructure projects throughout Australia since 2005. Announcing the awards on Monday, Mike Quigley, the chief of the Australian government-owned NBN Co., stressed that the rash of recent floods impacting the nation would not delay construction of the US$36 billion network. As Quigley explained that part of the government’s aim in awarding equipment contracts to two foreign firms “is to ensure that Australian industry is internationally competitive,” a spokesman for Corning said, “we look forward to supporting Australia’s vision and leadership in broadband deployment.”

**Vodafone, Indian Partner Clash On Reverse Listing**

British wireless giant Vodafone called on India’s market regulator this week to investigate a proposed reverse listing by partner Essar Telecommunications in which Essar would merge 11% of its indirect stake in the Vodafone Essar joint venture into India Securities (ISL), the financial services arm of the Essar Group. The dispute between Vodafone and Essar arises as Vodafone continues its legal fight against government efforts to collect $2.5 billion in back taxes accruing from Vodafone’s $11 billion acquisition of Hutchison Essar in 2007. Stiff price competition in India’s wireless phone sector has also eroded profit margins for Vodafone’s Indian operations, which experienced a 9% drop in EBITDA between the 2007-2008 and 2009-2010 earnings periods. Essar Group, the parent of Essar Telecommunications, holds a 33% stake in the Vodafone Essar venture and has the option to sell its stake to Vodafone by May of this year. Describing ISL as a “highly illiquid vehicle,” Vodafone voiced concern that the value of the combined ISL-Essar “could be misinterpreted” to indicate the “fair market value of Vodafone Essar.” A spokesman for Essar indicated that his company was aware of Vodafone’s concerns and would “respond appropriately.”

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