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For MSNBC, Comcast Represents Not A Threat, But An Opportunity

by

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Rumors have begun swirling that Comcast's impending merger with NBC-Universal will prompt significant changes in news flagship MSNBC. Fox News personality Bill O'Reilly recently stated that "we hear" Comcast will "change that whole thing over there." Shortly afterward, the channel briefly suspended anchor Keith Olbermann for donating money to Democratic candidates in violation of NBC News guidelines. While these incidents could be read as suggesting the channel may soon abandon its position as the liberal counterweight to Fox News, NBC-Universal has denied that any rebranding is planned. Indeed, upon reconsideration the channel quickly lifted Olbermann's suspension. And last month, it launched a two-year media campaign with the tagline "Lean Forward," which is designed to "embrace its progressive political identity."¹

But critics of the Comcast-NBCU merger sense a more nefarious plot afoot: they claim a post-merger Comcast-NBCU may emasculate MSNBC to please Rupert Murdoch. This theory originated with an early October New York Times media column, was fleshed out in a blog post by Cardozo Law Professor Susan Crawford, and publicized by Free Press.² This argument begins by noting that the combined Comcast-NBC entity will continue to draw most of its revenue from cable subscribers. Murdoch's News Corp. owns a slate of channels that any cable operator must carry to satisfy those

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subscribers, most notably Fox News. The conspiracy theorists suggest that News Corp. might threaten to bar Comcast from carrying these channels unless Comcast tones down Rachel Maddow and company, so that MSNBC is less of a competitive threat to Fox. And, so the theory goes, Comcast's dependence upon its subscriber revenue means the media giant must accede to Murdoch's demands.

This theory is far-fetched, to say the least. While analysts have debated the risks of vertical integration in the cable industry for almost twenty years, this argument represents a complete inversion of consumer protection advocates' traditional concerns. The 1992 Cable Act's ownership restrictions,³ and the Federal Communications Commission's subsequent efforts to impose limits on vertical integration,⁴ were predicated upon a fear that a cable operator might exploit its market power over distribution to give its affiliated channels an unfair advantage over competitors in the upstream market for content. In other words, vertical limits were supposed to protect Fox News from a Comcast-owned MSNBC, not the other way around.

Of course, the D.C. Circuit invalidated the FCC's vertical integration limits in 2001, and for good reason: the Commission's data simply did not support the hypothesis that vertical integration harms the market for cable content.⁵ The Commission itself noted a study demonstrating that none of the five largest cable operators showed a pattern of favoring their affiliated channels over non-affiliates.⁶ In fact, the Commission concluded that "vertical relationships had increased both the quality and quantity of cable programming services."⁷ Given these findings, the court accused the Commission of plucking its vertical limits "out of thin air."⁸ The Commission has maintained an open docket on this issue since the court's decision, but has yet to muster the data to justify a limit on vertical integration in the cable industry.

Reasonable minds may disagree about whether, in today's increasingly competitive video marketplace, cable companies have incentives to favor their affiliated channels. But it is a far greater stretch to suggest that a cable company would actively harm its affiliated channels to curry favor with competitors. The whole point of Comcast's acquisition of NBC-Universal is to gain a larger footprint in the market for cable channels and content. Comcast's chief executive, Brian Roberts, has dubbed the NBC News franchise in particular as the "single most awesome asset" that comes with the deal.⁹ It is difficult to imagine why Comcast would pay billions to acquire MSNBC and the rest of the NBC News operation, only to actively destroy or diminish the value of those assets in the interests of serving a rival media empire.

To support their claims, critics cite a 2008 incident in which Comcast fired a regional talk show host, Barry Nolan, ostensibly for criticizing Bill O'Reilly during a period of negotiations between Comcast and News Corp. But upon closer analysis, this analogy fails. Nolan was not sanctioned for statements made on the air. Rather, he announced his intention to disrupt a local Emmy award ceremony given in O'Reilly's honor, calling the latter a "mental case."¹⁰ After Comcast, his employer, warned him not to make a "scene" at the event, Nolan nonetheless distributed an unflattering handbill at the ceremony and visibly walked out when O'Reilly received the award.¹¹ Nolan sued, alleging that he was impermissibly fired for exercising his speech rights, but the court

dismissed the claim.¹² O'Reilly may wish to claim credit for Nolan's termination: he filed a complaint with Comcast on Fox letterhead, although the letter arrived after Nolan was suspended and Comcast denied any connection between the two. Ultimately, however, Nolan was an insubordinate employee who breached his employment agreement by embarrassing the company at a prominent industry event and was terminated as a result.

By extrapolating from the Nolan incident, critics display a fundamental misunderstanding of the cable television market. Assuming News Corp. was inclined to pressure cable operators to destroy MSNBC, one might ask why it is not already doing so. After all, there are many steps a cable operator could take to give Fox News an advantage over its rival even now: for example, it could drop MSNBC completely, or move the channel to a premium tier of service where it is seen only by those customers willing to pay extra.

But News Corp. does not demand these concessions as a condition of carrying Fox channels, because, apart from any other reason, it lacks the market power to issue such a threat. Comcast is the nation's largest cable provider, providing service to roughly one-quarter of all U.S. households. Without access to that distribution platform, Fox's channels would face steep declines in viewers and in revenue. As the FCC has repeatedly acknowledged, if there is a bottleneck in the market for video distribution, which in today's video marketplace is surely a difficult case to make, it stems from the fact that cable operators like Comcast control access to customers, not that certain media companies control popular content. Faced with the prospect of losing Fox channels, some Comcast customers may go through the hassle of switching to another cable provider. But many more presumably would simply change the channel — oftentimes to MSNBC or another channel in the Comcast-NBCU family.

Of course, if News Corp. does have the kind of market power that Professor Crawford and other like-minded critics suggest, they should embrace the Comcast merger. MSNBC has gained some traction against CNN in recent years, but its viewership still lags far behind Fox News. By merging with Comcast, MSNBC will gain a partner with the resources and the incentive to help it compete more effectively in the cable news market and steal share from Fox News.

In the end, no amount of regulation will force viewers to switch from Fox News to MSNBC. To win that battle, NBC-Universal must become a better competitor. Joining the Comcast family represents a very good opportunity for it to do so.

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¹ Brian Stelter, *With Tagline, MSNBC Embraces a Political Identity*, N.Y. TIMES, October 5, 2010, at B3.

² Brian Stelter, *An Award, Criticism, and Perils for Comcast*, N.Y. TIMES, October 4, 2010, at B9; Susan Crawford, *Comcast/NBCU: Who Answers Fox News?*, available at <http://scrawford.net/blog/comcastnbcu-who-answers-fox-news/1407/>; Timothy Karr, *Who Will Head MSNBC if Comcast Takes Over?*, Nov. 9, 2010, available at http://www.huffingtonpost.com/timothy-karr/who-will-head-msnbc-if-co_b_780957.html.

³ 47 U.S.C. 533(f)(1)(B).

⁴ See 47 C.F.R. 76.504 (1999), reversed and remanded by *Time Warner Entertainment, Inc. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

⁵ *Time Warner Entertainment, Inc. v. FCC*, 240 F.3d 1126, 1137 (D.C. Cir. 2001)

⁶ *Id.* at 1137-38 (citing *In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits, Second Report and Order*, 7 FCC Rcd. 8565, 8583-85 (1993)).

⁷ *Id.* at 1138.

⁸ *Id.* at 1137.

⁹ Jot Flint, *Comcast CEO Brian Roberts Says Cable Gets Bum Rap And He Likes 'Californication'*, Los Angeles Times, May 11, 2010, available at <http://latimesblogs.latimes.com/entertainmentnewsbuzz/2010/05/comcast-ceo-brian-roberts-says-cable-gets-bum-rap-and-he-likes-californication.html>

¹⁰ *Nolan v. CN8*, No. 08-12154-RWZ, 2010 WL 3749466 (D. Mass. Sept. 21, 2010).

¹¹ *Id.*

¹² *Id.*