Comcast-NBC deal opens door to Web troubles

December 16 2010, By Joe Flint

One company is the nation's biggest cable TV provider. The other owns a TV network, several popular cable channels and a movie studio.

But when it comes to the $30 billion merger of Comcast Corp. and NBC Universal, the regulators and lawmakers who will decide the fate of the deal aren't focusing on the big screen or the small screen. They're looking at the Internet.

Welcome to a media marriage, circa 2010.

Although there has been a lot of talk in media circles about what Comcast's ownership of NBC Universal would mean for viewers' choice of news and entertainment, the two branches of the federal government reviewing the merger - the Justice Department and the Federal Communications Commission - are more worried about what the combination means for the online world.

The Web is shaping up to be the No. 1 issue in a mega media merger today, much the way battles over program diversity and commitment to news loomed over media mergers in the past.

"This isn't the run-of-the-mill merger," said Jeffrey Silva, a telecommunications and media analyst with Medley Global Advisors. "Online video is an emerging market, and if someone gained power really early, it could stifle it. ... That's why there has been so much controversy."

The FCC and the Justice Department have different mandates, although there is considerable overlap between the two.

Generally speaking, the Justice Department's mission is to make sure a merger doesn't diminish competition, and the FCC examines whether a deal serves the public interest.

Rivals, legislators and watchdog groups fear that Comcast, armed with NBC content, will wield too much power in determining how the Internet develops as a medium to watch TV and movies. In addition to the NBC network and Universal Studios, Comcast would also get its hands on big cable channels including USA, Bravo, MSNBC and Syfy.

NBC also owns about one-third of Hulu, the popular online video site.

Congress and federal agencies want to slap conditions on Comcast, which provides cable TV to 1 in 5 homes and has 17 million broadband customers.

The conditions would require Comcast not to withhold its own content - such as cable channels - from any potential broadband competitor or block rival video service providers from accessing Comcast's broadband pipes into homes.

Last week, Rep. Henry Waxman, D-Calif., who is chairman of the House Energy and Commerce Committee, sent a letter to FCC Chairman Julius Genachowski and Christine Varney, the assistant attorney general of the Justice Department's antitrust division, outlining the conditions he wants put on the merger.

People close to the review process said Waxman's proposals would probably be very similar to the final terms of the deal.

Waxman told Genachowski and Varney that their agencies need to "prevent Comcast from degrading or blocking online distribution of programming that competes with Comcast and its offerings" as well as ensure that the company doesn't "prioritize or guarantee a higher quality of service" for its own content over competitors'.

At the end of November, Level 3 Communications Inc., a company that delivers content over the Internet for Netflix, accused Comcast of charging unreasonable fees for access to its broadband network. Comcast denied the accusation, saying it was a mere commercial dispute and had nothing to do with network neutrality, a principle - which is not law - that all Internet traffic be treated equally.

As public policy groups have advocated, Waxman also called for safeguards to prevent Comcast from withholding its content from rival cable, satellite or broadband distributors or charging more than market rates.

A condition pushed by Sen. Herb Kohl, D-Wis., chairman of the Senate subcommittee on antitrust and consumer issues, would require Comcast not to "prevent or coerce programmers from keeping their content off Internet websites or Internet distributors" as a condition for being carried by Comcast.

Additionally, Kohl has said he'd like a requirement that consumers be able to watch NBC programming online without having to be cable subscribers.

Although Comcast declined to comment on the review, the company has argued before Congress as well as the FCC and Justice Department that the Internet is still in its early stages of development and hence should be free of heavy-handed regulation.

The company has also made the case that applying conditions only to Comcast - and not other media and broadband companies - would be unfair.

One major challenge for lawmakers is that they are entering uncharted territory. The proposed merger is serving as something of a test lab for regulation of the Internet. It is not uncommon for regulators to use a merger as an opportunity to try to impose new rules on the companies seeking approval.

That puts Comcast, eager to close on a deal that was announced more than a year ago, in a vulnerable position: It must bow to regulators' demands - or walk away.

The FCC "rarely feels very concerned about jurisdiction," said Harold W. Furchtgott-Roth, a former FCC commissioner.

Between the FCC and the Justice Department, the former has more clout. "It is much easier for the FCC to impose conditions because the antitrust agencies have to credibly threaten to go to court to block a merger," Furchtgott-Roth said.

The FCC isn't the only one that looks to mergers among giants to shape the regulatory landscape.

"Every player in the sector looks for an opportunity to push agenda they might not be able to otherwise," said Blair Levin, a former FCC chief of staff and now a fellow at the Aspen Institute think tank.

Case in point: Bloomberg Media has been lobbying the FCC to require Comcast to put its cable business channel, which is typically in the Siberia of channel lineups, near NBC's financial network CNBC as a condition of approving the deal.