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PERSPECTIVE

Trump may throw wrench in AT&T deal

By Jill M. Manning and D. Scott Macrae

The election of Donald J. Trump brings a significant amount of uncertainty to the proposed $85 billion mega-merger between AT&T and Time Warner. If President Trump follows through on the promise of Candidate Trump, the proposed merger may be dead on arrival or, at the very least, will receive close scrutiny by antitrust officials at the Department of Justice (DOJ) and the Federal Trade Commission (FTC), as well as the Federal Communications Commission (FCC).

The proposed merger reflects the shift in American media consumption from traditional television to mobile via smartphones and tablets. AT&T, the second-largest wireless provider, seeks to capitalize on this shift by purchasing the content of Time Warner. If the merger proceeds, AT&T will not just provide access to "Game of Thrones," it will own it. What are the antitrust implications of the proposed merger, and what effect could it have on consumers?

In October, AT&T announced a deal to acquire Time Warner. Then presidential candidate Trump, echoing trust-busting President Teddy Roosevelt, strongly criticized the proposed merger, stating "deals like this destroy democracy" and that he "would never approve such a deal because it concentrates too much power in the hands of the too and powerful few." Some speculate that Trump's antitrust policies will be "revenge-driven" against those in the so-called liberal media who he considers enemies, including Jeff Bezos, head of Amazon and owner of the Washington Post. Candidate Trump targeted Amazon, stating "if I become president, oh, do they have problems. They're gonna have such problems." Consequently, Time Warner, owner of CNN, could fall victim to Trump's revenge-driven antitrust policies.

New York Times

The Time Warner Center in New York, Oct. 23, 2016.

DOJ/FTC Review of Proposed Merger

Historically, mergers are subject to the review process created by the Sherman Act of 1890 and the Clayton Act of 1914, which give the FTC and DOJ the right to institute legal action to challenge any merger when the effect "may be substantially to lessen competition." The Communications Act of 1934 added two new provisions that require FCC approval before a company can acquire or transfer any telecommunications lines or broadcast stations. The result is a dual system merger review that requires all communications mergers be approved by two agencies instead of just one.

AT&T, however, has indicated that it may attempt to prevent FCC review by avoiding transfer of any broadcast licenses in the merger. "The only scenario in which the FCC would have jurisdiction is if Time Warner transfers certain broadcast licenses to AT&T," RBC analyst Jonathan Atkin, who viewed a recent presentation by AT&T's Chris Womack and Michael Black, wrote. "The company believes these licenses (primarily business radio licenses and licenses related to Time Warner's ownership of the WPCN superstation) can be offloaded easily, obviating the need for an FCC review."

The proposed merger represents vertical integration between programming (Time Warner) and distribution (AT&T) and would result in further consolidation in the media industry. While frequently described as a vertical merger, AT&T and Time Warner are also horizontal competitors in the pay television market. AT&T, which offers the U-verse brand and also owns DirectTV, currently has a 26 percent share of that market. Time Warner has an 11 percent of the pay television market. The merged company would have combined 37 percent market share, far larger than Comcast's 22 percent share.

The media industry has seen significant consolidation over the past few years. Comcast bought NBC Universal, Disney purchased Marvel and Verizon acquired Yahoo and AOL. Proposed mergers among companies that dominate a specific sector of the market often lead to a reduction in competition. When fewer companies compete in a specific industry, consumers have fewer choices which can result in a host of negative consequences including increased prices and lower customer service.

Earlier this year, the DOJ challenged GE's plans to sell its appliance business to AB Electrolux, finding that the acquisition would "eliminat[e] competition that has benefited American consumers through lower prices and more options." GE subsequently abandoned the proposed sale. Similarly, there is a real concern here that the proposed merger would reduce competition and enable AT&T to keep Time Warner's content exclusive to AT&T — in other words, if you want to watch "Game of Thrones," you will need AT&T's wireless service. The proposed merger could eliminate choice by allowing AT&T to favor Time Warner's content rather than other programs its customers may prefer. AT&T could make access to Time Warner's content more expensive to competitors. AT&T might give Time Warner's cable networks better placement on channel lineups than its competitors. Without competition, customers may be faced with fewer choice of programming and higher prices for less service.

FCC Review of Proposed Merger

While the DOJ and FTC review a proposed merger by focusing on the effect on competition, the FCC has broader latitude. Under the Communications Act, the FCC determines "whether a proposed transaction will serve the public interest, convenience and necessity." One area of significant public concern is internet privacy. Less than a week after the announcement of the proposed merger, the FCC adopted new rules enhancing online privacy. The new rules require ISPs (like AT&T) to get optin consent from customers before sharing private information, such as locations and browsing histories, with advertisers and other third parties, thereby limiting how ISPs use and sell customer data. The new rules could significantly affect AT&T's plans to profit from the merger through targeted advertising. AT&T is familiar with the power of the FCC to squash merger plans. In 2011, AT&T withdrew its efforts to acquire T-Mobile after the FCC indicated it would oppose the deal. Although the present proposed merger does not suffer from the same problem, it will nonetheless face significant scrutiny as the FCC flexes its regulatory muscle.

The example of the Comcast/ NBC Universal merger in 2011 could prove instructive. In return for approving the merger, the DOJ extracted significant concessions to promote competition and protect consumers, including forcing the company to license programming to other distributors, agreeing to anti-retaliation provisions, and giving equal treatment to competing online products on its internet network. Christine Varney, head of the DOJ's antitrust division at the time, applauded the compromise: "The conditions imposed will maintain an open and fair marketplace while at the same time allow the innovative aspects of the transaction to go forward." Varney, now a partner at Cravath, Swain & Moore, is representing AT&T in connection with the merger.

The proposed merger faces an uphill and uncertain battle including hostility from Candidate Trump, uncertainty about the antitrust enforcement agenda of President Trump's administration, increased scrutiny of mega-mergers by the FTC and DOJ, and FCC concerns about internet privacy. One thing is certain: many of us will watch this battle play out while streaming CNN live on our mobile devices using AT&T's wireless service.

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