DOJ’s lawsuit to halt AT&T-Time Warner deal is the right thing to do

By Warren Grimes and Chris Sagers

Amidst the fierce political crosscurrents enveloping the Trump administration, the U.S. Department of Justice recently filed a lawsuit to prevent AT&T Inc., the largest seller of subscription television, from acquiring Time Warner Inc., one of the three largest providers of video content sold through TV subscriptions and the internet.

President Donald Trump has repeatedly expressed his opposition to the merger, though his personal views should have no relevance to the case. The Justice Department’s lawsuit is wise and courageous; it is a bold step to protect competition and consumers — the primary goal of antitrust laws.

AT&T says it will vigorously defend the deal, which in this case is a vertical merger — one that involves two firms that buy and sell from each other. As the telecommunications giant has pointed out, the government has not won a litigated case involving a vertical merger in decades. In fact, the government permitted a similar merger in 2011: Comcast’s acquisition of NBC Universal. AT&T also argues that the combination of a content provider and a distributor will better enable it to compete against large firms such as Amazon and Netflix, which have become major content providers.

AT&T’s arguments in support of the $85 billion deal are flawed. The company ignores the fundamental point of merger enforcement: to prevent the combination of companies that may substantially reduce competition in any market. AT&T’s contention that the merger would allow it to compete more effectively against other behemoth content providers, assuming it is true, ignores likely major injuries to competition, including to new entrants or small and creative content providers, to independent and efficient distributors, and to consumers bearing the brunt of higher prices and more limited choices. The existence of large rivals cannot justify mergers that substantially undermine competition. If it did, other large firms could use the AT&T merger as precedent for even more consolidation, ultimately leading to a tight oligopoly of vertically integrated telecommunications firms and the destruction of all meaningful competition.

The paucity of litigated vertical merger cases is hardly surprising. Few merger cases of any kind end up in court, in part because of the cost to government and private parties of litigating them. Government objections are more commonly resolved through negotiated consent decrees. The government has resolved objections to other vertical mergers in that way. That was the case in the 2011 Comcast-NBC Universal deal.

The concerns with the Comcast case were similar: When a major distributor and a content provider merge, there is a substantial risk that the distributor will refuse to deliver valued content to rival distributors except at discriminatory high prices. Another concern is that, as a distributor, the firm will favor its own content and exclude, or discriminate against, other content providers. This can stifle competition from new and innovative content providers. The Justice Department was very much aware of these vertical issues in 2011. As a condition of allowing the Comcast acquisition to move forward, the DOJ insisted that the firm agree to conduct restrictions designed to prevent abusive exercise of vertical restraints.

AT&T's much-repeated suggestion that vertical mergers are no longer a concern is false. There is widespread agreement that the larger and more dominant a firm becomes, the greater the concern with its abusive vertical practices. The resolution of the Comcast case is consistent with this view. As the Justice Department complaint indicates, AT&T, through its ownership of DirecTV, has a footprint in telecommunications already larger than Comcast's, a distinction that justifies the stronger relief sought against AT&T, which would require AT&T to strip certain assets out of the deal. During the failed negotiations to resolve this case, the DOJ reportedly said it would approve the deal if either AT&T sells DirecTV or Time Warner sells Turner Broadcasting, which would include CNN.

Concern with this acquisition is widespread within the video entertainment sector itself. After the Comcast merger, support for net neutrality regulation grew, including among content providers and smaller distributors. They feared they would be treated unfairly by vertically integrated firms such as Comcast, and stated those views forcefully both in opposition to that deal and in support of the Federal Communication Commission's net neutrality regulation. That the FCC even felt a need to regulate net neutrality reflected a fundamental reality of competition: tepid merger enforcement allows abusive power to grow to the point that there is no alternative to government regulation.

The Republican majority at the FCC, led by Chairman Ajit Pai, is poised to eliminate net neutrality regulation, in part because of its belief that the market should be left to self-regulate through competition. But the more these vertically integrating mergers are allowed, the less effective competition becomes, making regulatory intervention ever more inevitable.

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