

With Merger Trial Wrapped Up, AT&T Says Justice Department Failed to Make Case, No Remedy Permissible

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[Jeffrey May \(Wolters Kluwer\)](#)

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The Department of Justice Antitrust Division wrapped up its case to block AT&T Inc.'s proposed acquisition of Time Warner Inc. last week, and lawyers for the defendants told the federal district court in Washington, D.C. that the government "came nowhere close" to proving that the deal would violate Sec. 7 of the Clayton Act.

"The government ... gave the Court no basis for finding that this merger is likely to reduce competition at all, much less substantially," they argued in a post-trial filing. "Rather, the evidence overwhelmingly showed that this merger is likely to *enhance* competition." The defendants also provided the court with their proposed findings of fact and conclusions of law.

The Antitrust Division filed its complaint to block the AT&T/Time Warner deal last November. The trial wrapped up on April 30, after 20 days of testimony. The government's case relied heavily on the testimony of its economic expert, Professor Carl Shapiro, who had served as deputy assistant attorney general for economics at the Antitrust Division during the Obama Administration. The

government also offered the testimony of industry witnesses, including employees of defendants' competitors. In addition to expert testimony, the defendants put on industry witnesses, including the AT&T and Time Warner chief executives.

The government's theory is that AT&T, the nation's largest distributor of traditional subscription television, could use its control of Time Warner's popular programming, such as HBO and CNN, as a weapon to harm competition. The government alleged that a "vertical merger may violate the antitrust laws where the merging parties would—by means of their control of an input that their competitors need—have the incentive and ability to substantially lessen competition by withholding or raising the price for that input."

In their post-trial brief, the defendants contended that the trial evidence "demolished" the government's "central prediction ... that AT&T would use Time Warner's Turner content as a 'weapon' against rival distributors by threatening to withhold it during bargaining, thereby forcing them to pay higher prices." According to the defendants, industry witnesses with actual bargaining experience "categorically refuted" the government's "attenuated and abstract theory."

In addition to refuting the government's theory that the merger would increase consumer pay-TV prices, the defendants asserted that the Justice Department failed to support its theory that a combined AT&T/Time Warner would likely coordinate with rival Comcast/NBCUniversal either to withhold content from virtual multichannel video programming distributors (MVPDs), such as Dish Network's Sling TV, or to force virtual MVPDs to buy more channels that they want to offer consumers. "Sling was the *only* virtual MVPD to testify that it prefers "skinny bundles" of Time Warner programming," the defendants pointed out. "Displeasing Sling is not the same thing as substantially lessening competition marketwide."

Lastly, the defendants questioned the government's alternative theory that distributors will be unable to use HBO as a promotional tool. As with the coordination theory, the defendants argued that the theory had little support from the government's expert Carl Shapiro. In any event, the defendants said that they would not impose the feared restrictions and that, even if they did restrict HBO's promotional uses, "distributors could promote their services in other ways, just as they do today."

Remedies. Saying that this was not a close case, the defendants argued that no

remedy was permissible. The government had argued that either the deal should be blocked or the parties should be required to divest Turner Broadcasting assets as a condition of the deal.

The defendants argued against any remedy. They also advised the court not to include the defendants' commitment to arbitrate with distributors in any remedy on the ground that the government could use such a provision to challenge the court's underlying ruling on appeal. "It is not a remedy," the defendants said. "The Commitment is only one of many real-world market facts distinctly negating the government's critical assumption that the merged entity will have increased bargaining leverage."

A decision is expected next month prior to the parties' merger deadline. Of course, the judge's ruling could always come sooner, with detailed analysis in a written opinion to follow.