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Justice Department Unable to Overturn Decision Allowing AT&T Merger with Time Warner

Jeffrey May (Wolters Kluwer) · Monday, March 4th, 2019

The U.S. Court of Appeals in Washington, D.C. last week concluded that the government failed to prove that the combination of AT&T Inc. and Time Warner Inc. would violate Sec. 7 of the Clayton Act. A [decision](#) of the federal district court in Washington, D.C. denying the Antitrust Division's request to enjoin the deal has been affirmed. The appellate court found the government's objections that the district court misunderstood and misapplied economic principles to be unpersuasive. Further, the district court's factual findings were not clearly erroneous. The Justice Department said that it would not seek further review.

While the appellate court was troubled at times by the district court opinion, particularly with respect to its failure to discuss the U.S. Supreme Court's *Copperweld* decision in the context of corporate-wide profit maximization, it ultimately upheld the determination. The appellate court appeared unswayed by the government's concerns that the merger would give Time Warner increased bargaining leverage in negotiations with rival distributors. The government unsuccessfully argued that the transaction, valued at approximately \$108 billion, would likely result in a substantial lessening of competition by enabling Time Warner's Turner Broadcasting cable network to charge AT&T's rival distributors—and ultimately consumers—higher prices for its valuable programming content because rival distributors could be threatened with blackouts if they did not pay higher prices.

On appeal, the government pointed to two fundamental “errors” made by the district court in concluding that the government failed to meet its burden of proof: (1) the district court discarded the economics of bargaining, and (2) the district court failed to apply the foundational principle of corporate-wide profit maximization.

At the outset, the appellate court explained that, because this was a vertical merger case, the government could not use a short cut to establish a presumption of anticompetitive effect through statistics about the change in market concentration. Instead, the government had to make a “fact-specific” showing that the proposed merger is “likely to be anticompetitive” in the proposed market for multichannel video distribution.

The district court held that the government did not meet this first hurdle. It found that the government had failed to show that the merger was likely to increase Turner's bargaining leverage in affiliate negotiations. It also found that the government expert's quantitative model, which estimated the proposed merger would result in future increases in consumer prices, lacked sufficient reliability and factual credibility to generate probative predictions of future competitive harm. According to the

appellate court, the lower court did not err in finding that the government failed to clear the first hurdle in meeting its burden of showing that the proposed merger is likely to increase Turner's bargaining leverage.

Corporate-wide profit maximization. In the appellate court's view, the district court did not erroneously reject the corporate-wide profit maximization principle, as the government argued. Under this theory, a business with multiple divisions will seek to maximize its total profits. The government had contended that the district court's misapplication of the principle of corporate-wide profit maximization was evident from its statement that the evidence suggests "vertically integrated corporations have previously determined that the best way to increase company wide profits is for the programming and distribution components to separately maximize their respective revenues." However, the appellate court was not convinced that the lower court rejected the principle. In any event, the appellate court pointed out that AT&T's view that the government's claims of fundamental economic errors were ultimately irrelevant in light of Turner's "no blackout" commitment was not implausible.

Bargaining model. The government also argued that the district court clearly erred in rejecting its expert's quantitative bargaining model. However, the appellate court determined that, whatever errors the district court might have made in evaluating the inputs for the expert's quantitative model, the model did not take into account long-term contracts, which would constrain Turner's ability to raise content prices for distributors.

Arbitration agreements with a no-blackout guarantee. The appellate court pointed out the impact of Turner's post-litigation irrevocable offers of no-blackout arbitration agreements. Turner had informed approximately 1,000 distributors that it was "irrevocably offering" to engage in "baseball style" arbitration at any time within a seven-year period. In the event of a failure to agree on renewal terms, Turner agreed that the distributor would have the right to continue carrying Turner networks pending arbitration. According to the appellate court, the government's model did not take these agreements into account.

FCC filings. The government also introduced statements in prior Federal Communications Commission (FCC) filings by AT&T and DirecTV that vertical integration, such as in the earlier proposed Comcast-NBCUniversal merger, provided an incentive to increase prices and poses a threat to competition. The appellate court rejected the government's contention that the district court failed to properly weigh the probative force of the defendants' statements in these filings.

AT&T statement. "The merger of these innovative companies has already yielded significant consumer benefits, and it will continue to do so for years to come," said AT&T General Counsel David McAtee in response to the decision. "While we respect the important role that the U.S. Department of Justice plays in the merger review process, we trust that today's unanimous decision from the D.C. Circuit will end this litigation."

No further review. The Department of Justice has decided not to pursue an *en banc* rehearing by the full D.C. Circuit or a Supreme Court petition. The Department has no plans to seek further review, according to a Justice Department spokesperson.

The case is *U.S. v. AT&T, Inc.*, No. 18-5214.

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