AT&T suit may herald a new antitrust era - or Trumpian pique

November 22 2017, by Tali Arbel

In this Wednesday, Dec. 7, 2016, file photo, AT&T Chairman and CEO Randall Stephenson, left, testifies on Capitol Hill in Washington, before a Senate Judiciary subcommittee hearing on the proposed merger between AT&T and Time Warner, as Time Warner Chairman and CEO Jeffrey Bewkes listens at right. The Justice Department intends to sue AT&T to stop its $85 billion purchase of Time Warner, according to a person familiar with the matter who was not authorized to discuss the matter ahead of the suit's official filing. (AP Photo/Evan Vucci, File)

The Trump administration's decision to oppose the $85 billion AT&T-Time Warner merger may be clouded by suspicions of political influence. But considered on its merits, it could mark a significant departure in antitrust policy, one that might block or modify a broader set of mergers found to harm consumers.

The move disconcerted both Wall Street and the telecom and media industries, none of which expected it. Consumer groups are applauding, saying it's a good step by the Justice Department to protect people from higher cable bills and ensure that web-based alternatives to TV aren't stifled. (Many of the same groups, however, are also protesting the government's plan, announced Tuesday, to roll back "net neutrality" rules intended to equalize access to the internet.)

Matters, of course, are complicated by President Donald Trump's long-running feud with CNN, a Time Warner company, which Trump regularly denigrates as "fake news" and "failing." On Tuesday, Trump called the deal "not good for the country" and said he thought it would cause prices to go up. A White House spokeswoman said Monday she wasn't aware of any efforts to influence the case.

The Justice Department has suggested that AT&T could resolve the case by selling off DirecTV or a Time Warner business that includes CNN, according to a person familiar with the situation who couldn't go on the record. AT&T has rejected any option that would cause it to lose control of CNN.

LEGACY OF THE PAST

In this Oct. 24, 2016, file photo, clouds are reflected in the glass facade of the Time Warner building in New York. The Justice Department intends to sue AT&T to stop its $85 billion purchase of Time Warner, according to a person familiar with the matter who was not authorized to discuss the suit ahead of its official filing. (AP Photo/Mark Lennihan, File)

In 2011, Obama-era antitrust regulators waved through Comcast's acquisition of NBC Universal—a deal that, like the current one, brought together a major provider of television and internet service and an entertainment conglomerate. (AT&T offers wireless, home internet and TV services; Time Warner owns the Warner Bros. studio and networks including HBO, CNN and TBS.)

To prevent Comcast from abusing its greater leverage, regulators imposed a host of conditions on the company. For example, Comcast had to offer its TV and movies to online video competitors at the same rates as it did to cable and satellite rivals. But this approach isn't universally acclaimed.

For one thing, conditions are typically temporary; the ones for Comcast expire next year. They also don't fundamentally change behavioral incentives for the company, and they require ongoing enforcement. Complaints in the past have dragged on for years. Among critics of such "behavioral commitments" is Makan Delrahim, now the Justice Department's new antitrust chief.

"The DOJ in this instance is learning from those past mistakes," said Lina Khan, the legal policy director at the Open Markets Institute, a think tank that opposes excessive corporate power.

Delrahim has argued for requiring merged companies to divest certain businesses instead of imposing post-merger requirements on them. AT&T, however, doesn't want to do that. Its plan is to marry popular Time Warner networks with its nationwide wireless and television services in order to build a data-driven ad business on top of it all.

In this Wednesday, Dec. 7, 2016, file photo, AT&T Chairman and CEO Randall Stephenson, left, and Time Warner Chairman and CEO Jeffrey Bewkes are sworn in on Capitol Hill in Washington, prior to testifying before a Senate Judiciary subcommittee hearing on the proposed merger between AT&T and Time Warner. The Justice Department intends to sue AT&T to stop its $85 billion purchase of Time Warner, according to a person familiar with the matter who was not authorized to discuss the matter ahead of the suit's official filing. (AP Photo/Evan Vucci, File)

NEW THEORY OF COMPETITION

AT&T says TV bills won't go up and consumers will benefit from innovations in packaging video. The Justice Department and some experts argue the opposite.

For instance, MoffettNathanson analysts said in a note Tuesday that it was "in fact, very easy to imagine" how a company that both makes and distributes "must-have" news, sports and entertainment programming could use its power to thwart competitors by withholding it from rivals.

The government argues that AT&T could, for example, charge upstart streaming services prohibitively expensive fees for the rights to HBO or other channels, or even withhold them, making it harder to compete with AT&T's services. AT&T has said it intends to broaden, not limit, distribution of Time Warner.

"The DOJ's argument is simple: AT&T cannot lawfully be given this market power, because the incentives for them to abuse it are self-evident," the analysts wrote. "It is simply not the case that this is a 'novel' legal theory."

In this Monday, Oct. 24, 2016, file photo, the AT&T logo is positioned above one of its retail stores in New York. The Justice Department intends to sue AT&T to stop its $85 billion purchase of Time Warner, according to a person familiar with the matter who was not authorized to discuss the suit ahead of its official filing. (AP Photo/Mark Lennihan, File)

Antitrust enforcement used to be more aggressive. But starting in the 1980s, it became more focused on promoting consumer welfare than on ensuring competitive markets, Khan said. That made "vertical mergers," where the companies in question weren't direct competitors, more attractive, since regulators believed they created efficiencies without harming consumers.

For regulators to reject a vertical merger "represents a stark departure from the U.S. enforcement practice of the recent decades," Columbia law professor Anu Bradford said in an email. The last time the U.S. government won a court victory in a vertical merger antitrust case was in 1972, when the Supreme Court said Ford's takeover of a spark-plug business violated antitrust law.

The suit against AT&T could be the start of a new, more aggressive tack in antitrust by the Justice Department. But that depends on whether other considerations played a role.

"If it's politically motivated because the president doesn't like CNN, then it's just a wild card," said NYU law professor Eleanor Fox. "If this represents a change of heart, to be much more aggressive against mergers, it would be a game changer."