Written by **Daniel Sayani** on October 11, 2011

Justice Dept, Sprint Launch Antitrust Suit Against AT&T

In addition to Attorney General Eric Holder bringing suit against the nation's largest mobile services provider, seven states announced Friday they would be joining efforts to legally halt the merger. Attorneys General from California, Illinois, Massachusetts, New York, Ohio, Pennsylvania, and Washington have signed onto the effort to stop the deal that would merge two of the four largest national cellphone carriers.

The Justice Department issued an amended complaint against AT&T last week, as well as T-Mobile and its parent company, Deutsche-Telekom, arguing that the merger of the nation's second- and fourth-largest wireless carriers would violate antitrust law and "substantially lessen competition." The DOJ claims that the combination would reduce wireless communication competition in the United States, driving prices higher, making service worse, and offering fewer products for U.S. consumers.

The department said in the statement,

> AT&T had not demonstrated that the proposed transaction promised any efficiencies that would be sufficient to outweigh the transaction's substantial adverse impact on competition and consumers. AT&T could obtain substantially the same network enhancements that it claims will come from the transaction if it simply invested in its own network without eliminating a close competitor.

The department concluded that AT&T had not demonstrated that the proposed transaction promised any efficiencies which would be sufficient to outweigh the transaction's substantial adverse impact on competition and consumers. Moreover, the department noted that AT&T could obtain substantially the same network enhancements that it claims will come from the transaction if it simply invested in its own network without eliminating a close competitor.

With the acquisition, AT&T would displace Verizon Wireless, which is owned by Verizon Communications Inc. (VZ) and Vodafone Group Plc, as the number one U.S. wireless carrier. Together, AT&T and Verizon control 80 percent of profits in the market, according to the FCC's annual wireless report published June 27.

Unsurprisingly, the states joining efforts to block the merger are largely represented in the suit by "progressive" Attorneys General, who believe that it is the proper role of government to intervene in the

marketplace, and perceive an inherent obligation under the Sherman and Clayton Antitrust Acts to block the merger. For instance, New York Attorney General Eric Schneiderman — who was elected to the office on a platform of activism, rather than legal enforcement — sees the suit as another opportunity to advance "social and economic justice," consonant with his big-government agenda.

Schneiderman declared,

> This proposed merger would stifle competition in markets that are crucial to New York's consumers and businesses, while reducing access to low-cost options and the newest broadband-based technologies.
>
> We must do everything we can to encourage innovation and job creation. In vulnerable upstate communities, where concentration in some markets is already very high, and in New York City's information-intensive economy, the impact this merger would have on wireless competition, economic growth, and technological innovation would be enormous.

In addition, the wireless carriers Sprint-Nextel and Cellular South also filed suit against AT&T and T-Mobile over the proposed merger. Cellular South's vice president for strategic and government relations, Eric Graham, stated, "If AT&T were to complete this deal, not only would it substantially lessen competition, but it would essentially consolidate the market into the hands of the 'Big Two' — AT&T and Verizon."

Cellular South argued in the suit that AT&T and Verizon have "grown by absorbing other carriers and other means so that they now constitute 'the Big Two' — and each is far larger than any of the other wireless carriers in the United States. Over recent years, the Big Two have increased market share steadily, while other operators have struggled to maintain market share."

While widely accepted, the notion that antitrust litigation protects consumers by promoting competition is mistaken. Murray Rothbard notes in his classic *Power and Market: Government and Economy*,

> Evaluation of the antitrust laws has not proceeded from an analysis of their nature or of their necessary consequences, but from an impressionistic reaction to their announced aims. The antitrust laws, therefore, do not in the least "diminish monopoly." What they do accomplish is to impose a continual, capricious harassment of efficient business enterprise.

Instead, the Justice Department under Obama's nominee for Attorney General, emboldened by those voices clamoring for "social justice," is bringing suit against AT&T and T-Mobile for making a private business decision that holds innumerable benefits for consumers and promise for the future of innovation in the field of telecommunications.

Judicial scholar Robert Bork, in his 1978 analysis *Antitrust Paradox*, also addressed the claims of those who believe that antitrust laws promote competition. He argued that both the original intent of antitrust laws and economic efficiency required that consumer welfare and the protection of competition rather than competitors, be the only goals of antitrust law. Thus, while it was appropriate to prohibit cartels that fix prices and divide markets and mergers that create monopolies, allegedly exclusionary practices, such as vertical agreements and price discrimination, did not harm consumers and should not be prohibited. The paradox of antitrust enforcement was that legal intervention artificially raised prices by protecting inefficient competitors from competition. AT&T general counsel Wayne Watts conveyed this fact in the company's statement against the federal lawsuit, pointing out that the merger will result in better prices for consumers as well as an increase of 132 million new connections to mobile wireless devices.

AT&T has requested that Ellen Huvelle, the federal judge appointed to the case, drop the lawsuits brought against the merger by AT&T's competitors, Sprint and Cellular South (also known as C-Spire in certain markets). AT&T argues that these entities are competitors, not consumers, and therefore lack the right to bring forth antitrust litigation. Sprint and Cellular South argue that injuries to competitors are aligned with injuries to consumers, and are therefore "antitrust injuries" that injure competitors in the same way consumers are purportedly injured (i.e., presumably through high prices). AT&T argues that their competitors are not looking out for consumers, who would benefit from the merger, according to Watts, but are motivated by their corporate self-interest. Watts added that antitrust law is intended to protect competition, not competitors. "Sprint has spoken disingenuously about its motives for opposing the merger and, as recently as last week, said the Department of Justice should block AT&T from merging with T-Mobile, but would have good reasons to instead allow Sprint to purchase them," he observed.

Huvelle has reserved six weeks for the non-jury trial, which is set for February 13, 2012. Lawyers for both parties agreed that the matter was unlikely to need six weeks, and Huvelle announced that on October 24 she would begin hearing arguments over AT&T's planned motion to argue for the dismissal of the antitrust suits brought against it by C-Spire and Sprint.

Photo: AP Images