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States Flex Their Muscles and Antitrust Skills to Block Sprint/T-Mobile Merger

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A highly respected antitrust professor wrote: "When Congress enacted the federal antitrust laws it chose not to foreclose state antimerger activity. The legislative histories of the antitrust laws indicate that the congressional purpose was to supplement, not supplant, state activity. This intention has repeatedly been affirmed by the Supreme Court. Critics fear negative effects from ascendant state merger scrutiny. Many believe that the government's position towards exceptionally large transactions should be a fundamental matter of national economic policy. Enforcement and nonenforcement decisions, they say, should be made by officials appointed by the President with the approval of the U.S. Senate. Such critics fear that the prospect of challenge by any of fifty states adds uncertainty and delay into an already problematic process, and will cause beneficial transactions never to be attempted." The year was 1989.[1]

Since the enactment of the Hart-Scott-Rodino Act in 1976, we have grown accustomed to premerger notification at the federal level for all larger mergers and acquisitions. For the most part, State Attorneys General have participated via comments or supplemental filings in large transactions subject to premerger review. A generation of antitrust lawyers have lived in this environment. Indeed, some years ago lawyers were surprised that the federal government could challenge mergers after the fact given the long lapse in the governments exercise of that power, but that power was never removed, and private merger enforcement action also remains possible.

Can the states seek to block the merger? Yes. Will FCC and US Department of Justice approval stop the state litigation? No. What's the biggest obstacle facing the state challenge? Limited state funding. Antitrust litigation is often protracted and costly. T-Mobile and Sprint, with their largest stockholders — Deutsche Telekom AG and SoftBank Group Corp., respectively — will certainly dedicate resources to defeat the states via litigation siege. These pressures, coupled with Justice Department clearance, may push the states to settle, although the terms of a successful settlement for the states is unclear. Meanwhile, T-Mobile and Sprint may be delayed in completing the transaction, which is a costly complication without a certain outcome.

The Redacted Complaint filed by nine states and the District of Columbia, and later joined by an additional four states, presents a solid facial argument against the merger. There are only four companies with networks that serve at least 90% of the U.S. population. Verizon and AT&T are the largest. "T-Mobile and Sprint are the third and fourth largest [mobile network operators] MNOs in the United States and serve approximately 80 million and 55 million customers, respectively."[2]

The states allege that T-Mobile's controlling shareholder, Deutsche Telekom AG, believes that it could earn a greater return on its investment by reducing competition.[3] The states argue that:

"The proposed transaction would eliminate Sprint as a competitor and reduce the number of [mobile network operators] MNOs with nationwide networks in the United States from four to three. The combined company would have a retail market share larger than the two largest MNOs today, Verizon and AT&T. In some areas, including in the New York City metropolitan area, the combined company's share of subscribers would exceed 50%. The combined market share of Sprint and T-Mobile would result in an increase in market concentration that significantly exceeds the thresholds at which mergers are presumed to violate the antitrust laws. This increased market concentration will result in diminished competition, higher prices, and reduced quality and innovation."[4]

Although the data table is redacted, the Complaint claims that the nation's top 50 cellular market areas (CMAs) encompass about 50% of the U.S. population, and competition would be substantially lessened in each of the top 50 CMAs. The complaint argues many, particularly those with lower incomes who cannot pass a credit check and must purchase mobile wireless telecommunications service on a prepaid basis, rely on mobile wireless telecommunications services as their primary form of communications and do not have traditional wireline phone or broadband connections. If the merger is permitted, the "merger will negatively impact all retail mobile wireless telecommunications service subscribers but will be particularly harmful to prepaid subscribers"[5]

The states rely upon these claims to allege that "the transaction likely would substantially lessen competition in these local markets," creating an actionable harm to the state's citizens that justify the states' standing to challenge the merger.

The complaint contains other supporting arguments and detail. The merger "would cost Sprint and T-Mobile subscribers more than $4.5 billion annually."[6] Other countries that have allowed consolidation from four to three competitors recorded an average price increase "between 17.2% and 20.5%.[7] There are significant barriers to entry that will be faced by any new provider, so potential competition will not be a factor. Finally, the states argue that the proposed commitments made to the FCC are insufficient to protect competition.[8]

The states have set a solid foundation from which to proceed. There is no obvious precedent that will permit T-Mobile and Sprint to end the case quickly, but protracted litigation will test the resolve and resources of all the parties.

[1] Robert H. Lande, "When Should States Challenge Mergers: A Proposed Federal/State Balance" N.Y. L. School Rev. vol 35, pp. 1049 and 1047

[2] Complaint at 3.

[3] Complaint at 3.

[4] Complaint at 5.

[5] Complaint at pp. 2 and 5.

[6] Complaint at 29.

[7] To support this claim the Complaint cites the United Kingdom Office of Communications, A Cross-Country Econometric Analysis of the Effect of Disruptive Firms on Mobile Pricing (March 15, 2016)

[8] Complaint at pp. 31-33.