AGs' Sprint-T-Mobile Challenge Tests States' Influence

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Law360 (June 14, 2019, 9:49 PM EDT) -- Ten state attorneys general came out swinging on Tuesday with a challenge to the pending Sprint-T-Mobile merger, preempting pending decisions from both the Federal Communications Commission and the U.S. Department of Justice and raising the possibility that the states might have more influence over the merger's outcome than usual.

Attorneys general for the District of Columbia and states including California and New York filed a lawsuit against the deal, alleging that the tie-up will violate the Clayton Act by causing too much concentration in the wireless industry and rejecting promises from the companies of higher speeds, better service and lower prices as "unverifiable."

The lawsuit struck some observers as another unorthodox twist in a deal review that's already been irregular, most notably because the FCC's Republican majority has voiced support for the deal long before the agency's formal review is complete.

Here's a look at where the lawsuit fits into the overall merger approval process and what effects the AGs' action is likely to have.

FCC and DOJ Interplay

Last month, FCC Chairman Ajit Pai preempted the DOJ by announcing he will recommend that Sprint and T-Mobile be allowed to complete their megamerger based on commitments to build out rural 5G service, divest Sprint's prepaid Boost Mobile wireless unit and deploy unused spectrum holdings. Since then, the other two Republican commissioners have signaled they'd sign on, likely giving Pai enough votes to override any opposition from the commission's two Democrats.

While the FCC has yet to formally vote, the posture still puts the DOJ in an awkward position, since it has yet to reach a conclusion about the deal and now has to consider the concessions already secured by the other agency. Making matters worse, a contingent of states filed their own suit seeking to block the transaction on June 11.

Vic Domen, a partner with Norton Rose Fulbright who spent nearly 20 years with the Tennessee attorney general's office and was chair of the National Association of Attorneys General's antitrust task force, told Law360 that the states' early move is unusual. Domen, who left the AG's office in January and the antitrust task force in October, can't comment on the states' suit directly because of his work on the case in his previous roles, but said they are acting within their authority.

"I'm sure there's still conversations going on, but the states have made a decision and the DOJ now has to think about where it wants to go," he said. "That's an unusual position for the DOJ. Usually it's the other way around."

For deal-watchers still mulling the FCC's role, the suit raises questions about whether the agency's already-proposed conditions will hold water and whether the FCC has breached merger protocol.

During a Senate oversight hearing Wednesday, Democratic FCC Commissioner Jessica Rosenworcel said it's "highly unusual" that her Republican colleagues indicated they'd sign off before the chairman has circulated the official deal analysis.
"I have no economic analysis, legal analysis or paper before me and yet my colleagues have announced that they’re going to support this transaction via press release,” she said. “This is really irregular.”

For its part, the FCC majority maintains that the conditions are aggressive and dismissed suggestions they were pressured by the Trump administration to prematurely support the deal.

Pai testified Wednesday that his agency’s conditions will ensure the combined company puts its supercharged assets to work for consumers. In response to a question, Pai said no one at the White House has contacted the FCC about the deal. Concerns about administration pressure on the agency became a flashpoint in the Sinclair-Tribune broadcast megamerger, which the FCC ultimately killed last year to the president’s chagrin.

Speaking in favor of the concessions, Pai noted that the merged company was obligated to build out to three-quarters of the United States in three years — and 88% in six years. “That’s a critical amendment that will benefit all Americans, especially rural America,” Pai said.

**States Won’t Wait**

The AGs insist, however, that the merger will cost tens of thousands of jobs, and their lawsuit argues that a combined Sprint and T-Mobile will also drive up prices. The suit expressly rejects the concessions extracted by the FCC, saying the deal would increase concentration in the wireless space to an unlawful level, “even if the parties divest Boost Mobile.”

Virginia senior assistant attorney general Sara Oxenham Allen, who heads the office’s antitrust unit, told Law360 that the commitments promised to the FCC aren’t sufficient to avoid the harms the merger would cause. According to Allen, who currently chairs NAAG’s antitrust task force, the suing states didn’t want to wait for a decision from the DOJ.

Although the agency might still challenge the deal, it also could settle antitrust concerns with conditions the states don’t think are sufficient or it could simply allow the deal to proceed. If the DOJ does sign off on the merger, the companies would immediately be able to move forward, Allen said.

Allen did say, however, that she hopes the states would work with the DOJ if the department challenges the deal. “That would be most efficient,” Allen said.

R. Mark McCareins, a Northwestern University professor and former head of Winston & Strawn LLP’s global competition practice, said the court battle to come will be a war of attrition.

“They don’t have the budget or ... the internal resources” for full-blown litigation, McCareins told Law360, estimating that the costs for the AGs would run into the tens of millions of dollars.

The companies, McCareins said, can impose a significant burden on the AGs’ finances, especially if they refuse to settle. It’s rare, he said, for state AGs to coordinate a merger case through trial, especially for a deal that raises nationwide concerns. Instead, they typically force a settlement. “I don’t know that these two companies would be prepared to do that here,” he said.

Nevertheless, the states have already brought in a team from Munger Tolles & Olson LLP that includes Glenn Pomerantz, who helped lead the DOJ’s successful challenge of AT&T’s attempt to purchase T-Mobile in 2011.

**Complicating Approval**

Based on the support already brewing for the deal, some think the states’ action unnecessarily complicates the antitrust approval process. Sen. Roy Blunt, R-Mo., suggested Wednesday that the FCC is the true subject-matter expert and state officials should take their cues from it.

“Not everybody agrees with the [attorneys general] on this, who frankly probably haven’t spent a whole lot of time thinking about this particular marketplace or how important it is that there’s a third strong competitor,” he said.
Randolph May, president of free-market think tank Free State Foundation, also said the state AGs aren’t positioned to wade into a megamerger in the wireless space, as the FCC and DOJ have the resources to analyze matters like spectrum holdings and nationwide infrastructure deployment.

“It’s really, in my view, misguided for the state AGs to get involved. It’s really more political than anything else,” he said, noting that all of the lawsuit’s signatories are elected Democrats. The attorneys general of New York, California, Colorado, Connecticut, the District of Columbia, Maryland, Michigan, Mississippi, Virginia and Wisconsin signed on to the suit, which was filed in the Southern District of New York.

While the FCC’s course already seems charted, May said the AGs could be hoping to disrupt the DOJ review.

The states are probably “hoping that the filing of the lawsuit either has an influence on the Department of Justice or that it simply draws out the process in a way that somehow might make the merger less likely to be consummated,” he said.

But former Democratic FCC Commissioner Michael Copps said state attorneys general needn’t be experts in wireless policy to call attention to aspects of the deal that will harm consumers. The lawsuit may raise the profile of potential harms, like higher prices, and turn public opinion against the combination, said Copps, now a policy adviser for advocacy group Common Cause.

“It helps get this issue more squarely before the American people so they can understand what’s going on,” he said.

**AGs Going It Alone**

State enforcers aren’t strangers to taking on anti-competitive mergers and conduct, though they often work in tandem with their federal counterparts. On merger challenges, states can join a federal action to ensure that any settlement addresses local concerns.

Groups of states joined the DOJ in both of its successful health care merger challenges in 2016 — the $37 billion deal between Aetna and Humana and the $54 billion deal between Anthem and Cigna.

But they have also ventured out on their own, both individually and collectively. California Attorney General Xavier Becerra sued to block Valero Energy Corp. in 2017 from purchasing two San Francisco-area petroleum storage and distribution terminals owned by Plains All American Pipeline LP over competitive concerns. The suit came after the Federal Trade Commission cleared the deal. The companies abandoned the transaction.

Perhaps merger challenges are just another example of states’ newfound willingness to take action when it appears federal regulators won’t.

Outside the merger context, Washington State has taken the lead in a national push against fast-food and other franchises using no-poach provisions that can prevent workers from moving between locations. The state enforcer found itself at odds with the DOJ after the department pushed for private lawsuits against franchisors’ no-poach employment provisions to be judged under a harder-to-prove legal standard than Washington state prefers.

“If the states feel that there might be inaction or inability for the federal government to bring something, they’ll do it on their own,” Domen said.

While it is out of the ordinary for a contingent of states to file suit before federal enforcers make a call on a merger, Amanda Wait, a partner with Norton Rose and a former FTC attorney, said people shouldn’t be too surprised about the suit seeking to block the Sprint-T-Mobile deal or it’s timing.

“The states have been signalling their willingness to do something like this for a very long time,” she said.

Beau Buffier, the chief of the antitrust bureau at the New York attorney general’s office, who is helping lead the Sprint-T-Mobile suit, signaled this willingness to act without the feds at the
American Bar Association Antitrust Law Spring Meeting in 2017. He urged states to “rearm” in the face of lax federal enforcement and warned parties to “underestimate the states at your peril.”

“This is all the pinnacle of a yearslong trend where the states have been building up their abilities and their resources,” Walt said.

--Editing by Kelly Duncan and Alanna Weissman.