



AT&T-DirecTV And The Neverending Folly Of Antitrust Regulation

By: Clyde Wayne Crews Jr.

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Nothing much changes in antitrust regulation.

AT&T and DirecTV, seeking a \$48 billion merger, must play the Mother-May-I game with Washington regulators and justify consumer benefits of their infrastructure and video synergies before those who sometimes seem only to pretend to care about such things.

We find that we are repeating ourselves over again redundantly one more time when it comes to antitrust follies.

Back when DirecTV and EchoStar (owner of Dish Network) attempted to merge, opponents came out of the woodwork to describe the resulting Armageddon and ultimately blocked it.

That was 2001. My then-Cato Institute colleague Adam Thierer and I wrote a *TechKnowledge* article in defense of the deal: “The EchoStar-DirecTV Merger: Antitrust Folly Reaches Outer Space.”

This week, hearings occur in both the House and Senate Judiciary Committees on “The AT&T/DIRECTV Merger: The Impact on Competition and Consumers in the Video Market and Beyond,” as the latter puts it.

The heads of AT&T and DIRECTV *should not even be in Washington*. Yet, here they all are.

Such spectacles always seem to ask the wrong questions though. You’ll be able to get your fill of the number of competitors they have and the state of the programming marketplace from the written testimonies.

Despite all the “facts,” the “consumer” rationales for blocking ordinary business transactions like AT&T-DirecTV seem secondary at best.

Instead, parties frequently argue for or against antitrust intervention depending upon whether or not they are the ones in the crosshairs (Microsoft and Google were both great examples).

Antitrust regulation is faulty since it removes the requirement for a competitive market response by other businesses (like Dish Network and cable companies in the present case) and the capital markets broadly.

That makes antitrust regulation fundamentally anti-free enterprise and anti-consumer.

I'm leaving aside the fact that Dish (owned by EchoStar) and DirecTV could have merged over a decade ago. Their artificial separateness is an example of the distortion of markets by a government with far greater economic power than any two merging entities can ever muster.

We said in 2001 about EchoStar-DirecTV;

Policymakers thwart the natural progression of markets by placing antitrust regulatory hurdles in the way of companies that seek the economies of scale necessary to offer ubiquitous communications network services. Competitors would be powerless to stop market-driven deals from going forward were it not for the institutionalized governmental manipulation of free markets known as antitrust. The regulatory mentality that seeks to mold the communications marketplace to fit its own misguided vision will simply discourage investment in crucial new facilities-based networks.

Antitrust regulation is primarily about protecting the incumbent businesses. A competitor comes up with a deal to lower its prices and expand its markets; rivals want to stop it with force because they want to keep the customers the upstart might capture. It isn't much more complicated than that.

I called it *Antitrust Policy as Corporate Welfare* in 1997, and I still see the entire antitrust regime as a colossal waste and economic drain because the sheer scale and wealth-creating capability of tomorrow's capitalism should vastly outstrip today's.

As Adam and I said about the earlier scuttled merger: "it will take vast resources to build the broadband networks of tomorrow, and mergers on an unprecedented scale will be part of the market processes required to make it happen."

The blatant efforts to throw artificial barriers up in front of merger transactions or hobble them with glued-on requirements are also a marvel; we warned then that:

Alarming, regulators are using the merger review process to extract a parade of concessions from merging communications firms. The quid pro quo is simple: If you want the feds' antitrust blessing, you'd better play ball. You must offer service to areas where it might not be economical to do so, offer drastically reduced rates for that service that may keep you from recouping upfront investments, and subject yourself to an endless array of fines or penalties if you do not comply perfectly with those requirements. Such regulatory blackmail has been employed in

mergers between Verizon-NYNEX-GTE, SBC-Ameritech, AOL-Time Warner, MCI-Sprint, and others.

And sure enough, here is the American Cable Association in testimony regarding AT&T-DirecTV:

ACA believes regulators should impose a condition on AT&T/DIRECTV that prevents DIRECTV-affiliated programmers from disadvantaging the merged firm's rivals in the prices it charges.... ACA hopes to work closely with both the Subcommittee and the FCC throughout the year to explain the problems with arbitration conditions previously crafted by the agency and explore ways to fix them. (p. 4-5)

It'd be more understandable if efforts were more explicitly aimed at removing governmental industry-wide power; but ACA persists:

.... Congress and regulators cannot limit their time and effort to looking just at deals like AT&T/DIRECTV and Comcast/TWC/Charter; they must provide enhanced oversight of the market as a whole, and update rules and regulations that work in the new market order. (p. 5)

Just as this merger should not be blocked, “antitrust” regulators should not block or limit the inevitable responses to it by the likes of ACA. That’s what markets are for.

There are no grounds for worry that big telecom interests will monopolize information in a free society. The bandwidth cornucopia represented by wireless airwaves and fiber breakthroughs is barely tapped, and the peer-to-peer computing revolution promises to make a broadcaster out of everyone. The worry over media monopoly seems especially misplaced given that most programming consists of entertainment and fantasy—hardly the necessities of life. But antitrust law is busy engaging in a fantasy of its own, that of imagining itself an improvement over free markets.