UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellant*, v. AT&T INC.; DIRECTV GROUP HOLDINGS, LLC; and TIME WARNER INC., *Defendants-Appellees*.	No. 18-5214

MOTION OF THE UNITED STATES
TO EXPEDITE CONSIDERATION OF THE APPEAL

The government's lawsuit challenging AT&T's acquisition of Time Warner concerns the future of the telecommunications and media industries in the United States. Its outcome could determine whether the participants in these industries will be permitted to merge into vertically integrated firms that control valuable programming content as well as the means of distributing that content directly to end-customers in a manner that hurts competition and therefore consumers. If AT&T is permitted to control Time Warner's most valuable media assets, the merged firm will have both the incentive and the ability to raise its rivals' costs and stifle growth of innovative, next-generation entrants that offer attractive

alternatives to AT&T/DirecTV's legacy pay-TV model—all to the detriment of American consumers.

In approving the merger, the district court rejected fundamental principles of economics, creating uncertainty that will have an outsized effect on vertical merger analysis. The United States therefore brings this appeal and seeks a swift correction of the district court's errors, in order to preserve competition and clarify the proper analysis of vertical mergers.

The United States moves to expedite this appeal from the district court's June 12, 2018 Order denying the government's request, under Sections 7 and 15 of the Clayton Act, 15 U.S.C. §§ 18, 25, to permanently enjoin AT&T from acquiring Time Warner. That Order constitutes a final judgment under 28 U.S.C. § 1291.

Two days after issuing the Order, the district court granted the parties' joint motion to allow Defendants to close their transaction, *see* June 14, 2018 Minute Order, based on Defendants' commitment to maintain certain status quo conditions until the earlier of February 28, 2019, or the conclusion of any appeal, *see* Ex. A to Joint Motion to Modify Case Management Order, at 1 (Dist. Ct. Dkt. 148-1). As shown below, the district court's decision is subject to substantial challenge, and delay in resolving the appeal will cause irreparable injury. In addition, the public, as represented by the United States, has an unusual interest in prompt disposition.

Accordingly, after consultation with Counsel for Defendants, the United States, proposes the following deadlines, to which Defendants are not opposed:

- Government's Opening Brief: August 6, 2018
- Defendants' Answering Brief: September 20, 2018 (45 days later)
- Government's Reply Brief: October 11, 2018 (21 days later)
- Deferred Joint Appendix: October 11, 2018
- Final Briefs: October 18, 2018 (7 days later)

The parties have consented to the use of a deferred joint appendix pursuant to Fed. R. App. P. 30(c) and Circuit Rule 30(c). Because the United States believes that oral argument would substantially assist the Court's consideration of this complex case, we also request oral argument as soon as practicable after briefing is complete.

Background

AT&T is the world's largest telecommunications company. Its communications assets include AT&T's subsidiary DirecTV and AT&T U-verse service. Through its ownership of DirecTV, a satellite-based service, AT&T is the largest multichannel video programming distributor (MVPD) in the United States. Time Warner is a mass media and entertainment conglomerate. Its businesses include Turner Broadcasting System, the operator of some of the most popular television networks, such as TNT, TBS, CNN, and the Cartoon Network; Warner

Bros. Entertainment, the world's largest movie and television studio; and Home Box Office (HBO), the most widely distributed premium TV network in the country.

On October 22, 2016, AT&T agreed to acquire Time Warner in a transaction valued at approximately $108 billion. After a thorough investigation, the United States on November 20, 2017, sued to block the acquisition because "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly" in violation of Section 7.[1] The district court held a bench trial.

1. The government presented evidence at trial that combining Time Warner's valuable programming content, particularly the Turner networks, with AT&T's MVPD operations would give the merged entity enhanced leverage in negotiating with rival distributors. In particular, a merged AT&T/Time Warner will bargain with the knowledge that, if no agreement is reached with a rival distributor to carry Turner networks and a Turner "blackout" ensues, some distributor-competitors' subscribers will switch from the rival distributors to AT&T's DirecTV. The merged entity would lose less revenue from carrying out a

[1] As the United States explained below: "The Division reviews thousands of mergers each year—horizontal, vertical, and otherwise—and clears all but the scant few that careful analysis demonstrates will harm competition." U.S. Trial Br. 10 (Dist. Ct. Dkt. 76). The United States' investigation revealed that, unlike "most vertical mergers [that] do not threaten competitive harm," there was a reasonable probability that this merger would substantially lessen competition. *Id.*

threat to "go dark" on a rival distributor for some period of time than would an independent Turner. By reducing its downside risk in the event of a blackout, the merged company would gain greater leverage in negotiations with distributors and, as a result, charge higher prices for the same content than prior to the merger.

The government also demonstrated, pursuant to the fundamental economics of bargaining, that the merged AT&T/Time Warner likely would use its enhanced leverage to increase fees its distributor-competitors would pay to license Turner content. To quantify and assess the merger's impact on negotiations for Time Warner content between Time Warner and AT&T's rival distributors, the government's expert applied the economics of bargaining, which was pioneered by Nobel Prize winner John Nash and is broadly accepted. Using data that AT&T itself and other leading industry sources rely upon, the government showed that AT&T's existing rivals would end up paying $587 million more for Turner programming—the same Turner programming that existed prior to the merger. Those distributors then would pass along Turner price increases to subscribers nationwide. This same shift in incentive and ability to harm rivals through increased costs also would drive AT&T to inflict harm on innovative new entrants. With onerous licensing terms for Time Warner content, AT&T can stunt the development of competitive alternative distribution models that use the Internet to compete directly with the pay-TV model DirecTV relies upon.

Importantly, the government's prediction did not turn on the likelihood of a blackout; indeed, the government's theory of harm acknowledges that a blackout likely would not occur because Turner and rival distributors ultimately would reach licensing deals. The government simply reasoned from basic principles of economic logic, and produced evidence to show, that because the merger made a possible blackout less costly, Turner could negotiate higher fees in those agreements than an independent Turner prior to the merger could charge. Thus, the merged entity will hold out for higher fees than would Turner standing alone. It is the merger that changes the competitive dynamics and gives Turner the increased leverage and therefore the ability to charge supra-competitive fees.

This change in competitive dynamics is precisely what AT&T and its now-subsidiary DirecTV warned would happen when Comcast proposed its merger with NBCU. When AT&T stood to be harmed from the vertical integration of a rival, it explained to the FCC that cable operators with affiliated programming "attempt to use their control over such programming to try to artificially limit competition in downstream video distribution markets." AT&T Comments to FCC 2.[2] DirecTV similarly told the FCC that "vertical integration of programming and distribution can, if left unchecked, give the integrated entity the incentive and ability to gain an

[2] Comments of AT&T Inc. (June 22, 2012), *In re Revision of the Commission's Program Access Rules et al.*, FCC MB Docket Nos. 12-68, 07-18, 05-192, https://ecfsapi.fcc.gov/file/7021979512.pdf.

unfair advantage over its rivals. This ultimately results in higher prices and lower quality service for consumers." DirecTV Comments to FCC 6 (emphasis added).[3] DirecTV also predicted that the Comcast/NBCU vertical merger "would enable Comcast to raise the prices paid by its [distributor] rivals for NBCU programming." DirecTV Comments to FCC iii.[4]

2. The district court issued a Memorandum Opinion ("Op.," copy attached as Exhibit A) concluding that the government properly defined product and geographic markets, but did not meet its ultimate burden of persuasion to show "that the challenged 'transaction is likely to lessen competition substantially.'" Op. 51-52, 54 n.17 (quoting *United States v. Baker Hughes*, 908 F.2d 981, 985 (D.C. Cir. 1990)). The court rejected outright the notion that the merger would cause Time Warner to extract higher fees than it does now. It found that the merger would have no effect on Time Warner's incentives, or enhance AT&T's ability to raise its rivals' costs, whatsoever. Specifically, the court found that the government did not prove that the merger would be likely to result in any increase at all in Turner's bargaining leverage in affiliate negotiations. Op. 70.

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[3] Comments of DirecTV, Inc. (Jun. 21, 2010), *In re Applications of Comcast Corp et al. for Consent to Assign Licenses and/or Transfer Control of Licensees*, FCC MB Docket No. 10-56, https://ecfsapi.fcc.gov/file/7020510969.pdf.

[4] Reply of DirecTV, Inc. (Aug. 19, 2010), *In re Applications of Comcast Corp et al. for Consent to Assign Licenses and/or Transfer Control of Licensees*, FCC MB Docket No. 10-56, https://ecfsapi.fcc.gov/file/7020709220.pdf.

Argument

This Court grants expedited consideration of an appeal in two circumstances: (1) when "the decision under review is subject to substantial challenge" and "delay will cause irreparable injury," and (2) when either the public at large or at least someone other than the parties has "an unusual interest in prompt disposition." D.C. Cir. Handbook of Practice and Internal Procedures § VIII.B. Both circumstances are present here.

I. The District Court's Decision is Subject to Substantial Challenges on Appeal, and Delay Will Make It Increasingly Difficult to Unwind the Merger

A. The District Court Erred in Rejecting the Government's Bargaining Leverage Theory

The government's case is based on well-accepted and non-controversial economic principles of bargaining,[5] but the district court effectively discarded those principles and their logical implication that the merged firm will raise prices to its rivals. In so doing, the Court committed multiple errors. For example, the court disagreed with basic bargaining economics—that a decrease in the harms

[5] The economics of bargaining is not new or out of the mainstream, as even a defense expert acknowledged. Until the district court's decision, it has been uncontroversial in merger assessment. *See, e.g.*, *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 786-87 (9th Cir. 2015); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 562, 570 (6th Cir. 2014). As noted above, the FCC relied on the economics of bargaining when it considered the merger of MVPD Comcast with content provider NBCU.

suffered by a party from not reaching an agreement increases that party's leverage even if reaching an agreement is a much better option than not reaching one—by finding that Turner "would not be incentivized to *actually* engage in a long-term blackout with a distributor." Op. 117 (emphasis in original). This fundamental economic insight, which the district court rejected, does not depend on Turner's actually blacking out certain distributors post-merger. Instead, because the merger makes the combined AT&T/Time Warner less vulnerable to economic harm in the event no deal is struck (because AT&T's DirecTV will gain subscribers who switch away from distributor-competitors), the merged firm can and will credibly hold out for higher fees than before the merger. The *possibility* of a blackout is the key to leverage, and witness testimony established that industry participants plan for blackouts and project the costs even though such breakdowns in negotiations are rare. The district court's disregard of economic reasoning constitutes reversible error.

The district court additionally found that the government's bargaining model did not fit the facts of the case, Op. 84, 111-15, because the model "rests on assumptions that are implausible and inconsistent with record evidence," Op. 113 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 n.19 (1986)). But the "assumption" the court criticized was the fundamental economic principle, recognized in case law, that the merged firm would maximize

its corporate-wide profits (rather than instruct Turner and DirecTV to operate independently at the expense of overall profits to the parent corporation). This basic economic axiom of corporate-wide profit maximization forms the basis for much of corporate and antitrust law. In *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 770 (1984), the Supreme Court properly adopted a general rule of law grounded in economics rather than treating the issue as subject to case-specific fact-finding. The district court did precisely the opposite when it found, erroneously, that a post-merger Time Warner would not account for effects on sister-subsidiary DirecTV in negotiating with competing distributors. Op. 112-115. As a result of these errors in basic economics, the district court's evaluation of the government's case constitutes reversible error.

B. Expediting the Appeal Is Necessary to Prevent Irreparable Injury

Recognizing that merger cases face unusual exigencies, this Court previously has granted expedited appeals in such cases. *See, e.g.*, *United States v. Anthem, Inc.*, 855 F.3d 345, 348 (D.C. Cir. 2017); *Baker Hughes*, 908 F.2d at 982. That is because this Court and others have recognized that unwinding a merger to restore competition can be extremely difficult. *See, e.g.*, *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 904 (7th Cir. 1989); *FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1508 (D.C. Cir. 1986); *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984). AT&T and Time Warner have now closed their merger, but every day

that they are allowed to combine aspects of their businesses more deeply will make it more difficult for this Court and the district court on remand to unwind the merger and preserve competition.

Although Defendants have agreed to hold part of Time Warner—the Turner networks—separate from AT&T, that will last only until February 28, 2019. If the appeal is not decided by then, AT&T immediately can be expected to exercise the increased bargaining leverage that it would gain from control of Turner. This leverage likely would impact negotiations for Turner's contracts with AT&T's rival distributors that are expiring in 2018 and 2019. *See* Tr. 2530:14-2531:8 (attached as Exhibit B). AT&T could use the new bargaining leverage conferred on it by this merger to lock higher prices for Turner content into long-term contracts before this Court and the district court can unwind the merger, should the government prevail.

II. The Public Has a Strong Interest in Prompt Disposition

This case affects how tens of millions of Americans will receive video content and what they will pay for it. The public has a strong interest in quickly resolving this case and further clarifying the law that governs review of vertical mergers.

The district court's decision has ignited other efforts at vertical integration in the media and telecommunications industries. *See* Cecilia Kang, Edmund Lee &

Emily Cochrane, *Merger Decision Is a Green Light for Deal-Making*, N.Y. Times, June 13, 2018, at A1 (reporting that decision "is expected to unleash a wave of corporate takeovers"); Edmund Lee, *Disney, Fox and Comcast Are in Play*, N.Y. Times, June 13, 2018, at B1 ("A judge's approval on Tuesday of the $85.4 billion AT&T-Time Warner deal is sure to touch off a series of mergers."); Tim Wu, Op-Ed., *The Dangerous 'Bigness' of the AT&T-Time Warner Merger*, N.Y. Times, June 14, 2018, https://www.nytimes.com/2018/06/14/opinion/time-warner-att-merger.html ("The ruling . . . implicitly encourages the rest of the industry to integrate as well, and AT&T's comrades have taken the hint: Comcast has already announced its intent to acquire much of 20th Century Fox, while other deals are said to be imminent."). These deals will affect millions of American consumers, but they may be premised in significant part on an erroneous district court decision that should be corrected before these transactions advance and change the landscape of video programming and distribution in this country.

The Department of Justice (and/or other agencies with relevant jurisdiction) will have to review some or all of these new vertical transactions. The public interest strongly favors having this Court expeditiously clarify the law and address the uncertainty created by the district court's decision.

Conclusion

For the foregoing reasons, the United States requests that the Court expedite its consideration of this appeal and enter the unopposed briefing schedule described herein.

Dated: July 18, 2018

Respectfully submitted.

/s/ Mary Helen Wimberly

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27(d)(2), Fed. R. App. P., the undersigned hereby certifies that:

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2) because this document contains 2,689 words, excluding the portions exempted by Fed. R. App. P. 32(f).

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in Times New Roman font, size 14.

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2018, I caused the foregoing Motion of the United States to Expedite Consideration of the Appeal to be filed through this Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. In addition, I caused the foregoing to be emailed to lead counsel before the district court for Defendants AT&T Inc.; DIRECTV Group Holdings, LLC; and Time Warner Inc.:

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ADDENDUM

Certificate as to Parties, Rulings, and Related Cases

A. Parties and Amici

The following parties appeared before the district court: United States of America; AT&T Inc.; DIRECTV Group Holdings, LLC; and Time Warner Inc.

The district court did not grant any motion to intervene by third parties or accept any proposed amicus briefs.

The parties in this Court and known to the United States are: United States of America; AT&T Inc.; DIRECTV Group Holdings, LLC; and Time Warner Inc. (now known as Warner Media, LLC, doing business as WarnerMedia). The United States is not aware of any intervenors or amici in this Court at this time.

B. Rulings Under Review

The June 12, 2018, Order and Memorandum Opinion of the district court (Hon. Richard Leon) are attached hereto. The opinion has not yet been published in the *Federal Supplement*, but it is available electronically at 2018 WL 2930849.

C. Related Cases

The case on review was not previously before this Court or any court other than the district court below. The United States is not aware of any related cases.

/s/ Mary Helen Wimberly
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