

AT&T/T-Mobile Merger: Let's Call It What It Is, Part II



By [Leo Wrobel](#)

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[Return to the article](#)

As two of the largest wireless carriers in the U.S. prepare to join forces, Leo A. Wrobel and special guest author Eddie M. Pope, Esq. explain why the U.S. Department of Justice thinks of this collaboration as a threat - and why you should be equally alarmed

Only a short time has passed since InformIT posted [part 1 of this series](#) about the merger between AT&T and T-Mobile and yet there have been significant new developments. Fearing that a merger would limit choices and lead to higher prices, on August 31, 2011 the United States Department of Justice (DOJ) filed suit to block the merger. It was the first antitrust suit filed against AT&T in over three decades. Now the game is on, as AT&T and T-Mobile, respectively the number two and number four wireless carriers in the U.S., plot their legal response to the federal action.

In part 1 of this series, I stated that the most important issues in the merger are not simply price, brand, and customer service. The merger is only one aspect of a bigger plan: deciding who will *control* the wireless access market, *dominate* the Internet, and ultimately *decide* what you will see and hear. I haven't changed my position on this issue but I'm gratified that someone in government agrees with me at least in part. So what can we expect as this story plays out? For a more complete answer, I called upon a longtime friend, attorney and industry watcher [Eddie M. Pope](#). Here are our thoughts

What Does the Suit Mean to AT&T, T-Mobile, and All of Us?

The suit, filed by the DOJ in federal district court in the District of Columbia, seeks to have the court prohibit the merger of AT&T with T-Mobile. The suit alleges that the combination of the two companies would mean that "customers of mobile wireless telecommunications services likely will face higher prices, less product variety and innovation, and poorer quality services due to reduced incentives to invest than would exist absent the merger." The suit specifically mentions that T-Mobile's market strategy had been to be the "challenger brand" bringing new prices and new innovations to the marketplace.

The immediate question arises: Is this suit the end of the merger? As people who have dealt with AT&T for many years, we believe that the answer is "No." The fight over the merger is in fact just beginning. So what do we think AT&T and its opponents will do?

- **AT&T won't just walk away from the merger.** As we understand the terms of the agreement, if the merger doesn't occur, AT&T has to pay a breakup fee of \$3 billion in cash, as well as making other concessions to Deutsche Telekom worth an additional \$3 billion, making the total breakup cost some \$6 billion. That's real money, even to AT&T, and such a breakup would strengthen one of its main competitors. AT&T management won't surrender unless they see that the fight is hopeless.
- **AT&T will challenge the government's case.** The heart of the case is the *Herfindahl-Hirschman Index* (HHI), which measures how concentrated a market is. In a market with a lot of small competitors, the HHI is very low; by contrast, if only one provider exists in a market, the HHI reaches its maximum of 10,000 points. Without going into a lot of detail, the general rule is that a market in which the HHI is between 1,500 and 2,500 points is considered to be moderately concentrated, and markets in which the HHI is in excess of 2,500 points are considered to be highly concentrated. If a merger will increase the HHI in a highly concentrated market by more than 100 points, the merger raises significant competitive concerns.

The DOJ says that the AT&T/T-Mobile merger will raise the HHI in the top 100 market in the country by anywhere from 127 points (in Toledo, Ohio) to 1,531 points (in Honolulu, Hawaii). AT&T will counter with a bevy of top-notch economists who will say that the DOJ's numbers were calculated incorrectly. Determining HHI is

more art than science, and different experts can calculate it in a number of ways. T&T will also point out that the remaining carriers in the market are likely to be stiff competitors, with Sprint (in particular) being praised by AT&T for its competitive attributes.

- **AT&T will negotiate behind closed doors.** AT&T will seek out key personnel within the DOJ to determine whether it's possible to settle this case. AT&T is likely to offer concessions in the form of spinning off assets, transferring wireless licenses, agreements to comply with Net Neutrality rules, and other considerations that AT&T thinks the DOJ might want.
- **AT&T will attack the DOJ through the political process.** AT&T is one of the largest donors to politicians in the country. It's safe to predict that some of those politicians will attack the DOJ's actions, mirroring AT&T's claims that the merger will create jobs and promote investment in infrastructure. We expect calls for investigation of the DOJ, congressional hearings, and even legislation that would either deprive the DOJ of the power to move forward on the case or that would remove funding for any effort to prosecute the case by the government. The attacks won't come only from Republicans, either; some top-level Democrats will also question the DOJ's actions.
- **AT&T opponents will join the fray.** Just as it's possible for AT&T to hire top-level economists to say that the DOJ's HHI numbers are incorrect, AT&T's opponents can hire *other* economists, who will say that the DOJ's case produced HHIs that are too low. It's safe to predict that a bevy of interveners will be brought into the DOJ's case, all presenting their own spin on the merger.

Summary

Antitrust cases take years—sometimes even decades—to be resolved. (The last one, filed in 1974, ended in 1984 with the breakup of AT&T.) AT&T makes plans for the very long term, knowing that it can outlast most opponents. It can also hope for a new administration to take office in 2013, with a new attorney general who has different standards for antitrust violations.

In the meantime, AT&T has effectively neutralized T-Mobile as a competitor, especially since T-Mobile's current owner, Deutsche Telekom AG, has indicated that it doesn't plan to make any more investments in T-Mobile. Some people say that we're already down to three nationwide wireless carriers, not four. In effect, AT&T enjoys many of the benefits of the merger—including a reduced number of competitors—without actually having to pay billions for the acquisition.

While we believe that a settlement between AT&T and the DOJ is possible, (rumors have the two organizations already in dialogue at the time of this writing), we think it more likely that the case will fester in the courts at least until next November's elections. After that, what happens depends on the preferences of the president and/or the attorney general.

Please check back with us often for the latest on these important issues of choice control, and pocketbook. We welcome your questions below or at my [TelLAWCom Labs](#) site.

About my coauthor: Eddie M. Pope is an attorney in private practice in Austin, Texas. He has extensive experience dealing with AT&T and the Bell companies as a regulator, working for the Oklahoma Corporation Commission and two tours at the Public Utility Commission of Texas, as well as being General Counsel/General Regulatory Counsel for an entrepreneurial telephone company headquartered in Dallas. You can learn more about Ed at his [website](#).
