Net Neutrality’s Death Could Play a Role in Squashing a T-Mobile-Sprint Merger

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Rumors surrounding a possible Sprint bid for T-Mobile are ramping up again [1]. But a recent blow to net neutrality might end up giving regulators another reason to say no to the potential merger.

T-Mobile CEO John Legere unleashed all sorts of fury in Las Vegas at CES this year, getting kicked out of AT&T parties and swearing up a storm. Then he and T-Mobile announced another quarter of huge subscriber adds and another disruptive move—paying off early termination fees. The rumored ETF plan was enough to get AT&T to offer up to $450 for customers willing to switch from T-Mobile before it was officially announced.

During its wild CES presser, T-Mobile pulled another rogue maneuver and actually discussed rumors that SoftBank/Sprint is looking into a bid for the un-carrier. Legere said almost unconditionally that T-Mobile is focused on maintaining its presence as a change agent and maverick in the industry and therefore of no interest in any M&A activity that would interrupt its momentum.

It’s that maverick status that could prove to be a big hurdle between Sprint’s potential acquisition plans and regulatory approval, according to a Bloomberg report [2]. T-Mobile’s un-carrier strategy has thus far proven a headache for the other big carriers, which in turn elicits responses and helps foster competition within the industry.

Since putting the kibosh in 2011 on AT&T’s proposed $39 billion acquisition of T-Mobile, the FCC has maintained the need for four major mobile providers in the U.S. And recent developments could make having a big four to check each other even more imperative.

A D.C. Circuit Court of Appeals struck down [3] the FCC’s Open Internet rules which guarded against big ISPs from discriminating against or giving preferential treatment to certain types of traffic or internet companies operating on their networks.

Rick Karpinski, a senior analyst with Yankee Group, said the court’s decision could force the FCC to be more wary of carrier consolidation.

“If [the FCC] can't regulate an open Internet, then the more significantly-sized operators they can keep in existence the better to ensure that competitive pressure will keep large operators from abusing their power,” Karpinski said.

Before the recent court decision, the FCC reserved its heaviest open internet scrutiny for wireline services while maintaining just “measured steps” in policing the same rules for wireless broadband. The FCC classifies mobile broadband as a Title I “Information Service,” a classification that is limited from the impact of Open Internet rules.

But that relaxed policy for mobile broadband has come under fire with AT&T’s recent announcement of its sponsored data program. AT&T intends to allow internet companies to cover the data costs associated with accessing their online content via a wireless device. The service could potentially save wireless subscribers money, depending on which internet services sign on to sponsor. But many have criticized the plan for its potential to allow big, content-rich internet companies to effectively shut out smaller companies or competitors by paying for preferential treatment on AT&T’s network. AT&T has insisted sponsored data is in no way a threat to net neutrality, but FCC Chairman Tom Wheeler has promised the Commission will look closely at AT&T’s plans and intervene if need be to assure that “open access not only means getting on the network, but also getting to the network.”

If it finds the practice of sponsoring data to be contrary to public interest and competition, the FCC could potentially order AT&T to stop or modify the program, as Harold Feld, senior vice president at Public Knowledge, yesterday pointed out [4].

Feld said now the FCC has very broad authority under Section 706 but that the Commission always had very broad authority in regards to wireless broadband. But he said he didn’t think in the near future that the FCC was looking to use its expanded authority for anything. In regards to the Net Neutrality rules as they existed for wireless, Feld said the court left open that the FCC could still act if there was blatant anti-competitive activity. In the case of things like AT&T’s sponsored data, Feld thinks the FCC is likely to see how the market balances itself out.

“Certainly the traditional reaction that the FCC and others have when they are concerned about conduct they can’t control in the marketplace is to go back to more competition. If we just have enough competition that’ll cure everything,’” Feld said. “I do think that it certainly places renewed emphasis on this and conversely if there are significant proposed transactions like Sprint and T-Mobile, then the Commission is much more likely to use its merger review authority to impose conditions.”

On the one hand, the FCC is given authority to investigate and regulate certain practices that it had previously not considered itself as having the authority to do, Feld said. But on the other hand, he added, if there are practices that are actually harmful to consumers, because we have no clear legal standard under which to challenge them, it’s not clear the practices can be stopped.

“It’s become a very uncertain world,” Feld said.

While it figures out its authority to police mobile broadband, the FCC should be freshly up-to-date on the importance that a competitive field of four major wireless providers holds in balancing power. T-Mobile’s and AT&T’s on-going, very public feud serves a visceral reminder of the kind of disruption to the industry that can come from two competitive carriers trying to eat each others’ lunch.

“What is the end game in all of this? What is AT&T really looking for? Is it really just more subscribers? Or is it trying to knock T-Mobile down a few notches? Or is it retribution,” said Kevin Burden, director of mobility at Strategy Analytics.

The same could be said of T-Mobile’s ETF-payoff play to poach subscribers from its competitors, but the bottom line is the current field of U.S. carriers is ferociously competing and that will help preserve a number of public interests, whether it’s affordable plans and devices, robust networks or Net Neutrality’s promise of unfettered access to the internet.

If a merger of T-Mobile and Sprint went through, it would be SoftBank’s call on which company’s brand and business strategy prevailed over the new combined company, Karpinski said. Considering SoftBank CEO Masayoshi Son’s history in Japan of undercutting competitors to gain market share, there’s no reason to think he wouldn’t support T-Mobile’s approach in the U.S.

And as T-Mobile CFO Braxton Carter pointed out [5], there’s a possibility that a Sprint and T-Mobile merger deal could bring in Dish Network, give it access to a network infrastructure and essentially prop it up as a replacement fourth nationwide carrier. But Karpinski said that approach would face enormous challenges, citing the difficulty Canada is having now in introducing a viable fourth carrier, with Wind Mobile pulling out of Canada’s current spectrum auction.

The FCC and DOJ will likely consider these possibilities if or when see Sprint bid T-Mobile cross their desks. But the dynamic of the current wireless industry is likely just too good right now for any regulatory body to even consider upending it. And with its hands a little tied, the FCC undoubtedly appreciates how long healthy competition between carriers can go toward preserving the principles of net neutrality.

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