

LOBBYING AT&T-T-MOBILE, EXPRESS SCRIPTS-MEDCO

BY BILL MCCONNELL

AT&T Inc. chairman and CEO Randall Stephenson was caught off guard when the Department of Justice abruptly announced on the last day in August that the agency's antitrust division would seek to block his company's \$39 billion bid to acquire mobile telecom rival T-Mobile USA Inc.

DOJ antitrust chief Sharis Pozen had reached her decision months sooner than anyone outside the agency had expected, short-circuiting what Stephenson and AT&T's government relations team had expected would be a lengthy opportunity to negotiate divestitures and other conditions that would address the DOJ's competition concerns. Recognizing that the deal faced major antitrust obstacles, Stephenson and AT&T chief lobbyist James Cicconi had put together a massive Capitol Hill campaign designed to get members of Congress to bring pressure on Pozen to approve the deal. But the company's well-connected representatives failed to persuade the agency to rethink its opposition. Four months later, the Federal Communications Commission indicated it would follow the DOJ's lead, and a federal district judge issued rulings negative to the deal, sealing its fate.

In all, AT&T alone spent upwards of \$5 million lobbying Congress on the deal, according to the Center for Responsive Politics, making its failure to win approval all the more disappointing. AT&T and T-Mobile hired more than a dozen lobbying firms, including boutique shops that specialize in mergers and more traditional firms whose ranks include retired lawmakers and former congressional aides still tight with their former colleagues.

AT&T certainly didn't get its money's worth, and in the majority of cases, lobbying Congress makes little difference in the outcome of regulators' reviews. But for a few major deals, particularly those that are likely to draw opposition from competitors or public advocacy groups, it's worth taking the chance. Regulatory lawyers, lobbyists and people on Capitol Hill say that hearings or letters from politicians can influence public perception of a deal, affect the timing of regulators' decisions and, on rare occasions, help shape the outcome of a review by prompting regulators to consider issues they might otherwise have overlooked.

What's more, opponents of a deal often try to persuade politicians to publicly oppose a merger and attempt to turn the regulators against it. In those cases, companies seeking approval for a transaction often find it prudent to spread their side of the story just to make sure opponents don't derail the deal.

Sean Boland, partner in the antitrust practice at Baker Botts LLP,



says a deal must be very large to justify the expense, which can range from a couple hundred thousand dollars to several million. "You need to have a \$20 billion to \$40 billion deal for a campaign to be cost effective," he says.

Boland adds that in most cases a lobbying campaign has little effect on the outcome of the antitrust review. "It doesn't hurt, but it often doesn't help either," he says. Often, the decision to lobby Congress is driven by company executives, not their regulatory counsel in Washington. "When there's so much at stake and the regulatory process moves slowly and opaquely, CEOs often get frustrated and ask, 'What else can we do to move the process along?'"

Ostensibly, antitrust regulators at both the DOJ and the Federal Trade Commission decide a merger's fate based on the regulators' economic and legal analysis. If a merger is likely to harm consumers and can't be fixed with divestitures or other remedies, the agencies ask a court to block a deal. Otherwise, the merger is cleared. In practice, the agencies largely do their job as they're supposed to, and they are influenced very little by the letters and pronouncements that elected officials may throw their way when a major deal is under review. In fact, staffers actually reviewing a deal rarely see the lawmakers' communications. Instead, the letters from politicians are read and answered, if need be, by the agencies' own congressional relations staff.

Makan Delrahim, a member of the government relations practice at Brownstein Hyatt Farber Schreck LLP, a top merger lobbying firm, says company executives too often convince themselves that they can win antitrust or regulatory approval with lobbying campaigns.

“An antitrust investigation is like a criminal investigation in a way because you cannot lobby your way out of it,” says **Delrahim**. “I’ve always warned clients not to think an assistant attorney general or FTC chairman is going to decide against bringing a case because of lobbying.”

Competition concerns “are delicate issues, and the bull-in-the-china-shop approach can backfire. I would run away from any lobbyist who tells you he can get a deal done just because of relationships and lobbying.”

It’s equally wrong, however to think that lobbying Congress is irrelevant, he adds. “Sometimes the political process and opposition lobbying can unwind a deal, especially deals involving highly regulated or concentrated industries,” says **Delrahim**. “Handled properly, lobbying can prevent bad things from happening or undue delays in approving a deal. Lots of deals need adult supervision. Sometimes the antitrust agency staff can go on fishing expeditions to examine issues far outside the competition concerns posed by a merger.” Input from Capitol Hill “can help rein them in by making sure the agency focuses on enforcing the law as it is.”

When a multibillion-dollar deal is at stake, even a slight improvement in the odds can make it worthwhile to drop a few million dollars telling your side of the story to Capitol Hill. Although AT&T’s campaign was unusually large and aggressive, several other high-profile deals have been accompanied by significant lobbying efforts in recent years. Notable recent examples are the still-pending \$29.1 billion bid by Express Scripts Inc. to acquire Medco Health Solutions Inc., the competing bids in the past year to buy NYSE Euronext and last year’s \$30 billion takeover of NBC Universal Inc. by Comcast Corp.

Of all these recent deals, AT&T’s campaign stands out for its brazenness. And, to most experienced Capitol Hill hands and antitrust lawyers, it is a prime example of how not to lobby for a merger. Some even think the campaign may have contributed to the DOJ’s decision to challenge the deal quickly without giving AT&T much of a chance to try negotiating merger conditions. AT&T officials wouldn’t comment for this story.

Typically, a merger campaign is carried out by a handful of lobbyists quietly pressing their client’s case with the members of the Subcommittee on Antitrust, Competition Policy and Consumer Rights; the House Judiciary Committee; and other relevant congressional committees. Although no lobbying shop stands out as the undisputed leader, a small group of firms have built merger lobbying into a regular part of their practice. Most of them have former DOJ personnel or former staffers of the House and Senate Judiciary committees in their ranks and still have ties to agencies and congressional panels with jurisdiction over mergers.

Delrahim, for instance, was once chief counsel of the Senate Judiciary Committee and a former deputy assistant attorney general of the DOJ’s Antitrust Division. His firm includes others who have served as assistant attorneys general and as aides to the Judiciary Committee.

Others carving out merger work as one of their niches include Joseph Gibson, who founded Gibson Group LLC after serving as Re-

BEHIND THE CURTAIN <small>Key lobbyists in the world of antitrust</small>		
FIRM	KEY PEOPLE & THEIR FORMER GOVERNMENT POSTS	DEALS OR CLIENTS
Akin Gump Strauss Hauer & Feld LLP	Henry Terhune, counsel, House Rules Committee; Vic Fazio, chairman, House Democratic Caucus; Joel Jankowsky, counsel to House Speaker Carl Albert; Barney Skladany; Smith Davis	AT&T/T-Mobile; Ticketmaster/Live Nation; Bain Capital-Huawei/3Com
Breaux Lott Leadership Group (subsidiary of Patton Boggs LLP)	Senate Majority Leader Trent Lott; Sen. John Breaux	Delta/Northwest; AT&T/T-Mobile
Brownstein Hyatt Farber Schreck LLP	Brooks Brunson, special assistant to House Republican Conference; Allen Grunes, senior attorney, Justice Department; William Moschella, principal associate deputy AG, DOJ; Makan Delrahim, deputy assistant attorney general, DOJ, and chief counsel, Senate Judiciary Committee; Alexander Dahl, senior counsel, Senate Judiciary Committee; James Flood, counsel to Senate Judiciary Committee and Sen. Charles Schumer	AT&T/T-Mobile (on behalf of mobile wireless coalition); Comcast/NBCU; Merck/Schering-Plough; Hexion Specialty Chemicals/Huntsman; Google/DoubleClick; Simon Property/General Growth Properties
Gibson Group LLC	Joseph Gibson, House Judiciary Committee chief antitrust counsel, deputy assistant AG, DOJ	AT&T/T-Mobile; Express Scripts/Medco
Patton Boggs LLP	Jonathan Yarowsky, general counsel, House Judiciary Committee	Pfizer/Wyeth; Comcast/NBCU; XM/Sirius; Verizon (regarding industry mergers); Lucent/Alcatel; Microsoft (regarding competitors' mergers)
Peck, Madigan, Jones & Stewart Inc.	Jeffrey Peck, majority staff director, Senate Judiciary Committee	Comcast/NBCU (on behalf of Level 3 Communications); Hertz/Dollar Thrifty; AT&T/T-Mobile; Deutsche Börse/NYSE Euronext
Quinn Gillespie & Associates	Jack Quinn, White House counsel to President Clinton	Deutsche Börse/NYSE Euronext; AT&T/T-Mobile; XM/Sirius
Thorsen French Advocacy LLC	Alec French, counsel, House Judiciary Subcommittee on Courts, the Internet and Intellectual Property; Carl Thorsen, general counsel to Rep. Tom DeLay and DOJ deputy assistant AG	Continental/United Airlines; Comcast/NBCU; AT&T/T-Mobile (on behalf of Sprint Nextel)

Sources: Federal lobbying disclosure records, lobbying firms

publican counsel to the House Judiciary Committee and as a deputy assistant attorney general in the DOJ’s congressional relations office. Gibson also has worked as a private litigator specializing in civil cases and white-collar crime. Another in the field is Jeffrey Peck of Peck, Madigan, Jones & Stewart Inc., who served as general counsel and majority staff director of the Senate Judiciary Committee when it was chaired by now-Vice President Joseph Biden.

Janet McDavid, antitrust partner at Hogan Lovells LLP, says merging parties can often prevent a deal from becoming a political issue by hiring lobbyists to quietly approach lawmakers, explaining to them the reasons for the deal and how any antitrust issues will be addressed. “You can try to assure members of Congress that your side isn’t bringing political pressure on the agencies and that government regulators will do things by the book,” she says.

Under this strategy, a big coup for merging parties is simply convincing a committee chairman there’s no need to hold a hearing. Generating angry letters from Congress isn’t part of the plan.

Counter to the traditional practice, however, AT&T's strategy was to mount an effort similar in style to the noisy, high-profile campaigns surrounding major pieces of legislation like health-care reform and the Dodd-Frank Act. The baker's dozen of lobbying shops hired by AT&T not only included firms noted for their merger practices, such as Gibson Group and Quinn Gillespie & Associates, but also general practice firms employing a host of former lawmakers, including ex-Senate Majority Leader Trent Lott, a Republican from Mississippi; John Breaux, a former Republican senator from Louisiana; Steve Buyer, a former Republican representative from Indiana; and J.C. Watts, a former Republican representative from Oklahoma.

The high-priced help achieved some success -- more than 100 House Republicans publicly supported the deal, including House Judiciary Committee Chairman Lamar Smith, R-Texas, and 15 House Democrats backed it as well. In the Senate, Mike Lee of Utah and John Cornyn of Texas called on the DOJ to approve it.

Still, AT&T's assertive tactics backfired. For instance, after persuading the Gay & Lesbian Alliance Against Defamation, or GLAAD, to send the FCC a letter supporting the deal, members of the gay community criticized the move. "What is a gay rights organization doing weighing in on a phone company merger?" John Aravosis of Washington asked on Americablog Gay. GLAAD later rescinded its support. At least 16 public-interest, minority and civil rights groups voiced support for the deal, even though they could claim only modest or tangential benefits for the causes or people they claim to represent.

To many on Capitol Hill, recruiting GLAAD and the other groups appeared to be a ham-handed attempt to curry favor with America's first black president and his administration. That perception was amplified when it was revealed that most of the groups in AT&T's roster of backers had received financial donations from the company.

Added to AT&T's problems on the antitrust front was the fact that it touted a raft of promises -- that it would return 5,000 call center jobs to the U.S. and that the deal would permit the merged company to use spectrum more efficiently and roll out new broadband and mobile communications services more rapidly. Unfortunately for AT&T, those purported benefits did nothing to resolve the antitrust dilemma -- that at the national level the deal would have shrunk the wireless industry from four to three major players and at the local level would eliminate a competitor in 97 of the country's 100 top cellular markets.

By promoting irrelevant side benefits, AT&T only highlighted the deal's antitrust issues, say several longtime denizens of Capitol Hill. Says one, "People asked, 'Are those AT&T's best arguments?' It made them look twice at the competition issues."

A more traditional, subtle lobbying effort has been conducted by Express Scripts in its \$30 billion bid for Medco, a deal that would

combine two of the country's three leading pharmacy benefits managers. The merger is opposed by independent pharmacies, consumer groups and some senior citizens' groups, and for months the opponents have issued a barrage of statements attacking the merger. Furthermore, 44 lawmakers have publicly either opposed or raised questions about the deal.

Medco, however, has refrained from answering the opponents' near daily attacks on the merger, except when company officials testified at congressional hearings. Express Scripts did hire three lobbying firms to make the company's case before individual members of Congress. The quiet approach, at least in this case, appears to be working, as indications are that the FTC will approve the merger with narrow divestiture conditions acceptable to the company.

Mary Rosado, who set up Express Scripts' government affairs office seven years ago, says her industry has been a target of lobbyists from the pharmacy industry for years. Drug companies and pharmacies are often at odds over reimbursement contracts for prescription drugs, and the deal has given them one more reason to drum up attacks from Congress, she says.

Rosado views the attention being directed to the merger as an opportunity to explain to more lawmakers what PBMs do and how they help lower drug costs. "Our educational effort around the merger was a natural extension of what we do every day," she says.

Lobbyists looking for new accounts anticipated the attacks as well, and several of them called to pitch their services. "The number of phone calls I received from firms looking to be hired was more than I've ever gotten," Rosado says. The handful she hired were picked for their experience working the Subcommittee on Antitrust, Competition Policy and Consumer Rights and the House Judiciary Committee, which oversee merger and competition issues, because Express Scripts' in-house government affairs team has less experience with those panels.

Two of the three firms she hired, Gibson Group and Brand Law Group, have track records working antitrust issues and the FTC. The other firm, Mathis Group, is better known for its ties to organized labor.

Despite the substantial list of lawmakers raising concerns about the deal, Rosado thinks that the company's outreach helped to raise awareness about its business model and the PBM industry. "We wanted to make sure stakeholders heard directly from us as they considered the merits of the merger."

Even though the benefits of lobbying mergers are hard to tally, Rosado says she has seen a big increase in outreach to Capitol Hill over the past five years.

It appears that for the biggest, most controversial deals, it's becoming an essential part of the approval process. Says Brownstein Hyatt's **Delrahim**: "There's not a single assistant attorney general or FTC chair past or present that would admit he or she didn't care about or at least didn't listen to what members of Congress told them. They are always going to listen."

AS FEATURED ON

**The Deal
Pipeline**

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