

FTC Facing Qualcomm Alone As Trump Admin. Turns On Case

By **Bryan Koenig**

Law360 (July 17, 2019, 8:03 PM EDT) -- The public gulf between the Federal Trade Commission and the rest of the Trump administration widened dramatically Tuesday when the U.S. Departments of Defense and Energy joined the Justice Department to voice direct opposition to the FTC's antitrust win against Qualcomm.

Where once it had avoided the merits of the FTC case against Qualcomm's long-standing "no license, no chips" policy, the DOJ is now attacking the underlying case directly as it backs Qualcomm's bid, at the outset of the company's Ninth Circuit appeal, to pause a district court mandate for the company to tear up its allegedly anti-competitive contracts.

Disagreements between the two antitrust enforcers about the handling of specific cases are not unheard of, experts say. But the disagreement here, couched by the DOJ and its administration backers as concern with protecting Qualcomm's leading role developing next-generation wireless technology, seem to go farther.

"I think it's really, really unusual to have the two federal [antitrust] enforcers at odds with each other in such a public way," said Thomas F. Cotter, a professor at the University of Minnesota Law School.

What makes the matter even more unusual, according to experts, is the involvement of other agencies.

The disagreement has been brewing for several months and appears to represent the leading edge of a philosophical divide over the antitrust implications of standard-essential patents and commitments that SEP holders like Qualcomm make to license that technology on fair terms.

DOJ Antitrust Division chief Makan Delrahim has routinely argued that disputes over licensing commitments trigger contract law, not antitrust law. But the FTC's Obama-era predecessors considered Qualcomm to be in violation of antitrust law through its policy of forcing chip buyers to sign expensive patent licenses, authorizing the current suit on a 2-1 vote in the final days of the previous administration.

The suit ended in a dramatic win for the FTC in May, when U.S. District Judge Lucy Koh ruled that Qualcomm used its monopoly over premium modem chips to force cellphone makers like Apple, Huawei and Samsung into unfair patent licensing agreements.

The judge also agreed to issue a permanent injunction, ordering Qualcomm not to require customers to

license its patents in order to buy chips from it, among other things.

"These are pretty wholesale changes in Qualcomm's business model," said Lisa Kimmel, a senior counsel in Crowell & Moring LLP's antitrust group.

Judge Koh later refused to halt her mandate while Qualcomm appeals, spurring the company to ask the Ninth Circuit for a stay. In backing that request Tuesday, the DOJ argued in a statement of interest, backed by declarations from Energy and Pentagon officials, that upending Qualcomm's contracts could threaten U.S. national security by undermining the company's ability to invest in next-generation 5G wireless technology.

"Clearly there's an administration interest in these issues," Kimmel said.

Perhaps to underline the unity of the rest of the Trump administration, the statement of interest asserted that the concerns over Qualcomm's 5G competitiveness and its connection to national security represent "the view of the executive branch."

"This is taking the kind of national champion approach to antitrust that the U.S. used to attack when allegedly followed by other nations, and particularly European nations. U.S. enforcers used to talk about consumer welfare, not about maximizing profits for U.S. firms," Stephen Calkins, a professor at Wayne State University Law School and a former FTC general counsel, said in an email.

Others were also critical of the reliance on arguments to protect 5G, included in the briefing because courts are supposed to consider impacts on the "public interest" when mulling temporary measures like a stay pending appeal.

"It seems a stretch to raise issues of national security in connection with an antitrust case like this. The implication is that the law should be extra lenient toward any U.S. company that competes with foreign companies — a terrible approach to international trade. The invocation of these nationalistic arguments is just inappropriate in this case," Jorge L. Contreras, a law professor at the University of Utah's S.J. Quinney College of Law, said in an email.

The new statement of interest is a continuation of DOJ arguments in the case based on protecting 5G. Months after the bench trial concluded but before Judge Koh issued her ruling, the department asked the court not to impose an "overly broad remedy" that might harm 5G development. In that statement of interest, itself an unheard-of intrusion, the DOJ said it "takes no position at this time on the underlying merits of the FTC's claims or on any other issues related to the court's pending determination of liability."

The times have changed. In its new statement, the DOJ argued that Qualcomm's appeal is likely to succeed on the merits because, according to the department, Judge Koh "failed to identify a harm to the competitive process as required," wrongly held that the company is required to sell chips to competitors, and failed to "distinguish between desire for profit and anticompetitive intent."

Attacks on the merits of the case have also come from within the FTC itself. In an extraordinary move, FTC Republican Commissioner Christine Wilson wrote a Wall Street Journal op-ed criticizing the Qualcomm enforcement action initiated by her Obama administration predecessors, saying the ruling will "create new legal obligations, undermine intellectual-property rights, and expand the application of our antitrust laws beyond U.S. borders."

Wilson's willingness to criticize so publicly may indicate a partisan deadlock that prevented the commission from nixing the case or settling. Doing either of those things would require a majority vote, but FTC Commissioner Joseph J. Simons has recused himself from the Qualcomm case, leaving the matter up to two Democrats and two Republicans.

"There's no commission majority oversight of the case," Kimmel said, based on the apparent split. She speculated further that the internal FTC divisions may have made the DOJ feel more comfortable about weighing in.

If the rest of the Trump administration is united in protecting Qualcomm, Democratic lawmakers are not. The head of the House of Representatives' antitrust subcommittee fired off a letter to Delrahim in late May, calling the brief filed in the Qualcomm case "troubling" and accusing the department of helping monopolists navigate litigation with its newly stepped-up amicus program.

John Bergmayer, legal director at advocacy group Public Knowledge and a supporter of Judge Koh's decision, noted in an email that the FTC's status as an independent agency means that it's not that unusual for it to take a different approach from the rest of the federal government. What is unusual, Bergmayer said, is "the actual opposition to the FTC's victory being filed in court."

The FTC and DOJ declined to comment Wednesday.

Even Delrahim, who's recused from the Qualcomm matter, has said that open disputes between the antitrust agencies in a case is unlikely.

"It's possible, I don't think it's probable, and I think there's issues that we can resolve internally before it spills into the case," he said in a March interview with Harrity & Harrity LLP patent attorney Eli Mazour for Mazour's "Clause 8" podcast, according to a transcript.

Those comments provide important context for the instant dispute, according to Mazour.

"This shows how extremely important the rest of the government views the case to get involved, and the inability (of DOJ, DOD, and DOE) to productively work with the FTC to avoid this situation," Mazour said in an email.

The case is *Federal Trade Commission v. Qualcomm Inc.*, case number 19-16122, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Dave Simpson, Dorothy Atkins, Anne Cullen, Mike LaSusa and Matthew Perlman. Editing by Breda Lund and Brian Baresch.