IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MOTOROLA, INC., and NEXTEL COMMUNICATIONS, INC., Defendants.	)	No. CIV. A. 94-2331 (TFH) Filed: 2/29/99

MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO NEXTEL'S MOTION TO VACATE THE 1995 CONSENT DECREE

Defendant Nextel has moved to vacate the consent decree entered in this case just three and a half years ago. In light of the lack of factual and legal support for Nextel's position, the motion should be summarily denied.

Nextel has achieved the benefits for which it bargained in settlement negotiations with the United States — it was allowed to acquire its principal competitor in the provision of trunked dispatch services in a transaction that made Nextel the dominant provider of those services in 15 of the largest metropolitan areas in the country. Now, through this motion, Nextel seeks to deprive the public of the benefits of this Court's order, to which it agreed — preserving adequate spectrum in the 900 MHz frequency band so that potential competitors in trunked dispatch services may use that spectrum to enter the market and compete against Nextel.

The law does not permit litigants to walk away from judicially approved agreements in this manner. Rather, it imposes a heavy burden on defendants who seek termination of a decree over the objection of the United States. Nextel must prove that circumstances have changed in ways that were not anticipated, and that the remedy it seeks is consistent with the procompetitive purpose of the decree. Nextel's motion fails to meet this standard in three respects, each of which independently requires denial of the motion. First, instead of proving that relevant circumstances have changed, Nextel merely offers predictions that those circumstances will change at some time in the future. Second, while Nextel asserts that it did not anticipate these "changes," the record demonstrates unequivocally that Nextel made the same predictions before the decree was entered, and that those predictions were a principal focus of the parties' decree negotiations. Third, the remedy requested by Nextel would frustrate the purpose of the decree. It would circumvent the mechanism that the parties agreed upon to deal with foreseeable changes in the market, and it would preclude entry by firms that need to acquire spectrum to compete against Nextel.

The court need not conduct an evidentiary hearing to resolve these issues. Each of these defects is apparent by examining Nextel's motion and supporting materials, as well as sworn interrogatory answers, SEC filings, representations of counsel, and other admissions cited in this Opposition. Indeed, to require an evidentiary hearing would undermine two of the principal objectives of the decree. It would prolong the period in which valuable spectrum cannot be acquired and used by firms that want to compete against Nextel, and it would impose on the government and third parties the significant costs of litigation.

FACTUAL BACKGROUND

I. The SMR Business

Specialized mobile radio ("SMR") service is a form of "dispatch" service which allows two-way, over-the-air voice communications between a home office and various mobile units, or two or more mobile units. See United States v. Motorola, Inc., 1996-1 Trade Cas. (CCH) ¶ 71,402, 1995 WL 866794, at *7 (D.D.C. July 25, 1995) (Competitive Impact Statement ("CIS") filed pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("Tunney Act"), 15 U.S.C. § 16(b)-(h)). Typical users of dispatch services include service or delivery businesses with a need to communicate with a fleet of vehicles, such as delivery trucks, repair trucks, and messengers.[1] Id.

II. The Nextel/Motorola Merger

In early 1993, Motorola executed an agreement to sell its 800 MHz SMR business to Nextel, as well as to allow Nextel to manage its 900 MHZ SMR business, in exchange for a 24% interest in Nextel. Id. at *10. At that time, Nextel was the primary supplier of trunked SMR services in the United States. Id. at *9. Motorola was the second-largest provider (after Nextel)

[1]"Trunked" SMR services allow multiple customers to share channels by electronically assigning any available channel (i.e., a channel not then being used by another customer) to a customer whenever that customer needs to use the system. See United States v. Motorola, Inc., 1996-1 Trade Cas. (CCH) ¶ 71,402, 1995 WL 866794, at *7 (D.D.C. July 25, 1995) (Competitive Impact Statement ("CIS") reported pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("Tunney Act"), 15 U.S.C. § 16(b)-(h)). Trunked SMR services afford customers superior privacy and more reliable channel availability than conventional, non-trunked systems, in which a particular channel is dedicated to a single customer, or to multiple customers who use that channel on a first-come, first-served basis. Id.

of trunked SMR services in the United States at the time, as well as a major manufacturer of SMR and other wireless equipment. Id. at *10. Beginning around 1990, Nextel had acquired numerous small SMR providers, primarily those operating in the 800 MHz frequency band. Id. at *9. Nextel's strategic plan was to replace these small providers' analog dispatch systems with a digital SMR technology, the Motorola Integrated Radio System ("MIRS"), id., subsequently retooled with Motorola's "iDEN" (for "integrated digital enhanced network") technology. See Nextel Communications, Inc., SEC Form 10-K ("Nextel 10-K"), at 23 (1997) (attached as Ex. 1). Motorola's digital dispatch technology offered the ability to provide, in addition to dispatch services, a more reliable and better quality telephone interconnect service that Nextel planned to use to compete with cellular providers.[2] CIS at *9.

[2]Traditional trunked analog SMR or dispatch systems use high-power transmitters to provide two-way radio service that allows mobile units in a group to talk to one another at the push of a button over relatively wide geographic areas. Cellular and personal communications services ("PCS") systems use multiple low-power transmitters to cover relatively small geographic areas or "cells." Like cellular or PCS systems, digital SMR systems such as Motorola's iDEN technology operated by Nextel and the frequency-hopping multiple access technology formerly operated by Geotek Communications, Inc., divide a licensed service area into "cells" and reuse frequency within the same system for the provision of enhanced SMR service and mobile telephony. See Nextel Communications, Inc., SEC Form 10-K ("Nextel 10-K"), at 11-2 (1997) (attached as Ex. 1); Geotek Communications, Inc., SEC Form 10-K ("Geotek 10-K"), at 7 (1997) (attached as Ex. 2). Such digital SMR systems offer interconnection with the public switched telephone network that is on a par with that afforded by cellular and PCS providers, as well as significant improvements in voice quality over traditional analog SMR systems, and features such as text messaging and data transmission. See Ex. 1 at 3; Ex. 2 at 2-3.

III. The Consent Decree

The Department of Justice ("Department") conducted an extensive investigation of the potential competitive effects of Nextel's proposed acquisition of Motorola's dispatch assets. At the end of its investigation, the Department concluded that this proposed combination would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, by substantially lessening competition in the provision of trunked SMR services in 15 of the largest metropolitan areas in the country. See Complaint, United States v. Motorola, Inc., No. 1:94CV02331 (D.D.C. filed Oct. 27, 1994) (attached as Ex. 3). The Department concluded that the transaction would give Nextel a dominant position in SMR spectrum at the 800 and 900 MHz bands in those 15 metropolitan areas. Id. ¶¶ 25-40. Moreover, the Department determined that entry into local SMR markets using any radio spectrum was difficult, and that there were only limited prospects for new entry at both the 220 and 900 MHz bands.[3] Id. ¶ 41. Thus, the Department found that the effect of the proposed transaction would have been substantially to lessen competition in the sale of trunked SMR services in the affected cities, in violation of Section 7 of the Clayton Act. Id. ¶ 43.

[3]In 1991, the FCC announced its intent to allocate SMR channels in the 220 MHz band. However, deployment of SMR services using this spectrum was delayed by litigation, see Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Services, Order, PR Docket No. 89-552, 9 F.C.C.R. 1739 (1994), 1994 WL 102680 (attached as Ex. 4), and has lagged substantially behind developments in the 800 and 900 MHz bands ever since. See SMR Operators Headed for Second Straight Year of 13% Growth But Some 220 MHz Providers Get Off to Slow Start, Land Mobile Radio News, Nov. 22, 1996, 1996 WL 7867236 (attached as Ex. 5); CIS at *8. The Department determined that prospects for new entry through use of the 900 MHz band were limited by the prior allocation of most of that spectrum. Complaint ¶ 41 (Ex. 3).

Facing the costs and risks of litigation in which the Department would seek to block its acquisition of its largest SMR competitor, Nextel chose to settle the Department's antitrust case through a consent decree. That decree, which provided benefits to both the United States' interest in competition and Nextel's private business interests, was entered by this Court after a determination that its provisions were consistent with the public interest. The principal benefit to Nextel, of course, was the ability to proceed with its transaction, albeit with certain conditions and limitations. Nextel was allowed to acquire without limit Motorola's holdings in the 800 MHz band, except for those in Atlanta. United States v. Motorola, Inc., 1996-1 Trade Cas. (CCH) ¶ 71,402, 1995 WL 866794, § II.D., at *1, § IV.F., at *3 (D.D.C. July 25, 1995) (the "decree"). With this acquisition, Nextel became the dominant provider of SMR services in the affected cities, and gave Nextel sufficient spectrum to deploy its digital technology to offer telephone interconnect services in competition with cellular companies. CIS at *11.

From the Department's perspective, the principal benefit — indeed, the *sine qua non* for its acquiescence to the decree — was a set of restrictions, set forth in section IV.A. of the decree, that were designed to "preserve[] competition for trunked SMR customers by limiting the 900 MHz spectrum Nextel and Motorola will own and control for the next ten years," id., so that there would be sufficient 900 MHz capacity "to permit the entry of new trunked SMR service providers for customers with a need for dispatch services." Id. These restrictions, which reflected the Department's conclusion that competitive entry was most likely to occur in the 900 MHz band, took two forms. First, the defendants were required to relinquish control of the 900 MHz spectrum that they owned or managed, in excess of a defined number of channels in each

decree city.[4] Decree § II. B. & C., at *1, § IV.A. & C., at *3. Second, the defendants were forbidden to engage in future acquisitions of 900 MHz spectrum, in excess of the defined limits, for a period of ten years. Id. § IV.A, at *2, § VIII.C., at *6. The latter restriction was designed to accomplish two purposes: (1) to ensure that for a reasonable period of time into the future, 900 MHz spectrum would continue to be available for use by new entrants, CIS at *1, regardless whether those entrants were able to succeed immediately in developing a competitive alternative to Nextel, and (2) to make it unnecessary for the Department to litigate with Nextel and Motorola to block any subsequent attempts to acquire such spectrum, and thereby to avoid delay and uncertainty that would impair competition.[5]

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[4]The decree provides that "[d]efendants as a group may not hold or acquire licenses for more than thirty (30) 900 MHz channels in any Category A City or more than ten (10) 900 MHz channels in any Category B City . . . ." United States v. Motorola, Inc., 1996-1 Trade Cas. (CCH) ¶ 71,402, 1995 WL 866794, at § IV.A., at *2. Category A cities are Boston, Massachusetts; Chicago, Illinois; Dallas and Houston, Texas; Denver, Colorado; Los Angeles and San Francisco, California; Miami and Orlando, Florida; New York, New York; Philadelphia, Pennsylvania; and Washington, DC, id. § II.B., at *1; Category B cities are Detroit, Michigan, and Seattle, Washington. Id. § II.C., at *1.

[5]The Department acknowledged that consolidation of 800 MHz spectrum in more than a dozen major cities had the potential to increase competition in a separate market (the cellular telephone market) by enabling Nextel to deploy its nationwide digital SMR service and thereby compete with existing cellular providers. CIS at *11. This was a significant competitive benefit at the time, when markets for mobile telephone services were a duopoly, served only by two cellular carriers. Since that time, however, there has been substantial entry into mobile telephone service markets by PCS carriers, and these markets are likely to become increasingly competitive regardless of the number of customers that Nextel may serve. See Federal Communications Commission, Third Annual CMRS Competition Report § II.A.1.-2., at 18-19, § II.A.3., at 32 (1998) (detailing extent of PCS operators' entry and its enhancement of price competition in approximately 249 basic trading area markets) (attached as Ex. 6).

As we discuss more fully below, all parties were aware at the time of the consent decree negotiations that wireless service markets were changing as a result of technological innovation and modifications in FCC regulations governing the acquisition and use of spectrum. As a result, in addition to the standard modification clause, Decree § VIII.D., at *6, the parties agreed to include in the decree a provision that relaxes the standard for the Court's evaluation of requests to modify or terminate the decree based on changes that were foreseeable when the decree was entered. Decree § VIII.E., at *6. That provision takes effect on July 25, 2000, five years from entry of the decree. Id.

IV. Events Subsequent to Entry of the Decree

After the entry of the decree, Nextel rapidly expanded its holdings of 800 MHz spectrum. Nextel began by acquiring large numbers of small analog 800 MHz dispatch operators across the country, see Ex. 1 at 2, and, in late 1997, acquired Pittencrief Communications, Inc., then the second-largest analog 800 MHz dispatch provider. Id. at 17. Nextel is now further extending its dominant position in 800 MHz spectrum by means of additional acquisitions which are not prohibited by the decree. See Nextel Communications, Inc., SEC Form 10-Q, at 9 (Nov. 16, 1998) (recent acquisitions) (attached as Ex. 7); Nextel Communications, Inc., SEC Form S-4, at 13 (1999) (prospective acquisitions) (attached as Ex. 8). Meanwhile, Nextel has built out its national digital network using Motorola's iDEN technology, and has had significant success in marketing this wide-area dispatch service to former cellular telephone users. See Ex. 1 at 3-4, 6.

Consistent with the Department's analysis at the time of the decree (and notwithstanding predictions to the contrary made by Nextel at that time), there is no indication — in materials provided by Nextel or otherwise — that there has been any competitively significant entry into dispatch markets by firms outside of the 900 MHz band post-decree.

However, the Department's expectations for new competition in the 900 MHz band have been largely unrealized to date. Many of the 900 MHz licenses divested by Nextel and Motorola pursuant to the decree were acquired by Geotek Communications, Inc., which also acquired additional 900 MHz capacity and began offering a digital dispatch service at that band in 1996. Geotek Communications, Inc., SEC Form 10-K ("Geotek 10-K"), at 5, 7 (1997) (attached as Ex. 2). By March 1998, Geotek had launched 11 regional networks and served approximately 17,053 subscribers. Elizabeth V. Mooney, Amid Cash Troubles, Geotek Plans to Restructure, RCR (Rad. Communications Rep.) 1998 WL 8226217 (May 25, 1998) (attached as Ex. 9). Geotek offered traditional mobile telephone and one-to-many dispatch services, as well as a variety of mobile messaging, data and vehicle location services. See Ex. 2 at 2.

Geotek, had it succeeded, would have provided the type of competitive alternative to Nextel that the Department sought to promote through the decree's restrictions on Nextel's and Motorola's abilities to acquire 900 MHz spectrum. Cf. CIS at *11. However, Geotek did not succeed. In June 1998, finding itself with insufficient cash reserves to continue operations, Geotek and its domestic subsidiaries filed voluntary petitions seeking protection under Chapter 11 of the U.S. Bankruptcy Code. In re Geotek Communications, Inc. ("In re Geotek"), No. 98-

01375-PJW (Bankr. D. Del. filed June 29, 1998) (Wilmington Division). In fall 1998 and winter 1999, the auction of Geotek's 900 MHz licenses, which attracted multiple bidders, was begun, suspended, postponed, and restarted on multiple occasions. Earlier this month, Nextel reached an agreement to purchase Geotek's licenses contingent upon FCC approval of the license transfer and contingent upon the modification or termination of this court's consent decree. Order Authorizing and Approving the Sale of the Debtors' FCC Licenses and Related Assets . . . Subject to Terms of Purchase Agreement at 6, In re Geotek, No. 98-01375-PJW (Bankr. D. Del. Feb. 16, 1999) (referring to Asset Purchase Agreement) (attached as Ex. 10).

The difficulties encountered by Geotek, combined with the lack of entry in frequencies outside of the 900 MHz band, have left dispatch customers with few alternatives. Nextel has competed aggressively to serve consumers of mobile wireless telephone services, initially competing against the two cellular carriers in each market, and now against multiple PCS entrants in each market as well. However, consumers who need dispatch services, either alone or in combination with wireless telephone services, have not been so fortunate. Because there are few, if any, alternative suppliers of dispatch services, these customers have not benefitted from a truly competitive market.

Nextel, of course, is fully cognizant of the state of competition in the dispatch market. A July 1997 e-mail from one of Nextel's founders and its vice chairman, Morgan O'Brien, to Nextel's chairman and CEO, Daniel F. Akerson, states:

To make more clear the points I was trying to make Tuesday about our strategic position at 900 MHz:

- Other than Nextel's iDEN system, the largest potential for a dispatch business is at 900 MHz: 200 trunked channels and 200 conventional —a total of 10 MHz contiguous.
- Sooner or later, these channels will be consolidated, by someone.
- Geotek has the largest spectrum position at 900 MHz. Sooner or later, they will fail and those channels will hit the market.
- Nextel's core competence and differentiating factor in the wireless world is dispatch.

* * *

- The market place is not likely to give Nextel a free shot at the dispatch market forever. Sooner or later, some other force will emerge. Most likely, it will come at 900 MHz.
- The DOJ consent decree is vulnerable to attack. It is faulty in logic and its major internal proponent is no longer around. If Geotek fails, the major external proponent of the decree also goes away.
- My conclusion: Despite the risks and headaches, the best strategic move for Nextel is to get in front of the 900 MHz digital technology and try to guide it in ways that complement our 800 MHz iDEN product. We are the leaders of the two-way business and we have to keep fighting to stay in that position.

Morgan O'Brien e-mail to Daniel F. Akerson of July 24, 1997; Akerson e-mail to O'Brien of July 24, 1997 at 1-2 (emphasis added) (attached as Ex. 11). Mr. Akerson's response to this e-mail was unequivocal: "I agree with everything you assert." Id. at 1.

V. Nextel's Efforts to Terminate the Decree

In July 1998, Nextel approached the Department seeking its support of a motion to terminate or modify the decree so that Nextel could acquire additional 900 MHz spectrum. Over a period of several months, Nextel voluntarily provided information to the Department to support its request, consisting mainly of correspondence between its counsel and Department staff. In early October 1998, Department staff advised Nextel, "[W]e are not convinced that modification of the relevant decree restrictions would be in the public interest at this time." Donald J. Russell letter to Joe Sims of Oct. 1, 1998, at 3 (attached as Ex. 12). The staff identified five specific reasons for that tentative conclusion, including Nextel's failure to demonstrate (1) that cellular, PCS, and 220 MHz operators provided significant competition in dispatch, (2) that Nextel faced a capacity constraint which could be alleviated only through its acquisition of 900 MHz spectrum, or (3) that there were no other firms that would use the 900 MHz spectrum to compete against Nextel. Id. at 1-3. The staff indicated, however, that it was willing to consider any additional information or argument that Nextel might choose to offer on these or other issues. Id. at 3. The Department thereafter reviewed additional information supplied by Nextel, as well as information sought informally from third parties, and in late November 1998 issued to Nextel and Motorola narrowly drawn Civil Investigative Demands ("CIDs") containing interrogatories and document requests focused on Nextel's central contentions. In order to accommodate Nextel's need, and at Nextel's request, the Department agreed to complete its review on or before December 11, 1998.

After completing this review, the Department concluded that termination of the decree would be contrary to the public interest in competition. The Department found that Nextel's submissions did not make even a threshold showing of possible competitive benefit or other justification that would warrant the time and expense typically required for a full-scale review of market conditions. Even the limited investigation conducted by the Department demonstrated clearly that (1) there had been no significant new entry in the decree cities to provide competitive alternatives for dispatch customers, (2) despite the failure of Geotek, there are other firms that would likely acquire Geotek's 900 MHz assets to use them to compete against Nextel, and (3) the 900 MHz spectrum was now, as at the time of the decree, the most likely avenue for new competitors to enter the market.

Despite the Department's conclusions, stated to Nextel in December 1998, that the modification or termination of the decree would not serve the public interest in competition and that it would therefore oppose any motion by Nextel to terminate the decree, Nextel continued to participate in the Geotek bankruptcy proceeding and ultimately secured a contingent agreement to purchase its assets.

On February 16, 1999, Nextel filed its motion to vacate the decree and requested discovery and an evidentiary hearing.

ARGUMENT

I. UNDER APPLICABLE STANDARDS FOR DECREE MODIFICATION, NEXTEL MUST PROVE THAT RELEVANT CIRCUMSTANCES HAVE CHANGED, THAT THOSE CHANGES WERE UNANTICIPATED, AND THAT ITS REQUESTED REMEDY WOULD NOT FRUSTRATE THE PURPOSES OF THE DECREE.

Under Rule 60(b)(5) of the Federal Rules of Civil Procedure, a court may terminate or modify a decree of injunctive relief if "it is no longer equitable that the judgment should have prospective application." Fed. R. Civ. P. 60(b)(5). Nextel's motion rests on the argument that under this rule, "modification of a consent decree may be warranted when changed factual circumstances make compliance with the decree substantially more onerous." Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 384 (1992); see also United States v. Western Elec. Co., 46 F.3d 1198, 1202 (D.C. Cir. 1995). But Rufo makes clear that absent extraordinary circumstances, "modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree." Rufo, 502 U.S. at 385; see also Western Elec., 46 F.3d at 1203-04. Moreover, a party must demonstrate harm to the public's interest in competition, not simply harm to private business interests, to warrant relitigation of the facts underlying an antitrust consent decree for purposes of determining whether it should be modified or terminated. "Rule 60(b)(5) provides that a party may obtain relief from a court order when 'it is no longer equitable that the judgment should have prospective application,' not when it is no longer convenient to live with the terms of a consent decree." Rufo, 502 U.S. at 383. Finally, even with a showing of changed circumstances that were unanticipated, a decree "may not be changed in the interests of defendants if the purposes of the litigation as incorporated in the decree . . . have not been fully achieved." United States v. United Shoe Mach. Corp., 391 U.S.

244, 248 (1968) (emphasis added); accord Rufo, 502 U.S. at 379-80; Board of Education v. Dowell, 498 U.S. 237, 247 (1991). Thus, a request for modification must be denied if modification would "undermine the primary objective or purpose of either [the section modified] or the decree as a whole." Western Elec., 46 F.3d at 1207 (citing Rufo's reference to United Shoe).[6]

Nextel's motion fails in three respects to satisfy these requirements. First, rather than proving that relevant circumstances have changed, Nextel merely offers predictions that circumstances will change in the future — and even those predictions are contradicted within Nextel's own submissions in support of its motion. Second, Nextel's assertion that these "changes" were unanticipated is flatly contradicted by the record, which shows that Nextel was making precisely the same predictions when it was negotiating the terms of this decree. Third, Nextel's request to vacate the decree would undermine its purposes, as reflected in its plain and unambiguous terms. Nextel seeks to circumvent the parties' express agreement as to when the parties could request modifications based on changes that were foreseeable. Moreover, the termination Nextel requests would frustrate the central purpose of the decree — that of keeping 900 MHz spectrum available so that other firms will have the opportunity to compete against Nextel, which remains the dominant provider of SMR services.

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[6]It is worth noting that application of the Rufo "changed conditions" standard to antitrust decrees has evolved in cases addressing termination or modification of decrees that are substantially older than the three-year-old decree Nextel seeks to terminate here. See United States v. Eastman Kodak Co., 63 F.3d 95 (2d Cir. 1995) (affirming termination of 73- and 40-year-old decrees); United States v. Western Elec. Co., 46 F.3d 1198 (D.C. Cir. 1995) (affirming modification of 12-year-old decree); United States v. Agri-Mark, Inc., 156 F.R.D. 87 (D. Vt. 1994) (termination of 13-year-old decree).

II. NEXTEL'S PREDICTIONS THAT NEW COMPETITORS MAY BE ABLE TO ENTER THE MARKET IN THE FUTURE AND THAT NEXTEL MAY EXPERIENCE CAPACITY CONSTRAINTS DO NOT SUPPORT A FINDING THAT RELEVANT CIRCUMSTANCES HAVE CHANGED.

A. Nextel Has Failed to Demonstrate That New Competitors Have Actually Entered the Market.

Nextel's motion rests principally on its assertion that alternative providers of dispatch services "have appeared" on other frequency bands. Nextel's Memorandum of Points and Authorities in Support of Its Motion to Vacate the Consent Decree ("Nextel Br.") at 12. But a careful examination of Nextel's own evidence reveals that this "appearance" is largely a matter of speculation and prediction, rather than an accomplished fact. A showing that competitive alternatives may develop in the future is hardly sufficient to establish that circumstances have "changed," as required by Rufo. Customers who need dispatch services today will take scant comfort from the possibility that alternative suppliers might appear at some point in the future.

The flimsiness of Nextel's assertions of changed circumstances becomes apparent by considering the steps needed to achieve entry that would be sufficient to provide an effective competitive constraint on Nextel. First, such entry has been contingent on reform of a variety of FCC restrictions and rules that have had, and in some cases may still have, the practical effect of impeding entry into wireless communications markets. Second, new entrants must acquire rights to use the requisite spectrum, frequently through an FCC auction process. Both the first and second steps have been frequently delayed by litigation and the vagaries of the regulatory

process. Third, new entrants (or their suppliers) must develop and implement the technology needed to offer new services. Fourth, they must acquire and deploy the assets required to offer service -- including network equipment, customer equipment, tower sites and towers, and the like. Fifth, they must establish a reputation for high-quality, reliable service sufficient to persuade customers that they are an acceptable competitive alternative to incumbent providers. Sixth, there must be a sufficient number of firms who surmount these barriers, with a sufficient amount of capacity to provide services, to effectively constrain the exercise of market power. As demonstrated below, Nextel's evidence with respect to each and every potential competitive alternative demonstrates that these six steps have not been completed.

1. 220 MHz Providers.

Nextel's argument concerning the availability of competitive alternatives using 220 MHz frequencies can be summarized as follows:

- "The litigation involving licensing of 220 MHz systems has been resolved." Nextel Br. at 11.
- FCC spectrum auctions were completed in late 1998, in which purchases by several companies "signal their aspirations" to offer service. Id. at 13.
- "[N]ew construction is underway." Id.
- There are "approximately 30,000 users [of 220 systems] across the U.S." Id.

Even this evidence, paltry as it is, glosses over the limitations of 220 MHz competition that are described in Nextel's own exhibits. Those exhibits reveal that:

- The 30,000 220 MHz customers comprise less than 1% of all SMR subscribers. Nextel Ex. 8 at 121.

- It is difficult for manufacturers of 220 MHz equipment to reach economies of scale that would allow them to reach wholesale prices comparable to those enjoyed by providers at the 800 and 900 MHz bands. Id.; see also Affidavit of Frank Casazza, President and CEO, Mobex Communications, Inc. ¶ 6 (attached as Ex. 13); Affidavit of Robert W. Moore, President and CEO, Chadmoore Wireless Group, Inc. ¶ 6 (attached as Ex. 14).

- The number of 220 MHz systems constructed "cannot compare with the incumbent systems at 800 and 900 MHz." Nextel Ex. at 121.

- 220 MHz licensees "may" capture 4% of the SMR market in five years, "assuming a reasonable licensing and construction schedule." Id.

The Department's complaint filed in 1994 specifically alleged that 220 MHz providers of dispatch services were in the relevant market, Complaint ¶ 17 (Ex. 3), and in explaining the consent decree the Department explained that "SMR service in the 220 MHz band will be a substitute for SMR services in the 800 MHz and 900 MHz bands at some point in the future." CIS at *8. But the Department further noted that mere construction of 220 MHz systems "will not adequately discipline the parties' control of 800 MHz and 900 MHz systems in the 15 cities." Id. On the critical issue whether 220 MHz providers currently provide sufficient competition to constrain the exercise of market power, Nextel simply offers no evidence of changes since the decree was entered.

2. Dispatch on Bands Below 512 MHz.

Nextel also points to frequency bands below 512 MHz as a source of dispatch competition. But its showing with respect to this potential competition is even more meager than with respect to 220 MHz dispatch providers. Nextel asserts that:

- The FCC has "now authorized" trunking in this band. Nextel Br. at 14.

- The FCC "is in the midst of" refarming, and "[o]nce this has been achieved" the FCC will "have the option" of allocating some of the new capacity to trunked commercial applications. Id. at 15.

- A Nextel declarant offers "general impressions" (admittedly not based on a review of any records) that these bands are "very busy with licensing activity and new system development" and that some unspecified portion of applications have been for trunked commercial systems. Nextel Ex. 13 at 1.

Conspicuously absent from the Nextel submission is any information regarding the number, identity, sales revenue, number of subscribers, service characteristics, capacity, or competitive significance of competitors in this band — information that in some form would be expected to be in the possession of a company (Nextel) that is supposedly experiencing competition from such suppliers.

3. Cellular and PCS Carriers.

In its brief, Nextel also points to cellular and PCS sources as competitive alternatives for its dispatch customers. Nextel asserts:

- Cellular and PCS carriers are "seeking ways to add services like dispatch." Nextel Br. at 16.

- Equipment suppliers have developed equipment that will incorporate "push-to-talk" or "walkie-talkie" features. Id.

Again, absent from Nextel's brief is any showing that cellular or PCS providers today serve as a competitive alternative for consumers of dispatch services. Nextel provides no information that even suggests that these carriers have committed to purchase and deploy the

equipment needed to provide such services, how long that process might take, or that they can economically overcome technical obstacles to their deployment of dispatch capabilities.

Evidence on these points is publicly available, however, from other reliable sources. When the FCC examined the state of dispatch competition, it concluded:

> Most notable, however, has been the absence to date of entry by cellular and/or PCS providers into markets for dispatch services. One research group concludes that "it seems unlikely that SMR operators will face any meaningful competition for dispatch and group communications service from cellular or PCS companies." This group explains that cellular and PCS networks have been optimized to provide and bill for telephone-like service . . . . Indeed, according to this view, cellular carriers would have to retrofit their networks, and the feasibility of overcoming technical obstacles to provide dispatch capability is uncertain.

In re Applications of Pittencrief Communications, Inc., ("In re Pittencrief"), 13 F.C.C.R. 8935 at ¶ 53, 1997 WL 661865 (Oct. 24, 1997) (footnotes omitted) (attached as Ex. 15).

Similarly, a firm analyzing a potential $125 million investment in a Nextel venture in June 1998 stated that Nextel's "main product differentiation is the Direct Connect [dispatch] feature [and] Nextel believes that Direct Connect cannot be copied by rival [PCS and cellular] operators without incurring significant costs and delays." Donaldson, Lufkin & Jenrette staff memorandum to Merchant Banking Investment Committee of June 9, 1998, at 1, 6-7 (emphasis added) (filed under seal as Ex. 16).

These issues are also addressed to a limited degree in some of the exhibits included with Nextel's submission, though not in Nextel's brief. Those exhibits state:

- "Cellular and PCS carriers have shown little interest in providing dispatch services even though the FCC removed all restrictions against the provision of common carrier dispatch service in March of 1995." Nextel Ex. 8 at 55.

- "[S]ome believe the Ericsson equipment won't be as robust as Motorola's. While Nextel's service with Motorola offers instant group calling, some say Ericsson's equipment will take several seconds to set up. 'It falls short of being any serious threat' to Nextel, said Jeffrey Hines, an analyst at BT Alex Brown, who has a 'strong buy' on Nextel." Nextel Ex. 15 at 2.

* * *

In short, the evidence before the court fails to establish even a *prima facie* case that competitive alternatives for dispatch customers have emerged in the 220 MHz band, in the below-512 MHz band, or from cellular and PCS carriers, let alone that such alternative providers have sufficient capabilities and capacity to provide an effective competitive constraint on Nextel's behavior. Rather, that evidence confirms the conclusions of Nextel's highest officials that they continue to have "a free shot at the dispatch market." Ex. 11 at 1. Nextel's predictions that this situation may change in the future are not sufficient to meet its burden to show that the relevant competitive circumstances have changed since the entry of the decree.

B. Nextel's Claim that It Faces Capacity Constraints in Expanding Its Business Does Not Warrant Modification or Termination of the Decree.

Nextel argues that the decree should be terminated because of capacity limitations that will result if Nextel cannot acquire additional 900 MHz spectrum. Nextel Br. at 29-30. It claims that its decision to adopt technology that will support fewer voice paths in each frequency

channel, combined with an increasing number of subscribers, constitute "changed circumstances." Id. at 19-20, 23.

Events caused by a party's own actions, such as decisions regarding how to execute its business plan, are not the type of changed circumstances that support the termination or modification of a consent decree. See, e.g., Inmates of the Suffolk County Jail v. Rufo, 148 F.R.D. 14, 21 (D. Mass.), aff'd, 12 F.3d 286 (1st Cir. 1993); Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania, 533 F. Supp. 869, 875 (E.D. Pa.), aff'd, 678 F.2d 470 (3d Cir. 1982); Mayberry v. Maroney, 558 F.2d 1159, 1163 (3d Cir. 1977). Nextel, like any wireless carrier, faced many options in choosing how to engineer its network and presumably balanced an array of factors that affect the quality of its services and the costs it will incur to provide those services. It could have chosen (and still may) to expand its capacity by acquiring additional spectrum in the 800 MHz band, to add more cell sites to its network (which would allow it to "reuse" its spectrum more extensively), to improve its "compression" technology, or to adopt a variety of other strategies. Nextel presumably has chosen the set of options that will best serve its commercial interests. But even if Nextel's preference may be to address its capacity concerns by obtaining licenses in the 900 MHz spectrum band, Nextel's business preferences cannot override the public interest in the development of competition in dispatch services at the 900 MHz spectrum. Having devised its business strategy with full knowledge of the decree's restrictions, Nextel should not be permitted to argue that the results of that strategy create changed circumstances that require elimination of the decree.

III. THE "CHANGED CIRCUMSTANCES" ALLEGED BY NEXTEL WERE ANTICIPATED AND CONSIDERED WHEN THE DECREE WAS ENTERED.

Nextel contends that the "changes" in the relevant markets discussed above were "wholly unanticipated." Nextel Br. at 22. That contention is flatly inconsistent with the record.

A. Regulatory and Market Developments at Other Frequency Bands

When the Department was investigating the Nextel/Motorola transaction that gave rise to the decree, it was quite clear that the transaction would dramatically increase concentration in the provision of dispatch services, and that consumers of those services would have few alternative sources of supply from providers using the 800 and 900 MHz frequency bands. For that reason, the nature of competitive alternatives in other frequency bands was a principal focus of the Department's investigation, and of Nextel's arguments that the transaction would not violate the antitrust laws. As early as November 1993, Nextel's counsel, Charles A. James, pointed to legislative and regulatory developments at bands other than 800 MHz, arguing that those developments made it unlikely that Nextel's acquisitions would result in anticompetitive effects. See Charles A. James letter to Luin P. Fitch, Jr. of Nov. 24, 1993, at 2 (attached as Ex. 17). A September 1994 letter from Mr. James contended that "already announced FCC initiatives with respect to private radio services and other wireless personal communications [services] preclude any possibility that Nextel's acquisitions will have adverse competitive consequences." Charles A. James letter to Steven C. Sunshine of Sept. 14, 1994, at 1 (attached as Ex. 18). Notwithstanding that contention, Mr. James indicated that Nextel might be willing to enter into a consent decree, but urged the Department to accept a number of Nextel proposals regarding various provisions in such a decree:

For many of the reasons we believe that there is no antitrust concern here, a decree in this matter should last no more than five years. Congress and the FCC have already announced and commenced implementation of a number of initiatives that radically will transform the wireless telecommunications market as a whole, and in particular the network dispatch segment about which the [Antitrust Division] staff is concerned.

1. Congress has already amended the Federal Communications Act to permit cellular telephone companies to provide network dispatch services, and the FCC has indicated an intention to alter its rules to facilitate cellular entry under the legislatively-mandated concept of regulatory parity.

2. The FCC has announced an initiative to "refarm" all of the private radio spectrum below 512 MHz in a manner that will create up to 3100 new channels for private dispatch services, including trunked, wide-area services similar to Nextel's wide-area systems. . . .

3. Recent federal legislation mandates that the federal government surrender 200 MHz of spectrum presently being used for nonmilitary dispatch-type services for private re-licensing by the FCC, with 50 MHz of that spectrum to be surrendered within the next year. . . .

4. Recent federal legislation requires the FCC to expedite licensing of 120 MHz for so-called personal communications services ("PCS"). Under the concept of regulatory parity, including proposed rules that will place cellular, ESMR and PCS providers in a single regulatory category, PCS providers are expected to offer private network dispatch services. . . .

5. The FCC has announced proposed rules for Phase II licensing of SMR systems on the 900 MHz band, which will expand the number of cities in which 900 licenses are available and encourage the formation of wide-area 900 MHz SMR systems.

All of the foregoing point to a highly dynamic market in which it would be inappropriate to saddle Nextel with a ten-year decree. Nextel is the competitive upstart in the advanced wireless telecommunications business, attempting to introduce an unproven technology and to overcome a huge disadvantage in spectrum relative to cellular and PCS providers. It is abundantly clear that the dispatch segment of the wireless market will undergo radical changes within the next five years in terms of new technology, increased spectrum availability and competition from new providers. A ten-year decree, therefore, is unwarranted.

Id. at 3-4; see also Ex. 17 at 2. As the plain language of this letter demonstrates, Nextel's arguments for termination of the consent decree today on the basis of changes in regulatory and market developments are identical to those it made in 1994, prior to entry of the decree.

B. Nextel's Alleged Capacity Constraints

Nextel also argues that the decree should be vacated because without the ability to acquire 900 MHz spectrum, it will face capacity constraints, and "neither the capacity constraints nor its ability to remedy them through acquisition of 900 MHz spectrum was anticipated at the time of the decree." Nextel Br. at 23. This assertion, too, is squarely contradicted by the record.

From the very inception of its digital SMR network, Nextel recognized its "significant frequency disadvantage . . . relative to certain other providers of sophisticated wireless telecommunications services." Nextel Communications, Inc., Response to Second Request in Connection with the Proposed Acquisition of Certain Assets of Motorola, Inc., of April 11, 1994, at 20 (attached as Ex. 19). As a consequence, even before the decree was negotiated, Nextel admittedly was "consistently seeking to add new frequencies to its system and thereby increasing its capacity and lowering its costs." Id.[7]

[7]As Nextel itself notes, it acquired a substantial portion of the additional 800 MHz spectrum that the FCC made available for use in providing dispatch services after the entry of the decree, thereby significantly expanding its capacity. Nextel Br. at 7 n.3.

In its motion, Nextel alleges a capacity constraint arising from two facts. First, it claims that at the time of the decree, it anticipated that its technology would allow it to split one frequency channel into six voice-paths, but that adverse customer reaction to the poor voice quality produced by this approach forced it to modify its network, splitting each channel into only three voice-paths, rather than six. Nextel Br. at 19; Nextel Ex. 2 ¶ 13 (Affidavit of Daniel F. Akerson). Nextel's brief and supporting affidavit state that this less aggressive approach to channel splitting was introduced "late in the third quarter of 1996." Id.

But Nextel's supporting affidavit indicates that it began testing its initial technology in 1993, and that this testing revealed customer concerns about its voice quality. Nextel Ex. 2, ¶ 13. An SEC filing by Nextel in June 1995 disclosed that by spring 1995 — months before the consent decree was entered by the Court — Nextel had entered into an agreement with Motorola to purchase and implement Motorola's "Reconfigured iDEN" technology, a technology which "will necessitate a reduction in the number of time slots per channel." Nextel Communications, Inc., SEC Form S-4, at 23 (1995) (attached as Ex. 20). Thus, while Nextel's less aggressive approach to channel splitting may have been implemented after the decree was entered, Nextel had clearly identified the need to adopt this approach and contracted to implement it well before the entry of the decree.

Nextel also claims that it "did not anticipate . . . that Nextel's subscriber growth would quickly tax that capacity." Nextel Br. at 23. Nextel's submission to this court does not provide any evidence to show the number of subscribers it currently serves, or its projections at the time

of the decree for future subscriber levels. And other evidence belies its claims. In an April 11, 1994 response to an interrogatory that asked for Nextel's subscriber projections for the following three years, Nextel stated that it expected to serve over 1.23 million subscribers by the end of 1997. Ex. 19 at 16. This prediction, made prior to the consent decree, proved to be virtually precisely accurate. As of the end of 1997, Nextel in fact served approximately 1.27 million subscribers. Nextel Communications, Inc., 1997 Annual Report 2 (1998), <http://www.nextel.com/information/investor/annualreport97/97_letb.html> (attached as Ex. 21). Moreover, subscriber data provided to the Department by Nextel do not reveal any significant increase in the rate at which Nextel has added new subscribers after 1997. Nextel Communications, Inc., "Subscriber Growth (1997-1998)" at 1 (document Nextel provided to Department July 20, 1998) (attached as Ex. 22).

The evidence also refutes Nextel's current contention that the parties to the decree never anticipated that Motorola's technology would allow Nextel to operate on the 900 MHz frequencies. Nextel Br. at 18-19. In a September 1994 letter to the Department, Motorola's counsel urged the Department to limit to a three-year period the decree restrictions on its acquisition of 900 MHz spectrum. James D. Sonda letter to Steven C. Sunshine of Sept. 14, 1994, at 1-2 (attached as Ex. 23). In support of that request, Motorola argued that a longer restriction would hamper its longer-term plans to compete "in the development of new technologies for use on the 900 MHz spectrum." Id. at 2. Nextel, of course, was fully aware of this request by Motorola, and referred to it in its own letter to the Department of the same date. Ex. 18 at 2. Thus, the prospect of a Motorola technology that could be used to provide service in

the 900 MHz spectrum was explicitly anticipated by the parties at the time the decree was entered.

In sum, the evidence before the court establishes that if Nextel faces a capacity constraint — a contention that it has not supported in its motion — that constraint arises from factors that were actually anticipated by Nextel at the time of the decree.

C. FCC Regulatory Policies Pertaining to Wireless Services

Nextel also points to more general changes in FCC policies concerning wireless markets as a justification for vacating the consent decree. It argues that the FCC "is moving away from its former practice of assigning spectrum for particular purposes," Nextel Br. at 12, and contends, vaguely, that the FCC's move to categorize and regulate wireless services broadly as commercial mobile radio services ("CMRS") rather than under more narrowly defined service categories is somehow inconsistent with the decree. Id. at 11 n.6, 12, 16-17.

Once again, however, Nextel cannot claim that these changes in FCC regulation were unanticipated events. Mr. James's September 1994 letter to the Department, written in the course of the decree negotiations, expressly recognized that "[u]nder the concept of regulatory parity . . . proposed rules . . . will place cellular, ESMR and PCS providers in a single regulatory category . . . ." Ex. 18 at 3; see also Ex. 17 at 2.

In any event, there is no inconsistency between FCC policies and the antitrust enforcement policies of the Department of Justice which are reflected in the consent decree. The consent decree places no restriction on the uses to which licensees may devote their spectrum. And the FCC, while noting that a broad regulatory classification of CMRS is appropriate in many policy contexts, nonetheless concluded:

> [I]n the context of our analysis of mergers, we are required to examine the extent to which consumers can obtain the services they desire from multiple competing sources. These demands tend to be more narrowly defined. Some products may satisfy them, while others may not. Hence our focus in merger analysis is on a merger's impact on competition in the provision of the particular services offered, and any others that may meet these needs. It is not necessarily on the competition between mobile service carriers, per se.

In re Pittencrief, 13 F.C.C.R. 8935, ¶ 21 (Ex. 15). Applying this concept in its review of Nextel's acquisition of Pittencrief Communications, Inc., the FCC concluded that the transaction should be analyzed in terms of two distinct relevant product markets — interconnected mobile telephone services and dispatch services. Id. ¶¶ 23-36. That market definition is fully consistent with the consent decree. See CIS at *7, *11.

Nextel also implies that the consent decree is inconsistent with the FCC's decision to adopt a "cap" that limits CMRS providers to a total of 45 MHz of CMRS spectrum — a category that includes 800 and 900 MHz SMR spectrum, cellular spectrum, and PCS spectrum. Nextel Br. at 30. There is no inconsistency. First, the decree does not prohibit Nextel from acquiring cellular, PCS, or other spectrum up to the FCC's 45 MHz cap. The decree merely prevents Nextel from acquiring licenses in the 900 MHz band (but not any other CMRS spectrum) based

on the Department's conclusion that the 900 MHz spectrum was the most likely source of new dispatch competition. See CIS at *11-*12. Second, although the FCC has established a maximum limit on a single company's spectrum holdings within the CMRS category, it has not determined that spectrum acquisitions below that 45 MHz cap are competitively benign. Rather, the FCC examines the competitive effects of such transactions on a case-by-case basis, as it did in In re Pittencrief. See 13 F.C.C.R. 8935 (Ex. 15).

* * *

Nextel cannot credibly assert that it did not anticipate the "changed" conditions recited in its motion. Nextel's arguments today are merely recycled versions of the arguments it made in 1994, prior to entry of the decree. Having tried and failed in 1994 to persuade the Department to abandon its antitrust investigation or to limit the scope of the consent decree restrictions, Nextel now uses the same arguments to ask the court to undo the bargain reflected in the agreed-upon terms of the decree, which the Court has approved as consistent with the public interest in competition. There is no basis in law or equity for granting this extraordinary request.

IV. NEXTEL SEEKS TO VACATE THE DECREE BEFORE ITS COMPETITIVE OBJECTIVES HAVE BEEN ACHIEVED, AND TO CIRCUMVENT THE PARTIES' EXPRESS AGREEMENT CONCERNING MODIFICATION REQUESTS BASED ON FORESEEABLE CHANGES.

Even with a showing of changed circumstances, a decree "may not be changed in the interests of defendants if the purposes of the litigation as incorporated in the decree . . . have

not been fully achieved." United States v. United Shoe Mach. Corp., 391 U.S. 244, 248 (1968); accord Rufo, 502 U.S. at 379-80; Board of Education v. Dowell, 498 U.S. 237, 247 (1991). A request for modification must be denied if modification would "undermine the primary objective or purpose of either [the section modified] or the decree as a whole." Western Elec., 46 F.3d at 1207 (citing Rufo's reference to United Shoe). This standard requires a rigorous showing by the moving party, particularly in cases involving the termination of antitrust consent decrees over the Department's objection. See, e.g., United States v. Eastman Kodak Co., 63 F.3d 95, 101 (2d Cir. 1995) (asserting that "in most cases, the antitrust defendant should be prepared to demonstrate that the basic purposes of the consent decree[] . . . have been achieved" and applying that standard to a motion for termination opposed by the Department). Termination of an antitrust consent decree is a drastic remedy, often with far-reaching consequences that extend to the public interest in competition that the decree was entered to protect. Under United Shoe, a court may not grant unilateral termination if the purpose of a decree has not been achieved because to do so would in effect undo the parties' deal and undermine the public interest in competition in the market addressed by the decree. See 391 U.S. at 248; see also Eastman Kodak, 63 F.3d at 102 ("The United Shoe standard promotes adherence to settlement agreements voluntarily entered into by parties to a litigation and ensures that consent decrees are not so easily modifiable as to discourage parties from reaching constructive settlements.").

In this case, Nextel's request to vacate the decree in its entirety would undermine the objective of the decree in two respects. First, it would effectively nullify the agreed-upon mechanism, set forth in section VIII.E. of the decree, for dealing with foreseeable changes in

market conditions. Second, it would eviscerate the central objective of section IV.A. of the decree, which restricts Nextel's acquisition of 900 MHz spectrum so that other companies may use that spectrum to compete against Nextel.

A. Section VIII.E. of the Consent Decree.

In the negotiations of the consent decree, one of the last issues to be resolved was the duration of the decree's restrictions on the parties' acquisition of 900 MHz spectrum. Department staff, consistent with normal practice, proposed a duration of ten years. Nextel strenuously argued then, as it argues now, that the decree restrictions should not last so long given Nextel's predictions of rapid change in market conditions. Ex. 18 at 2-4. The parties ultimately reached a compromise. They agreed that the consent decree would have a duration of ten years. Decree § VIII.C., at *6. But they also agreed to relax, after five years, the standard that the parties would have to meet to modify the decree's terms. Decree § VIII.E., at *6. Section VIII.E., which reflects this compromise, provides:

> Five years after entry of this Final Judgment, any party to this Final Judgment may seek modification of its substantive terms and obligations, and neither the absence of specific reference to a particular event in the Final Judgment, nor the foreseeability of such an event at the time this Final Judgment was entered, shall preclude this Court's consideration of any modification request. The common law applicable to modification of this [F]inal [J]udgment is not otherwise altered.

Id. (emphases added). By including this provision in addition to the standard modification clause, Decree § VIII.D., the parties agreed that the changes in the law or marketplace conditions — if they actually occurred — might provide a justification for modification of the decree,

notwithstanding Nextel's anticipation of those changes at the time the decree was entered. By its own terms, however, Section VIII.E. has effect only "[f]ive years after entry of this Final Judgment." Id. That is, the parties contemplated that prior to that five-year milestone (July 25, 2000) foreseeable changes could not justify a modification of the decree over the Department's objection. It is evident that the parties both understood and did not intend to change, for the decree's first five years, defendants' burden to show an unanticipated change as a predicate for modification under section VIII.D. Nextel is simply trying to renege on that deal.

B. Section IV.A. of the Consent Decree.

There is no dispute that the purpose of section IV.A. of the decree, and of the decree as a whole, is to "preserve[] competition for trunked SMR customers by limiting the 900 MHz spectrum Nextel and Motorola will own and control for the next ten years." CIS at *11; see Decree § IV.A., at *2. By placing this restriction on defendants, the Department sought to ensure sufficient 900 MHz capacity "to permit the entry of new trunked SMR service providers for customers with a need for dispatch services." CIS at *11. The modification requested by Nextel would undermine this purpose.

At least two other firms, Mobex Communications, Inc. ("Mobex") and Chadmoore Wireless Group, Inc. ("Chadmoore"), stand ready and willing to acquire Geotek's 900 MHz licenses and use them to provide direct competition in dispatch with Nextel. See Ex. 13 ¶ 10; Ex. 14 ¶ 9. Both Mobex and Chadmoore are experienced firms with the potential to compete against Nextel by offering a lower-priced digital dispatch service. Ex. 13 ¶ 12; Ex. 14, id. Of

course, either Mobex or Chadmoore would need the 900 MHz spectrum formerly controlled by Geotek in order to bring such a competitive offering to market. By acquiring the spectrum itself, Nextel would block efforts by these potential entrants or any other competitors wishing to construct a digital dispatch system to compete with Nextel.

Mobex is a provider of wireless communications services with more than $80 million in assets and $50 million in 1998 gross revenues. Ex. 13 ¶ 2. Mobex owns and operates dispatch and paging systems using 800 and 900 MHz frequencies in secondary and tertiary markets in 18 states and serves approximately 55,000 subscribers. Id. Mobex has an experienced leadership team, with executives who have built and managed major wireline and wireless telecommunications organizations. See Mobex Communications, Inc., Senior Management (visited Feb. 25, 1999) <http://www.mobexcom.com/MOBEX/ABOUT.NSF>), at 1-2 (attached as Ex. 24). Mobex has assembled financial backing for its bulk bid on the 900 MHz licenses being auctioned pursuant to Geotek's bankruptcy filing, offering in excess of $150 million for all of Geotek's licenses and assets. Ex. 13 ¶¶ 10, 12.

Chadmoore is also a provider of wireless communications services with approximately $73 million in assets and roughly $2.5 million in gross revenues in 1998. Ex. 14 ¶ 2. Chadmoore owns and operates dispatch systems using 800 MHz frequencies in 80 secondary and tertiary markets and serves almost 30,000 subscribers. Id. Chadmoore also has an experienced leadership team with executives who have extensive wireline and wireless communications industry experience. Chadmoore Wireless Group, Inc., SEC Form 10-KSB/A at 23-24 (Dec. 14,

1998) (attached as Ex. 25). Chadmoore has also submitted a substantial bulk bid for Geotek's 900 MHz licenses and other assets. Ex. 14 ¶ 9.

If either Mobex or Chadmoore were to acquire Geotek's 900 MHz licenses, it would initially use the licenses to operate analog SMR systems and then convert heavily-loaded systems to digital SMR technology beginning in late 1999 or mid-2000. Ex. 13 ¶ 11; Ex. 14 ¶ 10. However, in order for Mobex or Chadmoore to bring SMR competition to the cities covered by the decree they must acquire the 900 MHz licenses to be auctioned by Geotek. Ex. 13 ¶¶ 10, 13; Ex. 14 ¶¶ 7, 11.

The purpose of section IV.A. of the decree, facilitating new entry into dispatch, has not yet been achieved. Because potential competitors are ready, willing, and able to acquire 900 MHz spectrum if it is available, vacating the decree would eliminate precisely the opportunity that section IV.A. was intended to promote, and would thus undermine the procompetitive purpose of the decree.

V. BECAUSE NEXTEL HAS FAILED TO MAKE EVEN A THRESHOLD SHOWING THAT VACATION OF THE DECREE COULD BE APPROPRIATE, THE COURT SHOULD DENY NEXTEL'S MOTION WITHOUT IMPOSING THE COST AND DELAY OF DISCOVERY AND AN EVIDENTIARY HEARING.

Nextel has asked for discovery and an evidentiary hearing in connection with its motion to vacate the consent decree. In light of Nextel's failure to satisfy any reasonable threshold for demonstrating that its motion could properly be granted, its motion to vacate the decree should

be denied without imposing on the Court, the Department, and third parties the costs and delays of discovery and trial.

To require further litigation here would set a dangerous precedent that would subvert the process by which most antitrust actions have been resolved for the better part of a century.[8] As the Supreme Court stated in United States v. Armour & Co., 402 U.S. 673, 682 (1971):

> [c]onsent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

Moreover, in their pronouncements on the extent to which a proposed decree should be subject to judicial proceedings beyond the submission of comments pursuant to the Tunney Act, 15 U.S.C. § 16(b)-(h), both the federal courts and Congress have implicitly recognized the important role that avoiding unnecessary, costly litigation plays in motivating potential settlements. In United States v. Airline Tariff Publ'g Co., 836 F. Supp. 9, 11 n.2 (D.D.C. 1993), this Court denied a request for a hearing on its determination whether the proposed decree was in the public interest pursuant to the Tunney Act, holding that the Act does not require such a

[8]Department records reflecting public information for 1989 through 1998 indicate that approximately 80% of the civil antitrust cases filed by the United States were resolved through consent decrees. See also H.R. Rep. No. 93-1463, at 6 (1973), reprinted in 1973 U.S.C.C.A.N. at 6535, 6536, 1974 WL 11645, at *5 (approximately 80% of the civil antitrust complaints filed by the United States between 1955 and 1972 were terminated prior to trial by the entry of a consent decree).

hearing and citing the legislative history stating that it was not the intent of Congress in passing the Tunney Act "to compel a hearing or trial on the public interest issue. It is anticipated that the trial judge will adduce the necessary information through the least time-consuming means possible." H.R. Rep. No. 93-1463, at 8 (1974), reprinted in 1974 U.S.C.C.A.N. at 6535, 6539, 1974 WL 11645 ("[The court] must preserve the consent decree as a viable settlement option."); see also United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 218 (D.D.C. 1982) (legislative history strongly confirms that a full-scale hearing is not required under the Tunney Act); United States v. G. Heileman Brewing Co., 563 F. Supp. 642, 652 (D. Del. 1983) (emphasizing the judicial consensus that "'a plenary evidentiary hearing . . . is neither necessary nor appropriate' for a public interest determination under the APPA"), quoting United States v. National Broad. Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978) (citation omitted). Modification or termination requests that are not based on significant and unanticipated changes similarly waste resources and undermine settlement as an enforcement tool.

A scant three and a half years ago, Nextel agreed to the terms of a ten-year decree in exchange for avoiding the risk, cost, and inconvenience of litigating the Department's Section 7 Clayton Act claim. If the Court now accedes to Nextel's request and requires the Department to litigate the very factual issues that were to have been resolved by the decree, it will ensure that neither the Department nor the public will be able to rely on the finality of existing or future antitrust consent decrees. Granting Nextel's motion would establish a precedent for antitrust defendants to reap the benefit of their bargain — in this case, consummation of the merger — and then try to avoid the consideration for that benefit to which they agreed. The Department

would hereafter be bound to reinvestigate the matters underlying a consent decree whenever approached by a party threatening to file for modification or termination, no matter how insubstantial the party's showing or how recent the decree's entry. Such a state of affairs would rob consent decrees of the finality and repose they are intended to provide and would, instead, provide incentives for increased antitrust litigation, resulting in increased costs to the business sector, the Department, the public, and the federal courts. See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975) ("I agree that in terms of the important role of the consent decree in antitrust procedure, too much tillage can destroy the garden. The Senate Judiciary Committee reported that a high percentage of antitrust actions are settled prior to trial, and recognized that the consent decree process was a 'legitimate and integral part of antitrust enforcement. . . . Obviously, the consent decree is of crucial importance as an enforcement tool, since it permits the allocation of resources elsewhere. . . . [T]he committee wishes to retain the consent judgment as a substantial antitrust enforcement tool. . . . The court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'") (Citations omitted.)

There is no need to incur the costs of discovery here. Nextel has known at least since October 1, 1998 that the absence of significant entry into the relevant markets would be an issue in this proceeding. Ex. 12 at 1-2. If Nextel's own personnel have been unable to identify any significant new competition by this time, that fact merely confirms that if any firms have entered the market, they are not competitively significant. In any case, discovery cannot erase the

evidence that is already in the record, which shows beyond doubt that Nextel actually anticipated the developments it now claims were unforeseen.

Continued litigation of Nextel's motion will accomplish nothing more than further delay in the entry of new competitors who wish to compete against Nextel. Nextel's determined efforts to secure a contingent purchase agreement for the Geotek 900 MHz spectrum have prevented potential competitors from moving forward to purchase the spectrum for competitive use. There is every reason to believe that but for Nextel's actions, one of those competitors would already have secured the right to use this spectrum. Continued litigation of Nextel's motion is likely to delay a new competitor's entry into the market for at least another three months. The Court should avoid such additional delay by denying Nextel's motion now.

CONCLUSION

Nextel claims that there have been significant changes in the relevant competitive conditions in the markets governed by the consent decree, but instead of evidence that dispatch customers now have adequate competitive alternatives, it offers only speculation and prediction that such competitive alternatives may emerge in the future.

Nextel claims now that the prospects for new competition were wholly unanticipated at the time of the decree, but the record demonstrates that Nextel made exactly the same predictions in 1994 that it makes today.

Nextel claims that it is now confronted with unanticipated capacity constraints, but the record demonstrates that each of the factors contributing to those constraints was known to Nextel at the time of the decree.

Nextel claims publicly that complete elimination of the decree would promote competition, but privately its highest-ranking executives acknowledge that the 900 MHz spectrum is the most likely source of new competition that will eliminate Nextel's "free shot at the dispatch market."

The record now before the Court demonstrates that Nextel has not and cannot satisfy the legal requirements for termination of a decree. For the reasons stated herein, Nextel's Motion to Vacate the Consent Decree should be denied.

Dated: February 26, 1999

Respectfully submitted,

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