UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA and STATE OF VERMONT, *Plaintiffs*, v. VERIZON COMMUNICATIONS INC. and RURAL CELLULAR CORPORATION, *Defendants.*	Case No. 1:08-cv-993-EGS

MEMORANDUM OF PLAINTIFF UNITED STATES IN SUPPORT OF UNOPPOSED MOTION TO MODIFY FINAL JUDGMENT

Plaintiff United States has moved this Court to modify the Final Judgment entered in this action. This memorandum summarizes the Complaint that initiated this action and the resulting Final Judgment, describes the proposed minor modification, explains the reasons why plaintiff United States has moved to modify the Final Judgment, and discusses the legal standards and precedents for modification of consent decrees.

I. Background

Verizon Communications Inc. ("Verizon") and Rural Cellular Corporation ("RCC") entered into an Agreement and Plan of Merger dated July 29, 2007, pursuant to which Verizon would acquire RCC. The United States filed a civil antitrust Complaint on June 10, 2008 seeking to enjoin the proposed acquisition. As explained more fully in the Complaint, and the concurrently filed Competitive Impact Statement, the likely effect of this acquisition would have been to lessen competition substantially for mobile wireless telecommunications services in a

number of geographic areas in Vermont, New York, and Washington, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition would have resulted in consumers in those areas facing higher prices, lower quality service and fewer choices of mobile wireless telecommunications services.

At the same time the Complaint was filed, plaintiffs also filed a Preservation of Assets Stipulation and Order and proposed Final Judgment, which were designed to eliminate the anticompetitive effects of the acquisition. Under the Final Judgment, which was entered on April 23, 2009, defendants were required to divest RCC's mobile wireless telecommunications services businesses and related assets throughout Vermont, in one geographic area in New York that is contiguous to Vermont, and in northeast Washington ("Divestiture Assets").[1] Subsequently, the wireless telecommunications businesses in these areas were divested to a wholly owned subsidiary of AT&T Inc. ("AT&T"), in a transaction that closed on December 22, 2008. Among other assets, AT&T acquired approximately 160,000 subscribers as a result of this transaction. Exhibit A, Declaration of Rudolph Hermond.

Section IV.I of the Final Judgment addresses the extent of the support that defendants can provide to an acquirer of the Divestiture Assets and currently restricts the term of any such transition services agreement between Verizon and AT&T to one year:

> At the option of the Acquirer(s) of the Divestiture Assets, defendants shall enter into a contract for transition services customarily provided in connection with the sale of a business providing mobile wireless telecommunications services or intellectual property licensing sufficient to meet all or part of the needs of the Acquirer(s) for a period of up to one year. The terms and conditions of any

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[1] The Divestiture Assets consist of RCC's wireless businesses in the Burlington Metropolitan Statistical Area ("MSA"), Vermont Rural Service Areas ("RSAs") 1 and 2, New York RSA 2 and Washington RSAs 2 and 3.

> contractual arrangement meant to satisfy this provision must be reasonably related to market conditions.

In accordance with this provision, AT&T and Verizon entered into a one-year transition services agreement that expires on December 22, 2009, which allowed AT&T to use systems acquired by Verizon from RCC and services provided by Verizon, relating to customer support, sales and billing.[2] This agreement was necessary to enable AT&T to provide wireless services to the acquired RCC subscribers at the same wireless telephone numbers without disruptions in service, until AT&T could integrate these subscribers onto its own systems. As part of this integration, AT&T decided to replace the acquired subscribers' RCC wireless devices with AT&T wireless equipment. Exhibit A. Consequently, AT&T made efforts to contact these subscribers and supply them with the AT&T equipment necessary to complete their transition to AT&T. *See id.*

AT&T has been unable to complete the conversion of all 160,000 subscribers within the one-year term of the transition services agreement. AT&T anticipates that as of December 22, 2009, the expiration date of the transition services agreement, there will be approximately 1,500 to 2,000 former RCC subscribers who will not have the new AT&T equipment and consequently will lose wireless service unless the transition services agreement is extended. Exhibit A. AT&T expects to be able to complete the transition to AT&T equipment for all but a few subscribers that AT&T will be unable to contact or who refuse to take service by March 2010 and seeks to continue operating under the transition services agreement until that time.[3] *See id.*

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[2] In addition, AT&T obtains under the transition services agreement transport services, which carry traffic from cell towers to the AT&T network ("backhaul services"). Exhibit A.

[3] In addition, for two cell sites in rural northeast Vermont, AT&T currently obtains backhaul service pursuant to the transition services agreement from Verizon. As of this time, it has been unable to obtain a replacement backhaul service from an independent provider. Exhibit

II. Description of the Proposed Modification and its Justification

For AT&T to fully integrate the remaining subscribers onto its network and to obtain alternative backhaul, plaintiff United States proposes modifying Section IV.I of the Final Judgment to extend the period during which Verizon may provide transition services to AT&T by three months, up to and including March 22, 2010, and to allow plaintiff United States, in its sole discretion, to extend the transition services period by another three months if necessary. This modification is required to avoid potential disruption of service to the former RCC subscribers who have not yet transitioned to AT&T service. Ending the transition services agreement on December 22, 2009, before AT&T has fully transferred these subscribers to its network, could result in interruption of service to these subscribers as well as loss of their wireless telephone numbers. A loss of wireless service could be especially difficult for these consumers during the busy holiday season.

The purpose of the Final Judgment was to ensure that the merger of Verizon and RCC would not result in harm to mobile wireless telecommunications services competition throughout Vermont, a neighboring geographic area in New York and in northeast Washington. The relief required to achieve this goal has been accomplished through the divestiture of RCC's wireless businesses in these areas to AT&T, a well known competitor with an established brand name. To avoid a violation of the Final Judgment, a minor modification of one provision is sought so that wireless services will not be interrupted in northeastern Vermont and to a small number of former RCC subscribers. The proposed modification will allow AT&T to serve a small number

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A. If it cannot obtain this service by December 22, 2009, AT&T will be unable to serve this area of Vermont.

of subscribers for a short period of time using Verizon-owned facilities and systems, and is unlikely to result in competitive effects. For these reasons, plaintiff United States believes that the modification is appropriate and in the public interest.

With the proposed modification, Section IV.I would read as follows (modification language highlighted):

> At the option of the Acquirer(s) of the Divestiture Assets, defendants shall enter into a contract for transition services customarily provided in connection with the sale of a business providing mobile wireless telecommunications services or intellectual property licensing sufficient to meet all or part of the needs of the Acquirer(s) for a period of up to **15 months, plus one additional three-month period, upon approval of plaintiff United States, in its sole discretion.** The terms and conditions of any contractual arrangement meant to satisfy this provision must be reasonably related to market conditions.

No other changes are proposed for the Final Judgment. Verizon still will not be allowed to reacquire any of the divested wireless businesses during the term of the Final Judgment. Verizon has represented to plaintiff United States that it is willing to extend the transition services agreement with AT&T on commercially reasonable terms.

III. The Legal Standards Applicable to Modification of an Antitrust Judgment With the Consent of the Government

This Court has jurisdiction to modify or terminate the Final Judgment pursuant to Section XII of the Judgment, Fed. R. Civ. P. 60(b)(5), and "principles inherent in the jurisdiction of the chancery." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932); *see also In re Grand Jury Proceedings*, 827 F.2d 868, 873 (2d Cir. 1987).

Where, as here, the parties have consented to a proposed modification of an antitrust judgment, the issue before the Court is whether modification is in the public interest. *See, United States v. Western Elec. Co.*, 900 F.2d 283, 307 (D.C. Cir. 1990) ("*Western Elec. I*") (noting that

court should "approve an uncontested modification so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*") (emphasis in the original); *see also United States v. Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir. 1993) ("*Western Elec. II*") (quoting *Western Elec. I*); *United States v. SBC Commc'ns, Inc.*, 339 F. Supp. 2d. 116, 117 (D.D.C. 2004) ("*SBC I*") (same). "[T]he district court may reject an uncontested modification only if it has exceptional confidence that adverse antitrust consequences will result – perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency." *Western Elec. II*, 993 F.2.d at 1577.

The public interest standard to be applied by the district court is the same one used in reviewing an initial proposed consent judgment in a government antitrust case. *See Western Elec. I*, 900 F.2d at 295; *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131, 147 n.67 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 406 U.S. 1001 (1983). It has long been recognized that the United States has broad discretion in settling antitrust litigation on terms that will best serve the public interest in competition. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995) (stating that the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest"). *See generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 11 (D.D.C. 2007) ("*SBC II*") (explicating the public interest standard under the Tunney Act).

The Court's role in determining whether the initial entry of a consent decree is in the public interest is not to determine what decree would best serve society, but only to determine whether entering the proposed decree would be in the public interest. It should so determine and

enter the proposed decree unless it cannot find that the government's explanation of why the proposed decree would be in the public interest is reasonable, or finds that the government has abused its discretion or failed to discharge its duty to the public. *See Microsoft*, 56 F.3d at 1460-62; *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981); *see also SBC II*, 489 F. Supp. 2d at 15-16 ("[T]he relevant inquiry is whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable."). The Court's role is to "insur[e] that the government has not breached its duty to the public in consenting to the decree." *Bechtel*, 648 F.2d at 666; *see also Microsoft*, 56 F.3d at 1461 (examining whether "the remedies [obtained in the Final Judgment] were not so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case). As the public interest standard for reviewing a modification to a consent decree is the same as for deciding whether initially to enter the decree, the Court should conclude that modifying the decree is in the public interest if the United States has offered a reasonable explanation of why the modification vindicates the public interest in competitive markets, and there is no showing of abuse of discretion affecting the United States's recommendation.

IV. <u>A Public Comment Period is Unnecessary</u>

The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (b)-(h), does not expressly

apply to the modification of entered final judgments.[4] Nonetheless, the courts and the Department have concluded that notice to the public and opportunities for comments are appropriate where significant decree modifications are proposed.[5] The modification proposed here is minor and will not have a material effect on Verizon's obligations under the decree. No public comment period is necessary for a determination that the proposed modification is in the public interest.[6] With the modification, AT&T will have transition services for an additional limited period of time, and possible disruption of customer service and loss of wireless telephone numbers during this time will be eliminated. The public interest will be served by having the modification made as soon as possible to enable AT&T to continue to serve all of Vermont and to provide wireless services to the small number of remaining former RCC subscribers as it continues its efforts to transition these subscribers to AT&T.

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[4]The procedures mandated by the APPA govern federal district courts' consideration of "[a]ny proposal for a consent judgment submitted by the United States" 15 U.S.C. § 16(b), and are designed to facilitate a public interest determination "[b]efore entering any consent judgment proposed by the United States." 15 U.S.C. § 16(e).

[5]See United States v. AT&T, 552 F. Supp. 131, 144-45 (D.D.C. 1982), aff'd. sub nom. Maryland v. United States, 460 U.S. 1001 (1983).

[6] Few courts have addressed the issue of the applicability to judgment modifications of the APPA. Courts in this district have made non-material modifications of Final Judgments without requiring notice to the public and opportunity for comments. United States v. Halliburton Company et al., Civil Action No. 98-CV-2340 (D.D.C. March 10, 2000, Judge Thomas Penfield Jackson); United States v. Tidewater, Inc., et al., Civil Action No. 92-106 (D.D.C. October 7, 1992, Judge Thomas F. Hogan); United States v. Baker Hughes, Civil Action No. 90-0825 (D.D.C. June 20, 1990, Judge Louis F. Oberdorfer). Two courts have held that the APPA is not applicable to judgment termination proceedings, suggesting that those courts would not view the APPA as applicable to minor judgment modifications (United States v. American Cyanamid Co., 719 F.2d at 565 n.7; United States v. General Motors Corp., 1983-2 Trade Cas. ¶ 65,614 at 69,093 (N.D. Ill. 1983)). But see United States v. Motor Vehicle Mfrs. Ass'n, 1981-2 Trade Cas. ¶ 64,370 (C.D. Cal. 1981).

Pursuant to D.C. Local Civil Rule 7(m) undersigned counsel has conferred with counsel for plaintiff State of Vermont, and defendant Verizon, successor in interest to RCC. The parties do not oppose this Motion.

V. Conclusion

For the foregoing reasons, plaintiff United States requests that the Court enter the proposed Order Modifying Final Judgment submitted with this Motion.

Dated: December 11, 2009

Respectfully submitted,

/s

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