UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, STATE OF ALABAMA, STATE OF CALIFORNIA, STATE OF IOWA, STATE OF KANSAS, STATE OF MINNESOTA, STATE OF NORTH DAKOTA, and STATE OF SOUTH DAKOTA, *Plaintiffs,* v. VERIZON COMMUNICATIONS INC. and ALLTEL CORPORATION, *Defendants.*	Case No. 1:08-cv-01878 (EGS)

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

Plaintiff United States and defendants have jointly 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 supports the modification, and discusses the legal standards and precedents for modification of consent decrees.

I. Background

Defendants entered into an Agreement and Plan of Merger dated June 5, 2008, pursuant to which Verizon Communications Inc. ("Verizon") acquired Alltel Corporation ("Alltel"). Plaintiffs United States and the States of Alabama, California, Iowa, Kansas, Minnesota, North Dakota, and South Dakota ("plaintiff States") filed a civil antitrust Complaint on October 30, 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 94 Cellular Market Areas ("CMAs") in 22 states[1] where Verizon and Alltel were among the most significant competitors, 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 Alltel's mobile wireless telecommunications services businesses and related assets in the 94 CMAs ("Divestiture Assets"). Subsequently, the wireless telecommunications businesses in 69 CMAs were divested to a wholly owned subsidiary of AT&T Inc. ("AT&T"), in a transaction that closed on June 22, 2010. The balance of the wireless telecommunications businesses in 25 CMAs were divested to Atlantic Tele-Network, Inc. ("ATN"), in a transaction that closed on April 26, 2010.

Section IV.J of the Final Judgment addresses the ability of the acquirers of the Divestiture Assets to contract with defendants for certain support services necessary to operate a wireless telecommunications business. This provision currently restricts the term of any such transition services agreement between Verizon and the divestiture buyers to one year:

> At the option of the Acquirer(s) of the Divestiture Assets, defendants shall

[1] The relevant states are Alabama, Arizona, California, Colorado, Georgia, Idaho, Illinois, Iowa, Kansas, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Utah, Virginia, and Wyoming.

> 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, provided that defendants shall only be required to license the Verizon brand to the acquirer(s) of the Divestiture Assets in the CMAs listed in Section II.D.3 for a period of nine (9) months. The terms and conditions of any contractual arrangement meant to satisfy this provision must be reasonably related to market conditions.

In accordance with this provision, Verizon entered into one-year transition services agreements with both AT&T and ATN, which allowed AT&T and ATN to use systems acquired by Verizon from Alltel as well as other services provided by Verizon, relating to network support, customer support, sales, and billing. These agreements are necessary to enable the divestiture buyers to continue to provide wireless services to the acquired Alltel subscribers at the same wireless telephone numbers without disruptions in service, until the divestiture buyers can develop their own or switch the customers to existing systems. AT&T's transition services agreement expires on June 22, 2011, and ATN's transition services agreement expires on April 26, 2011.[2]

II. Description of the Proposed Modification and its Justification

Plaintiff United States proposes modifying Section IV.J of the Final Judgment to extend the period during which Verizon may provide transition services to the divestiture buyers by four months, and to allow plaintiff United States, in its sole discretion, to extend the transition

[2] On the same date that the Complaint was filed in this case, plaintiff United States sought modification of the Final Judgment in *United States v. Bell Atlantic Corp., GTE Corp. and Vodafone AirTouch PLC,* because then-existing provisions limited Verizon's ability to reacquire wireless businesses divested pursuant to that decree. Civil No. 1:99CV01119 (EGS) (D.D.C. modified judgment entered Dec. 30, 2008). This modified final judgment also required redivestiture of certain wireless businesses due to a loss of competition in three CMAs. AT&T and ATN acquired the wireless businesses divested pursuant to this modified final judgment and are supporting their operations with transition services from Verizon. Concurrently with the filing of this Motion, an identical modification of this decree by this Court is being sought to allow the transition services agreements to be extended.

services period by another three months if necessary. This modification is required to allow the divestiture buyers extra time to complete their transitions in an orderly manner. Although both AT&T and ATN have made progress in constructing and reconfiguring their networks and developing support systems, they will be unable to complete all necessary tasks before their existing transition services agreements expire.

By the end of the one-year term of the transition services agreement, AT&T plans to complete most of the steps necessary to integrate the acquired assets and reduce its reliance on transition services from Verizon. *See* Exhibit A, Declaration of Rudolph Hermond. By June 22, 2011, AT&T plans to complete the construction of a new network using GSM wireless technology, provide the approximately 1.6 million acquired subscribers with new GSM devices, and transition these subscribers to the new network. *See* Exhibit A. Upon completion of this plan, AT&T will no longer need to rely on transition services from Verizon to support its retail operations. *Id.* However, in order to comply with the Federal Communications Commission's Order approving the sale of a certain portion of the Divestiture Assets to AT&T, AT&T will need to construct and install new elements in the old Alltel network which used CDMA technology to support CDMA roaming services provided to other carriers and their subscribers.[3] *Id.* AT&T cannot begin this process until all the acquired Alltel subscribers are transitioned off the CDMA network, which is projected to occur in June 2011. *Id.* AT&T anticipates it can

[3] As part of the approval process, AT&T agreed to accommodate reasonable requests for certain CDMA roaming services in accordance with the FCC's roaming rules for a period of time. *In the Matter of Applications of AT&T Inc. and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign, or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Agreement*, Memorandum Opinion and Order, 25 FCC Rcd. 8704, 8779 (2010).

complete the technical work on the CDMA network in four months, by October, 22, 2011. *Id.* During this additional four-month period, AT&T will need continued transition services from Verizon to support roaming services until the work is complete.

Similarly, ATN will not have completed its transition when the one-year term of its agreement with Verizon expires. ATN has (or will soon) successfully migrated off Verizon's transition services in a number of areas. *See* Exhibit B, Declaration of Wade McGill. Unfortunately, the billing system that ATN is developing to support its wireless products will not be completed by April 26, 2011. The billing system is essential for the ongoing provision of wireless and customer service. The billing system must properly create and maintain customer accounts, provision services and provide accurate bills. *Id.* After the system is designed, the elements must be tested and retested, so that customers do not experience an interruption or degradation in customer service when the conversion occurs. Because ATN wants to insure that the subscribers have access to the same features and functionality as they enjoyed prior to the divestiture, the design and development of the billing system was more complex than initially contemplated and required more development time. *Id.* Both ATN and its billing system vendor have been working diligently to recreate this system, but ATN anticipates that an additional four months, until August 2011, is necessary for the billing system to be fully tested and operational.

The purpose of the Final Judgment was to ensure that the merger of Verizon and Alltel would not result in harm to mobile wireless telecommunications services competition throughout the 94 affected CMAs. The relief required to achieve this goal has been accomplished through the divestiture of Alltel's wireless businesses in these areas to AT&T and ATN. To avoid a violation of the Final Judgment, a minor modification of one provision is sought so that the

divestiture buyers can complete their conversions and wireless services will not be interrupted. The proposed modification will allow AT&T and ATN to support their wireless businesses for a short period of time using Verizon-owned facilities and systems. The temporary use of Verizon support services is unlikely to result in significant 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.J 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 **16 months, plus one additional three-month period, upon approval of plaintiff United States, in its sole discretion**, provided that defendants shall only be required to license the Verizon brand to the acquirer(s) of the Divestiture Assets in the CMAs listed in Section II.D.3 for a period of nine (9) months. The terms and conditions of any contractual arrangement meant to satisfy this provision must be reasonably related to market conditions.

This language is practically identical to the modification made by this Court to the Final Judgment in *United States et al. v. Verizon Communications Inc. et al.*, Case No. 1:08-cv-993-EGS (Modified Final Judgment entered Dec. 11, 2009). In that matter, this Court modified the Final Judgment to allow the transition services agreement between Verizon and AT&T to be extended for three months so that AT&T could complete the conversion of a small number of subscribers to its network, obtain telecommunications transport services and avoid the interruption of wireless services. *See* Memorandum in Support of Unopposed Motion to Modify Final Judgment at 3. The modification proposed here is similar: a minor modification of short duration to allow the divestiture buyers to obtain transition services to complete their transitions

and avoid disruption of wireless services. No other substantive changes are proposed for the Final Judgment.[4] Verizon still will not be allowed to reacquire any of the divested wireless businesses during the term of the Modified Final Judgment. Verizon has already agreed to extend the transition services agreements with AT&T and ATN on commercially reasonable terms, conditioned on this Court's approval. Exhibits A and B.

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

[4] Certain changes have been made to the proposed Modified Final Judgment to reflect that the required divestitures have been made and that the term of the Modified Final Judgment will end ten years from the date the Final Judgment was entered (Section XIII, April 23, 2019), as well as stylistic changes to maintain the internal consistency of the Modified Final Judgment. A redline version comparing the Final Judgment and the proposed Modified Final Judgment is attached as Exhibit C.

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. A Public Comment Period is Unnecessary

The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (b)-(h), does not expressly apply to the modification of entered final judgments.[5] 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.[6] The modification proposed

[5]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).

[6]*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).

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.[7] With the modification, the divestiture buyers will have transition services for an additional limited period of time, and there will be no disruption of customer wireless service. The public interest will be served by having the modification made as soon as possible to enable AT&T and ATN to continue to provide wireless services and CDMA roaming services as they continue their efforts to transition the acquired wireless businesses.

Pursuant to D.C. Local Civil Rule 7(m) undersigned counsel has conferred with counsel for the plaintiff States. The parties do not oppose this Motion and consent to the entry of the Modified Final Judgment.

V. Conclusion

For the foregoing reasons, plaintiff United States requests that the Court enter the

[7] 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 et al. v. Verizon Communications Inc. et al., supra*; *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).

proposed Order Modifying Final Judgment and the proposed Modified Final Judgment submitted with this Motion.

Dated: April 1, 2011

Respectfully submitted,

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