IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Plaintiff, v. MOTOROLA, INC. and NEXTEL COMMUNICATIONS, INC. Defendants.	)	Case No. 1:94CV02331 (TFH)

PLAINTIFF UNITED STATES'S MEMORANDUM IN OPPOSITION TO ALLIANCE FOR RADIO COMPETITION'S MOTION FOR PERMISSIVE INTERVENTION OR, IN THE ALTERNATIVE, FOR LEAVE TO PARTICIPATE AS *AMICUS CURIAE*

The United States hereby opposes the Motion to Intervene or, In the Alternative, For Leave to Participate as *Amici Curiae* pursuant to 15 U.S.C. § 16 and Federal Rule of Civil Procedure 24, filed by the Alliance for Radio Competition ("ARC"). After months of intense litigation in this matter, the United States and Nextel Communications, Inc. ("Nextel") recently reached agreement on a proposed modification to the consent decree. This Court, in its order of June 14, 1999, established procedures that provided all interested persons, including ARC, with

an opportunity to submit comments on the proposed modification. ARC did submit comments, to which the United States has responded publicly. See Response of the United States to Public Comments on the Proposed Modified Decree ("Response to Public Comments") at 5 n.6.

ARC now seeks to intervene, and asserts vaguely that its "intervention would allow a more complete presentation of the issues and arguments relevant to the important question of whether the Consent Decree should be modified." But ARC has already had ample opportunity to present its arguments, and fails to satisfy the criteria for intervention. Therefore, the Court should deny ARC's motion.

ARGUMENT

I. ARC SHOULD NOT BE PERMITTED TO INTERVENE IN THIS PUBLIC INTEREST PROCEEDING

Before the proposed decree modification agreed to by the United States and Nextel can take effect, this Court must determine whether easing certain decree restrictions is consistent with the public interest in competition. See United States v. Western Elec. Co., 993 F.2d 1572, 1576 (D.C. Cir. 1993) (footnote omitted) ("[T]he 'public interest test,' as applied to a modification assented to by all parties to a decree, 'directs the district court to 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.'") (quoting United States v. Western Elec. Co., 900 F.2d 283, 307 (D.C. Cir. 1990) ("Triennial Review Opinion")).[1] Assuming *arguendo* that a third party may in some circumstances be permitted to intervene in a

[1] The Western Electric standard is similar to that applied to the initial entry of a proposed decree under the Tunney Act. See 15 U.S.C. § 16(e) (conditioning entry of final judgment on court's "determin[ation] that the entry of such judgment is in the public interest").

decree modification proceeding,[2] Rule 24(b)(2) does not allow intervention unless a party shows that there is a shared question of "fact or law in common with those of the main action," and where intervention would not "unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b)(2).

ARC does not satisfy the standards for permissive intervention. As a threshold matter, ARC does not advert to, let alone fulfill, the required showing that the government acted in bad faith or with neglect in advocating the public interest. Absent such a showing it is inappropriate for a court through third-party intervention to force upon the United States the trial of an antitrust case it has already settled. Moreover, ARC advances no interest other than that already well represented by the United States, the public interest in competition. To the extent that ARC seeks intervention to advance that interest, it impermissibly encroaches on the government's exclusive role in protecting the public interest in competition and ignores the procedurally satisfactory and preferred route of comment to the Court. Indeed, ARC has failed to explain why

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[2] In consensual modification proceedings, courts and the Department of Justice have followed procedures similar to those applicable under the Tunney Act to the initial entry of a decree. In the latter context, this Court consistently has held that the Act confers no *right* to intervene under Rule 24(a)(1), even if a putative intervenor seeks to weigh in on the public interest. See, e.g., United States v. Thomson Corp., 1996-2 Trade Cas. (CCH) ¶ 71,620, at 78,386, 1996 WL 554557, at *2 (D.D.C. 1996) ("[I]t is clear from the language of the Tunney Act, its legislative history and the case law that there is no right to intervene."); United States v. Microsoft Corp., 159 F.R.D. 318, 328 (D.D.C.) ("Intervention is not a matter of right under the Tunney Act."), rev'd on other grounds, 56 F.3d 1448 (D.C. Cir. 1995); United States v. Airline Tariff Publ'g Co., 1993-1 Trade Cas. (CCH) ¶ 70,191, at 69,894, 1993 WL 95486, at *1 (D.D.C. 1993) ("[T]here is no right to intervene in a Tunney Act proceeding to determine whether a proposed consent decree is in the public interest."); United States v. Western Elec. Co., 1987-1 Trade Cas. (CCH) ¶ 67,438, at 59,826, 1987 WL 56667, at *1 (D.D.C. 1987) ("In Tunney Act proceedings, there is no right to intervene."); United States v. AT&T, 552 F. Supp. 131, 218 (D.D.C. 1982), aff'd sub nom., Maryland v. United States, 460 U.S. 1001 (1983). Further, this Court has never found that a third party to a Tunney Act proceeding satisfied Rule 24(a)(2) criteria for intervention of right.

the comments it has submitted, to which the United States has responded, are inadequate to provide the Court with ARC's views on the proposed modification. Further, ARC's intervention inevitably would unduly delay this proceeding. The Court should therefore deny ARC's motion.[3]

A. ARC's Failure to Allege Governmental Bad Faith or Prosecutorial Neglect Bars Permissive Intervention.

"A private party generally will not be permitted to intervene in government antitrust litigation absent some strong showing that the government is not vigorously and faithfully representing the public interest" in reaching the proposed final judgment. Massachusetts School of Law at Andover, Inc. v. United States, 118 F.3d 776, 783 (D.C. Cir. 1997), (citing United States v. LTV Corp., 746 F.2d 51, 54 n.7 (D.C. Cir. 1984), quoting United States v. Hartford-Empire Co., 573 F.2d 1, 2 (6th Cir. 1978)); see also United States v. Thomson Corp., 1996-2 Trade Cas. (CCH) ¶ 71,620, at 78,386, 1996 WL 554557, at *2 (D.D.C. 1996) (same). ARC has not alleged, let alone demonstrated, bad faith or malfeasance on the government's part in agreeing to the proposed modification.[4] See United States v. G. Heileman Brewing, 563 F.

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[3]ARC requests leave to participate as an *amicus curiae* if its motion to intervene is denied. but this request effectively is moot. The Court has a sufficient basis at this time to enter the proposed modification of the decree, and no further proceedings in this matter are scheduled. Thus, there will be no proceedings in which to participate.

[4]ARC alleges that the United States "has failed to [enforce the decree] in the face of apparent violations," and has reiterated its allegations that Nextel's 900 MHz holdings violate the limits set forth in the consent decree. See ARC's Memorandum in Opposition to Motion to Enter Order Modifying Consent Decree at 2-5 (filed Sept. 8, 1999). ARC's contentions rest upon an erroneous interpretation of the decree, as the United States has explained at length. See Response of the United States to Public Comments on the Proposed Modified Consent Decree at 30-34. In any event, ARC has failed to show that its allegations have any bearing on the

Supp. 642, 648 (D. Del. 1983) ("[D]isagreement with the wisdom of the United States'[s] decision concerning the adequacy of proposed relief does not indicate inadequate representation of the public interest."). The Court would be justified denying permissive intervention on this basis alone. See United States v. The Stroh Brewery Co., 1982-2 Trade Cas. (CCH) ¶ 64,782, at 71,829-30, 1982 WL 1852, at *2 (D.D.C. 1982) (rejecting permissive intervention solely for movants' failure to assert bad faith, which "is required before such intervention will be permitted in an antitrust consent judgment proceeding").

Moreover, in the absence of a showing of bad faith or malfeasance "it is inappropriate for a court through third-party intervention to force upon the United States the trial of an antitrust case it has already settled." United States v. G. Heileman Brewing, 563 F. Supp. 642, 650 (D. Del. 1983). ARC urges the Court not to modify the decree and, in effect, to force the parties to engage in further litigation -- in which ARC wants to participate as a party -- over whether the decree should be vacated.[5] Nextel has concluded that its commercial interests are best served by prompt modification of the decree restrictions, and a termination of those restrictions in October 2000, rather than by continued litigation in which it would seek immediate and complete termination. The United States has determined that the public interest would be better served by the proposed modification than by further litigation. ARC may have concluded that its members'

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competitive effects of the proposed modification, and they are irrelevant to the requirement for permissive intervention.

[5]Even if the Court were to find on the present record that the modification proposed by the United States and Nextel is contrary to the public interest, we presume that the parties would proceed to the evidentiary hearing that the Court has already concluded would be necessary to determine whether there is a sufficient factual basis for termination of the decree as originally requested by Nextel.

commercial interests would best be served by forcing Nextel and the United States to continue to litigate Nextel's motion to vacate the decree. But ARC has not demonstrated that the public interest in competition requires further litigation.

B. The United States Well Represents the Public Interest in Competition.

Rule 24(b)(2) does not allow intervention unless a party shows that its claim shares a question of "fact or law in common with those of the main action." Fed. R. Civ. P. 24(b). ARC, however, claims merely that its intervention would "allow a more complete presentation of the issues and arguments relevant" to whether the decree should be modified because it is "in a unique position of being able to speak on behalf of the public that desires competition in dispatch service." Alliance for Radio Competition's Motion for Permissive Intervention or, In the Alternative, for Leave to Participate as *Amicus Curiae* ("ARC Br.") at 5 ("ARC's interests coincide with the public's . . . interests"). Even if that were true, it would be insufficient to justify permissive intervention by ARC.

It is firmly established that "[i]n federal antitrust litigation, it is the United States, not private parties, which 'must alone speak for the public interest.'" G. Heileman Brewing, 563 F. Supp. at 649, (quoting Buckeye Coal & Ry. Co. v. Hocking Valley Ry. Co., 269 U.S. 42, 49 (1925)). ARC has already submitted comments explaining its views on why it believes the proposed decree modification should not be entered. By seeking *intervention*, ARC would impermissibly arrogate for itself the role reserved exclusively to the United States in antitrust cases. ARC must "stand as any other member of the public. [It is] not entitled to intervene simply to advance [its] own ideas of what the public interest requires." G. Heileman Brewing,

563 F. Supp. at 648; accord United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981). Thus, "courts have consistently denied intervention to private parties whose views about the proper terms for an antitrust settlement differed from those of the United States."[6] G. Heileman Brewing, 563 F. Supp. at 648.

C. ARC Adequately Advanced Its Interest(s) by Commenting to the Court.

A "would-be intervenor must first establish that its participation would aid the court," Massachusetts School of Law, 118 F.3d at 783, something that ARC has failed to do. This Court established procedures for public notice and comment on the proposed modification in its order of June 14, 1999, which gave ARC the opportunity to provide the benefit of its assessment of whether the proposed modification of the Consent Decree is in the public interest. ARC submitted comments, which the United States has filed with the Court along with its Response. See Response to Public Comments at 5 n.6. Nothing barred ARC from providing in those comments "a more complete presentation of the issues and arguments relevant" to entry of the proposed modification. See ARC Br. at 5. Moreover, nothing suggests the Court will give ARC's comments less weight because it does not have intervenor status. Therefore, ARC does not now need intervenor status. See G. Heileman Brewing, 563 F. Supp. at 647 (denying

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[6]Courts have also typically denied permissive intervention where the proposed intervenor's claim is not "separately cognizable" from the government's action. See United States v. International Bus. Machs. Corp., 1995-2 Trade Cas. (CCH) ¶ 71,135, at 75,458, 1995 WL 366383, at *6 (S.D.N.Y. 1995) (noting relaxation of this requirement only in "special circumstances"); cf. Diamond v. Charles, 476 U.S. 54, 76 (1986) ("claim or defense" refer to "the kinds of claims that can be raised in courts of law as part of an actual or impending law suit"). ARC states no such claim.

intervention in part because movants had not "shown that the APPA's third-party comment procedure is an inadequate means to apprise the Court of their complaints about the Final Judgment"); The Stroh Brewery Co., 1982 WL 1852, at *2 (comment procedures afforded adequate means of informing the court); United States v. AT&T, 1982-1 Trade Cas. (CCH) ¶ 64,476, at 72,658, 1982 WL 1795, at *1 (D.D.C. 1982) (same).

D. ARC's Intervention Will Unduly Delay This Limited Proceeding.

ARC's protestations notwithstanding, its intervention would inevitably cause undue delay. ARC argues that delay is never undue where an attempted intervenor shows adequate grounds for upsetting a consent judgment. See ARC Br. at 6. But that argument, if accepted, would support intervention in *every* case where a movant opposed the entry of a consent decree. As explained above, ARC has asserted nothing other than its opinion -- which it has already expressed in comments that have been addressed by the United States -- that entry of the proposed modification would not be in the public interest. See United States v. Airline Tariff Publ'g Co., 1993-1 Trade Cas. (CCH) ¶ 70,191, at 69,894, 1993 WL 95486, at *1 (D.D.C. 1993) (denying a trade association permissive intervention because its filing of comments on the proposed decree would adequately enable it "to inform the Court and all parties of the effects of the proposed decree on its members"). By definition, therefore, ARC's intervention would needlessly postpone swift resolution of this litigation (and thus the opportunity for entry), and would add nothing to the Court's deliberations beyond what it has already contributed to the proceeding. Cf. United States v. International Bus. Machs. Corp., 1995-2 Trade Cas. (CCH) ¶ 71,135, at 75,458, 1995 WL 366383, at *5 (S.D.N.Y. 1995) ("'Additional parties always take

additional time. Even if they have no witnesses of their own, they are a source of additional questions, objections, briefs, arguments, motions and the like which tend to make the proceedings a Donnybrook Fair.'" (citation omitted)). Simply put, "[t]he prospect that a new party might string out a case that the original parties want to resolve usually is a compelling objection to intervention rather than a reason to allow it." Bethune Plaza, Inc. v. Lumpkin, 863 F.2d 525, 531 (7th Cir. 1988); see also United States v. G. Heileman Brewing, 563 F. Supp. 642, 650 (D. Del. 1983) ("[I]n the absence of a showing of bad faith or malfeasance, the potential for unwarranted delay and prejudice to the original parties implicit in third-party participation clearly outweighed any benefit that might have accrued from it.") (citing United States v. The Stroh Brewery Co., 1982-2 Trade Cas. (CCH) ¶ 64,804, at 71,960 (D.D.C. 1982)).

CONCLUSION

For the reasons stated above, this Court should deny ARC's Motion for Permissive Intervention or, In the Alternative, for Leave to Participate as *Amicus Curiae*.

Dated: September **XX**, 1999

Respectfully submitted,

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