IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA and STATE OF MINNESOTA *Plaintiffs*, v. ALLTEL CORPORATION and MIDWEST WIRELESS HOLDINGS L.L.C., *Defendants.*	**MEMORANDUM OF PLAINTIFF UNITED STATES IN SUPPORT OF JOINT MOTION TO MODIFY FINAL JUDGMENT** **Case No. 06-3631 (RHK/AJB)**

Plaintiffs, United States of America and the State of Minnesota, and defendants, Alltel Corporation ("Alltel") and Midwest Wireless Holdings L.L.C. ("Midwest Wireless"),[1] have jointly moved to modify the Final Judgment entered by this Court on January 8, 2007. The Final Judgment required defendants to divest certain mobile wireless businesses ("Divestiture Assets") to remedy the competitive harm alleged in the Complaint that would have resulted from the proposed acquisition of Midwest Wireless Holdings ("Midwest Wireless") by Alltel and precluded them from reacquiring the assets during the term of the Final Judgment. The Divestiture Assets were sold to Rural Cellular Corporation ("RCC"). However, Verizon Communications Inc. ("Verizon") has since

[1] The Final Judgment was entered after the United States challenged, under the antitrust laws, the acquisition of Midwest Wireless Holdings L.L.C. by ALLTEL Corporation. ALLTEL Corporation was acquired by Atlantis Holdings LLC in November 2007 and its name was changed to Alltel Corporation. It will be referred to in this memorandum as Alltel.

acquired RCC and now proposes to acquire defendant Alltel. Verizon's acquisition of Alltel would combine the mobile wireless businesses that the Final Judgment sought to separate and would pose a significant risk of lessening competition. To permit Verizon's acquisition of Alltel without the risk of lessening competition, the parties seek to modify the Final Judgment to permit reacquisition of the Divestiture Assets, subject to redivestiture pursuant to the terms specified in Section XV of the proposed Modified Final Judgment. Plaintiffs consent to the modifications of the Final Judgment, subject to the conditions contained in the proposed Modified Final Judgment and the proposed Modified Preservation of Assets Order ("Modified Order"). The modifications will not adversely impact competition. The Modified Final Judgment and the Modified Order ensure that the Divestiture Assets will be placed in a management trust immediately following the closing of the Verizon/Alltel transaction and will be operated independently of Verizon's and Alltel's other wireless businesses until they are redivested promptly to a buyer acceptable to plaintiffs. Modification of the Final Judgment is in the public interest.

I. THE COMPLAINT AND FINAL JUDGMENT

On November 17, 2005, defendants Alltel and Midwest Wireless entered into an agreement pursuant to which Alltel agreed to acquire Midwest Wireless. The United States filed a Complaint on September 7, 2006, seeking to enjoin the proposed acquisition (the "Complaint"). As explained more fully in the Complaint and the Competitive Impact Statement ("CIS"), filed at the same time as the Complaint, the likely effect of this

acquisition would have been to lessen competition substantially for mobile wireless telecommunications services in four areas of Minnesota in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would have resulted in consumers facing higher prices, diminished quality or quantity of services provided, and less investment in network improvements for these services.

At the same time the Complaint was filed, the United States also lodged a proposed Final Judgment, which was entered on January 8, 2007. Under the Final Judgment, defendants were required to divest Midwest Wireless's mobile wireless telecommunications services business and related assets in four areas -- Minnesota RSA 7 (Cellular Market Area ("CMA") 488); Minnesota RSA 8 (CMA 489); Minnesota RSA 9 (CMA 490); and Minnesota RSA 10 (CMA 491). The Divestiture Assets were divested to Rural Cellular Corporation, which in turn was acquired by Verizon on August 7, 2008.

On June 5, 2008, Verizon agreed to acquire Alltel. Consummation of the Verizon/Alltel transaction is the subject of a case filed by plaintiffs and several other states in the District of Columbia[2] and is also under review by the Federal Communications Commission ("FCC"). If the Divestiture Assets are not redivested, Verizon's acquisition of defendant Alltel would subvert defendant Alltel's divestiture of

[2] United States et al. v. Verizon Communications Inc. and Alltel Corporation, Civ. No. 08-CV-1878 (EGS) (D.D.C. filed Oct. 30, 2008). Pursuant to a proposed Final Judgment filed in that case, Verizon and Alltel have agreed to divest additional assets in Minnesota RSA 7 in order to remedy the competitive harm that would have resulted from the Verizon/Alltel transaction.

the Divestiture Assets. Pursuant to Section XIII, the Final Judgment is in effect until January 8, 2017, unless an extension is granted by the Court. Verizon, as the current owner of the Divestiture Assets, would violate the Final Judgment if it acquires the assets because the Final Judgment bans the re-combining of defendants' overlapping wireless assets in the four CMAs during the term of the Final Judgment.

II. STANDARD FOR APPROVING A MODIFICATION PROPOSED BY THE UNITED STATES

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 Jenkins v. Missouri*, 931 F.2d 470, 482 (8th Cir. 1991); *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*"); s*ee 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.2d 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 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' 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.

III. MODIFICATION OF THE FINAL JUDGMENT IS IN THE PUBLIC INTEREST

Plaintiff United States has agreed with plaintiff Minnesota, defendants, and Verizon, which has submitted to the jurisdiction of the Court, that the Final Judgment should be modified to allow defendants and Verizon to combine the wireless businesses

that were the subject of the Complaint and Final Judgment, subject to the provisions of the proposed Modified Final Judgment and proposed Modified Order. To implement the modification, a new Subsection XI.B would be added to Section XI (No Reacquisition) of the Final Judgment to allow defendants and Verizon to reacquire the Divestiture Assets, provided that they be promptly redivested to a buyer acceptable to the United States pursuant to the provisions of Section XV of the Modified Final Judgment and held in the interim before divestiture pursuant to the provisions of the Modified Order. Section XIII has been modified to extend the term of the Final Judgment for 10 years from the date of entry of the Modified Final Judgment.

The proposed modification is in the public interest because (i) it will allow the proposed merger of Verizon and Alltel to proceed. This merger subject to the proposed modification and the additional divestitures agreed to pursuant to a consent decree pending in the District of Columbia will not harm competition and may benefit consumers; (ii) under the Modified Final Judgment, the Divestiture Assets will be promptly redivested to a buyer approved by the United States; and (iii) provisions are included in the Modified Final Judgment and Modified Order that will protect and preserve the Divestiture Assets and ensure appropriate divestitures, including the appointment of a management trustee and Verizon's consent to the Court's jurisdiction for the purpose of enforcing the Modified Final Judgment.

Plaintiff United States would not have consented had Verizon and defendants not agreed to promptly sell the Divestiture Assets as combining Verizon's and defendant

Alltel's wireless businesses in the four CMAs would raise significant competitive concerns. In these areas, the competitive situation has not changed significantly since the Final Judgment was entered in January 2007, and the cellular businesses controlled by Verizon and Alltel are two of the leading wireless competitors. Based on plaintiff United States's review, including changes in market shares over the past two years and wireless local number portability data, Verizon and defendant Alltel impose significant competitive constrains on each other in these areas and are likely the closest substitutes for a large set of customers. Therefore, plaintiff United States believes that the proposed combination of these businesses would pose a substantial risk to competition, and the Final Judgment currently prohibits Verizon from owning both sets of wireless assets in these CMAs. The public interest is best protected here by modifying the Final Judgment to permit Verizon to acquire the Divestiture Assets, subject to a requirement to place them in a Management Trust and to divest those assets promptly.

IV. A PUBLIC COMMENT PERIOD IS UNNESCESSARY

The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (b)-(h), does not expressly apply to the modification of entered final judgments.[3] Nonetheless, the Department and the courts have concluded that notice to the public and an opportunity for

[3] 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).

comment are appropriate where significant decree modifications are proposed.[4] Here, however, the modification is not competitively significant because the Divestiture Assets will remain independent and competitive during the period of time they are operated by the Management Trustee pursuant to the Modified Order and will be sold to a company that will be an effective competitor as required by the Modified Final Judgment. Until the assets are divested, the merged Verizon/Alltel will not have management control over the competing wireless businesses in southern Minnesota; those businesses will be operated independently, by a court appointed Management Trustee. The Management Trustee will oversee the businesses, making all business decisions, including pricing, advertising, and maintenance and construction of the wireless network. The actions of the Management Trustee will be subject to the supervision of this Court and plaintiffs. Verizon will only retain a de jure interest with limited rights and responsibilities with respect to the wireless spectrum.[5] Under the Modified Final Judgment, Verizon and defendants are required to divest the assets 120 days after the consummation of the Verizon/Alltel transaction. The

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[4] 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).

[5] Under the terms of a short-term de facto transfer leasing arrangement, the spectrum licensee (here - Verizon) is relieved of primary and direct responsibility for ensuring that the spectrum lessee's (here - the Management Trustee) operations comply with the Communications Act and FCC policies and rules, remains responsible for its own violations of those laws, policies and rules and egregious behavior of the lessee which the licensee knew or should have known about. 47 C.F.R. §§ 1.9035, 1.9030. The spectrum licensee has primary responsibility for complying with the Communications Act and FCC policies and rules. Id.

Divestiture Assets will be divested to an acquirer acceptable to plaintiff United States in its sole discretion upon consultation with plaintiff Minnesota. The acquirer must have the intent and capability to compete effectively in the provision of mobile wireless services. Thus, there is no material change to the terms of the original Final Judgment. The Modified Final Judgment would require essentially the same relief as the original Final Judgment, the divestiture of the wireless businesses in the four CMAs in Minnesota. Under such circumstances, no public comment period is necessary for a determination that the proposed modification is in the public interest.[6]

[6] Courts 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 (TPJ) (D.D.C. March 10, 2000); United States v. Tidewater, Inc., et al., Civil Action No. 92-106 (TFH) (D.D.C. Oct. 7, 1992); United States v. Baker Hughes, Civil Action No. 90-0825 (LFO) (D.D.C. June 20, 1990). 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 558, 565 n.7 (2d Cir. 1983); 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).

V. CONCLUSION

For the foregoing reasons, plaintiff United States consents to the modification of the Final Judgment in this case, subject to completion of the procedures outlined herein, and the Court should find that the proposed modification is in the public interest.

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Respectfully submitted,

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