IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

AT&T CORP. and
TELE-COMMUNICATIONS, INC.,

Defendants.

No. 98-CV03170
Judge Emmet G. Sullivan

COMMENT RELATING TO PROPOSED FINAL JUDGMENT AND RESPONSE OF THE UNITED STATES TO COMMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. §16(b)-(h)) ("APPA"), the United States of America hereby files the public comment it has received relating to the proposed Final Judgment in this civil antitrust proceeding, and herein responds to the public comment. The United States has concluded that the change to the proposed Final Judgment that was suggested in the comment would be in the public interest. Accordingly, the United States has secured the consent of the defendants to modify the proposed Final Judgment in this respect. The APPA requires publication of the public comment and the United States' response. When that publication has been completed, the United States will file a

Certificate of Compliance with the APPA and a Motion for Entry of the Modified Judgment with the court.

I. BACKGROUND

This action was commenced on December 30, 1998, when the United States filed a civil antitrust complaint under Section 15 of the Clayton Act, as amended, 15 U.S.C. §25, alleging that the merger of Tele-Communications, Inc. ("TCI") with a wholly-owned subsidiary of AT&T Corp. ("AT&T") and the resultant acquisition by AT&T of a 23.5 percent equity interest in the mobile wireless telephone business of Sprint Corporation ("Sprint PCS") would substantially lessen competition in the provision of mobile wireless telephone services in many geographic areas throughout the country.

In June 1998, AT&T and TCI executed a Merger Agreement and Plan of Merger pursuant to which TCI would be merged into a wholly-owned subsidiary of AT&T. The proposed transaction would have resulted in the acquisition of a 23.5 percent interest in Sprint's mobile wireless business, one of the principal competitors to AT&T's mobile wireless telephone business in many geographic areas throughout the country. The United States concluded that AT&T's incentives to compete with Sprint PCS could be lessened significantly as a result of the ownership of this substantial interest in Sprint PCS. Accordingly, on December 30, 1998, the United States filed a Complaint seeking to enjoin the merger. Contemporaneously with its Complaint, the United States also submitted a proposed Final Judgment, a Competitive Impact Statement, and a Stipulation signed by the defendants consenting to entry of the proposed Final Judgment by the

Court after completion of the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16).

Among other things, the proposed Final Judgment requires the defendants to transfer the Sprint PCS stock to a trustee, who is required to divest the stock. *See* Section V.A., proposed Final Judgment. The proposed Final Judgment also contains a number of provisions to effect a "hold separate" arrangement until this divestiture has been completed. *See* CIS at 12-15. One of these provisions, set forth in Section VI.D. of the proposed Final Judgment, required that the trustee be instructed not to vote the Sprint PCS shares held by the trust.

II. RESPONSE TO PUBLIC COMMENTS

The only comment received by the United States was filed by Sprint.[1] Sprint's comment is focussed on section VI.D. of the proposed Final Judgment. Sprint points out that some of its potential corporate transactions require the approval of a majority (or some other specified percentage) of all shares entitled to vote. For these matters, shares that fail to vote are the equivalent of shares voting against a proposal. Given the substantial portion of Sprint PCS shares that will be held by the trust, Sprint contends that its ability to obtain shareholder approval on such matters could be impeded by the non-voting requirement in section VI.D. of the proposed Final Judgment, and that Sprint's effectiveness as a competitor could be diminished by this constraint on its strategic flexibility. Comments of Sprint Corporation at 2.

The United States agrees that section VI.D. of the proposed Final Judgment could have such an effect, and that the modification suggested by Sprint would be appropriate in order to

[1] This comment is attached hereto as Exhibit A.

address the concerns raised by Sprint. The United States' objective in negotiating the non-voting requirement in section VI.D. was to protect competition by ensuring that the Sprint PCS shares would not be voted in a way that might reduce competition. In light of the information and analysis set forth in Sprint's comments, however, the United States has concluded that the underlying objective would be better served if section VI.D. is modified, to read as follows: "The trustee shall be instructed to vote all of Liberty's Sprint Holdings that are entitled to vote for and/or against applicable matters in the same respective proportions as the other holders of the Sprint PCS Tracking Stock." This modification will fully neutralize the voting rights of the Liberty Sprint Holdings, yet avoids the unintended effects described by Sprint in its comment.

The defendants and the United States have entered into a Stipulation, attached hereto, agreeing to the entry of a Final Judgment which incorporates this modification to section VI.D., but which is otherwise unchanged from the proposed Final Judgment filed on December 30, 1998.

III. STANDARD OF REVIEW

As set forth in Section VII of the Competitive Impact Statement, the APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any

of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. 93-1463, 93d Cong. 2d Sess. 8-9 (1974), *reprinted in* U.S.C.C.A.N. 6535, 6538. As the United States Court of Appeals for the D.C. Circuit recently held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See* United States v. Microsoft, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

Under this standard, the Court's role is limited to determining whether the proposed decree is within the "zone of settlements" consistent with the public interest, not whether the settlement diverges from the Court's view of what would best serve the public interest. United States v. Western Electric Co., 993 F.2d 1572, 1576 (quoting United States v. Western Electric Co., 900 F.2d 283, 307 (D.C. Cir. 1990)); United States v. Microsoft Corp., 56 F.3d at 1457-58, *see also* 56 F.3d at 1460 (D.C. Cir. 1995). As the United States Court of Appeals for the District of Columbia Circuit recognized in reversing the district court's refusal to enter an antitrust consent decree proposed by the United States: "Congress did not mean for a district judge to construct his own hypothetical case and then evaluate the decree against that case." United States v. Microsoft Corp., 56 F.3d at 1458-60. To the contrary, "[t]he court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," and so the district court "is only authorized to review the decree itself," not other matters that the government might have but did not pursue. Id.

> Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government . . . and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977). The Court may reject the agreement of the parties as to how the public interest is best served only if it has "exceptional confidence that adverse antitrust consequences will result . . .." United States v. Western Electric Co., 993 F.2d at 1577 (D.C. Cir.), cert. denied, 114 S. Ct. 487 (1993), quoted with approval in United States v. Microsoft Corp., 56 F.3d at 1460.

IV. CONCLUSION

For the reasons stated herein, the proposed Final Judgment, with § VI. D. of the proposed Final Judgment modified as indicated above with the consent of the Defendants, is consistent with the public interest.

Respectfully submitted,

/s/

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