

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)
)
)
Plaintiff,) Civil No.: 1:99CV01119 (EGS)
)
v.)
)
)
BELL ATLANTIC CORPORATION,)
GTE CORPORATION,)
and VODAFONE AIRTOUCH PLC,)
)
Defendants.)
_____)

RESPONSE TO COURT’S INQUIRY REGARDING APPOINTMENT OF TRUSTEE

At the status conference regarding this matter held on April 12, 2000, the Court asked plaintiff to address a number of related issues regarding Section V.A.2 of the proposed Final Judgment. That provision provides, in relevant part: “The Court, shall on application of plaintiff, appoint a trustee selected by plaintiff who will be responsible for (a) accomplishing a divestiture of all Wireless System Assets transferred to the trustee from defendants . . . and (b) exercising the responsibilities of the licensee and controlling and operating the transferred Wireless System Assets”

Under this provision, the Department of Justice is responsible for the initial selection and nomination of a trustee but this responsibility does not diminish the Court’s ultimate authority over the trustee. Under the proposed decree, the Court would appoint any trustee, and would have the power to refuse to appoint the plaintiff’s nominee. It would be entirely consistent with the language of the

proposed decree for the Court to ask for any relevant information concerning the plaintiff's nominee, to interview the nominee, and to appoint or reject the nominee as the Court deems appropriate. Should the Court want the Division to select and nominate an alternate candidate or candidates, that also would be consistent with the terms of the proposed decree.¹

The principal question raised by this Court at the status conference is whether the Court, rather than the Department of Justice, should be responsible for the initial selection of a trustee. The Department typically assumes that responsibility in its divestiture decrees because of a desire to avoid placing unnecessary administrative burdens on the Court, and in order to promote rapid and effective divestitures. Selecting a trustee can be a time-consuming process: it involves identifying individuals with the necessary expertise, determining whether those individuals have an interest in acting as trustee, screening them for potential conflicts of interest (a process which, in the telecommunications industry, can be particularly cumbersome), and discussing with them the responsibilities and terms of the trust. Leaving these responsibilities with the Justice Department, rather than with trial judges who typically have very busy dockets, tends in most cases to permit the appointment of a trustee to proceed more rapidly.

The prompt appointment of a trustee, when such an appointment is required, is critical to achieving the competitive objectives of a divestiture decree. Competition generally is best served when

¹ Other provisions of Section V give the Court considerable additional powers over the trustee. Section V.B provides that the Court has the power to grant the trustee any additional powers beyond those enumerated in the proposed Final Judgment that the Court "shall deem appropriate." Section V.C gives the Court approval over the trustee's accounting as well as the authority to prescribe terms and conditions for the trustee's tenure. Section V.E requires the trustee to file monthly reports with the Court.

assets which are to be divested are transferred as quickly as possible to a purchaser who has the desire and ability to compete against the merging firm and any other market participants. Delay in completing a divestiture potentially harms competition in both the short run and long run. In the short run, while the merging firm continues to own the assets, it usually will not have incentives to use those assets to compete aggressively. In the long run, delay entails risks to the competitive vitality of the business to be divested. Pending completion of the divestiture, that business may have difficulty attracting and retaining effective executives, raising capital, developing and implementing strategic plans, and the like. Because of these risks to competition, any significant delay in selecting and appointing a trustee who may be needed to complete a divestiture threatens the objectives of a divestiture decree to preserve or restore competition.

The Justice Department's considerable history with divestiture decrees has led it to develop a set of commonly used judgment provisions designed to ensure rapid and effective divestitures. The provision regarding the selection and appointment of the trustee that is contained in the proposed Final Judgment in this case is one such provision. Since January 1, 1998, the Department of Justice has filed 31 proposed consent decrees which contain provisions for the appointment of trustees. In 29 of these consent decrees, the provisions governing the selection and appointment of a trustee were identical, or virtually identical, to the provisions of the proposed decree in this case. In only one instance has a judge modified this provision prior to finding that the proposed Final Judgment is in the public interest.²

² In *United States v. Florida Rock Industries, Harper Bros, Inc., Commercial Testing, Inc., and Daniel R. Harper* (M.D. Fla. 1999) the Court revised the language in the Final Judgment to read "the Court shall appoint, on application of the United States, a trustee selected by the United States **and approved by the Court** to effect the divestiture of each such asset not sold" (added language in bold).

In all the other cases in which a Final Judgment has been entered -- including every case in this district -
- the Court has found that the proposed Final Judgment was in the public interest and entered it without
modification.

The proposed Final Judgment, as currently written, serves the public interest by encouraging a
rapid and effective divestiture to the greatest extent possible, while at the same time preserving the
Court's ultimate authority over the appointment and tenure of the trustee. We urge the Court to find
that this proposed Final Judgment is in the public interest and to enter it forthwith.

Dated: April 14, 2000

Respectfully submitted,

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As previously noted, the Department believes that it is already clear that the Court's power to appoint
the trustee under the proposed decree includes the power to approve or reject the Division's nominee,
even absent this modification. The trustee provisions in these consent decrees have not otherwise been
rejected or modified by any court. (Seven of these 31 consent decrees are still pending and have not
yet been entered.)