IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

RESPONSE OF THE UNITED STATES TO PUBLIC COMMENTS ON THE PROPOSED MODIFIED CONSENT DECREE

The United States of America hereby files the public comments relating to the proposed Modified Consent Decree in this civil antitrust proceeding, and herein responds to the public comments. The United States has carefully reviewed the comments on the proposed Modified Consent Decree and remains convinced that its entry by the Court is in the public interest.

I.

BACKGROUND

This action commenced on October 27, 1994, when the United States filed a civil antitrust complaint alleging that a proposed transaction between Nextel and Motorola would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. See Competitive Impact Statement ("CIS") at 1. Nextel, then the nation's largest provider of specialized mobile radio ("SMR") or trunked dispatch services, had agreed to acquire most of Motorola's dispatch business. See id. The complaint alleged that the Nextel/Motorola transaction was likely to reduce competition substantially in fifteen (15) major cities in the United States in the market for trunked SMR services, and sought to enjoin the transaction. See id. at 2.

At the same time, the United States, Nextel, and Motorola filed a Stipulation by which they consented to entry of a proposed Consent Decree designed to eliminate the anticompetitive effects of the transaction. See id. On July 25, 1995, the Court ordered entry of the Decree, which it found to be in the public interest. See Decree § VIII.F. at 14. Pursuant to the terms of the Decree, (1) Nextel and Motorola were required to divest substantially all of their SMR channels in the 900 MHz band and to release, upon request of the license holders, substantially all the 900 MHz channels they managed in a number of large cities,[1] see id. §§ IV.A., C.-E., G.; (2) Nextel and Motorola, jointly, were prohibited from holding or acquiring more than thirty (30) 900 MHz channels in Boston, Massachusetts; Chicago, Illinois; Dallas and Houston, Texas; Denver,

[1]Boston, Massachusetts; Chicago, Illinois; Dallas and Houston, Texas; Denver, Colorado; Detroit, Michigan; Los Angeles and San Francisco, California; Miami and Orlando, Florida; New York, New York; Philadelphia, Pennsylvania; Seattle, Washington; and Washington, DC.

Colorado; Los Angeles and San Francisco, California; Miami and Orlando, Florida; New York, New York; Philadelphia, Pennsylvania; and Washington, DC (the "Category A Cities," see id. § II.B.), and ten (10) 900 MHz channels in Detroit, Michigan, and Seattle, Washington (the "Category B Cities," see id. § II.C.),[2] see id. § IV.A.; and (3) Nextel and Motorola were required to sell 42 800 MHz channels to an independent service provider in Atlanta, Georgia. See id. § IV.F.

Many of the 900 MHz channels divested pursuant to the Decree were acquired by Geotek Communications, Inc. ("Geotek"), which acquired additional 900 MHz channels and used the spectrum to offer dispatch services in competition with Nextel. However, Geotek's efforts to enter the dispatch market ultimately failed, and its sizeable blocks of the 900 MHz licenses in metropolitan areas nationwide are for sale pursuant to bankruptcy proceedings, and will therefore be available for use by some other firm.

On February 16, 1999, Nextel filed a Motion to Vacate Consent Decree, a motion which, if granted, would have allowed Nextel to acquire the Geotek licenses as well as additional 900 MHz spectrum. The United States opposed Nextel's request for immediate termination of the Decree. Among other things, Nextel had failed to demonstrate that competitively significant entry into the relevant dispatch markets had occurred. Moreover, the United States concluded that immediate termination of the Decree would have prevented the emergence of new competition using the Geotek licenses. An evidentiary hearing on Nextel's Motion to Vacate Consent Decree was scheduled to begin on June 14, 1999.

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[2]The Decree limited Nextel and Motorola to fewer channels in Detroit and Seattle because those are border cities where, by international agreement, only half the available spectrum may be licensed by the United States. See CIS at 13 n.5.

On the eve of that hearing, the United States and Nextel reached agreement on the terms of a proposed modification of the Decree ("Proposed Order"), and signed a Stipulation reflecting that agreement, as well as their agreement that proceedings in connection with Nextel's Motion to Vacate Consent Decree should be stayed pending final resolution of the motion for proposed modification of the Decree. In its Response to Nextel's Motion to Modify Consent Decree ("Response to Nextel's Motion to Modify"), the United States explained that whereas complete and immediate termination of the Decree -- the remedy sought by Nextel through its Motion to Vacate Consent Decree -- would not be in the public interest in light of competitive conditions, entry of the proposed modification would be in the public interest because it is suitably tailored in response to developments since entry of the Decree. On June 14, 1999 the Court entered an Order to Stay Proceedings in Connection with Nextel's Motion to Vacate Consent Decree and to Establish Notice and Public Comment Procedures for Motion to Modify Final Judgment.[3]

The proposed modified Consent Decree has three important elements. It would (1) prohibit Nextel from acquiring[4] Geotek's 900 MHz licenses in the Category A and B Cities (the licenses listed in Attachment A to the proposed Order), see Proposed Order ¶ 4 & Attach. A; (2) relax the limits on Nextel's and Motorola's 900 MHz channels to permit them to hold or acquire up to one hundred eight (108) 900 MHz channels in the Category A Cities and fifty-four (54) 900

[3]On June 17, 1999, the Court entered an Order Modifying Notice and Public Comment Procedures for Motion to Modify Final Judgment that allowed Nextel to substitute publication of a notice in Wireless Week for publication in Communication Week International.

[4]In response to one of the comments filed herewith, the United States and Nextel have agreed that this prohibition should be amended to enjoin and restrain Nextel from "acquiring or entering into management agreements for" any of the Geotek licenses. See infra text Section D.

MHz channels in the Category B Cities,[5] see Proposed Order ¶ 1; and (3) terminate the Modified Consent Decree on October 30, 2000, see id. ¶ 5. Finally, the proposed modifications would vacate the provision of the Decree that alters the standard for consideration of Decree modifications as of July 25, 2000. See id. ¶ 6. Entry of the modifications to the Decree would not affect the Court's jurisdiction to construe, modify, and enforce the Decree as modified, and to punish violations of the Decree.

In the Stipulation, the defendants and the United States consented to entry of the proposed modified Decree by the Court after completion of the procedures for public notice and comment outlined therein. See Stipulation ¶¶ 1-5 (filed June 14, 1999). The United States has received ten comments.[6] The filing of the comments and this response with the Court satisfies the last remaining requirement established by the Court's order of June 14, 1999. The United States therefore is filing, concurrently with this response, a motion for entry of the proposed Order modifying the Consent Decree, which may be entered by the Court without further proceedings.

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[5]In addition, the Decree provisions dealing with Nextel's and Motorola's management agreements for licenses owned by other parties would be modified to reflect the new limits. See Proposed Order ¶¶ 2, 3.

[6]The comments, which are attached hereto as Exhibits A-J, were submitted by the Alliance for Radio Competition ("ARC"), Chadmoore Wireless Group, Inc. ("Chadmoore"), Geotek Communications, Inc. ("Geotek"), Hughes Network Systems ("Hughes"), Intek Global Corporation ("Intek"), Mobex Communications, Inc. ("Mobex"), Radio Communications Systems, Inc. ("RCS"), Small Business in Telecommunications ("SBT"), Sunbelt Two-Way Radio, Inc. ("Sunbelt"), and Wilmington Trust Company ("Wilmington Trust").

II.

STANDARD OF REVIEW

When considering an uncontested motion to modify an existing consent decree, the Court's role is limited to determining whether the proposed modification is within the "zone of settlements" consistent with the public interest, not whether it diverges from the Court's view of what would best serve the public interest.[7] United States v. Western Elec. Co., 993 F.2d 1572, 1576 (D.C. Cir. 1993) (quoting United States v. Western Elec. Co., 900 F.2d 283, 307 (D.C. Cir. 1990)); United States v. Microsoft Corp., 56 F.3d 1448, 1457-58, 1460 (D.C. Cir. 1995). Though the Microsoft court in dictum suggests that a district judge must be even more deferential in reviewing "entry of an initial proposed decree" than in reviewing "the parties' request for approval of modification," 56 F.3d at 1460-61, the court made clear that stipulated modifications deserve considerable deference from the reviewing court. Indeed, the court observed that "[u]nder our own precedent dealing with uncontested modifications of a consent decree, we have repeatedly said that a district judge must approve such modifications so long as the proposal falls 'within the reaches of the public interest.'" Id. at 1457-58 (citing Western Elec., 900 F.2d at 309) (emphasis added). After reiterating that the public interest inquiry is a flexible one, 56 F.3d at 1460, the Microsoft court stated that "a court should not reject an agreed-upon modification unless '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

[7]Contrary to the assertions of ARC and Mobex, the four-part inquiry for reviewing motions to modify a consent decree that are contested by a party, as set forth in United States v. Western Electric Company, 46 F.3d 1198, 1203-04 (D.C. Cir. 1995) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383 (1992)), does not apply to review of an *uncontested* motion to modify an existing consent decree.

administrative agency.'" Id. (quoting Western Elec., 993 F.2d at 1577).

In addition, 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." Microsoft, 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. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977).

III.

RESPONSE TO PUBLIC COMMENTS

The United States hereby responds to the comments submitted by ARC, Chadmoore, Geotek, Hughes, Intek, Mobex, RCS, SBT, Sunbelt, and Wilmington Trust.

A. Provisions for Restrictions on Nextel's and Motorola's 900 MHz Spectrum Holdings

ARC, Chadmoore, Mobex, RCS, and Sunbelt object to entry of the proposed modifications of Sections IV.A., E. & G., which increase to 108 channels in the Category A Cities and to 54 channels in the Category B Cities the amounts of 900 MHz spectrum that Nextel is allowed to hold, acquire, and manage. The commenters argue that these proposed modifications are premature because significant entry in the market for trunked dispatch services has yet to materialize, the prospects for such entry remain speculative, and Nextel continues to wield market power in the relevant market.[8]

The United States does not dispute that the relevant dispatch markets today remain concentrated, and stated as much in its Response to Nextel's Motion to Modify. For that reason the United States refused to support immediate termination of the Decree and conditioned its consent to the proposed modification on the addition of Section IV.K., see infra Section C, which is intended to prevent Nextel from preempting entry by acquiring the most promising avenue for such entry in the near term, the large block of Geotek licenses. However, the United States also concluded, based on recent marketplace developments that became apparent through discovery in this proceeding, that concentration in the relevant markets is likely to be mitigated by other significant entry. Although the United States cannot predict with precision when this entry will

[8]ARC, Mobex, and RCS also argue that the new limits on Nextel's 900 MHz holdings leave an insufficient amount of capacity for competitors to acquire given that many 900 MHz channels are "committed" to non-dispatch uses such as data and paging. However, Nextel has been prevented from acquiring those licenses throughout the duration of the Decree, and despite this prohibition, those licenses have not yet been used to provide dispatch competition. The United States is not aware of any such licenses that appear likely to be used to provide dispatch services in the near term, even if the Decree is not modified.

occur, its likely advent within the next couple of years justifies the proposed modifications in the Decree's duration and restrictions.

Many of the regulatory restrictions that constrained entry into the dispatch market when the Decree was filed have since been lifted. In 1995, just prior to entry of the Decree, the Federal Communications Commission ("Commission" or "FCC") lifted the ban on the provision of dispatch services by cellular and personal communications services ("PCS") mobile telephony providers. That year, the Commission also proposed a new licensing framework for the 220 MHz band, and has since licensed a substantial amount of that spectrum. The major Phase II auction for rights to operate 220 MHz trunked dispatch systems in locations not served by the Phase I licenses ended in October 1998, and many of those licenses were issued earlier this year.

These developments have laid the groundwork for competitively significant entry into the relevant markets for trunked dispatch services. The 220 MHz licenses acquired in the Phase II auction held last year are just beginning to be built out in many of the Category A and B Cities. Cellular and PCS providers have been permitted to offer dispatch services for some time, but for a variety of reasons had chosen not to do so until recently. However, many of those carriers now have a variety of plans to modify their technology and have already modified their pricing so as to compete more directly against Nextel. Indeed, in the course of the discovery conducted prior to the scheduled evidentiary hearing, it became clear that competitive conditions in dispatch markets were changing in significant ways, and that further changes had become increasingly likely. Thus, although entry has not yet occurred to any significant degree -- and, hence, the United States continues to maintain that immediate termination of the Decree would be inappropriate -- this

relatively near-term entry will eliminate the need for a continuation of the Decree restrictions.[9]

Cellular and PCS companies have responded to Nextel's success in several ways. Their first response has been to offer new pricing plans designed to appeal to customers who might otherwise switch to Nextel's "Direct Connect" digital dispatch service. For instance, AT&T's "Group Calling" initiative, which is explicitly "designed for any business with a locally mobile workforce," offers unlimited wireless calls among designated work groups of five to 50 subscribers within a given area for a flat monthly fee. See, e.g., AT&T Wireless Services, "AT&T Launches New Wireless Business Offer: Group Calling" (June 9, 1999) <http://www.att.com/press/item/0,1193,509.00.html>; see also Bell Atlantic Mobile Digital Choice, "Mobile to Mobile Calling Option" (visited Aug. 12, 1999) <http://www.bam.com/ne/dig_choice.html> (unlimited calls to and from other Bell Atlantic mobile phones for an additional $10 per month); SBC Wireless, "Add a New Service" (visited Aug. 12, 1999) <http://www.swbellwireless.com/market/dallas/addservice.html> (describing "Phone-to-Phone Service" offering unlimited wireless local calls to other SBC Wireless customers for an additional $9.95 per month).

These short-term strategies -- devising new pricing arrangements by which cellular and

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[9]RCS also filed Supplemental Comments in which it argues that Nextel's recent attempts to acquire PCS spectrum in the 1.9 GHz band demonstrate that the proposed modification is unnecessary because Nextel can meet its needs for additional spectrum elsewhere. Whether Nextel will actually succeed in acquiring that spectrum, which is the subject of a bankruptcy proceeding, is unclear. Even so, the principal basis for the proposed modification is not Nextel's capacity constraints, but the determination that there is no need to maintain the Decree's original restrictions in light of expected entry into the relevant markets for trunked dispatch services. As explained in the text, the government has concluded that given the developments involving PCS, cellular, and 220 MHz providers, it will be sufficient to preserve a certain amount of 900 MHz spectrum (including the Geotek licenses) until October 2000 for the use of a competitor to Nextel, to ensure that significant competition emerges.

PCS firms will compete more directly and effectively against Nextel -- will not address important differences in functionality between cellular and PCS services and Nextel's dispatch service. However, those differences will likely be narrowed considerably as cellular and PCS firms deploy new technology that will offer dispatch functionality. See, e.g., Ericsson Press Releases, "Ericsson Introduces TDMA Pro - Enabling Private Radio Features Over Cellular Systems" (Feb. 11, 1999) <http://www.ericsson.com/pressroom/Archive/1999Q1/19990211-0052.html>; Ericsson Developing Telephone/Dispatch Radio Handset, Land Mobile Radio News, Jan. 1, 1999, 1999 WL 6446794. Based on the evidence obtained in discovery, the United States expects some cellular and PCS carriers to implement such technologies within the next 12 to 18 months, and others to do so over a somewhat longer period of time. The development of such technologies for use on preexisting cellular and PCS networks invalidates Mobex's concern that those providers are "locked out" of Motorola's proprietary iDEN technology. These other technologies, when combined with competitive pricing arrangements, are likely to place important constraints on Nextel's market power, particularly as to those customers with a strong interest in one-to-one or one-to-several dispatch communications.[10]

Customers whose businesses demand one-to-many trunked dispatch services will have additional options as 220 MHz licensees complete the buildout of their systems.[11] See, e.g.,

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[10]ARC's assertion that the cellular and PCS providers' absence from the bidding on the Geotek licenses shows that they are unlikely to offer dispatch services is a non-sequitur, since those firms will be able to offer such services using their current spectrum. Moreover, the innovative pricing plans introduced by cellular and PCS providers, which are already providing a substitute for some dispatch consumers (including former Nextel customers) require neither new spectrum nor new technology.

[11]RCS contends that neither providers in the 220 MHz band nor those in the bands below 512 MHz (commonly referred to as "the 450 MHz band") will become a significant competitive

"Intek Global Launches Sweeping New Strategic Initiative" (Jan. 19, 1999) <http://www.intekglobal.com/pressrelease.asp?PRTD=22>; PR Newswire, E.F. Johnson Begins Shipment on $1.8 Million Order for Intek Global (Mar. 22, 1999) (shipping of mobile radios for 220 MHz dispatch systems), 3/22/99 PRWIRE 09:33:00; Datamarine International, Inc., "Datamarine International Land Mobile Backlog Moves Past $1,000,000" (press release) (Mar. 24, 1999) (announcing increase in equipment orders due to post-auction construction of 220 MHz dispatch systems). The likely entry of competitive dispatch providers in the 220 MHz band in the relatively near future is confirmed by the comments submitted by Intek, the nation's largest holder of 220 MHz licenses for trunked dispatch services. In the process of requesting additional protection for emerging competition in the 220 MHz band, Intek makes clear the ambitious extent of its plans for developing trunked dispatch systems in major metropolitan areas within the next two years.

B. Provision for Termination

Several commenters object to the proposed modification of Section VIII.C., which changes the date on which the Decree will terminate from July 25, 2005 to October 30, 2000. ARC, Chadmoore, Mobex, RCS, and Sunbelt[12] argue that competitively significant entry is

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force in the market for trunked dispatch services. In its Response to Nextel's Motion to Modify, the United States itself noted that despite initial regulatory reforms, trunked dispatch providers sufficient to serve as real alternatives for customers would be unlikely to emerge in the 450 MHz band in the near term.

[12]Intek's request that Section VIII.C. be modified to terminate the Decree on March 24, 2002, the three-year anniversary of the FCC's initial grant of the Phase II 220 MHz licenses, is addressed elsewhere. See infra text Section E.

unlikely to occur by October 2000, and that termination of the modified Decree five years before it was set to expire is therefore premature given the extent of Nextel's market power and the time it will take for significant competitors to build their businesses. In particular, these commenters argue that such early termination is likely to serve as a disincentive to dispatch providers who would otherwise consider attempting to compete with Nextel.

As explained in the Response to Nextel's Motion to Modify, the earlier termination date set forth in the proposed modified Section VIII.C. reflects the United States's conclusion that significant entry into dispatch markets by cellular, PCS, and 220 MHz providers is likely to occur in the relatively near term, and that such entry will obviate continuation of the Decree's restrictions. When the Decree was originally negotiated, Nextel argued to the Department of Justice that a decree was unnecessary, and in any event should have a duration of no more than five years, because of predicted changes in the dispatch market. The Department was unwilling at that time to accept an automatic termination of the Decree after five years, but nonetheless recognized that the changes predicted by Nextel might warrant modification of the Decree's restrictions. Thus, the Decree itself contemplates possible modifications after five years, as of July 25, 2000, on the basis of changes in market conditions that were foreseeable at the time the Decree was entered.[13] See Decree § VIII.E.[14] The modified termination date of October 2000 is

[13]Mobex states that Section VIII.E. of the Decree provides that "five years after entry of the Final Judgment, the parties may seek a modification of the Final Judgment." This is incorrect. As explained in the text, Section VIII.E. provides for an altered standard of review for a modification of this Decree that is sought five years after its entry. Any party to any decree may seek modification at any time once a decree is entered as a final judgment.

[14]Section VIII.E. would be vacated by the proposed modification. In light of the relatively short remaining term of the Decree if the proposed modification is entered, and the aim of avoiding further litigation over the Decree during that remaining term, Section VIII.E. is no

only several months later than the date on which both parties had contemplated that changes in competitive conditions might justify modification of the Decree.

Furthermore, the proposed modification of the Decree's termination date will not prevent the United States from reviewing acquisitions of 900 MHz spectrum (or firms owning such spectrum) by Nextel after the termination of the modified Decree, and taking action under the antitrust laws to block such acquisitions that may prove to be anticompetitive at that time. In evaluating any such action, the Department of Justice would consider whether entry has been or would be timely, likely, and sufficient to provide a competitive constraint against any exercise of market power by Nextel. See U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines § 3 (rev. ed. 1997). Thus, if the Department's current expectations of future entry prove to be incorrect, the Department would still have adequate enforcement mechanisms with which to prevent future Nextel acquisitions of additional 900 MHz spectrum, if subsequent market developments indicate that such acquisitions would be anticompetitive.

C. Provision to Prohibit Nextel's Acquisition of the Geotek Licenses

1. Sale of the Geotek Licenses

The proposed modification adds to the Decree a new Section IV.K., which would prohibit Nextel from acquiring Geotek's 900 MHz licenses in the Category A and B Cities (the "decree cities") for the remaining term of the modified Consent Decree.

ARC, Chadmoore, Mobex, RCS, and Sunbelt argue that in light of the shortened duration of the Decree pursuant to the modified termination date, Geotek's creditors will have an incentive

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longer necessary or desirable.

to "warehouse" the Geotek licenses until they can be sold to Nextel upon expiration of the Decree. In support of these contentions, ARC, Chadmoore, Mobex, and RCS point to the creditors' recent filings with the FCC in support of assignment of the licenses from Geotek to the creditors and subsequently to Nextel, as well as to the creditors' request that the FCC waive coverage requirements (i.e., construction and service deadlines) pertaining to the licenses.[15] In light of this, these commenters argue that Section IV.K. will not ensure that the Geotek licenses will be sold to a Nextel competitor. Chadmoore proposes that the United States withdraw its tentative consent to the proposed modifications unless they are conditioned upon (1) the creditors' sale of the licenses to "a purchaser acceptable to the United States," and (2) elimination of the modification of the Decree's original termination date of July 25, 2005, so that the creditors will have no incentive to hold the licenses for sale to Nextel.[16]

The United States has concluded that the proposed Section IV.K. is in the public interest

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[15]See Applications of Hughes Network Systems and Wilmington Trust Co. for Consent to Assign 900 MHz Specialized Mobile Radio Licenses to FCI 900, Inc., a Subsidiary of Nextel Communications, Inc., In the Matter of Geotek Communications, Inc., FCC DA 99-1027 (filed Mar. 9, 1999); Joint Opposition of Hughes Network Systems and Wilmington Trust Co. to Petitions to Deny, In the Matter of Geotek Communications, Inc., FCC DA 99-1027 (filed July 15, 1999); Hughes Network Systems and Wilmington Trust Requests for Waiver of Coverage Requirements for 900 MHz SMR Licenses, FCC Form 601 Application, Public Interest Statement (filed June 18, 1999); see also Wireless Communications Bureau Seeks Comment on a Request for Waiver of the Coverage Requirements for 900 MHz SMR Licenses Filed by Geotek Communications, Inc. and Hughes Network Systems, Public Notice, In the Matter of Requests for Waiver of Coverage Requirements for 900 MHz SMR Licenses Filed by Geotek Communications, Inc., Hughes Network Systems and Wilmington Trust Co., DA 99-1283 (F.C.C. rel. June 30, 1999).

[16]Chadmoore criticizes the United States for failing to prevent Nextel from participating in the bankruptcy auction and contracting to buy the Geotek licenses. However, the United States would have had no justification for taking such action because the Decree does not prohibit the parties from entering into a contract for acquisition of spectrum that is contingent upon modification or termination of the Decree.

because it will substantially increase the likelihood that the Geotek licenses will be sold to a Nextel competitor, even though it does not and could not guarantee that result. Geotek and its creditors are not parties to the Decree. While the Decree can and does enjoin Nextel from acquiring these assets, it cannot otherwise restrict the ability of non-parties to dispose of those assets as they see fit.[17] Thus, it would not be possible for the Decree to require Geotek or its creditors to sell only to a purchaser approved by the United States.

Section IV.K. does, however, substantially enhance the opportunities of competitors to acquire the Geotek licenses by ensuring that Nextel cannot prevent entry through its immediate acquisition of those licenses. In weighing the option of "warehousing" the licenses so that they may be sold to Nextel after the modified Decree expires, the Geotek creditors will consider the cost of a significant delay in the disposition of those assets, the possibility that Nextel will no longer wish to acquire the licenses after the Decree expires, and the risk that the market value of the licenses may decline. Moreover, any subsequent sale of the licenses to Nextel will be subject to antitrust review, and if competition in dispatch markets fails to develop as the United States currently expects, such a sale could be blocked through an antitrust enforcement action.[18] Given

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[17]Chadmoore also contends that creditors' recent filings with the FCC supporting the eventual assignment of the Geotek licenses to Nextel violate the parties' Stipulation that "Nextel agrees to take all appropriate actions on June 15, 1999 to terminate its contract to acquire the [decree city] licenses of Geotek Communications, Inc." However, since the creditors are not parties to the Decree or the Stipulation, they are not bound by either.

[18]In Nextel's filing in support of Geotek's application for assignment of its licenses to the creditors and subsequently to Nextel, it states that "[w]ith regard to the transfer of the Geotek licenses within Consent Decree markets, the HSR and Clayton Act processes have been absorbed into the Nextel-DOJ settlement referenced above. Thus, because DOJ entered into the settlement, it has completed its HSR and Clayton Act reviews, pending approval by the U.S. District Court." Opposition of Nextel Communications, Inc. to Petitions to Deny, In the Matter of Geotek Communications, Inc., FCC DA 99-1027, at 27 (filed July 15, 1999). To the extent this

these considerations, the United States expects that the Geotek licenses will be available to be purchased by any Nextel competitor who offers fair market value for those licenses.

2. Competitive Significance of the Geotek Licenses

Geotek and its creditors, Hughes and Wilmington Trust, contend that Section IV.K. should be eliminated from the proposed modification because it harms Geotek's creditors by denying them the benefits of a sale to the highest bidder, Nextel, and preventing the prompt transfer of the licenses to what these commenters claim is their highest-valued use as reflected by the bids made during the bankruptcy auction.

As the United States explained in its Response to Nextel's Motion to Modify, the United States sought the restrictions in Section IV.K. because Geotek's 900 MHz licenses are particularly likely to be used for entry into the relevant markets. Thus, a continuation of the restriction on Nextel's acquisition of these licenses will enhance the prospects for the rapid development of dispatch competition.

Geotek's 900 MHz licenses provide important advantages for the development of a dispatch competitor in the Category A and B Cities. In addition to providing the means for large analog trunked dispatch operations, only the 900 MHz frequency band offers enough contiguous capacity with the characteristics necessary for establishment of a digital dispatch service with bundled features such as two-way data, paging, and vehicle location. The potential for digital

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statement may indicate that the United States has approved a future sale of the Geotek licenses in the decree cities to Nextel, it is incorrect. Should Nextel seek to acquire the Geotek licenses upon termination of the modified Decree, the United States will be required by law to review the competitive implications of that transaction in light of market conditions at that time. See 15 U.S.C. § 18(a).

dispatch service is an important competitive alternative because it generally offers higher voice quality and relatively compact, portable equipment. Digital dispatch technology allows greater compression of voice-paths per frequency channel, thereby using channel capacity more efficiently than most analog systems. There are several digital dispatch technologies for use at the 900 MHz band and many equipment manufacturers who make and sell this equipment.

In theory, other 900 MHz licenses offer these same advantages. But unlike other 900 MHz licenses, the Geotek spectrum has in fact been offered for sale, and covers relatively large, contiguous blocks in all the decree cities. (Nextel itself recognized this unique characteristic of the Geotek licenses when it stated that "[t]he occasion of this motion [to vacate the Decree] is Nextel's limited window of opportunity to acquire a large block of 900 MHz spectrum in the bankruptcy auction." Defendant Nextel Communications, Inc.'s Memorandum of Points and Authorities in Support of Its Motion to Vacate the Consent Decree at 4 (filed Feb. 16, 1999).) By acquiring the Geotek licenses, a potential competitor to Nextel could immediately obtain the critical mass of spectrum necessary to enter the relevant markets.[19] Several dispatch competitors made significant efforts to acquire the Geotek licenses and continue to express a strong interest in such an acquisition. The apparent obstacle to such potential acquisitions, up to the point of the agreed-upon modification of the Decree, was Nextel's offer of a higher price than those competitors were offering.

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[19]Chadmoore contends that the new Section IV.K. is unnecessary because the original Section IV.A. already prevented Nextel's acquisition of the licenses being auctioned by Geotek. Clearly, the United States conditioned its agreement to the proposed modification of Section IV.A. on Section IV.K.'s prohibition of Nextel's acquisition of the Geotek licenses so that this particularly promising avenue for entry would be available for sale to a potential competitor to Nextel. The proposed modified Section IV.A. alone could not accomplish that purpose.

In contrast to this evidence regarding the Geotek licenses, the United States is not aware of any other 900 MHz licenses that were likely to have been acquired in connection with entry into the relevant markets, or that any other acquisition of 900 MHz spectrum had been frustrated by Nextel's efforts to acquire such spectrum. In light of this evidence, the United States concluded that continuing to restrict Nextel's acquisition of the Geotek licenses would enhance the likelihood of entry, but that it was appropriate to allow Nextel otherwise to increase its holdings of 900 MHz spectrum in the decree cities.

In light of the important competitive purpose served by Section IV.K., the creditors' arguments amount to an assertion that the public interest in a competitive market for dispatch services should be subordinated to their private financial interests in selling Geotek's assets to the highest bidder. As a matter of law, it is well-established that if a transaction is harmful to competition, the courts "do not rank as a private equity meriting weight a mere expectation of private gain from a transaction . . . shown . . . likely to violate the antitrust laws." FTC v. Weyerhaeuser Co., 665 F.2d 1072, 1083 n.26 (D.C. Cir. 1981). This follows from Section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits transactions "the effect of [which] may be to substantially lessen competition . . . ." This prohibition is not qualified by any exceptions to protect the financial interests of would-be sellers, and any such exceptions would eviscerate the underlying purpose of the statute. Accordingly, in FTC v. Staples, Inc., this Court recognized that Office Depot shareholders "will likely lose a substantial portion of their investments if the merger is enjoined," 970 F. Supp. 1066, 1092 (D.D.C. 1997), but blocked the transaction because "[t]his private equity alone . . . does not suffice to justify denial of a preliminary injunction." Id. Similarly, in FTC v. PPG Indus., Inc., 798 F.2d 1500 (D.C. Cir. 1986), the Court of Appeals

reversed the district court's decision to deny a preliminary injunction to block an acquisition challenged under the antitrust laws. The district court decided to allow the acquisition to proceed pending final adjudication, in part because no other potential acquirer had offered terms as favorable as those offered by PPG, see FTC v. PPG Indus., Inc., 628 F. Supp. 881, 886 (D.D.C. 1986), and observed that the founder of Swedlow, the company to be acquired, would "like to receive full and fair value for his stock, and to know that others who have invested with him over the years will do likewise." Id. The Court of Appeals reversed, disregarding the interests of the shareholders entirely, noting that "the record reveals several firms . . . with varying degrees of interest in acquiring Swedlow," and holding that "[t]he district court's conclusion that PPG is the only firm willing to pay Swedlow's price may be questionable; under Weyerhaeuser it is, in any event, irrelevant." 798 F.2d at 1507.[20]

Indeed, sellers ordinarily want to sell to the highest bidder. So acquisitions challenged under Section 7 typically involve a proposed sale to the highest bidder. It is thus almost always the case that when a proposed acquisition is prohibited to protect competition, the seller is

[20]Ample case law confirms that private interests in this context are assigned little weight, if they are considered at all. See, e.g., Grumann Corp. v. LTV Corp., 665 F.2d 10, 15-16 (2d Cir. 1981) ("The Grumann shareholders are not entitled to a gain obtained from a sale that presents a substantial likelihood of violating § 7."); United States v. Ivaco, 704 F. Supp. 1409, 1430 (W.D. Mich. 1989) ("[P]rivate, financial harm must, however, yield to the public interest in maintaining effective competition."); United States v. Columbia Pictures Indus., Inc., 507 F. Supp. 412, 434 (S.D.N.Y. 1980) ("The public interest is not easily outweighed by private interests [and a]ny doubt concerning the necessity of safeguarding the public interest should be resolved by the granting of a preliminary injunction." (citations omitted)); United States v. Atlantic Richfield Co., 297 F. Supp. 1061, 1073-74 (S.D.N.Y. 1969) (potential substantial losses to stockholders "cannot be ignored" but "cannot outweigh the public interest in preventing this merger from taking effect pending trial [because] the public interest with which Congress was concerned in enacting Section 7 is paramount" (citations omitted)); United States v. Ingersoll-Rand Co., 218 F. Supp. 530, 543 (W.D. Pa. 1963) ("[T]he public interest in preserving a free-competitive economy cannot be outweighed by any private interest.").

required to forego the highest bid and to take less instead.[21] The Decree whose modification is at issue here was entered pursuant to a Section 7 action.

In this instance, in particular, the creditors cannot claim that they have any legally protectable right, or even expectation, to sell their assets to Nextel. The addition of Section IV.K. is but a continuation of the procompetitive restriction established in the original Decree. Contrary to Hughes's assertion that when Geotek acquired its licenses they "were valued based on their regulatory properties, which included free transferability and unrestricted use," Geotek and its creditors knew from the outset that the Decree would prohibit a sale of 900 MHz spectrum back to Nextel. Geotek acquired its licenses in 1996 largely through the divestitures ordered by the Decree, see Decree § IV.A., and in the FCC's Phase II spectrum auctions in 1996.[22] Nor is Geotek's inability to sell 900 MHz spectrum to Nextel an incidental or "unexpected" effect of the Decree, cf. Microsoft, 56 F.3d at 1459; rather, it is part and parcel of the Decree's principal restriction, which bars Nextel's acquisition of such spectrum. See Decree §

[21]Nor is there an exemption from the antitrust laws for the sale of assets of bankrupt firms. The "failing firm" doctrine recognizes that in some cases, a competitor's acquisition of a bankrupt firm may not lessen competition in violation of Section 7 of the Clayton Act. But a long line of cases makes clear that the doctrine comes into play only if, in addition to showing that the acquired firm is truly "failing," the potential acquirer is "the only available purchaser." Citizen Publ'g Co. v. United States, 394 U.S. 131, 137-38 (1969) (acquisition may proceed only if purchaser is "last straw at which the [acquired company] grasped"); see also United States v. General Dynamics Corp., 415 U.S. 486, 507 (1974); United States v. Third Nat'l Bank, 390 U.S. 171, 191 (1968); Dr. Pepper/Seven-Up Cos. v. FTC, 991 F.2d 859, 865 (D.C. Cir. 1993); Olin Corp. v. FTC, 986 F.2d 1295, 1306-07 (9th Cir. 1993).

[22]Likewise, Hughes's accusation that the United States is being inconsistent in that "[i]n 1995 . . . the Department did not allege that the Geotek licenses were in any way special or unique," does not make sense. As explained above, the "Geotek licenses," as such, did not exist until 1996. Nonetheless, as of the Decree's entry in 1995, Nextel could acquire only extremely limited amounts of 900 MHz spectrum in the decree cities. See Decree § IV.A.

IV.A. In sum, the creditors' argument that the Court should reject the proposed modification on account of their private financial interests is not only irrelevant as a matter of law, but disingenuous to the extent that Section IV.K. simply prevents their consummation of a transaction long-prohibited by the original Decree as anticompetitive.

Hughes's assertion that the bankruptcy court "determined that the market had spoken" when it approved the sale of Geotek's licenses to Nextel misstates that court's role. The bankruptcy court's mission is to protect and maximize the interests of creditors in accordance with the Bankruptcy Code, not to assess whether the highest sale price offered for assets in bankruptcy may reflect something other than their market value -- i.e., whether the bid may reflect an acquisition's likely anticompetitive effects. Thus, the bankruptcy court made its approval of Nextel's acquisition of Geotek's licenses contingent upon modification or termination of the Decree by an order of *this* Court in this *antitrust* proceeding.[23]

D. Entry Into New Management Agreements

Chadmoore points out that the proposed modification to Section IV.G. technically allows Nextel to enter into management agreements with Geotek's creditors regarding the 900 MHz

[23]Geotek also argues that the proposed modifications are "internally inconsistent" and contradict the United States's previous policy in that Nextel should either be allowed to acquire no 900 MHz spectrum or all of it. This is incorrect. The original Decree allows Nextel and Motorola to hold a limited amount of 900 MHz spectrum, see Decree § IV.A., in order to facilitate Nextel's deployment of its digital network and Motorola's experimentation with new technologies, and because such limited holdings would not interfere with the entry of new trunked dispatch providers at the 900 MHz band. See CIS at 13. The proposed modifications are suitably tailored to current competitive conditions. The United States's consent to the proposed modifications is not inconsistent with its prior positions, but simply reflects changes in the market for trunked dispatch services that have occurred, and that will occur in the relatively near future.

licenses that were previously owned by Nextel and Motorola as of August 4, 1994. Chadmoore alleges that Nextel and the creditors may enter into such agreements in order to "tie up" those licenses until the modified Decree terminates in October 2000.

Chadmoore is correct that the language of the proposed modification might be construed to permit Nextel to enter into agreements to manage those Geotek channels which had previously been owned or managed by Nextel. This possibility was not contemplated by the parties in the negotiation of the proposed modification, and would be inconsistent with the purpose of preventing Nextel from controlling those channels for the duration of the Decree, in order to ensure that those channels may be used by a new entrant. Accordingly, the United States and Nextel have agreed that the language of the proposed modification should be amended to make clear that Nextel will not be permitted either to acquire or to manage the Geotek channels for the duration of the term of the Consent Decree, as modified. Pursuant to this amendment, the following underlined language has been inserted into proposed Section IV.K. of the modified Decree: "For the term of this Final Judgment as modified, Nextel is enjoined and restrained from acquiring <u>or entering into management agreements for</u> any of the licenses identified in Attachment A."

E. Effects on Providers in the 220 MHz Band

Intek requests that the proposed modifications be conditioned so that Nextel could only use the additional 900 MHz spectrum it may acquire for expansion of its digital iDEN system, and that Nextel be prohibited from using those channels for the operation of analog dispatch systems. Intek claims that the operation of such systems by Nextel would harm or preclude the emergence

of significant trunked dispatch competition in the 220 MHz band. Intek also requests that Section VIII.C. of the Decree be modified so that the Decree would terminate on March 24, 2002, the three-year anniversary of the FCC's initial grant of the Phase II 220 MHz licenses, to prevent Nextel from using additional 900 MHz capacity to compete with trunked dispatch providers in the 220 MHz band.

Intek's comments reflect a misapprehension of the purpose for restricting Nextel's acquisition of 900 MHz licenses. The Decree restricts such acquisitions to ensure that firms other than Nextel will have the opportunity to acquire spectrum that they would need in order to offer dispatch services in competition with Nextel. Absent such restrictions, Nextel could prevent competitive entry by acquiring this scarce spectrum. The restrictions on Nextel's acquisition of 900 MHz spectrum are not intended to limit Nextel's ability to compete against firms providing dispatch services using other frequency bands, either by dictating the services that Nextel may offer or the technology to be used to provide those services. Including such restrictions, as Intek's proposal would do, would serve to protect individual *competitors*, but would be harmful to *competition* and the interests of consumers of dispatch services. See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) ("It is competition, not competitors, which the [Clayton] Act protects.").

It is quite possible that some of the 900 MHz spectrum Nextel may acquire pursuant to entry of the proposed modifications is now being used by analog dispatch providers. Both the customers of those services and Nextel will reasonably require a period of transition before the spectrum can be integrated into Nextel's digital iDEN network. Intek's proposal, if adopted, would seem to require Nextel to terminate immediately these analog service offerings if it acquires

such licenses -- a requirement that might produce additional sales for Intek or other 220 MHz competitors, but which would restrict the choices available to dispatch customers while increasing Nextel's costs. Such a result would harm rather than protect competition.

F. Process for Public Notice and Comment

Geotek argues that the procedures for public notice and comment stipulated to by the parties and ordered by the Court in this proceeding are fundamentally unfair because, it claims, the United States did not publicly share the factual bases for its agreement to the proposed modifications prior to the comment period. Chadmoore contends that the parties should have been required to follow all procedures required for entry of a proposed consent decree pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 ("Tunney Act"). Accordingly, Chadmoore claims that the United States should have been required to submit a competitive impact statement, see 15 U.S.C. § 16(b), or, to the extent that the competitive impact statement issued in 1994 contains information not in the United States's Response to Nextel's Motion to Modify, that it should have been republished in the Federal Register.[24] Chadmoore asserts that Nextel should have been required to file a statement of lobbying activities. See 15 U.S.C. § 16(g). Chadmoore argues that both parties have failed to submit information adequate for the Court to make an independent public interest determination.

As noted above, on June 14, 1999 the Court entered an order establishing the notice and comment procedures for this proceeding. Within days of that order the United States published a

[24]The competitive impact statement has been published together with the text of the Decree in a legal reporter and on Westlaw. See United States v. Motorola, Inc., et al., 1996-1 Trade Cas. (CCH) ¶ 71,402 at 77,020, 1995 WL 866794, at *6 (D.D.C. July 25, 1995).

notice in the Federal Register listing the papers filed with the Court in connection with the Motion to Modify Consent Decree, including the United States's "memorandum setting forth the reasons why it believes that modification of the Final Judgment would serve the public interest" -- i.e., the Response of the United States to Nextel's Motion to Modify. The notice, which was also published in The Wall Street Journal and Wireless Week, provided the address at which the papers filed pertaining to the proposed modification are available for public inspection, explained that copies of the papers can be obtained from the Antitrust Division upon payment of the photocopying fee established by Department of Justice regulations, and gave all persons notified 30 days to file comments with the Antitrust Division.

The Tunney Act applies only to the initial entry of consent decrees in government antitrust cases, and not to modifications of those decrees.[25] See 15 U.S.C. § 16(b) (addressing "[a]ny

[25]The only court to hold otherwise did so in a single sentence, without providing authority or analysis. See United States v. Motor Vehicle Mfrs. Ass'n, 1981-2 Trade Cas. (CCH) ¶ 64,370 at 74,704, 1981 WL 2519, at *1 (C.D. Cal. 1981).

In United States v. American Telephone & Telegraph Company, the court expressed skepticism that the Tunney Act did not apply to a proposed modification of a consent decree, but had no occasion to decide the issue given the parties' consent to application of those procedures. See 552 F. Supp. 131, 143-45 n.51 (D.D.C. 1982). Moreover, the court had explained that although the AT&T decree was technically a modification of a decree entered in 1956, the decree was, in essence, a proposal to settle the case then being tried before it and should therefore be reviewed as would entry of any new decree. See U.S. v. American Tel. & Tel. Co., 1982-1 Trade Cas. (CCH) ¶ 64,465, at 72,611, 1982 WL 1790, at *11 (D.D.C. 1982) ("The relief . . . has to do with this case, not a case closed 25 years ago which has nothing whatever to do with the operating companies which are being divested here under the proposal, but only with Western Electric. If this case was about the 1956 decree I wonder what we were doing here for 11 months. [This is] a consent decree in this case in which AT&T essentially agreed to the relief sought by the Government.") (statement of Greene, J.). In any event, the court subsequently modified the decree on numerous occasions without employing the precise procedures required by the Tunney Act.

proposal for a consent judgment submitted by the United States for entry" (emphases added))[26]; cf. United States v. American Cyanamid Co., 719 F.2d 558, 565 n.7 (2d Cir. 1983) ("by its terms, the Tunney Act is not applicable to a termination proceeding"); cf. also In re International Bus. Machs., 687 F.2d 591, 601 (2d Cir. 1982) (Tunney Act "by its express terms" does not apply to stipulation of dismissal). Of course, the Court has broad discretion to establish procedures for public notice and comment on proposed modifications, in order to aid its careful consideration of whether such modifications are in the public interest. Cf. American Cyanamid, 719 F.2d at 565 n.7 (advising that the Tunney Act "provides useful guidance to the courts in deciding how modification procedures should be addressed."). Similarly, as a matter of longstanding policy, the United States has adopted procedures substantially like those set forth in the Tunney Act in order to ensure adequate public notice of proposed modifications, and to provide ample opportunity for interested parties to comment on such proposed modifications that are likely to have significant effects on competition and the public.[27] See U.S. Dep't of Justice, Antitrust Division Manual at

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[26]The Tunney Act's only references to modification relate to modification of the proposal, see 15 U.S.C. § 16(b)(5), and provisions for modification of the decree once it is entered, which must be set forth in the competitive impact statement, see id. § 16(e)(1). This indicates that if Congress had wanted the statute to cover modification proceedings it would have included such standards in the provisions that outline the public interest obligations of the court. Cf. 15 U.S.C. § 16(e), (f). Congress has considered, but chose not to enact, legislation to amend the Tunney Act "to improve the procedures for consensually resolving civil antitrust actions brought by the United States." H.R. 6361, 97th Cong. at 1 (1982) (proposed amendment to section 16(b) to include "any proposed stipulation submitted by the United States to terminate any civil action, or to modify any stipulation, order, or judgment entered to terminate any civil action . . ." (emphasis added)); see also The Tunney Act: Oversight Hearing on H.R. 6361 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong. (May 13, 1982) (Serial No. 66).

[27]The United States does not believe, however, that rigid adherence to all of the Tunney Act requirements in all decree modification proceedings would be in the public interest. In contrast to the initial entry of a consent decree, decree modifications occasionally are required in

III-151 - III-155 (rev. ed. 1998). Such procedures were employed here, consistent with the Court's order.

Geotek and Chadmoore have failed to show that those procedures have prejudiced in any way their ability to comment on the proposed modification, or the Court's ability to reach an informed decision on whether the modification is in the public interest. Chadmoore claims that the United States has failed to explain how the proposed modification could be in the public interest because, it claims, neither party has substantiated Nextel's capacity constraints with evidence. Geotek complains that the United States has failed to share with it "expert reports and many other Nextel and Motorola" documents, although it does recognize the existence of a protective order entered by the Court, which requires confidential treatment of such materials.[28]

Contrary to those complaints, the United States has explained the reasons for its conclusion that the proposed modification is in the public interest, and the evidence that underlies that conclusion. Chadmoore's and Geotek's suggestions that a more detailed and extensive presentation of evidence should be required is inappropriate for two reasons.[29] First, such a

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exigent circumstances, and sometimes involve technical modifications that have no significant competitive effects. In such cases, the court may properly make its public interest determination without imposing the cost and delay entailed by a strict application of the precise waiting period and publication requirements set forth in the Tunney Act.

[28]Geotek claims that its position is supported by United States v. Western Electric Company, 969 F.2d 1231, 1236-41 (D.C. Cir. 1992), which asserts "that a Government statement of public interest support of a decree modification, standing alone, is not a sufficient reason for the court to grant the modification." The Western Elec. court reviewed a contested modification of a consent decree which itself provided for an alternative standard for review of modifications contested by a party to that decree. Id. It is therefore inapposite to this proceeding.

[29]Disclosure of such evidence is not required by the Tunney Act in any event. See 15 U.S.C. § 16(b), (c), (f); see also United States v. The Thomson Corp., 949 F. Supp. 907, 915 n.7 (D.D.C. 1997) (denying request for government's disclosure of investigative documents during

requirement would vitiate the important benefits that both the United States and Nextel sought by settling their differences, rather than continuing litigation through an evidentiary hearing. Public interest proceedings should not be conducted in a manner that effectively requires the parties to continue to litigate, thereby undermining the incentives of parties to reach settlements. See United States v. Airline Tariff Publ'g Co., 836 F. Supp. 9, 11 n.2 (D.D.C. 1993) (denying request for evidentiary hearing on public interest issue, and citing legislative history for the proposition that Congress did not intend that public interest proceedings be conducted in such a manner as to undermine the consent decree as a viable settlement option). Second, the specific evidence that Chadmoore and Geotek demand is largely contained in business plans and other documents that Nextel, as well as numerous third parties, have produced pursuant to statutory and judicial guarantees of confidentiality. Disclosure of this evidence would not only violate the terms of protective orders entered in this case, but would also compromise the United States's ability to obtain such important evidence in future proceedings.

G. Expansion of Inquiry and Decree Restrictions to Nextel's 900 MHz Holdings in Non-Decree Cities

RCS argues that Nextel has significantly expanded its 800 MHz and 900 MHz holdings in markets other than the Category A and B Cities subject to the Decree and that the United States should therefore expand the scope of its inquiry to investigate whether Nextel's acquisition of the Geotek licenses in such "secondary" markets for trunked dispatch services would cause undue

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Tunney Act proceedings because "there is . . . nothing in the statute or the case law that requires [it]"; noting "since the enactment of the Tunney Act no Court has required the United States to disclose its investigatory files as a condition for approving a decree").

concentration. RCS claims to have submitted the highest individual bids for the licenses held by Geotek for 900 MHz spectrum in Louisville and Lexington, Kentucky. RCS asserts that Herfindahl-Hirschman Index ("HHI") studies of those two markets demonstrate high concentration and that RCS's ability to provide consumers with a competitive dispatch alternative will therefore be thwarted if Nextel, who submitted the highest bulk bid for the Geotek licenses, is allowed to acquire the non-decree city licenses.

The concerns expressed by RCS are irrelevant to this proceeding. RCS is contending, in essence, that the United States should seek to block Nextel's prospective acquisition of licenses in markets which were not the subject of the underlying antitrust complaint in this case or of the original consent decree. The United States has concluded that it should not file a new case to prevent these acquisitions because they would not violate Section 7 of the Clayton Act. That decision is not subject to review in this proceeding. The public interest inquiry here is limited to questions concerning remedies for the violations alleged in the underlying complaint. That inquiry may not be extended to consideration of cases that the government might have, but did not, pursue. See, e.g., Microsoft, 56 F.3d at 1459 (the court's public interest inquiry is limited to those issues "formulated in the complaint").

H. Alleged Decree Violations

ARC and Mobex claim that the Court should refuse to enter the proposed modification because Nextel has violated the Decree and therefore has "unclean hands." ARC claims that Nextel has violated the Decree by never having divested itself of 900 MHz licenses as required by

the Decree.[30] ARC and Mobex contend that Nextel is in violation of the Decree by virtue of its 900 MHz holdings which (together with the licenses held by Motorola) are in excess of the Decree's limits. Mobex asks the Court to hold Nextel in civil contempt,[31] to modify the Decree to "restart" its ten-year term (thereby terminating it, presumably, sometime in the autumn of 2009), and to require Nextel to divest its current 900 MHz holdings in the decree cities.[32]

These allegations reflect a misunderstanding of the scope of the current Decree restrictions limiting Nextel's 900 MHz holdings. When the Decree was filed, SMR spectrum was licensed on a Designated Filing Area ("DFA") basis, under which a licensee was authorized to broadcast at a

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[30]ARC also asserts that Nextel holds numerous 900 MHz licenses in markets nationwide which it has not constructed. Such conduct would not constitute a violation of the Decree. Also outside the scope of this proceeding are the issues raised in SBT's comments, none of which address the proposed modification of the Decree. SBT's comments reiterate its past allegations that Nextel has violated FCC regulations, and its past objections to FCC policies and actions which it claims have assisted Nextel to the detriment of its dispatch competitors.

[31]Private parties generally have no right of action for a defendant's violation of a decree entered in a government case. See, e.g., Rafferty v. NYNEX Corp., 60 F.3d 844, 849 (D.C. Cir. 1995) ("Unless a government consent decree stipulates that it may be enforced by a third[-]party beneficiary, only the parties to the decree can seek enforcement of it.").

[32]Mobex also alleges that Nextel has employed an "illegal tie-in" strategy of dominating the market for dispatch and then forcing its customers to buy a bundled package of dispatch, cellular telephone, and paging service or nothing at all. The antitrust laws prohibit tying arrangements in some circumstances because of concerns that market power in the "tying" product (which is dispatch, according to Mobex) may be used to harm competition for "tied" products (in this instance, cellular, paging, and other services). But nothing in Mobex's allegations, even if they are assumed to be true, suggests that competition in the markets for these "tied" products has been harmed. Rather, Mobex's allegations suggest only that the "tie-in" is a means through which Nextel exercises market power against customers of dispatch services. The United States agrees that Nextel currently has market power in dispatch markets, which is the reason it has opposed immediate termination of the Decree. But Mobex's confused allegations of illegal tying add nothing to that analysis and are irrelevant if, as the United States has concluded, entry by cellular, PCS, and 220 MHz providers will dissipate Nextel's current market power in the relevant markets for trunked dispatch services in the relatively near future.

specific frequency, from a specific location, at a specific power level. DFA licenses were allocated in a manner designed to ensure that a particular license could be used without interfering with other DFA licenses that authorized use of the same frequencies in adjacent geographic areas. The transmissions authorized by DFA licenses typically can be received within a 35-mile radius of the authorized transmission site, although this generalization is subject to many exceptions because of variations in local topography. Thus, to prevent interference, transmission sites for any other DFA licenses using the same channels must be located at least 70 miles from any incumbent DFA transmission sites. Since the demand for SMR services (and SMR spectrum shortages) typically would be most intense in urban areas, a large majority of DFA licenses authorize transmission from a point within 25 miles of the geographic center of a metropolitan area, although in some cases DFA licenses authorize transmissions from outside that "core."

The language of the Consent Decree reflected an attempt to define with precision those channels which would and would not count against the limits on Nextel's 900 MHz holdings. Because of the difficulties in determining precisely the geographic area that could be served with a particular DFA license, any attempt to define channel limits in terms of coverage area would have been subject to considerable ambiguity and dispute. Therefore, in defining the limits on Nextel's holdings of 900 MHz spectrum, the Decree specified whether a channel would count against those limits based on the location from which transmissions were authorized, as of September 1, 1994, under the DFA license. See Decree § II.G. Channels transmitting from points within a 25-mile radius of the geographic centers of the decree cities counted against the Decree's limits, see id. (referring to center coordinates as defined in the Code of Federal Regulations), but channels transmitting from points outside that circle did not count against the Decree's limits on Nextel's

900 MHz holdings, even if Nextel's transmissions from that site could provide service to the city's core.

After the entry of the Decree, the FCC issued additional 900 MHz SMR licenses, but did so according to a licensing scheme that differed from the DFA license arrangements. The new licenses essentially authorized the licensee to use particular channels throughout an entire Major Trading Area ("MTA") -- an area much larger than any single city -- but did not specify the precise location or power level at which the licensee was required to broadcast. MTA licensees, however, are required to operate in a manner that does not interfere with the transmissions of a DFA licensee previously authorized to use the same channels. Thus, in cases where Nextel already owned a DFA license for a channel, a firm that acquired an MTA license for that channel could not use it to provide service in the area already served by Nextel with its DFA license.

In alleging that Nextel has violated the Decree, ARC and Mobex assume that certain Nextel MTA licenses would count against the Decree's limits. However, as the United States understands the Decree restrictions, that is not the case. More specifically, in some cases, Nextel owned (consistent with the Decree's limits) a DFA license for particular channels authorizing transmission from a site within the 25-mile core of a decree city, and subsequently acquired an MTA license for the same channels. In these cases, Nextel's DFA license would count against the Decree's limits, but its MTA license would not be counted in addition to the DFA license. In other cases, Nextel owned (consistent with the Decree's limits) a DFA license authorizing transmission from a site outside the 25-mile core, but with which it provided service to the core, and subsequently acquired an MTA license for the same channels. In these cases, Nextel's DFA license is not counted against the Decree's limits (since it is located outside of the 25-mile core)

and its MTA license similarly is not counted. If a competitor (rather than Nextel) had acquired the co-channel MTA license, the competitor would have been required to operate from those channels so as not to interfere with Nextel's preexisting (and Decree-compliant) DFA license, which was being used to provide SMR service within a decree city. Conversely, if Nextel (rather than a competitor) acquired the co-channel MTA license, that acquisition did not have the effect of excluding a competitor from providing SMR service within the area served by Nextel's DFA license, because the MTA license would not permit another licensee to interfere with Nextel's use of its co-channel DFA license in any event.

In other cases, a Nextel competitor owned a DFA license within the core, and Nextel subsequently acquired an MTA license for the same channels. As explained above, however, Nextel's MTA license would not permit it to use those channels within the area served by the competitor's DFA license, and thus Nextel's acquisition of such a license would not prevent a competitor's use of the relevant channels within the core. In this situation, also, the United States does not understand Nextel's MTA license to count against the Decree's limits.

The allegations of Consent Decree violations made by ARC and Mobex are premised on an assumption that MTA licenses acquired by Nextel in the circumstances described above would count toward the Decree's limits on Nextel's 900 MHz holdings. Since that assumption is incorrect, the United States has concluded that there is no basis for initiating civil or criminal contempt proceedings against Nextel, and that the allegations do not support the conclusion that the proposed modification of the Decree would be contrary to the public interest.

IV.

CONCLUSION

After careful consideration of the comments received relating to the proposed Modified Consent Decree and for the reasons stated herein and in the Response to Nextel's Motion to Modify, the United States continues to believe that the proposed modified Consent Decree is adequate to address the competitive concerns that remain in the market for trunked dispatch services. Therefore, the proposed modified Consent Decree should be found to be in the public interest and should be entered.

Respectfully submitted,

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