

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SBC COMMUNICATIONS, INC.

and

BELLSOUTH CORPORATION,

Defendants.

Civil Action No. 00-2073 (PLF)

FILED

OCT 13 2004

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION AND ORDER

I. BACKGROUND

This case originally arose from a proposal by defendants SBC Communications, Inc. ("SBC") and Bellsouth Corporation ("Bellsouth") to form a joint telecommunications venture that would ultimately become Cingular Wireless LLC ("Cingular"). On August 30, 2000, plaintiff commenced an antitrust action in this Court, based on concerns that the proposed transaction would result in undue concentration of market share in markets for wireless telephone service in California, Indiana, and Louisiana, and would substantially lessen competition there. A Final Judgment entered by this Court on December 29, 2000, with the consent of the parties, required defendants to make divestitures of certain spectrum licenses and other assets in those markets before the transaction could be consummated. It also bars defendants from reacquiring any of the divested spectrum licenses until December 29, 2010.

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Some of the spectrum licenses divested in California and Louisiana were subsequently purchased by AT&T Wireless, a company that Cingular agreed to acquire on February 17, 2004. As the Final Judgment's bar to Cingular's ownership of the divested licenses would interfere with the proposed acquisition, the parties jointly moved on August 11, 2004, for modification of the Final Judgment of December 29, 2000, to allow Cingular to reacquire the licenses that had been purchased by AT&T Wireless.

On August 12, 2004, the Court issued an order establishing procedures for modification of the Final Judgment. Pursuant to that order, Bellsouth and SBC would at their own expense publish notice of the proposed modification in three newspapers, and the government would publish a notice in the Federal Register. A 30-day notice and comment period would follow, after which plaintiff would file any comments received and its responses with the Court. See Order to Establish Procedures For Motion to Modify Final Judgment.

This procedure having been followed, and plaintiff having affirmed its assent to modification of the Final Judgment, the Court now considers the parties' Joint Motion to Enter an Order Modifying Final Judgment.

II. ANALYSIS

1. Public Interest Determination

Under the Tunney Act, the Court must make an independent determination of whether a consent decree, judgment, or modification thereof is in the public interest. See 15 U.S.C. §§ 16(b)-(h); United States v. Western Electric Co., 993 F.2d 1572, 1576 (D.C. Cir. 1993). Under the "public interest test" as applied in the D.C. Circuit, the Court is to

approve uncontested modifications if the resultant arrangement is “within the *zone of settlements* consonant with the public interest *today*.” Id. (quoting United States v. Western Electric Co., 900 F.2d 283, 307 (D.C. Cir. 1990) (emphasis in original)).

The Court’s public interest review, however, does not extend beyond the concerns raised in the original complaint:

[T]he court is to compare the complaint filed by the government with the proposed consent decree and determine whether the remedies negotiated between the parties and proposed by the Justice Department clearly and effectively address the anticompetitive harms initially identified. In other words, the court “may not reach beyond the complaint to evaluate claims that the government did *not* make.”

United States v. The Thomson Corp., 949 F.Supp. 907, 913-14 (D.D.C. 1996) (quoting United States v. Microsoft Corp., 56 F.3d 1448, 1459 (D.C. Cir. 1995) (emphasis in original)). Here, the original complaint focused on the increased concentration of market share in the affected markets (and a resulting rise in prices and decrease in service quality) if the Cingular joint venture were allowed to proceed. Complaint ¶¶ 17-22. It was these concerns that motivated the divestiture requirements embodied in the original Final Judgment.

2. *Public Comment on the Proposed Modification*

Specific objections from third parties, and the degree to which the consenting parties address them in their motion for modification, are an important factor to be considered in making the public interest determination. See United States v. The Thomson Corp., 949 F.Supp. at 914.

Only one member of the public responded during the 30-day notice and comment period. Mr. Dennis Moore, a former employee of Cingular Wireless, submitted a

two page letter with attachments. See Response of Plaintiff United States to Public Comment on the Proposed Modified Final Judgment, Ex. 1. Mr. Moore's submission, however, does not concern the impact on competition of any modification of the Final Judgment and does not deal with the antitrust concerns at issue in this case at all. Rather, it consists of a copy of a letter sent by Mr. Moore to the Chairman of the Federal Communications Commission on March 17, 2004 (several months before the notice and comment period on the proposed modification commenced), discussing Mr. Moore's personal allegations of employment discrimination by Cingular. The 42-pages of attachments to Mr. Moore's letter consist only of news articles about the proposed acquisition of AT&T Wireless by Cingular and documents related to an employment discrimination lawsuit filed by Mr. Moore against Cingular in the United States District Court for the Northern District of Illinois.

The matters raised by Mr. Moore's comments are unrelated to the anticompetitive concerns of the original antitrust complaint and are consequently outside the scope of this proceeding. See United States v. The Thomson Corp., 949 F.Supp. at 913-14. The results of the notice and comment period therefore give the Court no reason to deny modification of the Final Judgment if the modification is otherwise in the public interest.

3. The Government's Public Interest Finding

In the Joint Motion to Modify Final Judgment, the government explains its reasons for consenting to the modification. Under the original Final Judgment, divestitures were required to assuage concerns that the Cingular joint venture would result in undue concentration in wireless markets in Indiana, Louisiana, and California. See Memorandum of

the United States in Support of Joint Motions to Modify Final Judgment and to Establish Procedures to Modify Final Judgment at 2. Since the entry of the Final Judgment, however, the competitive conditions for wireless mobile telephone services in the Los Angeles and Indianapolis markets have changed. More wireless carriers have begun operation in the Indiana and California markets, and defendants' market share in those markets has fallen by at least 5 to 10 percent. See id. at 8-9. According to the government, after the Cingular/AT&T Wireless acquisition, the combined firm would have at least 20% less market share in the Los Angeles area than defendants had at the time of the entry of the Final Judgment, and would face competition from four other facilities-based competitors who continue to increase their number of subscribers. See id. at 9-10. AT&T Wireless has also agreed to take measures to reduce the concentration of market share in Indiana should the requested modification be allowed. See id. at 10-11. Consequently, the government maintains, "the original Final Judgment's bar on reacquisition of the divested spectrum licenses in California and Indiana is no longer necessary to ensure the competitive operation of the marketplace." Id. at 11-12.

III. CONCLUSION

To approve the modification, the Court must determine whether the proposed modification is within the "zone of settlements consonant with the public interest." United States v. Western Electric Co., 993 F.2d at 1576. The procedure set out in this Court's Order of August 12, 2004, has been followed. The government's factual proffer concerning changes in the relevant markets and its public interest analysis are persuasive. It has adequately responded to the lone public comment filed in the notice and comment period – a

comment unrelated to anticompetitive concerns. Furthermore, nothing in the history of the case or the parties' filings gives the Court any reason to question the government's finding that the proposed modification is in the public interest.

The Court therefore finds that the proposed modification of the existing Final Judgment is in the public interest. Accordingly, it is hereby

ORDERED that plaintiff's Motion to Enter Order Modifying Final Judgment [21] is hereby GRANTED; and it is hereby

ORDERED that the parties' Joint Motion to Modify Final Judgment [14] is DENIED as moot.

An Order to Modify Final Judgment and a Modified Final Judgment consistent with this Memorandum Opinion shall issue this same day.

SO ORDERED.



PAUL L. FRIEDMAN
United States District Judge

DATE: 10/13/04