UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. SBC COMMUNICATIONS INC. and BELLSOUTH CORPORATION, Defendants.	Civil No.: 1:00CV02073 (PLF)

MEMORANDUM OF THE UNITED STATES IN SUPPORT OF
JOINT MOTIONS TO MODIFY FINAL JUDGMENT AND
TO ESTABLISH PROCEDURES TO MODIFY FINAL JUDGMENT

Defendants, SBC Communications Inc. and BellSouth Corporation, and plaintiff, United States, have jointly moved to modify the Final Judgment entered by this Court on December 29, 2000 and establish procedures for the modification. The United States has tentatively consented to the modification of the Final Judgment to allow defendants to reacquire divested spectrum licenses in California and Indiana if certain conditions are met, subject to public notice and an opportunity for public comment because of changes in competitive conditions in the affected geographic areas. Modification of the Final Judgment therefore is in the public interest.

I.

THE COMPLAINT AND FINAL JUDGMENT

On August 30, 2000, the United States filed a civil complaint against defendants SBC Communications Inc. ("SBC") and BellSouth Corporation ("BellSouth"), charging that the

formation of Cingular Wireless LLC ("Cingular"), the companies' proposed wireless telecommunications joint venture, would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, by substantially lessening competition in wireless mobile telephone service in certain overlapping wireless markets in California, Indiana, and Louisiana. At the same time, the United States filed a proposed Final Judgment, which was entered by the Court with the consent of the United States and the defendants on December 29, 2000.

According to the Complaint, SBC and BellSouth were among each other's most significant competitors in the overlapping wireless markets in California, Indiana, and Louisiana. Cingular would have controlled defendants' combined cellular and PCS (personal communications services) businesses in the "PCS/Cellular Overlap areas" (i.e., Indiana and California) implicated by the proposed modification filed with the Court today. The Complaint asserted that the transaction would have resulted in a firm with a combined share of between 45% and 65% of the market in each of the PCS/Cellular Overlap areas, further concentrating markets that were already concentrated by effectively reducing the small number of competitors in those areas by one, thus substantially reducing competition to the detriment of consumers.

The Final Judgment required SBC and BellSouth to divest mobile wireless telephony businesses – spectrum licenses along with the related businesses and network assets – in the Los Angeles Metropolitan Statistical Area ("MSA"), the Indianapolis Major Trading Area ("MTA"), and multiple Cellular Marketing Areas ("CMAs") in Louisiana. AT&T Corp., the predecessor to AT&T Wireless Services Inc. ("AT&T Wireless"), purchased the divested licenses in the Los Angeles MSA and the Indianapolis MTA. Under Section XI of the Final Judgment, the parties

are barred from reacquiring any divested spectrum licenses for the term of the Final Judgment, which expires December 29, 2010.

On February 17, 2004, Cingular Wireless LLC, the joint venture whose formation by defendants in 2000 led to the original Final Judgment, agreed to acquire AT&T Wireless. Consummating the Cingular/AT&T Wireless acquisition, which is currently subject to review by both the Department of Justice and the Federal Communications Commission ("FCC"), would result in Cingular reacquiring the spectrum licenses in California and Indiana divested pursuant to the Final Judgment in violation of Section XI of the Final Judgment.

II.

LEGAL STANDARDS APPLICABLE TO THE MODIFICATION OF AN ANTITRUST DECREE WITH THE CONSENT OF THE UNITED STATES

This Court has jurisdiction to modify or terminate the Final Judgment pursuant to Section XII of the Judgment, Fed. R. Civ. P. 60(b)(5), and "principles inherent in the jurisdiction of the chancery." United States v. Swift & Co., 286 U.S. 106, 114 (1932); see also In re Grand Jury Proceedings, 827 F.2d 868, 873 (2d Cir. 1987).

Where, as here, the United States tentatively has consented to a proposed modification of a judgment, the issue before the Court is whether modification is in the public interest. See, e.g., United States v. Western Elec. Co., 993 F.2d 1572, 1576 (D.C. Cir. 1993) ("Western Elec. II"); United States v. Western Elec. Co., 900 F.2d 283, 305 (D.C. Cir. 1990) ("Western Elec. I"); United States v. Loew's, Inc., 783 F. Supp. 211, 213 (S.D.N.Y. 1992); United States v. Columbia Artists Management, Inc., 662 F. Supp. 865, 869-70 (S.D.N.Y. 1987) (citing United States v. Swift & Co., 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,702-03, 65,706 (N.D. Ill. 1975)).

A federal district court applies the same public interest standard in reviewing an initial consent judgment in a government antitrust case. See 15 U.S. C. § 16(e); Western Elec. I, 900 F.2d at 295; United States v. American Telephone & Telegraph Co., 552 F. Supp. 131, 147 n.67 (D.D.C. 1982), aff'd sub nom., Maryland v. United States, 406 U.S. 1001 (1983); United States v. Radio Corp. of Am., 46 F. Supp. 654, 656 (D. Del. 1942).

It has long been recognized that the United States has broad discretion in settling antitrust litigation on terms that will best serve the public interest in competition. See Sam Fox Publ'g Co. v. United States, 366 U.S. 683, 689 (1961). The Court's role in determining whether the initial entry of a consent decree is in the public interest, absent a showing of abuse of discretion or a failure to discharge its duty on the part of the United States, is to determine whether the United States's explanation is reasoned, and not to substitute its own opinion. See United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508 at 71,980 (W.D. Mo. 1977); see also United States v. Microsoft Corp., 56 F.3d 1448, 1461-62 (D.C. Cir. 1995); United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981) (citing United States v. National Broad. Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978)); United States v. Medical Mutual of Ohio, 1999-1 Trade Cas. ¶ 72,465 at 84,271 (N.D. Ohio 1999). The United States may reach any of a range of settlements that are consistent with the public interest. See, e.g., Microsoft, 56 F.3d at 1461; Western Elec. I, 900 F.2d at 307-09; Bechtel, 648 F.2d at 665-66; United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975). The Court's role is to conduct a limited review to "insur[e] that the government has not breached its duty to the public in consenting to the decree," through malfeasance or by acting irrationally. Bechtel, 648 F.2d at 666; see also Microsoft, 56 F.3d at 1461 (examining whether "the remedies [obtained in the Final Judgment] were not so

inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'"). Where the United States has offered a reasoned and reasonable explanation of why the modification vindicates the public interest in free and unfettered competition, and there is no showing of abuse of discretion or corruption affecting the United States's recommendation, the Court should accept the United States's conclusion concerning the appropriateness of the modification.

III.

MODIFICATION OF THE FINAL JUDGMENT AND REASONS THE UNITED STATES TENTATIVELY CONSENTS TO MODIFICATION OF THE FINAL JUDGMENT

A. The Modification

The United States has tentatively agreed with defendants SBC and BellSouth to modify the Final Judgment to allow defendants to reacquire the divested spectrum licenses in California and Indiana. To implement this, Sections XI and XIII should be modified to read as follows:

XI

No Reacquisition

> A. Defendants may not reacquire any part of the spectrum licenses issued by the Federal Communications Commission ("FCC") and all other licenses, permits and authorizations divested pursuant to this Final Judgment in the MSAs and RSAs listed in Section II.D.I and the following BTAs within the Indianapolis MTA listed in Section II.D.II.B: BTA 015 Anderson, IN; BTA 039 Muncie, IN; BTA 373 Richmond, IN; BTA 442 Terre Haute, IN; and BTA 457 Vincennes-Washington, IN ("Restricted BTAs"), provided, however, the divested spectrum licenses in the Restricted BTAs may be reacquired in connection with the proposed Cingular/AT&T Wireless Acquisition if the conditions in Subsection B are met.
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> B. Defendants may reacquire the divested spectrum in the Restricted BTAs if they do not also acquire as a result of the Cingular/AT&T Wireless

Acquisition any interest (equity, financial, or otherwise) in, any ability to exercise control over, or any right to use the spectrum covered by the Partnership Licenses in any of the Restricted BTAs, except as noted below. In furtherance of this, defendants shall:

1. Provide to plaintiff for its approval, in its sole discretion, copies of all agreements entered into by the defendants or AT&T Wireless with the owners of the Partnership Licenses, including amendments to the existing agreements between AT&T Wireless and Von Donop, so that plaintiff will have the opportunity to review them before this Final Judgment is modified. No term shall be included in said agreements or amendments that would in any way limit Von Donop's ability to make the spectrum covered by the Partnership Licenses available to other users. The agreements may be contingent on the closing of the Cingular/AT&T Wireless Acquisition;

2. Not acquire, directly or indirectly, any rights to influence or control how the Partnership Licenses are used, sold or leased, nor shall defendants and AT&T Wireless have any control over the identity of any purchasers or lessees, or the price or any other terms and conditions of sale or lease;

3. Be prohibited from acquiring any managerial, administrative, financial or legal interest in the Partnership Licenses or entering into any arrangement that allows them to use the Partnership Licenses; and

4. Notify plaintiff 30 days before the implementation of any changes in the relationship between defendants or AT&T Wireless and Von Donop.

The defendants may retain a limited interest in the proceeds of any sale or lease of the Partnership Licenses, provided that (1) such interest influences neither whether the Partnership Licenses are sold or leased nor the terms on which they are offered and (2) such interest is capped at the total amount of debt incurred by Von Donop in acquiring the Partnership Licenses and any tax consequences to Von Donop from the agreements referenced in Subsection B.1.

Any breach of these conditions by defendants, while defendants own, operate, or control any of the reacquired licenses in the Restricted BTAs shall violate this Final Judgment.

C. For purposes of Section XI, the following definitions will apply:

1. "AT&T Wireless" means AT&T Wireless Services Inc., its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents and employees.

2. "Cingular/AT&T Wireless Acquisition" means the proposed acquisition of AT&T Wireless by SBC/BellSouth Wireless Joint Venture encompassed in The Agreement and Plan of Merger dated February 17, 2004.

3. "Partnership Licenses" means the following spectrum licenses issued by the FCC:

Call Sign	Market	Channel Block	MHz	Frequencies
WPOK609	BTA015-Anderson, IN	C	30	1895.00-1910.00 1975.00-1990.00
WPOK648	BTA309-Muncie, IN	C	30	1895.00-1910.00 1975.00-1990.00
WPOK655	BTA373-Richmond, IN	C	30	1895.00-1910.00 1975.00-1990.00
KNLF314	BTA442- Terre Haute, IN	C1	15	1902.50-1910.00 1982.50-1990.00
KNLF305	BTA457-Vincennes-Washington, IN	C1	15	1902.50-1910.00 1982.50-1990.00

4. "Von Donop" means Von Donop Inlet PCS, LLC, its owners, partners, successors, and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents and employees, including but not limited to its successors or assigns related to the Partnership Licenses.

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XIII

Expiration of Modified Final Judgment

Unless this Court grants an extension, this Modified Final Judgment shall expire on the tenth anniversary of the entry of the original Final Judgment, December 29, 2000.

B. Reasons for the United States's Tentative Consent

Since the entry of the Final Judgment, the competitive conditions for wireless mobile telephone services in the Los Angeles MSA and the Indianapolis MTA have changed.[1] In general, there are more wireless carriers today offering wireless telephony services in these areas, and the newer providers using PCS spectrum that had just begun to operate at the time the Final Judgment was entered have been successful at attracting significant numbers of new customers. In all areas affected by this modification, the percentage of customers served by the defendants has decreased, falling at least 5 if not 10 percentage points, and in none of the affected areas will the firm resulting from the Cingular/AT&T Wireless acquisition have a market share approaching the market shares the combined SBC and BellSouth businesses would have had in 2000 without the divestitures required by the Final Judgment. Thus, the modification is appropriate at this time.

In considering whether the prohibition on reacquiring the divested spectrum licenses in California and Indiana is still necessary to protect competition, the United States considered several factors in determining on a case-by-case basis whether to agree to the modification in a particular area. These factors included whether entry has occurred since the Final Judgment was

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[1] The following factual statements are based upon public information and competitively sensitive information received in response to compulsory process from several entities and from the Federal Communications Commission.

entered, the number and relative strength of competitors offering wireless mobile telephony services, the availability of additional spectrum to other wireless carriers to allow them to offer high quality voice services and introduce advanced data services, and the competitive effect of allowing the spectrum licenses to be reacquired in the context of Cingular's proposed acquisition of AT&T Wireless.

The Complaint alleged local geographic markets defined by the overlaps between the licensing areas of defendants. In analyzing whether to consent to the modification, plaintiff followed an approach similar to that followed in the Complaint and looked at the smallest practical geographic markets as defined by the areas covered by the divested licenses. In California, plaintiff evaluated the Los Angeles MSA, and in Indiana, plaintiff examined each of the BTAs ("Basic Trading Areas") that make up the Indianapolis MTA. In order to allow the Court to review the matter in a timely manner and to allow for public comment without delaying the proposed Cingular/AT&T Wireless acquisition (which covers many other geographic areas), the United States is expediting this modification request by using a conservative approach that is most likely to protect consumers. If the reacquisition caused little or no competitive harm at the MSA or BTA level, it is unlikely to cause harm if competition instead occurs in a broader geographic market. The United States may conclude at the end of its review of Cingular's proposed acquisition of AT&T Wireless that alternative geographic areas are the appropriate relevant markets to use in analyzing the competitive effects of the acquisition.

Entry has occurred in the Los Angeles MSA since the Final Judgment was entered by Court, and today all six of the nation's largest wireless carriers provide service in the area. After the Cingular/AT&T Wireless acquisition, the combined firm would have at least 20% less market

share than defendants had at the time of the entry of the Final Judgment, and will face competition from four other facilities-based competitors who continue to increase their number of subscribers. In addition, Cingular has entered into agreements with T-Mobile to unwind their joint venture, which will preserve T-Mobile as a viable and independent competitor in Los Angeles.[2] Thus, the Final Judgment's bar on reacquiring the spectrum license in the Los Angeles MSA is no longer necessary to preserve competition.

Entry that was only beginning in the Indianapolis MTA when the Final Judgment was entered by the Court in 2000 has since flourished throughout the majority of the MTA, at least along interstate highways and in the more populous areas of the rural BTAs. In several BTAs, the FCC is auctioning off unassigned spectrum licenses early next year. Recently, a portion of the divested spectrum in several BTAs has been sold by AT&T Wireless or is under an option to purchase by another wireless carrier. Each BTA currently has at least five different facilities-based wireless carriers offering service within the BTA. After the Cingular/AT&T Wireless acquisition, the combined firm would have at least a 20% lower market share than defendants at the time of the entry of the Final Judgment, and in some BTAs the decline in market share appears to be even greater.

In addition to the above changes in the competitive conditions in the Indianapolis MTA, defendants have agreed to eliminate an existing relationship in five BTAs with Von Donop Inlet

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[2] See T-Mobile USA, Inc., Press Release, T-Mobile USA to End Network Venture with Cingular and Acquire California/Nevada Network and Spectrum--Acquisition Positions T-Mobile USA for Strong Growth (May 25, 2004).

PCS, LLC ("Von Donop") that currently enables AT&T Wireless to effectively control the spectrum licensed to Von Donop, which owns spectrum licenses in several BTAs within the Indianapolis MTA and in other areas. This aggregation of spectrum in those five BTAs raised concerns about the abilities of other carriers to improve the quality of existing services and introduce advanced data or other services. To resolve these concerns, defendants and AT&T Wireless will relinquish all control and influence over the use or disposition of the Von Donop licenses in these BTAs, contingent upon the closing of the Cingular/AT&T Wireless acquisition, lessening the amount of spectrum controlled by the merged firm. AT&T Wireless will retain a limited interest in the proceeds from the licenses to reimburse its costs related to those licenses. The plaintiff will review and approve in its sole discretion any agreements entered into in relation to the Von Donop spectrum to ensure that no control or influence beyond the limited interest in the proceeds will be exerted by defendants in the event that the divested spectrum licenses are reacquired. Based upon the agreement to relinquish control over the Von Donop's licenses in five BTAs and other factors discussed above, the Final Judgment's bar on reacquiring the spectrum license in the Indianapolis MTA is no longer necessary to preserve competition.

The modification to Section XIII is intended to maintain the status quo by preserving the current expiration date of the Final Judgment. Given the increased competition in the wireless industry, it is not necessary to extend the term of the Final Judgment.

In light of the changes in the competitive conditions in the affected geographic areas and the conditions agreed to in the modification of the Final Judgment, the United States believes that 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, and that modification of the Final Judgment is in the public interest.

IV.

PROPOSED PROCEDURES FOR GIVING PUBLIC NOTICE OF THE PENDING MOTION AND INVITING COMMENT THEREON

The opinion in United States v. Swift & Co. articulated a court's responsibility to implement procedures that will give non-parties notice of, and an opportunity to comment upon, antitrust judgment modifications proposed by consent of the parties:

> Cognizant . . . of the public interest in competitive economic activity, established chancery powers and duties, and the occasional fallibility of the Government, the court is, at the very least, obligated to ensure that the public, and all interested parties, have received adequate notice of the proposed modification . . . .

1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,703 (N.D. Ill. 1975) (footnote omitted).

It is the policy of the United States to consent to motions to modify judgments in antitrust actions only on condition that an appropriate effort be undertaken to notify potentially interested persons of the pendency of the motion. In this case, the United States has proposed, and defendants SBC and BellSouth have agreed to, the following:

1. The United States will publish in the Federal Register a notice announcing the joint motion to modify the Final Judgment and the United States's tentative consent to it, summarizing the Complaint and Final Judgment, describing the procedures for inspecting and obtaining copies of relevant papers, and inviting the submission of comments within 30 days of the publication.
2. Defendants SBC and BellSouth will publish at their own expense notice of the motion to modify the Final Judgment in two consecutive issues of The Los

Angeles Times, The Indianapolis Star, and RCR Wireless News. These periodicals are likely to be read by persons interested in the markets affected by the Final Judgment. The published notices will provide for public comment during the following 30 days.

3. Within a reasonable period of time after the conclusion of the 30-day comment period following publication of the notices, the United States will file with the Court copies of any comments that it receives and its response to those comments.

4. The parties request that the Court not rule upon the motion until the United States has filed any comments and its responses to those comments or until the United States notifies the Court that no comments were received, and the required review and approval of agreements as described in the modification has occurred. The United States reserves the right to withdraw its consent to the motion at any time prior to entry of an order modifying the Final Judgment.

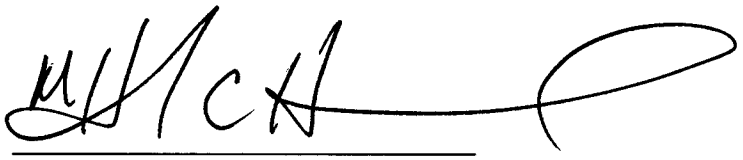
This procedure is designed to notify all potentially interested persons that a motion to modify the Final Judgment is pending and provide them adequate opportunity to comment thereon. Defendants SBC and BellSouth have agreed to follow this procedure, including publication of the appropriate notices. The parties therefore submit herewith to the Court a separate order establishing this procedural approach and request that the Court enter this order promptly.

V.

CONCLUSION

For the foregoing reasons, the United States tentatively consents to the modification of the Final Judgment in this case, and the modification is in the public interest.

Respectfully submitted,



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