

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JUL 25 1995

UNITED STATES OF AMERICA,
Plaintiff,

v.

MOTOROLA, INC. and
NEXTEL COMMUNICATIONS, INC.)
Defendants.

CLERK, U. S. DISTRICT COURT
DISTRICT OF COLUMBIA

Civil Action No.

94 2331

Filed October 27, 1994

Entered: July 25, 1995

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on October 27, 1994; the parties, by their respective attorneys, having consented to the entry of this Final Judgment; and without this Final Judgment constituting any evidence against or admission by any party with respect to any issue of fact or law herein;

Now, therefore, before the taking of any testimony, without trial or adjudication of any issue of fact or law; and upon the consent of the parties, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I.

JURISDICTION

This Court has jurisdiction over the parties and the subject matter of this action. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

II.

DEFINITIONS

As used in this Final Judgment:

A. "Affiliate" means any person in which Motorola or Nextel separately or in combination hold (i) the right, contractual or otherwise, to direct the management decisions, or (ii) an ownership interest of 50 percent or greater, unless defendants do not have the right to direct the management decisions.

B. "Category A City" means any or all of the cities of Boston, Massachusetts; Chicago, Illinois; Dallas and Houston, Texas; Denver, Colorado; Los Angeles and San Francisco, California; Miami and Orlando, Florida; New York, New York; Philadelphia, Pennsylvania; and Washington, D.C.

C. "Category B City" means either or both of the cities of Detroit, Michigan or Seattle, Washington.

D. "Category C City" means the city of Atlanta, Georgia.

E. "Defendants" means Nextel and/or Motorola.

F. "800 MHz channel" means a trunked or conventional channel or frequency pair in the 800 MHz band within a 25 mile radius of the geographic center of Atlanta, capable of being used in providing trunked SMR service in accordance with the Federal Communications Act.. Center coordinates are defined in 47 C.F.R. §90.635 and in Federal Communications Commission Public Notice 43004, Private Radio 800 MHz Systems Application Waiting List, released May 27, 1994.

G. "900 MHz channel" means a trunked or conventional channel or frequency pair in the 900 MHz band within a 25 mile radius of the geographic center of any city identified in section II paragraphs B and C, capable of being used in providing trunked SMR service in accordance with the Federal Communications Act.. Center coordinates are defined in 47 C.F.R. §90.635 and in Federal Communications Commission Public Notice 43004, Private Radio 800 MHz Systems Application Waiting List, released May 27, 1994. For the purposes of this Final Judgment, the location of channels shall be determined as of September 1, 1994.

H. "Management agreement" means the SMR Systems Facilities Services Agreement, SMR User Acceptance Agreement and any and all such agreements relating to Motorola's and/or Nextel's management of an SMR license for any licensee.

I. "Motorola" means Motorola, Inc., each affiliate, subsidiary or division thereof, and each officer, director, employee, agent or other person acting for or on behalf of any of them.

J. "Nextel" means Nextel Communications, Inc., each affiliate, subsidiary or division thereof, and each officer, director, employee, agent or other person acting for or on behalf of any of them. Nextel shall include OneComm Corporation as provided for in the Agreement and Plan of Merger dated July 13, 1994 and Dial Page, Inc. as provided for in the letter of intent dated August 5, 1994.

K. "Person" means any natural person, corporation, association, firm, partnership or other legal entity.

L. "SMR infrastructure equipment" means equipment (e.g., switches, transmission equipment, and radio base stations) used by an SMR service provider in or for the provision of SMR service anywhere in North America and includes related software, maintenance and support services and other equipment, products or services used to provide SMR service.

M. "Specialized Mobile Radio System" or "SMR" means a radio system in which licensees provide land mobile communications services (other than radio-location services) in the 800 MHz and 900 MHz bands on a commercial basis as defined and regulated in 47 C.F.R. Part 90.

III.

APPLICABILITY

A. The provisions of this Final Judgment shall apply to defendants, to each of their successors and assigns, to their subsidiaries, affiliates, directors, officers, managers, agents, and employees, and to all persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

B. Nothing herein contained shall suggest that any portion of this Final Judgment is or has been created for the benefit of any third party and nothing herein shall be construed to provide any rights to any third party.

IV.

PROHIBITED CONDUCT

Defendants are enjoined and restrained as follows:

A. Defendants as a group may not hold or acquire licenses for more than thirty (30) 900 MHz channels in any Category A City or more than ten (10) 900 MHz channels in any Category B City without the prior written permission of plaintiff. To the extent that defendants are currently the licensees for more than thirty (30) 900 MHz channels in any Category A City or more than ten (10) 900 MHz channels in any Category B City, defendants shall divest fully and completely all licensed channels in excess of the relevant number and sell all SMR infrastructure equipment attributable to the divested channels to a person or persons approved by the plaintiff, provided, however, that the provisions of this Final Judgment shall have no effect with respect to frequencies licensed under the authority of a foreign government.

B. Defendants shall not finance any portion of the purchase of any license pursuant to a sale mandated by section IV. paragraph A of this Final Judgment without plaintiff's prior written permission.

C. Except as permitted by paragraph E, defendants shall terminate management agreements relating to all 900 MHz channels in Category A and Category B Cities at the written request of the licensee. Further, defendants are prohibited from exercising, maintaining, enforcing or claiming any right of first refusal to purchase the system, license or operation relating to such channels, and

are prohibited from exercising, maintaining, enforcing or claiming any right to select the SMR infrastructure equipment to be deployed on the systems.

D. Except as permitted by paragraph E, defendants are further enjoined and restrained from taking any action to prevent or inhibit a licensee's termination of its management agreement and/or affiliating with a network controlled by a third-party pursuant to section IV. paragraph C, above.

Defendants may, however, require a licensee to provide 120 days notice of an intent to exercise its rights under section IV. paragraph C, and may solicit customers of a terminating system to purchase defendants' services. Nothing in this paragraph shall impose any express or implied duty on the part of defendants to conduct business with any person.

E. Notwithstanding the provisions of section IV. paragraphs C and D, above, defendants may (1) refuse to terminate a management agreement, (2) exercise, maintain, enforce or claim a right of first refusal to purchase, or (3) exercise, maintain, enforce or claim a right to select the SMR infrastructure equipment used by a 900 MHz channel in a Category A City when, including that channel, the defendants as a group control by license and by management agreement, combined, thirty (30) or fewer 900 MHz channels in that city. Further, defendants may (1) refuse to terminate a management agreement, (2) exercise, maintain, enforce or claim a right of first refusal to purchase, or (3) exercise, maintain, enforce or claim a right to select the SMR infrastructure equipment used by a 900 MHz channel in a Category B City when, including that

channel, the defendants as a group control by license and by management agreement, combined, ten (10) or fewer 900 MHz channels in that city.

F. Defendants shall fully and completely divest forty-two (42) 800 MHz channels in the Category C City to a person or persons approved by the plaintiff. Defendants shall have the full discretion to designate the frequencies to be divested. The divestitures required by this paragraph shall be contingent upon closing of the transaction contemplated by the letter of intent between Nextel and Dial Page, Inc., dated August 5, 1994. Further, any transaction to accomplish such divestitures may be made contingent upon closing of the transaction contemplated by the letter of intent between Nextel and Dial Page, Inc., dated August 5, 1994.

G. Defendants are enjoined and restrained from entering into new management agreements for 900 MHz channels in any Category A or Category B Cities, except as to channels owned or managed by defendants as of August 4, 1994, without the prior written permission of plaintiff. Defendants are further enjoined and restrained from holding or acquiring, either directly or indirectly, more than a five percent ownership interest in any corporation or entity that itself owns, controls, or manages, either directly or indirectly, 900 MHz channels in any Category A or B Cities without the prior written permission of the plaintiff unless the corporation's or entity's ownership, control or management of 900 MHz channels in combination with that of defendants is less than or equal to thirty (30)

900 MHz channels if a Category A city and ten (10) 900 MHz channels if a Category B city.

H. For purposes of complying with the provisions of section IV. paragraphs A through F, defendants shall share information and enter agreements to the extent reasonably necessary to effect the allocation between them with respect to 900 MHz channels they will continue to license under the relevant number limit.

I. Defendants shall take all reasonable steps to complete the required divestitures no later than 180 days after entry of this Final Judgment. Defendants shall provide plaintiff notice when the divestitures have been completed in accordance with the terms of this Final Judgment with respect to each city. In its sole discretion, plaintiff may extend the date by which defendants are required to divest rights in 900 MHz frequencies; provided however, that plaintiff shall extend the divestiture period to accommodate proceedings by the Federal Communications Commission with respect to the transfer of any divested license.

J. Until the divestitures required by this Final Judgment have been accomplished, defendants shall refrain from taking any action that would jeopardize the economic viability of properties to be divested.

V.

AGENT

A. If defendants have not completed the required divestitures within 180 days of entry of this Final Judgment, the Court shall, upon application of the plaintiff, appoint an agent to effect the mandated sales. After the agent's appointment becomes effective, defendants immediately shall identify specific frequencies to be divested. Thereafter, only the agent, and not the defendants, shall have the right to sell excess licensed channels. The agent shall have the power and authority to effectuate the mandated sales at such price and on such terms as are then obtainable by the agent, to a purchaser acceptable to the plaintiff, subject to the provisions of this Final Judgment. The agent shall have such other powers as the Court deems appropriate. Defendants shall use all reasonable efforts to assist the agent in accomplishing the required sales. Defendants shall not object to a sale by the agent on any grounds other than malfeasance. Any such objection by defendants shall be conveyed to plaintiff and to the agent within fifteen (15) days after the agent has notified defendants of a proposed sale.

B. The agent shall be a business broker with experience and expertise in the disposition of telecommunications properties. Plaintiff shall provide defendants with the names of not more than two nominees for the position of agent for the required divestiture. Defendants will notify plaintiff within five days thereafter whether either or both such nominees are acceptable. If either or both

of such nominees are acceptable to defendants, plaintiff shall notify the Court of the person or persons upon whom the parties have agreed and the Court shall appoint one of the nominees as agent. If neither of such nominees is acceptable to defendants, defendants shall furnish to plaintiff within five days after plaintiff provides the names of its nominees, written notice of the names and qualifications of not more than two nominees for the position of agent for the required divestiture. Plaintiff shall furnish the Court the names and qualifications of its proposed nominees and the names and qualifications of the nominees proposed by defendants. The Court may hear the parties as to the qualifications of the nominees and shall appoint one of the nominees as agent.

C. The agent shall serve at the cost and expense of defendants, on such terms and conditions as the Court may prescribe, and shall account for all monies derived from the sale of channels and all costs and expenses so incurred.

D. The agent shall have full and complete access to the personnel, books, records, and facilities of the defendants relevant to excess licensed channels and the defendants shall develop such financial or other information relevant to the channels to be sold as the agent may request. Defendants shall take no action to interfere with or impede the agent's accomplishment of the sale and shall use their best efforts to assist the agent in accomplishing the required sale.

E. After his or her appointment, the agent shall file monthly reports with the parties and the Court setting forth the agents' efforts to accomplish divestitures contemplated under this Final Judgment. If the agent has not

accomplished such divestitures within six months after the agent's appointment, the agent shall thereupon promptly file with the Court a report setting forth (1) the agent's efforts to accomplish the required divestitures, (2) the reasons, in the agent's judgment, why the required divestitures have not been accomplished, and (3) the agent's recommendations. The agent at the same time shall furnish such report to the parties, who shall each have the right to be heard and to make additional recommendations. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the agency, which shall include, if necessary, extending the term of the agency and the term of the agent's appointment.

VI.

SANCTIONS

Nothing in this Final Judgment shall bar the United States from seeking, or the Court from imposing, against defendants or any person any relief available under any applicable provision of law.

VII.

PLAINTIFF ACCESS

A. To determine or secure compliance with this Final Judgment and for no other purpose, duly authorized representatives of the plaintiff shall, upon written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants, be permitted:

1. access during defendants' office hours to inspect and copy all records and documents in their possession or control relating to any matters contained in this Final Judgment; and

2. to interview defendants' officers, employees, trustees, or agents, who may have counsel present, regarding such matters. The interviews shall be subject to defendants' reasonable convenience and without restraint or interference from defendants.

B. Upon written request of the Assistant Attorney General in charge of the Antitrust Division, defendants shall submit such written reports, under oath if requested, relating to any of the matters contained in this Final Judgment as may be reasonably requested.

C. No information or documents obtained by the means provided in this section VII shall be divulged by plaintiff to any person other than a duly authorized representative of the executive branch of the United States or a duly authorized representative of the Federal Communications Commission, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

VIII.

FURTHER ELEMENTS OF DECREE

A. Defendants shall provide each licensee subject to a management agreement with a copy of this Final Judgment and notice of their rights under this

Final Judgment in a form approved by plaintiff within seven days of the date this Final Judgment is entered.

B. This Final Judgment resolves issues with respect to: (1) defendants' consummated and proposed acquisitions of 800 MHz channels in the continental United States and Canada; (2) proposed mergers and acquisitions between Nextel, OneComm Corporation and Dial Page, Inc.; and (3) agreements between and among the defendants as of August 4, 1994 with respect to the financing and construction of SMR systems. Nothing in this Final Judgment, expressly or by implication, is intended to affect defendants' activities except as specifically required herein.

C. This Final Judgment shall expire ten years from the date of entry.


D. Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

E. Five years after the entry of this Final Judgment, any party to this Final Judgment may seek modification of its substantive terms and obligations, and neither the absence of specific reference to a particular event in the Final Judgment, nor the foreseeability of such an event at the time this Final Judgment was entered, shall preclude this Court's consideration of any modification request.

The common law applicable to modification of final judgments is not otherwise altered.

F. Entry of this Final Judgment is in the public interest.

DATED: July 25, 1995


UNITED STATES DISTRICT JUDGE