MEMORANDUM OF THE UNITED STATES IN OPPOSITION TO COMPTEL'S MOTION FOR LEAVE TO INTERVENE, OR IN THE ALTERNATIVE TO PARTICIPATE AS AMICUS CURIAE

EXHIBIT 5

filed in

United States v. SBC Communications, Inc. and AT&T Corp.,
Civ. Action No. 1:05CV02102 (EGS) and
United States v. Verizon Communications and MCI, Inc.,
Civ. Action No. 1:05CV02103 (EGS)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
APR 23 1997
JAMES R. MANSPEAKER
CLERK
BY_______ DEP. CLK

Civil Action No. 97-B-10

UNITED STATES OF AMERICA and THE STATE OF COLORADO,

Plaintiffs,

v.

VAIL RESORTS, INC., RALSTON RESORTS, INC., AND RALSTON FOODS, INC.,

Defendants.

ORDER

Jeffrey Bork, a resident of Summit County, Colorado, seeks to intervene. All plaintiffs and defendants oppose his intervention. For the following reasons, I will deny Bork's motion to intervene.

I.

Plaintiffs filed a complaint on January 3, 1997, challenging Vail's acquisition of Ralston Resorts' three Colorado ski areas—Breckenridge, Keystone, and Arapahoe Basin. All three areas are located within Summit County, Colorado. Along with their complaint, plaintiffs filed a stipulation and a proposed final judgment (Consent Decree) containing the settlement agreed to among the parties. The Consent Decree provides, in part, for the divestiture of one of the three Ralston ski areas--Arapahoe Basin.

The complaint alleges that Vail's acquisition of the three areas had the potential to substantially lessen competition in the "Front Range Colorado Skier" market in violation of

section 7 of the Clayton Act, 15 U.S.C. § 18. Front Range Colorado Skiers are defined in the complaint to be persons living east of the Rocky Mountains in or around Fort Collins, Boulder, Denver, Colorado Springs, and Pueblo. The complaint does not allege a violation of the Clayton Act in any other market because "The [Antitrust] Division's investigation did not reveal any likely anti-competitive effect from the proposed merger in the destination skier market or in other relevant markets such as the local skier market." Competitive Impact Statement ("CIS"), p. 6, n.2. Rather, the CIS states that since Breckenridge, Keystone, and Arapahoe Basin (three of the four Summit County ski areas) were jointly owned prior to their acquisition by Vail, they were not competing against each other for customers. Vail's divestiture of Arapahoe Basin will, according to plaintiffs, therefore increase competition within Summit County. CIS at 15.

II.

The Tunney Act, 15 U.S.C. §16(b)-(h), sets forth the procedures that the Antitrust Division, the Defendants, interested persons, and the court must follow before a proposed Consent Decree may become final. The Antitrust Division is required to (1) file the proposed Consent Decree and a Competitive Impact Statement with the court; (2) publish them in the Federal Register and in a newspaper of general circulation; (3) consider any public comments on the proposed Decree it receives; (4) respond to the public comments; and (5) file the public comments and its responses to them with the court. 15 U.S.C. § 16(b) and (d).

Once this process has been completed, I must determine whether the entry of the Consent Decree "is in the public interest." 15 U.S.C. § 16(e)-(f). In doing so, I may consider the competitive impact of the relief provided by the proposed Decree, and alternative

forms of relief on "the public generally, and individuals alleging specific injury from the violations set forth in the complaint." 15 U.S.C. § 16(e). I have the discretion to allow intervention of interested parties pursuant to the Federal Rules of Civil Procedure. 15 U.S.C. § 16(f)(3). However, Congress has directed that the public interest inquiry be conducted in the "least complicated and least time-consuming means possible." S.Rep. No. 296, 93d Cong., 1st Sess. 6 (1973). In addition, Fed.R.Civ.P. 24(b) provides that "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Bork cites three reasons for his motion to intervene: (1) to enable him to submit to the court his comment on the CIS; (2) to submit to the court the Antitrust Division's response to his comment; and (3) to permit him to reply to the Antitrust Division's response to his comment. Bork's first two reasons are meritless. As discussed, the Antitrust Division is already required by the Tunney Act to submit to the court all public comments on the CIS, including Bork's, and its responses to them. Further, for the following reasons, I conclude that Bork's third proffered reason is insufficient to warrant intervention.

First, Bork's motion is technically inadequate. Rule 24(c) requires a prospective intervenor to file a "pleading setting forth the claim or defense for which intervention is sought." Bork has not done so. Given that Bork is attempting to intervene pro se, however, I will address the other reasons his intervention will not be permitted.

"[T]he usual rule . . . has been that private parties will not be allowed to intervene in government antitrust litigation." Wright, Miller and Kane, *Federal Practice & Procedure 2d*, § 1908 at 266 (1986). The Tunney Act provides the simplest and most comprehensive means

for a court to gather the relevant information on a proposed consent decree in order to make a public interest determination. It establishes procedures whereby the public can comment and the government can respond to public concerns. Allowing private citizens to intervene and become parties to proceedings so that they can individually extend the comment period beyond what is provided in the Tunney Act would be contrary to the streamlined procedure envisioned by Congress.

Clearly, Congress envisioned some circumstances where intervention by private parties would be appropriate. See 15 U.S.C. § 16(f)(3). This is not one of those situations, however. Generally, courts will not authorize permissive intervention under Rule 24(b) unless the intervenor can show bad faith or malfeasance on the part of the government in negotiating or accepting the Consent Decree. *United States v. Associated Milk Producers*, 394 F. Supp. 29, 41 (W.D. Mo. 1975), *aff'd*, 534 F.2d 113, 117 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976). Bork has neither alleged nor presented any evidence that the United States or Colorado acted in bad faith or engaged in malfeasance here, and intervention under Rule 24(b) would be inappropriate.

Nor is Bork entitled to intervention as a matter of right under Rule 24(a). Rule 24(a) requires a prospective intervenor to show that his interests are inadequately represented by the present parties. Given that he has not alleged any malfeasance by the plaintiffs and he is empowered by the Tunney Act to submit his own comment on the Consent Decree, I cannot conclude that plaintiff's interests are inadequately represented by the plaintiffs.

Further, the interests that Bork apparently seeks to protect are not at issue in this case. Bork's sole concern about the Consent Decree is that it fails to account for the interests of

local Summit County skiers. The complaint filed by plaintiffs, however, does not state a claim for antitrust violations affecting the local skier market in Summit County. Rather, the complaint asserts only that the Vail acquisitions of the Ralston ski areas will have anti-competitive effects for the "Front Range Colorado Skier" market, which is defined in the complaint not to include mountain communities such as Summit County. Therefore, Bork is not an "individual[] alleging specific injury from the violations set forth in the Complaint." 15 U.S.C. § 16(e)(2).

I am not permitted, in a Tunney Act proceeding, to "second guess" the government about a case that it elected not to pursue (e.g., alleged harm to the local Summit County skier market). *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995). The complaint and Consent Decree were specifically drafted by plaintiffs to remedy the potential harm from the proposed merger to Front Range skiers. To the extent that Bork's interests coincide with those of Front Range skiers, they are adequately represented by plaintiffs. To the extent that Bork is asserting a harm peculiar to local Summit County skiers, his allegations are outside the scope of the complaint and beyond the scope of my review under the Tunney Act.

The government's decision not to bring a particular case on the facts and law before it at a particular time, like any other decision not to prosecute, "involves a complicated balancing of a number of factors which are peculiarly within [the government's] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). I will not invade the province of the government's discretion by permitting Bork to intervene here and assert claims beyond the scope of the original complaint.

Accordingly, it is ORDERED that:

1. Bork's motion to intervene is DENIED.

Dated: April 23, 1997 in Denver, Colorado.

BY THE COURT:

LEWIS T. BABCOCK, JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

Civil Case No. 97-B-10

The undersigned certifies that a copy of the foregoing

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