

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.)	

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

The United States of America hereby files this supplemental response to the public comments on the proposed Modified Consent Decree, in order to apprise the Court of recently obtained information that may be relevant to a determination that entry of the Modified Consent Decree is in the public interest. This information supports the United States' position that a continuation of the decree's prohibition against Nextel's acquisition of the Geotek licenses will increase the likelihood that those licenses will be acquired by one or more firms that would use the licenses to compete against Nextel. Prompt entry of the Modified Consent Decree, which would preserve that restriction until October 30, 2000, will best protect this opportunity for

competition.

On February 16, 1999, Nextel Communications, Inc. (“Nextel”) filed a Motion to Vacate Consent Decree, which, if granted, would have allowed Nextel to acquire licenses held by Geotek Communications, Inc. (“Geotek”) to use 900 MHz spectrum in the cities subject to the Consent Decree (the “Geotek licenses”).¹ This motion was filed shortly after Nextel and Geotek had entered into an Asset Purchase Agreement (“the Agreement”) providing for the contingent acquisition of those licenses (as well as additional licenses in cities not subject to the Consent Decree) by Nextel. The Agreement was contingent upon Nextel’s obtaining modification or termination of the Decree to allow the acquisition to proceed,² and provided for termination of the Agreement by Geotek in the event it received written notice from Nextel that it had ceased its efforts to obtain “a DOJ Consent or a District Court Order.”³ In addition, the Agreement

¹The licenses being sold by Geotek Communications, Inc. pursuant to bankruptcy proceedings, are listed in Attachment A to the Proposed Order submitted to the Court on June 14, 1999.

²Section 4.01(b)(ii)(C) of the Agreement provides:

DOJ Consent or District Court Order. Buyer shall have received (I) a DOJ Consent or (II) the entry of a District Court Order that has not been stayed, rescinded or modified and that has become final and nonappealable, which DOJ Consent or District Court Order permits buyer to acquire, own and utilize in its businesses all of the Phase II Purchased Assets without divestiture, disposition or other limitation to the utilization of the [Geotek licenses] or any other radio frequency spectrum licensed to, managed by or otherwise utilized by Buyer or any of its affiliates.

³Section 7.01 of the Agreement provides:

This agreement may be terminated by Seller, only as to the purchase and sale of the Phase II Purchased Assets, if: (i) Buyer has provided Seller with written notice, pursuant to Section 3.02(b)(i), that it is not continuing its efforts to obtain a DOJ Consent or a District Court Order; . . . This Agreement may be terminated by either Party if: . . . (C) only as to the purchase and sale of the Phase II Purchased Assets [includes Geotek

contains a “no-shop” provision that prohibits Geotek from soliciting interest in or offers for the licenses from any party other than Nextel, or from entering into discussions or otherwise cooperating with any third party with respect to purchase and sale of the licenses.⁴ See id. § 3.01(c).

The Court ordered an evidentiary hearing on Nextel’s Motion to Vacate Consent Decree, scheduled to begin on June 14, 1999. 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. A key element of the proposed Modified Consent Decree would prohibit Nextel from acquiring or entering into management agreements for Geotek’s 900 MHz licenses in the markets subject to the Consent Decree (the licenses listed in Attachment A to the proposed Order). See Proposed Order ¶ 4 & Attach. A.

The Stipulation provided, among other terms, that “Nextel agrees to take all appropriate actions on June 15, 1999 to terminate its contract to acquire the licenses of Geotek Communications, Inc. identified in Attachment A to the proposed Order modifying the Final

licenses], on any date that is more than 90 days after the Effective Date, the District Court enters an order or makes a ruling that has the effect of denying Buyer’s request for a District Court Order;

⁴Section 3.01(c) of the Agreement provides:

Limitations on Solicitation. Seller agrees that, from the Effective Date until the earlier of the Phase II Closing or termination of this Agreement pursuant to Article VII hereof: (i) Seller shall promptly inform Buyer of any offers or solicitations to purchase any of the Purchased Assets, including the terms thereof, made by any third party; and (ii) neither Seller nor any of its agents shall take any action, directly or indirectly: (A) to solicit indications of interest in, or offers for, the purchase and sale of any of the Purchased Assets from anyone other than Buyer (a “Third Party”); or (B) to enter into discussions or otherwise cooperate with any Third Party with respect to the purchase and sale of any of the Purchased Assets.

Judgment.” Stipulation, ¶ 7 (June 14, 1999). The United States expected and intended this provision of the Stipulation to result in immediate termination of the Agreement -- a result that would have permitted other firms to attempt to purchase the Geotek licenses and use them to compete against Nextel. As the United States explained in its Response to Public Comments, “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 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.” Response of the United States to Public Comments on the Proposed Modified Consent Decree at 16.

In November 1999, the United States received information to indicate that despite this Stipulation, the Agreement has not yet been terminated. See Ex. 1. In a letter dated June 15, 1999, Nextel notified Geotek’s counsel that it had reached agreement with the United States for a proposed Modified Consent Decree in settlement of its request for termination of the Decree, and indicated that the letter constituted written notice of its determination not to continue to seek modification or termination of the Decree pursuant to Section 3.02(b)(i) of the Agreement. See Ex. 1 (Letter of June 15, 1999) at 1. In a letter of June 18, 1999, Geotek’s counsel responded that as a result of Nextel’s settlement agreement with the United States, Geotek and its creditors “have been contacted by a number of entities who have expressed an interest in acquiring some or all of the [Geotek licenses].” See Ex. 1 (Letter of June 18, 1999) at 1. Geotek’s counsel requested that Nextel grant a waiver of the “no-shop” provision so as to allow Geotek and its creditors “to solicit indications of interest in, or offers for, the purchase and sale of any of the [Geotek licenses] and enter into discussion and otherwise cooperate with any Third Party with

respect to the purchase and sale of any of the [licenses].” Id. at 2. Geotek’s counsel went on to state that “[b]y this request, Seller does not waive and expressly reserves any and all rights that it has against Buyer under the Asset Purchase Agreement, the License Assignment Agreement or otherwise.” Id.

In response, in a letter of June 22, 1999, Nextel’s counsel refused to act on the requested waiver without a “more definitive description” and “clear statement” of the rights Geotek intended to reserve. See Ex. 1 (Letter of June 22, 1999) at 2. Nextel’s counsel noted that such waiver would be unnecessary if Geotek were to exercise its right to terminate the Agreement. See id. Correspondence between the parties of July 6 and 12, 1999, simply restated their respective positions and failed to resolve the impasse. See Ex. 1 (Letters of July 6 and 12, 1999).

Upon learning of these events, the United States requested Nextel promptly to waive the Agreement’s “no-shop” provision so that other potential purchasers would have an opportunity to negotiate to acquire the Geotek licenses. Nextel has agreed that it will do so. With respect to termination of the Agreement, Nextel now states that it “has no ability to terminate the contract” until the Court enters the Modified Consent Decree, but states that it can and will do so upon entry of the decree modification.⁵

The information discussed above is relevant in two respects to the Court’s determination of whether the proposed modification of the consent decree is in the public interest.

First, comments and other submissions by Geotek and its creditors have implied that

⁵In order to avoid any dispute concerning the nature of Nextel’s obligations, the United States and Nextel have submitted a Stipulated Order which makes clear, among other things, that Nextel will be required promptly to terminate the Agreement after entry of the decree modification.

Nextel is the only potential purchaser of the Geotek licenses.⁶ However, the correspondence described above indicates that immediately after the filing of the proposed modification, other potential purchasers expressed interest in acquiring the licenses, but that discussions between Geotek and those parties were foreclosed by the continued existence of the Agreement and by Nextel's failure to waive the Agreement's "no-shop" provisions.

Second, prompt entry of the decree modification will best promote the opportunity for new competition using the Geotek licenses. Nextel could afford to offer a premium price to Geotek, since Nextel's acquisition of the licenses would protect its market power. Thus, the preferred option from the perspective of the Geotek creditors has been to receive that premium by selling those licenses at the earliest possible time to Nextel, pursuant to the terms of the Agreement, even though that option would prevent the emergence of competition through the use of those licenses by some firm other than Nextel. Entry of the decree modification will make it clear to Geotek that its preferred option is not available, thereby providing an opportunity for potential competitors to acquire the Geotek licenses. Until such time as the modification is entered, however, it appears unlikely that the Geotek licenses will be used for this (and perhaps for any other) purpose.

CONCLUSION

For the reasons stated herein, the Court should find that the proposed decree modification

⁶See, e.g., Geotek Creditors' Amicus Curiae Brief in Support of Defendant Nextel Communications, Inc.'s Motion to Vacate Consent Decree at 16 (filed June 3, 1999) ("Nextel is the only company to which Geotek can sell its licenses in any reasonable fashion").

is in the public interest, and should enter the modification.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

_____/s/_____
Donald J. Russell
Chief, Telecommunications Task Force

_____/s/_____
Claude F. Scott, Jr. (D.C. Bar No. 414960)
Trial Attorney
Department of Justice Antitrust Division
Telecommunications Task Force
1401 H Street, N.W., Suite 8000
Washington, DC 20005
(202) 353-0378

Dated: December 15, 1999

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.)	

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

The United States of America hereby files this supplemental response to the public comments on the proposed Modified Consent Decree, in order to apprise the Court of recently obtained information that may be relevant to a determination that entry of the Modified Consent Decree is in the public interest. This information supports the United States' position that a continuation of the decree's prohibition against Nextel's acquisition of the Geotek licenses will increase the likelihood that those licenses will be acquired by one or more firms that would use the licenses to compete against Nextel. Prompt entry of the Modified Consent Decree, which would preserve that restriction until October 30, 2000, will best protect this opportunity for

competition.

On February 16, 1999, Nextel Communications, Inc. (“Nextel”) filed a Motion to Vacate Consent Decree, which, if granted, would have allowed Nextel to acquire licenses held by Geotek Communications, Inc. (“Geotek”) to use 900 MHz spectrum in the cities subject to the Consent Decree (the “Geotek licenses”).¹ This motion was filed shortly after Nextel and Geotek had entered into an Asset Purchase Agreement (“the Agreement”) providing for the contingent acquisition of those licenses (as well as additional licenses in cities not subject to the Consent Decree) by Nextel. The Agreement was contingent upon Nextel’s obtaining modification or termination of the Decree to allow the acquisition to proceed,² and provided for termination of the Agreement by Geotek in the event it received written notice from Nextel that it had ceased its efforts to obtain “a DOJ Consent or a District Court Order.”³ In addition, the Agreement

¹The licenses being sold by Geotek Communications, Inc. pursuant to bankruptcy proceedings, are listed in Attachment A to the Proposed Order submitted to the Court on June 14, 1999.

²Section 4.01(b)(ii)(C) of the Agreement provides:

DOJ Consent or District Court Order. Buyer shall have received (I) a DOJ Consent or (II) the entry of a District Court Order that has not been stayed, rescinded or modified and that has become final and nonappealable, which DOJ Consent or District Court Order permits buyer to acquire, own and utilize in its businesses all of the Phase II Purchased Assets without divestiture, disposition or other limitation to the utilization of the [Geotek licenses] or any other radio frequency spectrum licensed to, managed by or otherwise utilized by Buyer or any of its affiliates.

³Section 7.01 of the Agreement provides:

This agreement may be terminated by Seller, only as to the purchase and sale of the Phase II Purchased Assets, if: (i) Buyer has provided Seller with written notice, pursuant to Section 3.02(b)(i), that it is not continuing its efforts to obtain a DOJ Consent or a District Court Order; . . . This Agreement may be terminated by either Party if: . . . (C) only as to the purchase and sale of the Phase II Purchased Assets [includes Geotek

contains a “no-shop” provision that prohibits Geotek from soliciting interest in or offers for the licenses from any party other than Nextel, or from entering into discussions or otherwise cooperating with any third party with respect to purchase and sale of the licenses.⁴ See id. § 3.01(c).

The Court ordered an evidentiary hearing on Nextel’s Motion to Vacate Consent Decree, scheduled to begin on June 14, 1999. 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. A key element of the proposed Modified Consent Decree would prohibit Nextel from acquiring or entering into management agreements for Geotek’s 900 MHz licenses in the markets subject to the Consent Decree (the licenses listed in Attachment A to the proposed Order). See Proposed Order ¶ 4 & Attach. A.

The Stipulation provided, among other terms, that “Nextel agrees to take all appropriate actions on June 15, 1999 to terminate its contract to acquire the licenses of Geotek Communications, Inc. identified in Attachment A to the proposed Order modifying the Final

licenses], on any date that is more than 90 days after the Effective Date, the District Court enters an order or makes a ruling that has the effect of denying Buyer’s request for a District Court Order;

⁴Section 3.01(c) of the Agreement provides:

Limitations on Solicitation. Seller agrees that, from the Effective Date until the earlier of the Phase II Closing or termination of this Agreement pursuant to Article VII hereof: (i) Seller shall promptly inform Buyer of any offers or solicitations to purchase any of the Purchased Assets, including the terms thereof, made by any third party; and (ii) neither Seller nor any of its agents shall take any action, directly or indirectly: (A) to solicit indications of interest in, or offers for, the purchase and sale of any of the Purchased Assets from anyone other than Buyer (a “Third Party”); or (B) to enter into discussions or otherwise cooperate with any Third Party with respect to the purchase and sale of any of the Purchased Assets.

Judgment.” Stipulation, ¶ 7 (June 14, 1999). The United States expected and intended this provision of the Stipulation to result in immediate termination of the Agreement -- a result that would have permitted other firms to attempt to purchase the Geotek licenses and use them to compete against Nextel. As the United States explained in its Response to Public Comments, “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 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.” Response of the United States to Public Comments on the Proposed Modified Consent Decree at 16.

In November 1999, the United States received information to indicate that despite this Stipulation, the Agreement has not yet been terminated. See Ex. 1. In a letter dated June 15, 1999, Nextel notified Geotek’s counsel that it had reached agreement with the United States for a proposed Modified Consent Decree in settlement of its request for termination of the Decree, and indicated that the letter constituted written notice of its determination not to continue to seek modification or termination of the Decree pursuant to Section 3.02(b)(i) of the Agreement. See Ex. 1 (Letter of June 15, 1999) at 1. In a letter of June 18, 1999, Geotek’s counsel responded that as a result of Nextel’s settlement agreement with the United States, Geotek and its creditors “have been contacted by a number of entities who have expressed an interest in acquiring some or all of the [Geotek licenses].” See Ex. 1 (Letter of June 18, 1999) at 1. Geotek’s counsel requested that Nextel grant a waiver of the “no-shop” provision so as to allow Geotek and its creditors “to solicit indications of interest in, or offers for, the purchase and sale of any of the [Geotek licenses] and enter into discussion and otherwise cooperate with any Third Party with

respect to the purchase and sale of any of the [licenses].” Id. at 2. Geotek’s counsel went on to state that “[b]y this request, Seller does not waive and expressly reserves any and all rights that it has against Buyer under the Asset Purchase Agreement, the License Assignment Agreement or otherwise.” Id.

In response, in a letter of June 22, 1999, Nextel’s counsel refused to act on the requested waiver without a “more definitive description” and “clear statement” of the rights Geotek intended to reserve. See Ex. 1 (Letter of June 22, 1999) at 2. Nextel’s counsel noted that such waiver would be unnecessary if Geotek were to exercise its right to terminate the Agreement. See id. Correspondence between the parties of July 6 and 12, 1999, simply restated their respective positions and failed to resolve the impasse. See Ex. 1 (Letters of July 6 and 12, 1999).

Upon learning of these events, the United States requested Nextel promptly to waive the Agreement’s “no-shop” provision so that other potential purchasers would have an opportunity to negotiate to acquire the Geotek licenses. Nextel has agreed that it will do so. With respect to termination of the Agreement, Nextel now states that it “has no ability to terminate the contract” until the Court enters the Modified Consent Decree, but states that it can and will do so upon entry of the decree modification.⁵

The information discussed above is relevant in two respects to the Court’s determination of whether the proposed modification of the consent decree is in the public interest.

First, comments and other submissions by Geotek and its creditors have implied that

⁵In order to avoid any dispute concerning the nature of Nextel’s obligations, the United States and Nextel have submitted a Stipulated Order which makes clear, among other things, that Nextel will be required promptly to terminate the Agreement after entry of the decree modification.

Nextel is the only potential purchaser of the Geotek licenses.⁶ However, the correspondence described above indicates that immediately after the filing of the proposed modification, other potential purchasers expressed interest in acquiring the licenses, but that discussions between Geotek and those parties were foreclosed by the continued existence of the Agreement and by Nextel's failure to waive the Agreement's "no-shop" provisions.

Second, prompt entry of the decree modification will best promote the opportunity for new competition using the Geotek licenses. Nextel could afford to offer a premium price to Geotek, since Nextel's acquisition of the licenses would protect its market power. Thus, the preferred option from the perspective of the Geotek creditors has been to receive that premium by selling those licenses at the earliest possible time to Nextel, pursuant to the terms of the Agreement, even though that option would prevent the emergence of competition through the use of those licenses by some firm other than Nextel. Entry of the decree modification will make it clear to Geotek that its preferred option is not available, thereby providing an opportunity for potential competitors to acquire the Geotek licenses. Until such time as the modification is entered, however, it appears unlikely that the Geotek licenses will be used for this (and perhaps for any other) purpose.

CONCLUSION

For the reasons stated herein, the Court should find that the proposed decree modification

⁶See, e.g., Geotek Creditors' Amicus Curiae Brief in Support of Defendant Nextel Communications, Inc.'s Motion to Vacate Consent Decree at 16 (filed June 3, 1999) ("Nextel is the only company to which Geotek can sell its licenses in any reasonable fashion").

is in the public interest, and should enter the modification.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

_____/s/_____
Donald J. Russell
Chief, Telecommunications Task Force

_____/s/_____
Claude F. Scott, Jr. (D.C. Bar No. 414960)
Trial Attorney
Department of Justice Antitrust Division
Telecommunications Task Force
1401 H Street, N.W., Suite 8000
Washington, DC 20005
(202) 353-0378

Dated: December 15, 1999