IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Plaintiff, v. MOTOROLA, INC. and NEXTEL COMMUNICATIONS, INC. Defendants.	)	Case No. 1:94CV02331 (TFH)

PLAINTIFF UNITED STATES'S REPLY TO ALLIANCE FOR RADIO COMPETITION'S AND GEOTEK CREDITORS' MEMORANDA IN OPPOSITION TO MOTION TO ENTER ORDER MODIFYING CONSENT DECREE

The Wilmington Trust Company and Hughes Network Systems (collectively, the "Geotek Creditors" or "creditors") and the Alliance for Radio Competition ("ARC") have submitted memoranda styled as "Oppositions" to the United States's Motion to Enter Order Modifying Consent Decree in this case. Neither submission supports a conclusion that the proposed modification lies outside of the zone of settlements that are consistent with the public interest -- the only issue that is before the Court at this time. The Geotek Creditors, moreover, offer the remarkable suggestion that the Court may simply enter the modification that they would like,

over the opposition of the United States. That contention is plainly wrong. The Court should promptly enter the modification that the parties in this case, the United States and Nextel Communications, Inc. ("Nextel"), have proposed.

ARC and the Geotek Creditors are not parties in this case, and the Court has not authorized either to participate in this litigation in any manner other than through the submission of comments concerning the proposed decree modification.[1] Both ARC and the Geotek Creditors did submit such comments, to which the United States previously responded. See Response of the United States to Public Comments on the Proposed Modified Consent Decree ("Response to Public Comments") (filed Aug. 26, 1999). Their most recent submissions, styled as memoranda in opposition to entry of the proposed modification of the consent decree, merely repeat and elaborate on the arguments that they put forth in their comments, but do so well beyond the close of the period for such comments established in the Court's Order of June 14, 1999. Since ARC's and the Geotek Creditors' latest submissions are unauthorized, redundant, and untimely, they may properly be ignored by the Court. In any event, they add nothing of substance to the issue before the Court -- whether the proposed modification lies within the reaches of the public interest.

ARC contends that the modification goes too far in relaxing, and eventually terminating, the restrictions on Nextel's acquisitions of 900 MHz spectrum. The Geotek Creditors contend that the modification does not go far enough in that direction. ARC contends that the relevant markets for trunked dispatch services are not competitive and that therefore the current decree

[1]Both ARC and the Geotek Creditors have moved to intervene in this proceeding. The United States filed its opposition to the Geotek Creditors' motion on August 9, 1999, and will file its opposition to ARC's motion on or before September 20, 1999.

restrictions should be left unchanged, if not supplemented.[2] The Geotek Creditors contend that the relevant dispatch markets are intensely competitive, and that the continuation of any decree restrictions -- in particular, the prohibition of Nextel's acquisition of Geotek's licenses before October 2000 -- would be harmful to competition.

In responding to ARC's and the Geotek Creditors' original comments, the United States explained the basis for its conclusion that the proposed modification is suitably tailored to respond to changes in competitive conditions in dispatch markets in the cities affected by the consent decree. See Response to Public Comments at 7-24. The question before the Court at this time is whether the comments, considered in conjunction with the United States's response, justify "'exceptional confidence that adverse antitrust consequences will result'" from the proposed modification, for absent such exceptional confidence, the Court must approve modifications agreed upon by the parties. United States v. Microsoft Corp., 56 F.3d 1448, 1460 (D.C. Cir. 1995) (quoting United States v. Western Elec. Co., 993 F.2d 1572, 1577 (D.C. Cir. 1993)). The Court's role is limited to determining whether the proposed modification "'is within the zone of settlements'" consistent with the public interest, not whether the modification diverges from the Court's view of what would best serve the public interest. Western Elec., 993 F.2d at 1576 (quoting United States v. Western Elec. Co., 900 F.2d 283, 307 (D.C. Cir. 1990)); see also Microsoft, 56 F.3d at 1457-58, 1460. Under that standard, the proposed modification must be entered, for the reasons explained by the United States in its Response to Public

[2]ARC also reiterates its allegations that Nextel's 900 MHz holdings violate the limits set forth in the consent decree. ARC's contentions rest upon an erroneous interpretation of the decree, as the United States has explained at length. See Response to Public Comments at 30-34. In any event, ARC has failed to show that its allegations have any bearing on the competitive effects of the proposed modification.

Comments. See United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("[T]he Department of Justice has a range of discretion in deciding the terms upon which an antitrust case will be settled. . . . This Court may not substitute its opinion or views concerning the . . . determination of appropriate injunctive relief for the settlement of such cases absent proof of an abuse of discretion." (Citations omitted.)).

The Geotek Creditors are not content with merely repeating their arguments that the proposed modification is inconsistent with the public interest. In addition, they ask the Court to enter a modification to their liking, over the objection of the United States. Their proposed order would adopt many of the provisions of the modification to which the United States and Nextel agreed, but their proposed order would not include Section IV.K. (which would prohibit Nextel's acquisition of specified 900 MHz licenses through October 30, 2000), one of the principal components of the settlement between the parties.

The Geotek Creditors, who are not parties to the decree, cite no authority suggesting that such a modification would be permissible, and of course it plainly would not be. As this Court has already recognized, a decree may not be modified or terminated over the United States's objection unless the moving party has demonstrated (1) a significant change in factual conditions or in law, (2) that the changed conditions make compliance with the decree substantially more onerous, (3) that the moving party did not anticipate the changed circumstances at the time it entered into the decree, and (4) that the proposed modification is suitably tailored to the changed circumstances. See United States v. Motorola, Inc., No. 94-2331 (TFH), slip op. at 3-4 (D.D.C. Mar. 16, 1999) ("Memorandum Opinion") (citing United States v. Western Elec. Co., 46 F.3d 1198, 1203-04 (D.C. Cir. 1995) (citing Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367,

384-85, 391 (1992)).[3] This Court has already concluded that application of this standard here would require an evidentiary hearing to determine whether there is a factual basis to justify modification or termination of the decree. See, e.g., Memorandum Opinion at 5 ("Whether these changes have actually resulted in competitive alternatives for dispatch customers, and whether any alternative providers have sufficient capabilities and capacity to provide an effective competitive constraint on Nextel's behavior, are factual issues that should be the subject of an evidentiary hearing.").

Thus, even if the Court were to find on the present record that the modification proposed by the United States and Nextel is contrary to the public interest, there would be no basis to grant the relief requested by the Geotek Creditors. In that event, the existing decree would remain in place, until such time as the Court might conduct an evidentiary hearing, and conclude that there is a sufficient factual basis for modification or termination.

Nextel has concluded that its commercial interests are best served by a prompt relaxation of the decree restrictions, and a termination of those restrictions in October 2000, rather than by continued litigation in which it would seek immediate and complete termination. Accordingly, Nextel requested a stay of proceedings in connection with its motion to vacate the decree, terminated its contract to acquire the Geotek licenses, and stipulated to the entry of the proposed modification. See Nextel's Motion to Modify Consent Decree (filed June 14, 1999); Stipulation

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[3] See also United States v. United Shoe Mach. Corp., 391 U.S. 244, 248 (1968) (decree may not be terminated over the objection of the United States unless "the purposes of the litigation as incorporated in the decree" have been "fully achieved") (cited in Rufo, 502 U.S. at 379-80); United States v. Eastman Kodak Co., 63 F.3d 95, 102 (2d Cir. 1995) ("[A]s a general matter . . . an antitrust defendant should not be relieved of the restrictions that it voluntarily accepted until the purpose of the decree has been substantially effectuated, or when time and experience demonstrate that the decree is not properly adapted to accomplishing its purposes.").

at ¶¶ 5-7 (filed June 14, 1999); Stipulation (filed Aug. 26, 1999). The Geotek Creditors and ARC have evidently concluded that their commercial interests would best be served by forcing Nextel and the United States to continue to litigate Nextel's motion to vacate the decree. But they have not demonstrated that the public interest in competition requires further litigation. Cf. United States v. G. Heileman Brewing, 563 F. Supp. 642, 650 (D. Del. 1983) ("[I]t is inappropriate for a court through third-party intervention to force upon the United States the trial of an antitrust case it has already settled.").

CONCLUSION

As explained herein, the United States continues to believe that the proposed modified Consent Decree is adequate to address the competitive concerns that remain in the relevant markets for trunked dispatch services. ARC and the Geotek Creditors have failed to demonstrate otherwise. Therefore, the proposed modified Consent Decree should be found to be in the public interest and should be entered.

Dated: September 14, 1999

Respectfully submitted,

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