UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. BELL ATLANTIC CORPORATION, GTE CORPORATION, and VODAFONE AIRTOUCH PLC, Defendants.	)	Civil No.: 1:99CV01119 (EGS)

JOINT MOTION TO MODIFY FINAL JUDGMENT

Plaintiff United States of America, and defendants, GTE Corporation, Vodafone Airtouch Plc, and Bell Atlantic Corporation, which has changed its name to Verizon Communications Inc.,[1] jointly move this Court under the Federal Rules of Civil Procedure 60(b)(5) and Section XII of the Final Judgment entered in this matter, to modify the Final Judgment to allow Verizon to reacquire Wireless System Assets in 22 Cellular Market Areas ("CMAs") and to acquire and redivest the Alltel Divestiture Assets as defined in Section XIV, pursuant to the procedures set forth in the proposed Modified Final Judgment and proposed Order and Stipulation with Respect to Modified Final Judgment and Preservation of Assets ("Order and Stipulation").

In support of this motion, the parties state as follows:

1. Verizon announced an agreement to acquire Alltel on June 5, 2008. Pursuant to the

[1] The Final Judgment was entered after the United States challenged, under the antitrust laws, the merger between GTE and Bell Atlantic and Bell Atlantic's agreement to partner with Vodafone in Cellco Partnership, d/b/a Verizon Wireless.

Final Judgment herein, Wireless System Assets in 19 CMAs and portions of 13 Metropolitan Trading Areas which overlapped with 77 CMAs, were divested. In 25 of these CMAs, the Wireless System Assets were acquired by Alltel. Barring modification, Verizon's acquisition of Alltel would violate the Final Judgment; however, the change in competitive conditions in 22 of these CMAs warrants modification of the Final Judgment to allow Verizon to reacquire the Wireless System Assets. But, in three of the CMAs, a Verizon/Alltel merger would pose a significant risk to competition, and the wireless businesses in those CMAs should be redivested. The proposed modification would allow Verizon to temporarily reacquire the wireless businesses in these three CMAs, subject to the provisions of the proposed Order and Stipulation. In the view of plaintiff United States, the proposed modification is in the public interest.

2. Concurrently with this Motion, the parties jointly moved to establish procedures to modify the Final Judgment entered by this Court on April 18, 2000.

3. Plaintiff United States has tentatively agreed to the modification subject to defendants and Alltel Corporation agreeing to the following procedures (see the proposed Order and Stipulation filed concurrently with this Motion):

a. that defendants publish at their own expense a notice of the proposed modification of the Final Judgment in two consecutive issues of (a) The Birmingham News; (b) The Arizona Republic; (c) The St. Petersburg Times; (d) The Miami-Herald; (e) The Albuquerque Journal; (f) The Cleveland Plain Dealer; (g) The Columbus Dispatch; (h) The State; (i) The Dallas Morning News; (j) The Wall St. Journal; and (k) Communications Daily, and file proof of such publication with the Court;

b. that plaintiff United States publish a notice in the Federal Register of the Motion to Modify the Final Judgment, the reasons for modifying the Final Judgment, and the opportunity to file comments;

c. that copies of all comments received by plaintiff United States within 30 days after the last publication of the notices described in paragraphs 2(a) and 2(b) and plaintiff United States's responses to those comments be filed with this Court by plaintiff United States within a reasonable period of time after the conclusion of the 30-day comment period; and

d. that this Court will not rule upon the joint motion until plaintiff United States has filed any comments and its responses to those comments or plaintiff United States notifies the Court that no comments were received.

4. Plaintiff United States tentatively has agreed to the modification of the Final Judgment if certain conditions are met, but as a matter of policy does not consent to the modification of judgments without public notice and an opportunity for public comment.

A proposed Order to Modify the Final Judgment and a Modified Final Judgment are attached.

Dated: October 30, 2008

Respectfully submitted,

FOR PLAINTIFF UNITED STATES

/s/ Hillary B. Burchuk
Hillary B. Burchuk (D.C. Bar No. 366755)
Lawrence M. Frankel (D.C. Bar No. 441532)
Lorenzo McRae (D.C. Bar No. 473660)
Attorneys, Telecommunications & Media Enforcement Section
Antitrust Division

U.S. Department of Justice
City Center Building
1401 H Street, N.W., Suite 8000
Washington, D.C. 20530
(202) 514-5621
Facsimile: (202) 514-6381

FOR DEFENDANTS BELL ATLANTIC CORPORATION, AND GTE CORPORATION AND VERIZON COMMUNICATIONS INC.

/s/ John Thorne
John Thorne (D.C. Bar No. 421351)
Senior Vice President and Deputy General Counsel

Verizon Communications Inc.
1320 N. Courthouse Road
Ninth Floor
Arlington, VA 22201
(703) 351-3900
Facsimile (703) 351-3670

FOR DEFENDANT VODAFONE AIRTOUCH PLC

/s/ Richard Liebeskind
Richard Liebeskind (D.C. Bar No. 479309)
Alvin Dunn (D.C. Bar No. 423229)
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037-1122
(202) 663-8000
Facsimile (202) 513-8264

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. BELL ATLANTIC CORPORATION, GTE CORPORATION, and VODAFONE AIRTOUCH PLC, Defendants.	Civil No.: 1:99CV01119 (EGS)

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

Plaintiff United States of America, and defendants, GTE Corporation, Vodafone Airtouch Plc, and Bell Atlantic Corporation, which has changed its name to Verizon Communications Inc. ("Verizon"),[1] have jointly moved to modify the Final Judgment entered by this Court on April 18, 2000 (the "Final Judgment") and establish procedures for the modification. The Final Judgment required the defendants to divest certain mobile wireless businesses to remedy the competitive harm that otherwise would have resulted from the proposed combinations as alleged in the Supplemental Complaint. Verizon now seeks approval to reacquire a portion of the divested mobile wireless systems through its acquisition of Alltel Corporation ("Alltel").[2]

[1] The Final Judgment was entered after the United States challenged, under the antitrust laws, the merger between GTE and Bell Atlantic and Bell Atlantic's agreement to partner with Vodafone in Cellco Partnership, d/b/a Verizon Wireless.

[2] Alltel has submitted to the jurisdiction of this Court and has agreed to be bound by the proposed Modified Final Judgment.

Because of significant changes in competitive conditions in affected geographic areas, plaintiff United States tentatively consents to the modification of the Final Judgment to allow Verizon to reacquire wireless system assets in Alabama, Arizona, Florida, New Mexico, Ohio, South Carolina, and Texas subject to certain conditions specified in the proposed modification of the Final Judgment, and subject to public notice and an opportunity for public comment. Modification of the Final Judgment is in the public interest.

I.

THE COMPLAINT AND FINAL JUDGMENT

In the Complaint and Supplemental Complaint filed in this action,[3] plaintiff United States alleged that the proposed acquisition of GTE by Bell Atlantic and the proposed partnership between Bell Atlantic and Vodafone would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, by substantially lessening competition in mobile wireless telephone services[4] in geographic areas in Alabama, Arizona, California, Florida, Idaho, Illinois, Indiana, Montana, New Mexico, Ohio, South Carolina, Texas, Virginia, Washington, and Wisconsin. At the time the Supplemental Complaint was filed, plaintiff United States, with the consent of defendants, also filed a proposed Final Judgment requiring the divestiture of certain wireless businesses. The Final Judgment was entered by the Court on April 18, 2000.

---

[3] Plaintiff United States initially filed its Complaint on May 7, 1999, alleging that the proposed acquisition of GTE by Bell Atlantic would violate Section 7 of the Clayton Act. Plaintiff United States then filed a Supplemental Complaint on December 6, 1999, to add violations that arose from the Vodafone and Bell Atlantic/GTE agreement to form the Cellco Partnership.

[4] The term "wireless mobile telephone services" as used in the Supplemental Complaint is the equivalent of "mobile wireless telephone services."

According to the Supplemental Complaint, Bell Atlantic, GTE, and/or Vodafone were direct competitors in overlapping wireless markets in certain geographic areas of the aforementioned states. The Bell Atlantic/GTE merger and the Bell Atlantic/Vodafone Partnership would have substantially lessened competition in 96 Cellular Marketing Areas ("CMAs").[5] These areas included (1) 19 CMAs where Bell Atlantic and one of the other defendants wholly or partly owned businesses offering competing mobile wireless telephone services using licenses in the 800 MHz band or cellular licenses ("Cellular/Cellular Overlap Areas") and (2) portions of 13 Metropolitan Trading Areas ("MTAs") where defendants owned or were about to acquire, in whole or in part, cellular mobile wireless telephone businesses that competed with another defendant's wireless telephone business that provided service using spectrum in the 1.8 GHz band or PCS spectrum ("Cellular/PCS Overlap Areas"). The overlap portions of the 13 MTAs comprise 77 CMAs. According to the Supplemental Complaint, in each of the Cellular/Cellular Overlap Areas and PCS/Cellular Overlap Areas, collectively referred to as the Overlapping Wireless Markets, the wireless businesses owned or to be owned in whole or in part by Bell Atlantic, Vodafone, and GTE competed to sell the best quality service at the lowest possible rates and were among each other's most significant competitors. The Supplemental Complaint asserted that if GTE and Bell Atlantic consummated their proposed merger, and Bell Atlantic and Vodafone consummated their proposed partnership, the level of concentration among firms providing mobile wireless services would be significantly increased

[5] CMAs are made up of metropolitan statistical areas ("MSAs") and rural service areas ("RSAs") and were used by the Federal Communications Commission ("FCC") in issuing the original cellular mobile wireless licenses.

and competition for mobile wireless telecommunications was likely to be substantially lessened in the Overlapping Wireless Markets.

The Final Judgment required defendants to divest wireless system assets in the Overlapping Wireless Markets. Cellular business assets in 25 of the CMAs were subsequently purchased by Alltel.[6] Pursuant to Section XII.B, the Final Judgment is in effect until April 18, 2010, unless an extension is granted by the Court.

On June 5, 2008, Verizon agreed to acquire Alltel. Consummation of the Verizon/Alltel acquisition, would result in Verizon reacquiring the assets that were divested to Alltel's predecessor, ALLTEL Communications, Inc., pursuant to the Final Judgment. It would violate the purpose and meaning of the Final Judgment for Verizon to reacquire the assets defendants were compelled to divest during the term of the Final Judgment without appropriate modification of the Final Judgment.

II.

THE PROPOSED MODIFICATION IS IN THE PUBLIC INTEREST

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

[6] Alltel purchased the divested wireless system assets in the following 25 CMAs: Cleveland OH MSA (CMA 16); Tampa FL MSA (CMA 22); Phoenix AZ MSA (CMA 26); Akron OH MSA (CMA 52); Greenville SC MSA (CMA 67); Tucson AZ MSA (CMA 77); El Paso TX MSA (CMA 81); Mobile AL MSA (CMA 83); Albuquerque NM MSA (CMA 86); Canton OH MSA (CAM 87); Lakeland FL MSA (CMA 114); Pensacola FL MSA (CMA 127); Lorain OH MSA (CMA 136); Ft. Myers FL MSA (CMA 164); Sarasota FL MSA (CMA 167); Bradenton FL MSA (CMA 211); Anderson SC MSA (CMA 227); Las Cruces NM MSA (CMA 285); AZ RSA 2 (CMA 319); FL RSA 1 (CMA 360); FL RSA 2 (CMA 361); FL RSA 3 (CMA 362); FL RSA 4 (CMA 363); FL RSA 11 (CMA 370); and OH RSA 3 (CMA 587).

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, plaintiff United States has tentatively consented to a proposed modification of an antitrust judgment, the issue before the Court is whether modification is in the public interest. *See United States v. Western Elec. Co.*, 900 F.2d 283, 307 (D.C. Cir. 1990) ("*Western Elec. I*") (noting that court should "approve an uncontested modification so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*"); *see also United States v. Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir. 1993) ("*Western Elec. II*") (quoting *Western Elec. I*); *United States v. SBC Commc'ns, Inc.*, 339 F. Supp. 2d. 116, 117 (D.D.C. 2004) ("*SBC I*") (same). The Court of Appeals for this Circuit has stated that "the district court may reject an uncontested modification only if it has exceptional confidence that adverse antitrust consequences will result – perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency." *Western Elec. II*, 993 F.2d at 1577.

The public interest standard to be applied by the district court is the same one used in reviewing an initial proposed consent judgment in a government antitrust case. *See 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). 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 United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995) (stating that government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest"). *See*

generally United States v. SBC Commc'ns, Inc., 489 F. Supp. 2d 1**,** 11 (D.D.C. 2007) ("*SBC II*") (explicating the public interest standard under the Tunney Act).

The Court's role in determining whether the initial entry of a consent decree is in the public interest is not to determine what decree would best serve society, but only to determine whether entering the proposed decree would be in the public interest. It should so determine and enter the proposed decree unless it cannot find that the government's explanation of why the proposed decree would be in the public interest is reasonable, or finds that the government has abused its discretion or failed to discharge its duty to the public. *See Microsoft*, 56 F.3d at 1460-62; *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981); *see also SBC II*, 489 F. Supp. 2d at 15-16 ("[T]he relevant inquiry is whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable."). The Court's role is to "insur[e] that the government has not breached its duty to the public in consenting to the decree." *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'"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case). As the public interest standard for reviewing a modification to a consent decree is the same as for deciding whether initially to enter the decree, the Court should conclude that modifying the decree is in the public interest if the United States has offered a reasonable explanation of why

the modification vindicates the public interest in competitive markets, and there is no showing of abuse of discretion affecting the United States's recommendation.

III.

MODIFICATION OF THE FINAL JUDGMENT
IS APPROPRIATE GIVEN THE CHANGES THAT HAVE
OCCURRED IN MOBILE WIRELESS TELEPHONE SERVICES

Plaintiff United States has tentatively agreed with defendants and Verizon that the Final Judgment should be modified to allow Verizon to reacquire some of the divested wireless system assets in Alabama, Arizona, Florida, New Mexico, Ohio, South Carolina, and Texas. To implement this modification, new Sections XIII and XIV should be added permitting Verizon to reacquire the divested wireless system assets in each of the 25 CMAs, provided that it must sell the reacquired assets in three of those CMAs – the Anderson South Carolina MSA, Las Cruces New Mexico MSA and Ohio RSA 3 CMAs ("Redivestiture Assets") – to an acceptable buyer pursuant to the terms specified in Sections XIII and XIV.

A. Competitive Conditions in Mobile Wireless Telecommunications Services Have Changed Substantially in the More than Eight Years Since the Final Judgment Was Entered

Competitive conditions in the wireless industry, and in the CMAs in question, have changed dramatically since the Final Judgment was entered in 2000. As explained in the Supplemental Complaint and Competitive Impact Statement, the FCC issued two cellular licenses beginning in the early 1980s for each MSA and RSA.[7] Subsequently, the FCC

[7] Supplemental Complaint, *United States v. Bell Atlantic Corp., GTE Corp., and Vodafone Airtouch Plc*, 1:99CV01119 (EGS), ¶ 18 (D.D.C. filed Dec. 6, 1999) ("Supplemental Complaint"); Competitive Impact Statement, *United States v. Bell Atlantic Corp., GTE Corp., and Vodafone Airtouch Plc*., No. 1:99CV01119 (LFO), at 7 (D.D.C. Dec. 22, 1999) ("CIS").

determined that competition in wireless services would be enhanced if additional spectrum was licensed and it auctioned PCS spectrum, which can also be used to provide mobile wireless services, in 1995.[8] As a result, when this case was filed in 1999, in most of the Overlapping Wireless Markets, there were two established cellular providers and sometimes one or two PCS license holders that had just started to offer services or begun to construct the facilities necessary to begin offering service.[9] Moreover, even where one or more PCS providers had constructed networks and started to offer service, including the Overlapping Wireless Markets, the incumbent cellular providers at that time still typically had substantially larger market shares than the new entrants.[10] Thus, the Bell Atlantic/GTE merger and the Bell Atlantic/Vodafone partnership would have merged the two most significant competitors, in terms of subscribers and coverage area, in each of the Cellular/Cellular Overlap Areas. In the PCS/Cellular Overlap Areas, combining a cellular provider with one of the few PCS carriers that had launched limited service would have reduced the possibility of achieving the additional competitive benefits that had motivated the FCC to make additional licenses available.[11] It was unclear at the time how

---

[8] Supplemental Complaint ¶ 18; CIS at 7; *see also* First Report, *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC WT Docket No. 95-317, 10 FCC Rcd 8844, 8845-46, 1995 WL 1086279 (Aug. 18, 1995).

[9] Supplemental Complaint ¶ 18; CIS at 7.

[10] Supplemental Complaint ¶ 18; CIS at 7-8.

[11] There is some evidence that consumers have benefitted from lower per minute charges after the entry of PCS providers. FCC data shows that the average revenue per minute for wireless mobile calls declined from $.44 in 1993 to $.37 in 1997 (33% decrease) but fell 68% from $.37 to $.12 between 1997 to 2001. Twelfth Report, *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, FCC WT

quickly other PCS providers would be able to build their networks and whether their networks would have the same coverage as the existing cellular providers.

Since the Final Judgment was entered, the owners of PCS spectrum have spent substantial sums to greatly expand their networks and market their services. All of the major carriers (Verizon, AT&T, Sprint, and T-Mobile) rely partially or totally on PCS networks to serve their customers. Customers typically do not differentiate between cellular and PCS services and data shows that customers frequently switch between these providers. As a result, the FCC found that by 2006 approximately 93.6% of U.S. counties (and 90.4% of census blocks, excluding federal land) have four or more providers of wireless service,[12] and many geographic markets for mobile wireless service are less concentrated than they were in 2000.[13] Moreover, the cellular providers

---

Docket No. 07-71, 23 FCC Rcd 2241, 2324, tbl.14, Average Revenue Per Minute, 2008 WL 312884, *59 (Feb. 4, 2008) ("*FCC Twelfth CMRS Report*"). These declines may also reflect decreased costs of providing the services.

[12] *FCC Twelfth CMRS Report*, 23 FCC Rcd at 2263-64, 2008 WL 312884, *14-15.

[13] *Compare* Fifth Report, *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 15 FCC Rcd 17,660, 17,688, 2000 WL 1166196, *16 (Aug. 3, 2000) (noting "[t]here are still many markets that have yet to see any [PCS] operators compete with the [two] incumbent cellular operators") ("*FCC Fifth CMRS Report*"), *with FCC Twelfth CMRS Report* at 2245 & tbl. Estimated Mobile Telephone Rollouts by Census Block (90% of the U.S. population lives in areas with at least four mobile telephone operators competing to offer service, and more than half live in areas with at least five competing providers). In addition, "[c]oncentration in the U.S. mobile telephone market, as measured by the Herfindahl-Hirschman Index ("HHI"), declined from 2706 at the end of 2005 to 2674 at the end of 2006." *FCC Twelfth CMRS Report* at 2246.

typically no longer dwarf carriers relying on PCS spectrum in terms of number of subscribers[14] or coverage area,[15] as they did in 1999.

Of course, competitive conditions, and thus the competitive implications of any proposed transaction, still vary considerably from one local area to another.[16] For that reason, each CMA must be individually analyzed to determine whether the reacquisition of divested assets by Verizon may pose a competitive concern. Plaintiff United States has conducted this evaluation in each of the 25 CMAs where the Verizon/Alltel transaction would result in the reacquisition of assets divested pursuant to the Final Judgment.[17] As discussed further below, in 22 of the 25 CMAs, competition is sufficiently robust that Verizon's proposed acquisition of the Alltel mobile

---

[14] For example, whereas the FCC estimated that there were 14.5 million PCS subscribers nationwide at the end of 1999, in 2007 just two of the PCS carriers, T-Mobile and Sprint, accounted for 56.2 million subscribers nationwide. *FCC Fifth CMRS Report* at 28, App. B, Table 6, B-9 (based on publicly available carrier data), Sprint Nextel Corp. Quarterly Report (Form 10-Q) at 28 (May 12, 2008) (reporting 27.5 CDMA postpaid subscribers as of 4Q07); Press Release, T-Mobile USA Reports 28.7M Customers at the End of 2007, at 1 (Jan. 28, 2008), *available at* < http://www.t-mobile.com/Cms/Files/Published/0000BDF20016F5DD010312E2BDE4AE9B/0000BDF20016F5DE0117C70CF8824224/file/TMUS%20Q4%20%20YE%202007%20Customer%20Release%20FINAL.pdf >.

[15] *Compare FCC Fifth CMRS Report* at 17,688 ("While the broadband PCS sector has made great strides over the past five years, its coverage is not as extensive as the coverage of cellular networks."), *with FCC Twelfth CMRS Report* at 2254-55 (including two PCS carriers, Sprint and T-Mobile, among the four mobile telephone providers "that analysts typically describe as 'nationwide' . . . each of [which] has networks covering at least 235 million people (out of 303 million)").

[16] *See, e.g.*, Complaint, *United States v. Verizon Communications Inc. and Rural Cellular Corporation*, No. 1:08CV00993 (EGS), ¶ 15 (D.D.C. filed June 10, 2008).

[17] The Supplemental Complaint alleged local geographic markets defined by the overlaps between the licensing areas of defendants. In analyzing whether to consent to the modification, plaintiff United States followed an approach similar to that used in the Supplemental Complaint. To a large extent, wireless markets are still local in that customers are only interested in carriers who offer substantial coverage where they live, work, and travel on a regular basis.

wireless business assets is not likely to significantly lessen competition. However, in three of the CMAs, a Verizon/Alltel merger still would pose a significant risk to consumers.

B. Reacquisition of the Divested Assets in 22 of the 25 CMAs Poses Little Risk of Significantly Lessened Competition

The 25 CMAs were analyzed on a market-by-market basis that included consideration of, without limitation, the number of mobile wireless telecommunications services providers, their market shares and competitive strengths and weaknesses, whether additional spectrum is now, or is likely soon to become available, and the likelihood of timely new entry. In considering the competitive significance of the providers, plaintiff United States considered whether providers are limited by insufficient spectrum or other factors in their ability to add new customers, the breadth and depth of coverage offered by different providers in each area and the surrounding area, network coverage in relationship to the population density of the license area, each provider's retail presence, and the likelihood that any provider would expand its existing coverage. Plaintiff United States relied on data provided by Verizon and Alltel as well as data obtained from the FCC. In particular, information about the extent to which providers were viewed by customers to be close substitutes was considered, including changes in market shares over time and wireless local number portability data.[18] After carefully consideration of these factors, plaintiff United States has concluded that combining Verizon's and Alltel's wireless businesses raises no

[18] Since November 2003, FCC rules permit a customer to retain its assigned telephone number and "port" that number from one wireless provider to another when a subscriber decides to change wireless providers. The FCC gathers statistical information concerning the porting of wireless telephone numbers, including the identities of the providers losing and gaining subscribers.

significant competitive concerns in 22 of the CMAs, largely as a result of widespread and successful entry of providers using PCS spectrum in these CMAs.

Today, PCS providers have constructed networks that support the largest or one or more of the largest wireless businesses in each of the 22 CMAs. The PCS providers have invested substantially to attract customers in these areas, and in all 22 CMAs, the competitors, taken together, have more than twice as many retail outlets as Verizon and Alltel combined. Consequently, in each of the 22 CMAs, Verizon will still face at least three and up to four effective wireless competitors following consummation of the Verizon/Alltel transaction. It does not appear that the combining businesses in the 22 CMAs are the two largest, strongest competitors[19] and in a number of these CMAs, neither Verizon nor Alltel operates the largest or second largest wireless business.[20] Instead, the competitors Verizon and Alltel face in each of these CMAs have successfully built out their networks, established a widespread retail presence, and are significant competitive forces. Perhaps most importantly, Verizon and Alltel are not

[19] For purposes of this analysis, the size and rank of a wireless business is measured by the number of subscribers, a standard typically used in the wireless industry to measure the size of a business.

[20] Although the Supplemental Complaint in this matter alleges that the proposed combinations between Bell Atlantic, GTE, and Vodafone were likely to result in an increased risk of coordination (in addition to unilateral effects), plaintiff United States believes that such coordination is unlikely in the 22 CMAs due to the increased number of significant competitors as well as changes in the mobile wireless telephone services industry that make localized coordination less likely. Mobile wireless services have increasingly become more differentiated with providers offering an array of handsets and data services as well as varied pricing plans. In addition, price plans in large part are established on a regional or national basis rather than set within a specific CMA. Providers are more likely to compete within a CMA by offering local promotions or establishing themselves as the carrier with the best local coverage. These factors make it unlikely that allowing Verizon to acquire wireless assets in the 22 CMAs would facilitate coordination between the remaining firms.

particularly close substitutes in these areas. An analysis of Verizon and Alltel customers who port their wireless number and service to another carrier shows that they do not disproportionately choose each other's service. Instead, in each of these areas, one of the other competitors appears to be a closer substitute for those customers than Verizon or Alltel. There appears to be no significant likelihood that the proposed acquisition will tend substantially to lessen competition in these CMAs.[21] Plaintiff United States therefore believes that the Final Judgment should be modified to permit Verizon to acquire the Alltel wireless assets in these areas.[22]

---

[21] Over the past several years, the United States has investigated numerous proposed mergers of wireless carriers and has brought a number of cases challenging those mergers, alleging that they would significantly reduce competition, including *United States et al. v. Cingular Wireless Corp., SBC Communications Inc., BellSouth Corp. and AT&T Wireless Services, Inc.*, Civ. No. 1:04CV01850 (RBW) (D.D.C. filed Oct. 24, 2004); *United States v. AT&T Inc. and Dobson Communications Corp.*, Civ. No. 1:07CV01952 (RMC) (D.D.C. filed Oct. 30, 2007); *United States v. Alltel Corp. and Western Wireless Corp.*, Civ. No. 1:05CV01345 (RCL) (D.D.C. filed July 6, 2005), and *United States et al. v. Verizon Communications Inc. and Rural Cellular Corp.*, Civ. No. 1:08CV00993 (EGS) (D.D.C. filed June 10, 2008). Each of those matters was resolved via a consent decree requiring the divestiture of an appropriate set of assets. The United States has evaluated the competitive situation in the 25 CMAs in question here using the same standards used in evaluating those prior matters and would not file a complaint alleging competitive harm in the 22 CMAs.

[22] The situation here is analogous to that in *SBC I*. There too, the United States initially brought an action to block the combination and required divestiture of wireless business in a number of CMAs. A subsequent merger – between Cingular and AT&T Wireless – recombined some of the assets that the initial Final Judgment required to be separated. After finding that the recombination was not likely substantially to lessen competition in the geographic areas in question due to changes in competitive conditions over a number of years (particularly, increased entry and success by wireless firms using PCS spectrum), the United States moved for a modification to allow reacquisition of the divested assets. The district court concluded that "the government's factual proffer concerning changes in the relevant markets and its public interest analysis are persuasive," and entered an order modifying the Final Judgment. *SBC I*, 339 F. Supp. 2d at 119.

C. Because Reacquisition of the Divested Assets in Three CMAs Poses a Significant Risk of Lessening Competition, These Assets Must Be Redivested Pursuant to the Terms in the Proposed Modified Final Judgment

In three CMAs, Las Cruces New Mexico MSA, Anderson South Carolina MSA and Ohio RSA 3, the cellular businesses controlled by Verizon and Alltel are two of the leading wireless competitors. Although competitors have, to some extent, built out their networks in these CMAs since 1999, they have not been as successful in attracting new customers in these CMAs as they have been in the other 22 CMAs. Postmerger, in each of these three CMAs, the combined firm would have more retail outlets than all of its competitors combined, suggesting the continued dominance of Verizon and Alltel. Based on the information available, including the lack of significant change in market shares and wireless local number portability data, it appears likely to plaintiff United States that Verizon and Alltel continue to be significant competitive constraints on each other in these areas and that they may be the closest substitutes for a large set of customers. Plaintiff United States accordingly has concluded that allowing Verizon to reacquire divested assets in these three CMAs would pose a substantial risk to competition. Therefore, the Final Judgment should be modified to permit Verizon to acquire the Alltel wireless assets only temporarily, and subject to a requirement to redivest those assets.

Accordingly, plaintiff United States, defendants and Alltel have agreed the Final Judgment should be modified to require the Redivestiture Assets to be sold to a buyer acceptable to the plaintiff United States in its sole discretion, and that defendants and Alltel must preserve and hold separate those assets pending the divestiture. Competition in these areas is protected until the assets are sold by the appointment of a Management Trustee, who will operate the

businesses according to the terms specified in the Order and Stipulation with Respect to Modified Final Judgment and Preservation of Assets. The divestitures will be carried out pursuant to the terms specified in the Modified Final Judgment.

In light of the changes in the competitive conditions in the affected geographic areas and the conditions contained in the proposed modification of the Final Judgment, plaintiff United States has tentatively determined that the original Final Judgment's constraint on the reacquisition of certain wireless spectrum assets in Alabama, Arizona, Florida, New Mexico, Ohio, South Carolina, and Texas is no longer necessary and that modification of the Final Judgment is in the public interest.[23] The modification of the Final Judgment is intended to maintain the status quo regarding the current expiration date – April 18, 2010 – except as to the Redivestiture Assets. Given the overall increased competition in the wireless industry, plaintiff United States has no reason to request an extension of all of the terms of the Final Judgment.

Attached to the Motion is a draft Modified Final Judgment that includes a new Section XIII, which includes provisions identifying the license areas where the wireless business may be retained by defendants and Verizon, or redivested. A new Section XIV contains new provisions governing the redivestiture of the assets in the Anderson South Carolina MSA, the Las Cruces New Mexico MSA and Ohio RSA 3. Section XII has been modified to extend the term of the Modified Final Judgment for 10 years from the date of its entry for the Redivestiture Assets.

IV.

[23] Because there is no need to modify the original expiration date of the Final Judgment, the proposed modification does not affect that date. In the event that the defendants seek to reacquire other assets covered by the original Final Judgment prior to expiration, the United States would conduct a localized analysis and seek any further modifications that it deemed appropriate.

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 plaintiff 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, plaintiff United States has proposed, and defendants have agreed to, the following:

1. Plaintiff United States will publish in the Federal Register a notice announcing the joint motion to modify the Final Judgment and plaintiff 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 and Verizon will publish at their own expense notice of the motion to modify the Final Judgment in two consecutive issues of: (a) The Birmingham News; (b) The Arizona Republic; (c) The St. Petersburg Times; (d) The Miami-Herald; (e) The Albuquerque Journal; (f) The Cleveland Plain Dealer; (g) The Columbus Dispatch; (h) The State; (i) The Dallas Morning News; (j) The Wall St.

Journal; and (k) Communications Daily. These periodicals are likely to be read by persons interested in the markets affected by the modifications to 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, plaintiff 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 plaintiff United States has filed any comments and its responses to those comments or until plaintiff 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. Plaintiff 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 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 plaintiff United States tentatively consents to the modification of the Final Judgment in this case, subject to completion of the procedures outlined herein, and the modification is in the public interest.

Dated: October 30, 2008

Respectfully submitted,

/s/ Hillary B. Burchuk
Hillary B. Burchuk (D.C. Bar # 366755)
Lawrence M. Frankel (D.C. Bar # 441532)
Lorenzo McRae (D.C. Bar # 473660)
Attorneys
Telecommunications & Media Enforcement Section
Antitrust Division
U.S. Department of Justice
City Center Building
1401 H Street, N.W., Suite 8000
Washington, D.C. 20530
(202) 514-5621
Facsimile: (202) 514-6381

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of October, 2008, the foregoing Joint Motion to Modify Final Judgment, Memorandum of Plaintiff United States in Support of Joint Motions to Modify Final Judgment and to Establish Procedures to Modify Final Judgment, and the proposed Order to Modify Final Judgment, were served upon the following counsel, via U.S. First Class mail, postage prepaid:

FOR VODAFONE AIRTOUCH PLC
Richard Liebeskind, Esq.
Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, D.C. 20037-1122

FOR DEFENDANTS BELL ATLANTIC CORPORATION, GTE CORPORATION AND VERIZON COMMUNICATIONS INC.
John Thorne
Verizon Communications Inc.
1320 N. Courthouse Road, 9th Floor
Arlington, VA 22201

FOR ALLTEL CORPORATION
Jeffrey A. Jaeckel
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1888

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
51 W. 52nd Street
New York, N.Y. 10019

/s/ Hillary B. Burchuk
Hillary B. Burchuk
Attorney, Telecom & Media
Antitrust Division
U.S. Department of Justice
City Center Building
1401 H Street, N.W., Suite 8000
Washington, D.C. 20530