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SBC-AT&T and Verizon-MCI Merger Review Ends—Not with Bang, but with Whimper

On January 30, 2005, SBC agreed to acquire AT&T. Two weeks later, on February 14, 2005, Verizon agreed to acquire MCI. After its investigation, the Department of Justice Antitrust Division ("DOJ" or "Antitrust Division") filed complaints and proposed consent decrees in both cases on October 27, 2005. The SBC-AT&T merger closed on December 18, 2005, and the Verizon-MCI merger closed on January 6, 2006. However, the antitrust reviews of these mergers only ended on March 29, 2007, when the United States District Court issued a 56-page opinion concluding that the entry of the proposed final judgments is in the public interest. *United States v. SBC Comm.*, Nos. 05-2102, 05-02103, 2007 U.S. Dist. LEXIS 22947, at *1 (D.D.C. March 29, 2007). Having said near the beginning of the 17-month Tunney Act proceeding reviewing the consent decrees that it would not be a "rubber stamp," the District Court gave out indications that it might expand the scope of Tunney Act review of government antitrust settlement, that it might second-guess the Antitrust Division's analysis and approach, and that it might even send the DOJ and the parties back to the drawing board. In the end, it did none of these things.

In the complaints accompanying the consent decrees, the government argued that the mergers would "substantially lessen competition" with regard to hundreds of commercial buildings in metropolitan areas where the merging parties are the only firms that own or control a direct wireline connection to the building. In several buildings, AT&T and MCI were the only carriers with last-mile connections to the buildings and, thus, the DOJ asserted that the mergers would reduce from two to one the number of carriers with last-mile connections (so-called "2-to-1 buildings"). The DOJ also found that entry was unlikely to eliminate the competitive harms the mergers would cause.

In its proposed final judgments, the DOJ required SBC and Verizon to divest certain assets (the "Divestiture Assets") within 120 days after the

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closing of the mergers, or five days after notice of the entry of the final judgment by the court, whichever is later. The DOJ defined the Divestiture Assets in terms of an indefeasible right of use ("IRU"), which is a long-term leasehold interest giving the holder the right to use specified strands of fiber. The IRUs must be for at least ten years, cannot include a recurring fee, and cannot limit the right of the acquirer to use the desired asset. The Divestiture Assets include IRUs for last-mile connections to 2-to-1 buildings where the DOJ determined entry was unlikely and transport facilities sufficient to allow the purchaser to use the IRUs to provide telecommunications services.

Competitive carriers, represented by *amici* trade associations ACTel and COMPTEL filed oppositions to the proposed final judgments. They argued that the DOJ had not gone far enough in its complaint, and, most pertinently, that the remedies in the proposed consent decrees were insufficient to fix the violations alleged. They also suggested that amendments to the Tunney Act review standard enacted in 2004 gave the court broader authority than previously existed. While taking a long time to reach its conclusions, the District Court found that the 2004 amendments at best "effected minimal changes," leaving the scope of review "sharply proscribed." Applying the limited review standard to the two pending mergers, the court found no grounds for rejecting the settlements.

The Tunney Act Standard of Review

The Tunney Act requires courts to determine whether proposed final judgments are "in the public interest." 15 U.S.C. § 16(e)(1). The Tunney Act does not define "in the public interest," but instead lists several factors courts must examine in making the determination. The court struggled with the meaning of the term because of the absent definition, and because the amendments to the Tunney Act in 2004 brought precedent into question. Ultimately, the court found that the 2004 amendments were designed to promote a court's independent examination of the factors in the statute.

Legislative history of the 2004 Tunney Act amendments suggests that there was congressional concern that the case law resulted in an overly deferential review of prosecutors' judgment so that final judgments should only be rejected by courts if they make a "mockery of judicial power." The court here concluded that the purpose of the 2004 amendments was to ensure that courts consider all of the enumerated factors in the statute, and thus, courts "cannot use the 'mockery of justice' standard as the general standard of review under the Tunney Act."

Nonetheless, and most importantly, the court held that under the 2004 amendments, a court cannot delve into matters outside of the scope of the government's complaint in making its public interest determination.

Some *amici* argued that courts should consider matters outside those addressed in the government's complaint.

The court also addressed the degree of deference, if any, to be accorded to the government's evaluation of the adequacy of the proposed final judgments. Under the Tunney Act, "[t]he overall standard for the Court is deciding whether the entry of the proposed settlements is 'in the public interest.'" To the court, "[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." Courts must accord deference to the government regarding the "efficacy of its remedies." Accordingly, courts will "approve the proposed settlements if they are 'within the reaches of the public interest.' The government need not prove that the settlements will perfectly remedy the alleged antitrust harms; it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms."

Review of the Two Consent Decrees

Having established the standard of review, the court separated the statutory factors loosely into two groups. The first group addresses the competitive impact of the proposed remedies, *i.e.*, how well the settlement remedies the harms alleged in the complaints (consideration of "the competitive impact of such judgment, including termination of alleged violations"; "duration of relief sought"; "the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations"; and "any other competitive considerations bearing upon the adequacy of such judgment"). The second group addresses issues unrelated to the competitive impact of the settlement (*e.g.*, "provisions for enforcement and modification"; "anticipated effects of alternative remedies actually considered"; "consideration of the public benefit, if any, from a trial"; and "whether its terms are ambiguous").

In this case, the government argued that the proposed settlements perfectly remedy the alleged antitrust violations because the proposed final judgments require asset divestitures at all buildings where harm is alleged—the 2-to-1 buildings where entry is unlikely. To the government economist whose testimony supported the settlement, the "proposed remedies are straightforward because the asset-buyers 'step into the shoes of AT&T or MCI.'"

The *amici* proffered a litany of shortcomings with the proposed settlements. The court found that two of them did represent "significant shortcomings":

1. because network size matters, buyers of divestiture assets may not be able to fully replace AT&T or MCI; and

2. since AT&T and MCI were especially competitive firms in the market, buyers might not be able to offer services of the same quality to customers.

Nonetheless, the court—while acknowledging these shortcomings could reduce the effectiveness of the settlements—found that the government had presented a reasonable basis for concluding that the settlements would replace much of the competition lost and, therefore, were "reasonably adequate, and thus within the reaches of the public interest."

The *amici* challenged the government's formula for predicting entry. The court acknowledged that the government's approach did not account for all relevant factors, but was sufficient as a "reasonable, practical prediction of likely entry."

As to the second category of factors, once the "government showed its work," *i.e.*, delineated for the court that it considered detailed alternative remedies, the court found that factor met. The court found that the settlements contained standard provisions to maintain jurisdiction and ensure compliance, and that the terms of the proposed final judgments were not ambiguous.

Hence, at the end of the day, a long 17-month "day," this case found that the 2004 Tunney Act amendments did not alter much about judicial review of antitrust consent decrees. With a sufficient showing that provides a court a record to check off the various factors, even when some reasonable substantive arguments can be advanced as to the sufficiency of the remedies, the DOJ's judgment will be upheld…if not rubber-stamped.

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