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Judge Looks Into Modifying Terms of 2 Phone Mergers

By STEPHEN LABATON

WASHINGTON, July 7 — A federal district judge in Washington is considering the imposition of major modifications to the two largest telephone mergers in history: SBC Communication's acquisition of AT&T and Verizon's purchase of MCI.

In a surprising order issued Friday afternoon, Judge Emmet G. Sullivan raised a series of questions about the Bush administration's review of the two deals that he said should be answered by the Justice Department and the phone companies at a hearing next week.

Both deals have already closed, and lawyers said that the judge could not unravel them, although he could try to impose significant conditions or divestitures.

The proceedings will probably shed light on the administration's antitrust enforcement program at a time when officials have put up virtually no roadblocks to deals and imposed few restrictions in other areas of antitrust law.

Still, the proceedings could affect the government's review of BellSouth's proposed acquisition by AT&T, the name the company took after AT&T was swallowed by SBC. The proceedings are also the first significant test of changes in the law that have given federal judges greater authority to scrutinize antitrust settlements.

Federal judges have been examining such settlements since the 1970's, when they were given the authority under the Tunney Act, which was adopted in response to the scandal involving the Nixon administration's decision to settle an antitrust proceeding against ITT.

Ever since a federal appeals court ruled in 1995 that Judge Stanley J. Sporkin of Federal District Court had acted outside of his authority in striking down a proposed antitrust agreement between the government and Microsoft, judges have generally approved settlements with relatively little scrutiny. But in 2004, Congress gave judges greater latitude to consider such deals.

In his order Friday, Judge Sullivan asked the lawyers to address what authority he had to question the settlements. He then raised several questions that suggested he had concerns with the settlements.

Exhibit B

"Through the eyes of a layperson, the mergers, in and of themselves, appear to be against public interest given the apparent loss in competition," he wrote. "In layperson's terms, why isn't that the case?"

Another question he posed asked, "What consideration should the court give the arguments of the attorney general of New York, Elliot Spitzer, that the mergers will adversely affect digital subscriber lines (DSL) and the Internet backbone?"

While he could ultimately reject the deals, lawyers involved said they did not expect it would unravel them. At most, they said, a rejection could lead to changes in the settlements and possible divestitures, although the government and phone companies would probably appeal any decision that sought to rewrite the deals substantially.

Challenges to the two telephone deals have been filed by Mr. Spitzer and by organizations representing smaller rivals, some of whom buy the lines of the telephone companies at wholesale rates and then resell them. The companies have asked the court to find that the deals are not in the public interest because the Justice Department failed to force the companies to shed some overlapping assets.

The top lawyer for the companies challenging the settlements has been Gary L. Reback, a California lawyer who was the intellectual and tactical leader in the effort in the 1990's by a group of companies that persuaded the government to prosecute Microsoft for antitrust violations.

In a court brief filed last month, Mr. Reback attacked the phone companies and the Justice Department.

"At issue is judicial review of the successful efforts of the two largest local telephone monopolists, SBC and Verizon, aided and abetted by the current administration of the antitrust division of the Department of Justice, to reconstitute as a nationwide local and long-distance duopoly what was formally the Bell System monopoly," he wrote.

The Bush administration said that it had carefully examined the deals and ordered the appropriate divestitures. It said the judge's authority to review the government's handling of the deals was limited.

"The purpose of a Tunney Act proceeding is for a court to examine the proposed remedy, and determine whether it is in the public interest," the Justice Department said in its brief. "It is not for a court to reinvestigate the underlying merger at the behest of disappointed competitors or put the Department of Justice on trial to justify its prosecutorial decision making."