UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. MCI COMMUNICATIONS CORPORATION and BT FORTY-EIGHT COMPANY ("NewCo"), Defendants.	Civil Action No. 94 1317(TFH) Filed: 6/15/94

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THE PROCEEDING

On June 15, 1994, the United States filed a civil antitrust complaint under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, alleging that the proposed acquisition of a 20% equity interest in MCI Communications Corporation ("MCI") by British Telecommunications plc ("BT"), and the proposed formation of a joint venture between MCI and BT to provide international enhanced

telecommunications services, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, by lessening competition in the markets for international telecommunications services between the United States and the United Kingdom and for global seamless telecommunications services, thereby depriving United States consumers of the benefits of competition -- lower prices and higher quality services. Defendants are MCI and BT Forty-Eight Company, also known as NewCo, which at present is a wholly owned subsidiary of BT and which will become the joint venture of MCI and BT upon consummation of the agreements between them. The Complaint seeks injunctive and other relief.

The United States and the defendants have stipulated to the entry of a proposed Final Judgment, after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) - (h). Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations of the Judgment. The United States and the defendants also have stipulated that the defendants will abide by the terms of the proposed Final Judgment after consummation of the transactions between them, pending entry of the Final Judgment by the Court, permitting the transactions to go forward prior to completion of the Tunney Act procedures. Should the Court decline to enter the Final Judgment, defendants have also committed in the stipulation to abide by its terms until the conclusion of this action.

II.

EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. **The Proposed Transactions**

On August 4, 1993, MCI and BT entered into an Investment Agreement by which BT would acquire a 20% equity stake in MCI for approximately $4.3 billion. MCI and BT entered into an amended and restated version of this Investment Agreement on January 31, 1994. With consummation of this Investment Agreement and related agreements, BT would become the single largest shareholder in MCI. In addition, BT would receive a number of special shareholder rights, including the need for BT's consent to various actions by MCI, access to internal MCI information, and proportionate board representation consisting of three of the fifteen seats on MCI's Board of Directors. MCI would gain certain special rights with respect to BT as well, including a seat on the BT Board of Directors.

MCI and BT have agreed that if either party competes with the other in its "core" business (defined to include any telecommunications services or equipment, with specific limited exceptions) in its assigned territory (the "Americas" for MCI, and the rest of the world for BT), it will lose all special rights, including board membership.[1/] While the agreement does not formally prohibit BT and MCI from

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[1] Pursuant to agreement with the competition authorities of the Commission of the European Union, the restriction on MCI entering BT's core business in its territory has been limited to a period of five years from closing, but the duration of the restriction on BT competing in the United States has not been limited. 1994 O.J. 94/C, Notice re Case No. IV/34,857 - BT - MCI (March 30, 1994).

competing with each other in their domestic and international telecommunications businesses, as a practical matter it ensures that BT will only enter the United States telecommunications markets through its investment in MCI so long as their relationship continues. BT's operations in the United States principally consist of Syncordia, a wholly owned subsidiary engaged in "global outsourcing." This is the provision of various integrated international telecommunications services and enhanced services to large users through a single source, allowing customers to transfer responsibility for owning and managing their corporate telecommunications networks.[2/]

When they entered into the Investment Agreement , MCI and BT also entered into a Joint Venture Agreement and other related agreements committing them to form a joint venture, to be owned 75.1% by BT and 24.9% by MCI. This joint venture, NewCo, is incorporated in the United Kingdom, and will have its principal place of business and most of its employees in the United States. BT and MCI both will contribute international telecommunications facilities to the joint venture, including BT's Syncordia business. The stated purpose of the joint venture is to provide international enhanced telecommunications services to large international users, such as multinational corporations. These services will be

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[2] BT and MCI had a more significant competitive overlap in the United States at the time that they entered into the Investment Agreement, in the area of public data networks. BT's subsidiary British Telecommunications North America (BTNA) owned the Tymnet public data network, a major provider of such services, while MCI owned 25% of Infonet, one of Tymnet's principal competitors. MCI agreed to acquire Tymnet from BT. Before it consummated this acquisition earlier in 1994, however, MCI sold its share in Infonet to the other owners of Infonet.

available from a single source and will be consistent in quality, features and capabilities wherever purchased. These services may include various types of data services, messaging and video conferencing, global calling card services, intelligent network services, certain types of satellite services, and global outsourcing such as Syncordia already offers in the United States and other countries. Under certain circumstances, and if permitted by regulatory authorities, the role of the joint venture may be expanded to include other telecommunications services in addition to enhanced ones. The venture may also expand its business operations to other types of customers.

MCI will be the exclusive distributor of the joint venture's services in North and South America and the Caribbean ("the Americas"), and BT will be the joint venture's exclusive distributor in the rest of the world. MCI and BT also have agreed to supply the necessary services and facilities in their respective distribution regions to enable the joint venture to operate. In addition, MCI and BT have agreed not to compete with the joint venture anywhere in the world. Therefore, BT and MCI will have to realize all gains from the areas of business in which the joint venture is engaged through their ownership interests in the joint venture and their sales of its services, and BT generally will only be able to participate in this market in the United States through its investments in MCI and the joint venture.[3/]

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[3] There is a limited possibility for so-called "passive sales," that is, sales by BT or MCI to a customer with no presence in its assigned area where the

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B. The Parties to the Transaction and the Relevant Markets

MCI is the second largest long distance telecommunications carrier in the United States, and in terms of traffic, the fifth largest telecommunications carrier in the world. Its principal long distance domestic and international competitors in the United States are AT&T Corporation, the largest carrier, and Sprint Corporation, the third largest carrier. BT, formerly a government-owned monopoly, is now privately held. It is by far the largest telecommunications carrier in the United Kingdom, and is the fourth largest telecommunications carrier in the world in terms of traffic. BT is the dominant telecommunications carrier in the United Kingdom, as it provides almost all local services and has high market shares in long distance domestic and international services. Indeed, BT has over ten times the total sales revenues of Mercury Communications Ltd., its only substantial competitor in long distance services. Thus, the transactions between MCI and BT will result in vertical affiliation between the dominant telecommunications carrier in the United Kingdom and the second largest long distance provider in the United States.

Both MCI and BT provide international telecommunications and enhanced telecommunications services between the United States and the United Kingdom to individuals and businesses for the exchange of voice, video, and data messages. MCI carries about 20% of the international switched telecommunications traffic

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[3] (...continued)
customer has on its own initiative chosen to contract with the firm outside its area, but has not been solicited by that firm.

originating and terminating in the United States and BT carries about 75% of the international switched telecommunications traffic originating and terminating in the United Kingdom. Mercury is the only other company in the United Kingdom currently permitted to provide international telecommunications services between the United States and the United Kingdom using its own telecommunications facilities (there is also some limited resale of the services of BT and Mercury). No other companies have been licensed in the United Kingdom to provide international telecommunications systems.

BT has substantial market power in the provision of telecommunications services in and to the United Kingdom, in large part because access to its local network is necessary for all other telephone companies that seek to provide long distance domestic and international services. About 97% of all telecommunications traffic in the United Kingdom terminates through BT's local network, and the great majority of traffic also originates on BT's network. Although cable television companies provide local telecommunications services in some areas of the United Kingdom, today they account for an insignificant proportion of such services, in the range of 1%, and their activities are unlikely to diminish BT's market power during the term of the proposed decree.[4/] Substantial replication of BT's local telecommunications network in the United Kingdom

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[4] In addition to BT and the cable companies, there is one other provider of local telecommunications services in the United Kingdom, serving only the city of Kingston-upon-Hull where BT does not have a local network.

would be prohibitively expensive for any new entrant or existing long distance provider.

BT also controls the largest and most comprehensive long distance domestic and international telecommunications network in the United Kingdom, and carries about 84% of domestic switched long distance traffic in the United Kingdom. (Mercury carries virtually all of the rest.) Since 1991, the United Kingdom government has granted additional licenses for domestic telecommunications systems. Those new domestic licensees either have not yet begun commercial long distance operations using their own facilities (some firms operate on a limited scale as resellers using the facilities of BT or Mercury), or have not yet achieved any substantial share of the United Kingdom market.

BT has been able to retain a dominant position in the provision of long distance domestic and international telecommunications services in the United Kingdom for several reasons, including its control of the local network. BT does not provide Mercury or other competitors either equal access or number portability. Both of these features are generally offered to all long distance carriers by operators of the monopoly local exchange networks in the United States, and have been important factors in the development of domestic and international long distance competition. Equal access would allow customers to gain access to the long distance networks of Mercury and other competitors through BT's network without dialing additional numbers or obtaining special equipment that is not needed to use BT's long distance services. Number

portability would allow customers switching from BT to Mercury or other competitors to retain their original telephone number. The lack of equal access and number portability places Mercury and any other competitors who may offer long distance service at a competitive disadvantage to BT, contributing to BT's ability to sustain its substantial market power in the provision of long distance domestic and international telecommunications services in the United Kingdom. These long distance services are necessary to deliver enhanced telecommunications and seamless global telecommunications services internationally.

In addition, Mercury must pay BT Access Deficit Charges ("ADCs") in order to have traffic delivered through BT's network. ADCs are payments made by competing carriers to BT for each minute of traffic those carriers send through BT's network. ADCs are intended by United Kingdom regulatory authorities to compensate BT for providing its other local exchange services subject to price controls. These charges, especially for international traffic, greatly exceed BT's cost of providing interconnection to Mercury. ADCs may be imposed on new entrants that compete with BT and interconnect with its network. The total cost for Mercury, or any other United Kingdom competitor of BT that is required to pay ADCs, to send international traffic through BT's local network is several times greater than the comparable costs paid by international long distance carriers in the United States for interconnection with local networks.

C. The Competitive Effect of the Acquisition

The Complaint alleges that the acquisition of MCI shares by BT may substantially lessen competition in the provision of international telecommunications services between the United States and the United Kingdom. BT will have increased incentives and the ability, using its dominant position in the United Kingdom, to favor MCI and to disfavor its United States competitors in international telecommunications services in various ways, making competitors' offerings less attractive in quality and price than those of MCI, and so lessening the ability of MCI's rivals to compete effectively in these services. As a result of this anticompetitive conduct, the price of international telecommunications services to the United Kingdom available to United States consumers could be increased, and the quality lessened, relative to what United States consumers would pay and receive in a competitive market.

International telecommunications services are generally provided today on a "correspondent" basis, meaning that providers in different countries enter into commercially negotiated bilateral agreements with one another to complete each other's traffic. International correspondent telecommunications services primarily consist of the basic switched voice telephone call, which is known either as International Direct Dial ("IDD") or International Message Telephone Service ("IMTS"), and International Private Line Service ("IPLS"). They also include certain other switched telecommunications and enhanced telecommunications services.

"Switched" traffic makes use of switching facilities and common lines. Consumers typically obtain switched correspondent services from the provider in the country where a call originates, and calls are handed off to the provider in the other country without direct customer involvement. IPLS consists of circuits dedicated to the use of a single customer, and the providers of IPLS in each country typically sell their "half" of the circuit to the user separately. Switched services constitute the great majority of international telecommunications services in terms of both traffic and revenues.

The Complaint alleges that acquiring a 20% ownership interest in MCI will increase BT's incentive to discriminate in favor of MCI and against other United States international carriers in the market or markets for international telecommunications services between the United States and the United Kingdom. BT's incentive to favor MCI is reinforced by the provision in the Investment Agreement that subjects BT to loss of its special rights if it competes in the Americas in the provision of telecommunications services and equipment.

MCI could receive various forms of favorable treatment from BT with respect to its international correspondent services between the United States and the United Kingdom. For example, BT could favor MCI or disfavor its competitors with respect to the prices, terms and conditions on which international services are provided, as well as the quality of provisioning of those services, and could provide to MCI advance information about planned changes to its network. Such discrimination could place other United States international

carriers at a competitive disadvantage to MCI, enabling MCI to charge more for its services or to provide a lower quality of service than it would otherwise be able to do without losing customers.

In addition, the Complaint alleges that BT's ownership interest in MCI would increase BT's incentive to provide MCI confidential, competitively sensitive information that BT obtains from other United States carriers through their correspondent relationships with BT. In order to use BT's correspondent switched and private line services and to negotiate terms of use, United States international telecommunications providers must provide BT various types of competitively sensitive information, including private line customer identities, service requirements, plans for the introduction of new services, changes in existing services, and future traffic projections. If BT were to share this information with MCI, then MCI could gain an anticompetitive advantage over its United States competitors. Allowing MCI access to such competitively valuable information about its competitors would also increase the risk of collusion.

Finally, the Complaint alleges that the agreements will give BT the increased incentive and ability to send its international switched traffic to the United States exclusively or largely to MCI. Such diversion of traffic could harm competition among international telecommunications service providers in the United States, and United States consumers, by increasing the net settlement

payments that other United States carriers must make to BT.[5/] If BT diverted all or most of its traffic to MCI, unaffiliated United States international carriers would lose offsetting return traffic from BT and would have to make larger settlement payments to BT, putting them at a competitive disadvantage in the market for United States-United Kingdom telecommunications, and this could result in MCI charging higher prices. The ability to divert the bulk of its traffic to an affiliated United States carrier could also give BT an increased incentive to keep international accounting rates above cost.[6/]

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[5] The correspondent agreements governing switched services establish an "accounting rate" per minute of traffic, for each type of traffic sent over a particular international route. The carriers in each country pay half the accounting rate (the "settlement rate") to their foreign correspondents for each minute of traffic completed. Settlement payments for outgoing traffic are offset by the settlement payments for incoming traffic. When there is an imbalance in the amount of outgoing and incoming traffic between carriers, the carrier with the most outgoing traffic makes a net settlement payment to its correspondent. Today, United States carriers accept the same proportion of the total switched traffic from each of their correspondents in a foreign country as the proportion of total switched traffic to the correspondent that each of the United States carriers send. This protects each carrier from being competitively disadvantaged by having to make large net settlement payments that other competitors can avoid. Federal Communications Commission policy supports this proportionate allocation of switched traffic, although the FCC has not adopted regulations governing proportionate allocation.

[6] Because United States carriers send substantially more traffic to the United Kingdom than United Kingdom carriers send to the United States, United States carriers must make large net settlement payments to United Kingdom carriers, most of which go to BT. Current accounting rates between the United States and the United Kingdom are substantially above the cost of providing service.

D. The Competitive Effect of the Joint Venture

The Complaint also alleges that the formation of the BT-MCI joint venture may substantially lessen competition in the market or markets for seamless global telecommunications services provided in the United States. BT will have increased incentives and the ability, using its dominant position in the United Kingdom, to favor NewCo and MCI and to disfavor their United States competitors in seamless global telecommunications services in various ways, lessening the ability of the competitors of MCI and NewCo to develop and offer new seamless global services and compete effectively in these services. As a result of this anticompetitive conduct, the quality of seamless global telecommunications services available to United States consumers could be lessened, and the price increased, relative to what United States consumers would pay and receive in a competitive market.

Seamless global telecommunications services would be made available by a single provider using an integrated international network of owned or leased facilities, and would have the same quality, features, characteristics, and capabilities wherever they are provided, making them significantly superior to ordinary correspondent telecommunications services for many customers, particularly multinational corporations and other large users of international telecommunications. Seamless services would permit one-stop shopping, so that users could avoid negotiation with telecommunications network operators in different countries, and would overcome the inadequacies and differences in

standards in various national telecommunications systems. They could offer scale economies by comparison with private networks individually organized by users. However, creating seamless global networks will require a major commitment of resources and expertise that few firms can supply.

Seamless global telecommunications services represent an emerging market, but an important one for the evolution of international telecommunications. Other entrants or potential entrants in this market, in addition to BT and MCI, include AT&T's Worldsource (a non-exclusive partnership with several foreign providers including Japan's KDD), Unisource (an alliance of the national or principal telecommunications providers in Switzerland, Sweden and the Netherlands), Eunetcom (an alliance of the German and French national telecommunications providers), Sprint, and Cable & Wireless plc (the parent of Mercury).

By their nature, seamless global telecommunications services must be offered on a consistent basis in all the major countries where customers are located. Thus, nondiscriminatory access to the telecommunications networks in these countries is essential for any provider of these services. The United Kingdom has a crucial role in seamless global telecommunications services because about ten percent of all likely potential customers have their headquarters there, and most potential customers of these services need telecommunications services in the United Kingdom.

BT's role in the joint venture would increase its incentive to favor the joint venture and MCI over other United States providers of seamless global telecommunications services. Since BT could not compete with the joint venture and only MCI could solicit customers for the joint venture's services in the United States, where about 40 percent of all potential customers have their headquarters, BT would depend on MCI and NewCo for revenues from such services in the United States. It would not have the opportunity to earn additional revenues in non-exclusive arrangements to provide similar services with other providers, so its incentive to use its dominant position in the United Kingdom to place MCI and NewCo in the strongest possible position in the United States, at the expense of competitors, would be reinforced.

BT could discriminate in favor of NewCo and MCI using its vertically integrated position in the United Kingdom, with a virtual monopoly in local services and a dominant position in long distance domestic and international services, as these services will be needed by competing providers of seamless global services to complete traffic. Discrimination could occur in interconnection to the BT network, provision of information about the network, and provision of the international private circuits NewCo and its competitors would need for their seamless global service "platforms." BT could also provide NewCo and MCI with competitively sensitive information it obtains from seamless global service competitors who interconnect with BT's United Kingdom network. Finally, BT could favor MCI and NewCo by sending them on a non-correspondent basis traffic

from the United Kingdom that would otherwise be allocated proportionately. The agreements between BT and MCI specifically provide for such use of NewCo facilities.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Prohibitions and Obligations

Under the provisions of the Antitrust Procedures and Penalties Act, the proposed Final Judgment may only be entered if the Court finds that it is in the public interest. The United States has tentatively concluded that the proposed Final Judgment affords an adequate remedy for the alleged violations and is in the public interest.

Section II contains the substantive restrictions and obligations. They include transparency requirements (Section II.A), confidentiality requirements (Section II.B, II.C and II.D), and requirements related to international simple resale (Section II.E). These various requirements, in combination, will substantially diminish the risk of abuse of BT's market power to discriminate or otherwise afford anticompetitive advantages to MCI and NewCo.[7] They will do so by making discrimination easier to detect, by precluding the misuse of confidential information obtained by BT from MCI's competitors, and by increasing the

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[7] NewCo is broadly defined in Sections IV.A and IV.K to ensure that the entire joint venture will be subject to the Final Judgment, regardless of the forms that it may take or restructurings that may occur.

likelihood that United States competitors of MCI and NewCo, if licensed, will be interconnected with BT in the United Kingdom, so that they can respond effectively to international discrimination and diversion of BT's traffic to MCI. The object of these substantive terms is to ensure that MCI, as the result of its direct affiliation with BT or its position as the exclusive distributor of NewCo services in the United States, is not advantaged over its competitors in the United States to the detriment of competition or consumers.

1. Transparency Requirements

Section II.A forbids MCI and NewCo from offering, supplying, distributing, or otherwise providing any telecommunications or enhanced telecommunications service that makes use of telecommunications services provided by BT in the United Kingdom or between the United States and the United Kingdom, unless MCI and NewCo disclose certain types of information. Because these transparency requirements may be affected by changes in regulation or other circumstances, Section II.A provides the United States with the ability to waive these requirements in whole or in part.

Pursuant to Section IV.E, MCI and NewCo will provide the information to the Department of Justice, which may then disclose the information to any United States corporation that holds or has applied for a license, from either United States or United Kingdom authorities, to provide international telecommunications services between the United States and the United Kingdom. This will enable the principal competitors of MCI and NewCo to monitor whether

either of these companies is receiving discriminatory treatment in their favor from BT, and provide them with evidence that could be used to make a complaint to any governmental authorities in the United States or the United Kingdom. The term "governmental authorities" is used broadly and includes independent agencies. Corporations receiving this information from the Department of Justice would be required to sign a confidentiality agreement with the Department, obligating them not to disclose non-public information to any persons other than governmental authorities. The stipulation between the defendants and the United States describes the form of a confidentiality agreement in more detail. This confidentiality provision was adopted to prevent wider dissemination of defendants' non-public business information than is necessary to detect and prevent anticompetitive conduct.

Defendants also have stipulated to enter into agreements with BT, prior to entry of the Final Judgment, that will ensure that they are provided with sufficient information to comply with Section II.A. Such agreements with BT must also be consistent with the separate obligations on defendants, under Sections II.B-D, precluding receipt from BT of various types of information about their competitors.

The terms "telecommunications services" and "enhanced telecommunications services" are employed throughout the transparency

requirements as well as elsewhere in the Final Judgment.[8] "Telecommunications services," as defined in the Final Judgment (see Section IV.L), include ordinary switched voice telephony and private circuits as well as conveyance (including transmission, switching and receiving) of data and video information, and signaling, translation and conversion in the network. These basic telecommunications services are the bulk of existing telecommunications, and are licensed and regulated to some degree in both the United States and the United Kingdom. There are relatively few significant providers. In contrast, "enhanced telecommunications services" (as defined in Section IV.F), which use telecommunications services as a foundation to provide various advanced and intelligent applications of additional value to users, are subject to little or no regulation in the United States and the United Kingdom. The number of providers is often greater than for basic telecommunications, although all such providers must have access to the basic telecommunications services in order to do business.[9]

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[8] The definitions of "telecommunications services" and "enhanced telecommunications services" in the Final Judgment are based on the distinction between basic services and enhanced services recognized by the FCC, as well as similar concepts in the United Kingdom (where "value-added services" is analogous to enhanced services). The definitions do not duplicate those used by the national regulatory authorities, which differ somewhat in terminology, but they incorporate as much as possible the underlying concepts, while ensuring consistent treatment within the context of this judgment for services offered in the United States and in the United Kingdom.

[9] If an activity is a "telecommunications service" as defined in the Final Judgment, it remains so when it is offered or bundled with enhanced services or (continued...)

NewCo will interconnect directly with BT's United Kingdom network, and will obtain other telecommunications services from BT, such as international circuits, to use in the provision of seamless global network services. NewCo's services may be distributed by BT either alone or together with BT's own domestic services in the United Kingdom. NewCo may have access to valuable information concerning changes to BT's United Kingdom network that has not yet been disclosed to other competitors.

Accordingly, NewCo is subject to four categories of disclosure requirements. Section II.A.1 obligates it to disclose the prices, terms and conditions, including any discounts, on which telecommunications services are provided to NewCo pursuant to interconnection agreements. Interconnection agreements are specific arrangements (see Section IV.H) by which other licensed operators in the United Kingdom receive rights to connect their systems to BT's network and have BT complete delivery of traffic, on terms that may differ from those available to retail customers. Although BT began to publish new interconnection agreements last year, BT's license allows it the option to publish pricing methodologies instead of actual prices. Section II.A.1 will compel NewCo to disclose the actual prices BT charges it for interconnection.

Section II.A.2 imposes similar disclosure obligations on NewCo for prices, terms and conditions, including any discounts, of any other telecommunications

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[9] (...continued)
other equipment, facilities, or services, or if it is called a "package of facilities" or something other than a telecommunications service.

services it obtains from BT. These services could include international private circuits obtained at retail or otherwise from BT. The disclosure requirements under this provision also apply to the terms on which BT provides U.K. telecommunications services to customers together with NewCo services, thus facilitating detection of discrimination in bundling of services. To some extent these types of information are already disclosed by BT in its retail tariffs pursuant to United Kingdom regulation, but Section II.A.2 ensures comprehensive transparency to prevent discrimination.

Section II.A.4 requires NewCo to provide additional information about the specific telecommunications services that it receives from BT to supply telecommunications or enhanced telecommunications services between the United States and the United Kingdom, as well as the services BT provides directly to customers in the United Kingdom as the distributor for NewCo. NewCo is required to disclose the types of circuits, including their capacity, and other telecommunications services provided. NewCo also is required to disclose information concerning the actual average times between order and delivery of circuits and the number of outages and actual average times between fault report and restoration for various categories of circuits. These types of information are not otherwise disclosed under existing regulations, and are important to the detection of various types of discrimination. Where NewCo has to disclose particular telecommunications services provided by BT under II.A., it is required to identify the services and provide reasonable detail about them (if not already

published). However, if a service is sold as a unit, separate underlying facilities need only be disclosed to the extent necessary to identify the service and the means of interconnection. NewCo is not required to identify individual customers or the locations of circuits and services dedicated to particular customers.

Finally, under Section II.A.6 NewCo is required to disclose information it or MCI receives from BT about planned and authorized changes in BT's United Kingdom network that would affect interconnection arrangements with any licensed operators. Should MCI receive information separately from NewCo, it has the same disclosure obligation. Disclosure of information of this nature is important to ensure that NewCo, through its affiliation with BT, is not given commercial advantages through advance notice.

MCI's relationship with BT in the provision of international services will be less complex than NewCo's, owing to MCI's agreements not to compete with NewCo and to suffer loss of its special rights if it competes with BT outside the Americas for a period of five years from closing. MCI will continue to provide international correspondent switched and private line services together with BT. To ensure greater transparency in MCI's dealings with BT, Section II.A contains two sets of disclosure obligations specifically applicable to MCI.

Section II.A.3 applies to any international switched telecommunications or enhanced telecommunications services provided by MCI and BT on a correspondent basis between the United States and the United Kingdom. It requires MCI to disclose both the accounting and settlement rates, and other

terms and conditions, applicable to any of these services. When there is no specific agreement between MCI and BT setting forth this information, MCI must state the rates, terms and conditions on which the service is actually provided. If BT combines types of traffic subject to different accounting rates to determine the proportionate allocation of switched traffic to United States providers, MCI must disclose its own minutes of traffic in each separate accounting rate category so that the other United States providers can determine whether they are being sent the appropriate shares of traffic from BT, if they do not already receive data (such as total traffic volumes in each rate category) that is sufficient to enable them to do so. This latter obligation addresses a particular type of possible discrimination in international services, known as "grooming," by which a foreign carrier can favor particular United States correspondents with traffic of superior value while appearing to allocate minutes of traffic on a proportionate basis. Today some types of information covered by Section II.A.3, such as agreed-upon accounting rates, are supplied to the Federal Communications Commission ("FCC") and are published, or are provided to competitors. Where information has already been made available in these ways, Section II.A.3 of the Final Judgment does not require MCI to provide it to the Department of Justice.

Section II.A.5 requires MCI to provide information about the United States-United Kingdom international private circuits it provides jointly with BT. MCI must disclose the actual average times between order and delivery by BT, and the actual average time intervals between fault report and restoration in specific areas

of the international facility and the overseas network. This information is similar to types of information NewCo provides under Section II.A.4 and serves similar purposes. MCI is also required, for circuits used to provide international switched services on a correspondent basis between the United States and the United Kingdom, to identify average numbers of circuit equivalents available during the busy hour. The great majority of these circuits would be with BT. None of the information disclosed under Section II.A.5 is made public today.

Under Section II.A., MCI and NewCo are required to disclose intellectual property or proprietary information only if it is one of the types of information expressly required to be disclosed by any of these transparency obligations, or if it is necessary for licensed operators to interconnect with BT's United Kingdom network or for United States international providers to use BT's international facilities to complete their services. MCI and NewCo, as well as BT indirectly, are thus protected against overly broad disclosure of such valuable commercial information.

2. Confidentiality Requirements

Three provisions of the proposed Final Judgment, Sections II.B, II.C and II.D, constrain the ability of MCI (including the director it appoints to the BT board) and NewCo to receive from BT (including BT-appointed directors on the board of MCI), various types of confidential information that BT obtains from MCI's and NewCo's United States competitors. Existing regulatory requirements do not adequately protect any of this information from disclosure.

Under Section II.B MCI and NewCo will not receive information from BT that other United States competitors identify as proprietary and maintain as confidential, but that has been obtained by BT as the result of its provision of interconnection or other telecommunications services to the competitors in the United Kingdom. In order to obtain interconnection, other licensed operators are commonly required to provide BT with a statement of requirements containing detailed information about their planned services and interconnection needs. As interconnection needs change over time, BT will receive more confidential information. BT may also learn the identities and service needs of particular customers of its competitors who need to have private circuits interconnected with BT. Of course, there is no alternative to interconnection with BT because of its local monopoly bottleneck and overall market power in the United Kingdom.

Section II.C similarly forbids MCI and NewCo from receiving confidential, non-public information from BT that BT may obtain from other United States competitors of MCI and NewCo through its correspondent relationships with them. United States international telecommunications providers have no reasonable alternative at present to using BT for at least some of their correspondent traffic to and from the United Kingdom. A limited exception is provided to allow MCI to obtain certain types of aggregate information it may need to comply with its transparency obligations under Sections II.A.3(ii) and II.A.5, but in no circumstances may MCI use this exception to receive individual information about other providers that is otherwise prohibited by this section.

Finally, Section II.D. addresses a specific competitive risk in the context of international correspondent relationships, by prohibiting MCI from seeking or accepting from BT any non-public information about the future prices or pricing plans of any competitor of MCI in the provision of international telecommunications services between the United States and United Kingdom. BT and its United States correspondents, in the course of accounting rate negotiations, exchange considerable information including business plans and traffic projections. Section II.D addresses the substantial risk of violation of Section 1 of the Sherman Act that would arise if BT were to obtain non-public pricing information from MCI's competitors once BT becomes MCI's single largest owner, by precluding any sharing of price information through BT. Risks of price collusion, tacit or explicit, are considerable in an industry with a small number of large providers offering similar types of services.

3. International Simple Resale Requirements

The international simple resale provision of the proposed Final Judgment, Section II.E, is directed at actions by BT, using its dominant position in the United Kingdom, that would discriminate in favor of MCI, including the diversion of most or all of BT's traffic from the United Kingdom through MCI and NewCo. Such conduct could raise prices to United States consumers or otherwise harm competition in the United States, unless United States carriers are licensed to operate in the United Kingdom and interconnected with BT so that they can respond effectively to BT's conduct.

International simple resale ("ISR") (see Section IV.I) is the transmission through private or leased international telecommunications facilities (or by any other international means where usage is not measured) of voice or data traffic (excluding certain enhanced capabilities), if that traffic is carried over the public switched telecommunications network in both the country where it originates and the country where it terminates. ISR avoids the correspondent system, and traffic sent by ISR would be exempt from proportionate allocation policies. When all providers on an international route are equally capable of using ISR, it can lessen the risk of discriminatory practices in switched correspondent services, and can enable United States providers to retaliate against attempts by a foreign carrier to use its market power to increase the settlement liabilities of unaffiliated carriers relative to those of its United States affiliate.

ISR between the United States and the United Kingdom can lawfully occur only when the telecommunications regulatory authorities of both countries find generally that equivalency exists between them in policies relating to open entry and non-discrimination. However, that equivalency finding will not be sufficient for all United States providers to begin offering ISR to the United Kingdom, because in the United Kingdom each provider of international simple resale services must also be individually licensed. To provide ISR, a firm must have the ability to use international facilities and interconnections to the domestic networks at both ends of the international route.

Section II.E prohibits MCI and NewCo from providing any telecommunications facilities or services to be used by BT for international simple resale between the United Kingdom and the United States, until (1) all qualified United States international telecommunications providers that applied by December 1, 1993 for United Kingdom licenses that would allow them to provide ISR have been granted ISR licenses,[10] and (2) all such licensed United States providers have been offered the opportunity to interconnect with BT's United Kingdom network on standard, nondiscriminatory and published terms, with reasonable arrangements for any other necessary technical aspects of interconnection. This provision does not compel or direct the grant of any licenses, which is the prerogative of the United Kingdom government. It ensures, however, that any delays in licensing competing United States providers, or delays on BT's part in interconnecting such licensed providers in the United Kingdom, will not be used to anticompetitive effect by MCI, NewCo and BT.[11]

The December 1, 1993 cutoff date for qualified providers includes all qualified United States applicants who sought to provide international simple resale service before NewCo's own license application was filed in the United

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[10] Some of these applicants may have also applied for other types of licenses from United Kingdom authorities. The Final Judgment requires only the grant of international simple resale authority.

[11] Section II.E., by providing objective criteria for determining which United States international telecommunications providers are qualified, ensures that no individual United States carrier can misuse its United Kingdom ISR license application to delay BT's ability to provide ISR.

Kingdom. Plaintiff and defendants have sought to identify, by stipulation, the United States international telecommunications providers that they presently understand to be qualified under Section II.E.[12/] Any other persons, however, may notify the Department before entry of the Final Judgment that they believe they are also qualified within the meaning of Section II.E. If plaintiff concludes that any such additional persons are qualified they will be added to the stipulated list.

Section II.E does not affect the ability of the FCC, and United Kingdom authorities, to determine when general conditions warrant authorizing international simple resale or other forms of resale between the United States and the United Kingdom.

4. Modifications

Section VII, the modifications provision, affords the means of expanding, altering or reducing the substantive terms of the Final Judgment, and is essential to the protection of competition. Modifications that are not contested by any party to the Final Judgment are reviewed under a "public interest" test. See, e.g., United States v. Western Electric Co., 993 F.2d 1572, 1576-77 (D.C. Cir. 1983).

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[12] The stipulated list presently includes: ACC Global Corp., including ACC Long Distance UK Ltd.; Ameritel Communications Inc., including Amera Tela Communications (UK) Ltd.; AT&T Corporation, including AT&T (UK) Ltd.; City of London Telecommunications Ltd. (COLT); IDB Communications Group, Inc., including WorldCom International, Inc.; MFS Communications Inc., including MFS Communications Ltd.; and Sprint Corporation, including Sprint Holdings (UK) Ltd. Some of these firms have already received United Kingdom international simple resale licenses.

Where a proposed modification is contested by any party to the Final Judgment, the Court must determine both whether modification is required, and whether the particular modification proposed is appropriate. The United States is able to seek changes to the substantive terms and obligations of the Final Judgment from the Court, including additional requirements to prevent receipt of discriminatory treatment by defendants, in order to avoid substantial harm to competition or consumers in the United States. The defendants are able to seek modifications removing obligations of the Final Judgment in order to avoid substantial hardship to themselves. In either case, the party seeking modifications must make a clear showing that modification is required, based on a significant change in circumstances or a significant new event subsequent to the entry of the Final Judgment. Such a change in circumstances or an event subsequent to the entry of judgment need not have been unforeseen, nor need it have been referred to in the Final Judgment. The parties recognize that discrimination of a significant nature involving BT and defendants, subsequent to the entry of the Final Judgment, could constitute such a new event. Before concluding that discrimination against any particular competitor of MCI or NewCo required seeking a modification of the Final Judgment to protect competition or consumers, the Department of Justice would ordinarily inquire at the outset whether the injured competitor had availed itself of existing regulatory remedies, if any, in the United Kingdom as well as the United States, and what relief had

been provided or action taken, if any, by the telecommunications regulatory agencies.

If the Court concludes that any party has met its burden of showing that the Final Judgment should be modified over the opposition of another party, it would then be empowered to grant any particular modification that meets three criteria. The modification must be (i) in the public interest, (ii) suitably tailored to the changed circumstances or new event that gave rise to its adoption, and must not result in serious hardship to any defendant, and (iii) consistent with the purposes of the antitrust laws of the United States, and the telecommunications regulatory regime of the United Kingdom. This standard protects against overbroad modifications, and recognizes that mere inconvenience or some hardship to a defendant will not preclude a modification, but only "serious" hardship. The loss of opportunity to profit from anticompetitive conduct is not a "serious" hardship within the meaning of this standard. Any proposed modification, to be consistent with the antitrust laws, must not be of an anticompetitive character, and must protect competition or consumers in the United States. Modifications must also be consistent with the system of regulation of telecommunications in the United Kingdom.

Section VII permits the United States, where any party has sought modifications of the Final Judgment, to invoke any of the visitorial provisions contained in Section V of the Final Judgment in order to obtain from defendants

any information or documents needed to evaluate the proposed modification prior to decision by the Court.

5. Visitorial and Compliance Requirements

Section V of the Final Judgment allows the Department of Justice to monitor defendants' compliance by several means. Section V.A obliges defendants to maintain records and documents sufficient to show their compliance with the Final Judgment's requirements. Sections V.B and V.C enable the United States to gain access to inspect and copy the records and documents of defendants, and also to have access to their personnel for interviews or to take sworn testimony. Section V.B covers access to MCI, as well as to NewCo's operations in the United States. To avoid difficulties that might arise in applying that visitorial procedure to discovery directed at foreign operations of NewCo, Section V.C. provides that NewCo documents and personnel, wherever located (including abroad), would be produced by NewCo in the United States, within sixty days of request in the case of documents, and subject to the reasonable convenience of the persons involved in the case of requests for interviews or sworn testimony. Section V.D permits the United States also to require any defendant to submit written reports relating to any matters contained in the Final Judgment. Finally, Section V.E supplies confidentiality protections for information and documents furnished by defendants to the United States under the other provisions of Section V. It permits the Department of Justice to share information and documents with the Federal Communications Commission (subject to confidentiality protections), and to share

information with the Office of Telecommunications ("OFTEL"), the United Kingdom telecommunications regulator.

6. Term of Years

Section IX.B of the proposed Final Judgment specifies that the substantive restrictions and obligations of the Final Judgment shall expire five years after the entry of the judgment. Five years is an appropriate duration for the substantive provisions because the joint venture is expected by BT and MCI to last a minimum of five years and has been planned on that basis. In addition, MCI can enter BT's assigned territory outside the Americas to compete with BT five years after closing without losing its special rights in BT. The parties have committed by separate stipulation to notify the Department whether they will continue the joint venture six months before the expiration of the Final Judgment's substantive requirements, giving the United States an opportunity to decide whether it is necessary to take further action to protect competition. The international telecommunications markets, including the market or markets for international telecommunications services between the United States and the United Kingdom and the emerging market or markets for seamless global telecommunications services, may evolve rapidly during the next five years, in part due to the transactions under consideration in this case and the Final Judgment. Under these circumstances, the United States does not consider it necessary to impose a lengthier duration on the substantive provisions of the proposed Final Judgment.

B. Effects of the Proposed Final Judgment on Competition

The transactions between BT and MCI represent the first opportunity the Department of Justice has had to consider the competitive consequences of the acquisition of a substantial interest in a major United States international telecommunications provider by a foreign telecommunications provider with market power in its home market. The formation of an exclusive international joint venture between such firms to provide a wide range of enhanced telecommunications services presents additional competitive issues.

The BT-MCI joint venture may enable the parties to offer services that they would not otherwise provide. But the BT-MCI transactions also pose substantial risks to competition in the United States, owing to BT's vertically integrated virtual monopoly in local services and its dominant position in long distance domestic and international services in the United Kingdom, which when combined with MCI's competitive long distance services would give rise to increased incentives for BT's market power to be used to favor MCI and NewCo and disadvantage competitors in the United States. In other circumstances involving vertical integration between large monopoly providers of local exchange telecommunications services and competitive long distance providers in the United States, the Department of Justice has obtained various forms of relief under the antitrust laws to protect competition. See, e.g., United States v. American Telephone and Telegraph Co., 552 F. Supp. 131 (D.D.C. 1982), aff'd mem. sub nom. Maryland v. United States, 460 U.S. 1001 (1983); United States v. GTE

Corp., 603 F. Supp. 730 (D.D.C. 1984). While the relief proposed here is not the same as in those cases, it serves a similar competitive purpose, taking into account the particular circumstances and risks associated with the transactions between MCI and BT. These include the unique practices and relationships between carriers in the provision of international telecommunications services, the continued existence of MCI as a separate entity following these transactions, and the involvement of a foreign telecommunications provider subject to a distinct regulatory regime overseas.

The United States believes that the relief proposed here, including both the substantive restrictions and obligations and the ability of the Court to modify the Final Judgment to respond to additional competitive problems, will substantially benefit competition. The ability of MCI and NewCo to realize anticompetitive advantages in the United States will be substantially constrained.

Entry of the proposed Final Judgment will allow the transactions between BT and MCI to proceed, and any benefits from them to be realized by consumers. At the same time, it will provide United States competitors with increased means to detect discrimination, protect them against misuse of their confidential business information, and enable them to respond to BT's provision of international simple resale through MCI and NewCo with services of their own to the United Kingdom that could bypass BT's international switched correspondent services and alleviate the risks of anticompetitive conduct involving MCI and NewCo. It will also provide the United States with a mechanism to modify the Final Judgment, in

response to post-judgment changed circumstances or other events, without having to initiate separate antitrust litigation. This opportunity to impose additional restrictions on defendants to protect competition and consumers in the United States will ensure against any possibility that the other substantive provisions of the Final Judgment and existing regulatory requirements may prove insufficient to protect competition. Thus, the modification provision will serve as an additional important deterrent to anticompetitive behavior.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorney's fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuits that may be brought against defendants in this matter.

In addition, persons affected by unreasonable discrimination on the part of MCI, in violation of 47 U.S.C. § 202, may complain to the Federal Communications Commission as provided by 47 U.S.C. § 208, for such relief as is

available under the Communications Act and the Commission's regulations, or bring suit for damages pursuant to 47 U.S.C. § 206. Persons affected by an undue preference or undue discrimination on the part of BT in violation of Condition 17 of BT's license, or other violation of BT's license, in favor of MCI or NewCo, may complain to the United Kingdom Office of Telecommunications for such relief as OFTEL is authorized to provide under the United Kingdom Telecommunications Act and BT's license. Entry of the proposed Final Judgment will not impair the bringing of such complaints and actions, and indeed will likely facilitate the effective detection and prevention of anticompetitive conduct through existing regulatory mechanisms.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Final Judgment should be modified may submit written comments to Richard L. Rosen, Chief, Communications and Finance Section, U.S. Department of Justice, Antitrust Division, 555 Fourth Street, N.W., Room 8104, Washington, D.C. 20001, within the 60-day period provided by the Act. These comments and the Department's responses, will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its

consent to the proposed Judgment at any time prior to entry. The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate to carry out or construe the Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish any violations of its provisions. Modifications of the Final Judgment may be sought by the United States or by the defendants under the standards described therein.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered litigation to seek an injunction to prevent the proposed transactions between BT and MCI. The United States rejected that alternative because the relief in the proposed Final Judgment, together with existing regulatory safeguards in the United States and the United Kingdom, should provide protection against significant anticompetitive effects on competition.

In formulating the proposed Final Judgment, the United States also considered the extent to which the regulatory regime in the United Kingdom and the FCC have mechanisms currently in place to address anticompetitive conduct, including discrimination, by providers of international telecommunications services. The United States considered including in the Final Judgment specific nondiscrimination conditions, enforceable through contempt sanctions, to deter

discrimination by BT in favor of MCI and NewCo. It concluded that the other provisions of the Final Judgment, existing regulatory requirements and enforcement practices in the United States and the United Kingdom, and the ability of the United States to seek modifications of the Final Judgment, are sufficient to protect competition.

The United States was not prepared to rely on existing regulation alone to prevent harm to competition and consumers in the United States. While the United Kingdom regulatory authorities share with the United States a generally procompetitive approach to telecommunications policy, protection of competition and consumers in the United States is not the primary goal of United Kingdom regulators. There are a number of important telecommunications regulatory issues that remain unsettled in the United Kingdom, and some policies specifically limiting competition remain in effect, such as the duopoly on international facilities-based competition. Historic experience and the present state of competition in the United States and the United Kingdom were also taken into account in determining that this relief was needed.

Because, however, the telecommunications regulatory regime in the United Kingdom now embodies or is developing important competitive policies and safeguards, the United States concluded that it is possible to protect competition adequately in these circumstances without placing specific antidiscrimination prohibitions in the proposed Final Judgment or prohibiting the MCI-BT transactions altogether, as would likely have been necessary otherwise. The

procompetitive direction of United Kingdom telecommunications regulation is evidenced by the ending of the BT-Mercury domestic duopoly policy in 1991, and by the more recent licensing of additional facilities-based domestic competitors to BT and Mercury and the grant of several international simple resale licenses to, among others, United States firms. OFTEL, the principal U.K. telecommunications regulatory authority, has issued a statement on interconnection and accounting separation setting forth policies and targets for making a wider variety of interconnection arrangements with BT available to competitors, and creating greater transparency in the relationship between BT's own network and retail operations. OFTEL is seeking to improve its regulatory oversight of BT and promote greater competition in other respects as well. In sum, the United Kingdom telecommunications regulatory regime has taken steps to promote and foster competition that have not yet occurred in most of the world, and it was appropriate for the United States to take these developments into account in not requiring more extensive relief to be included in the proposed Final Judgment.

The United States also considered issues of international comity in shaping the proposed Final Judgment. Consistently with its longstanding enforcement policy, the United States sought in the substantive provisions of the Final Judgment to avoid situations that could give rise to international conflicts between sovereign governments and their agencies. The substantive requirements imposed on MCI and NewCo have been tailored so as to avoid direct United States

involvement in BT's operation of its telecommunications network in the United Kingdom on an ongoing basis, minimizing the potential for conflict with United Kingdom authorities.

VII.

STANDARD OF REVIEW UNDER THE TUNNEY ACT FOR THE PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States are subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed final judgment "is in the public interest." In making that determination, the court *may* consider:

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). The courts have recognized that the term "public interest" "take[s] meaning from the purposes of the regulatory legislation." NAACP v. Federal Power Comm'n, 425 U.S. 662, 669 (1976); United States v.

American Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984). Since the purpose of the antitrust laws is to "preserv[e] free and unfettered competition as the rule of trade," Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958), the focus of the "public interest" inquiry under the Tunney Act is whether the proposed final judgment would serve the public interest in free and unfettered competition. United States v. Waste Management, Inc., 1985-2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C. 1985). In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[13] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making the public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

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[13] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

It is also unnecessary for the district court to "engage in an unrestricted evaluation of what relief would best serve the public." United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). Precedent requires that

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[14]

A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

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[14] United States v. Bechtel, 648 F.2d at 666 (quoting United States v. Gillette Co., 406 F. Supp. at 716). See United States v. BNS, Inc., 858 F.2d 456, 463 (9th Cir. 1988); United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); see also United States v. American Cyanamid Co., 719 F.2d at 565.

> waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

The proposed consent decree, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a merger or whether it mandates certainty of free competition in the future. The court may reject the agreement of the parties as to how the public interest is best served only if has "exceptional confidence that adverse antitrust consequences will result . . ." United States v. Western Electric Co., 993 F.2d 1572, 1577 (D.C. Cir. 1993).

Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'"[15/] Under the public interest standard, the court's

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[15] United States v. American Tel. and Tel Co., 552 F. Supp. 131, 150 (D.D.C.), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1982) (quoting United States v. Gillette Co., 406 F. Supp. at 716); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky 1985).

role is limited to determining whether the proposed decree is within the "zone of settlements" consistent with the public interest, not whether the settlement diverges from the court's view of what would best serve the public interest. United States v. Western Electric Co., 993 F.2d at 1576 (quoting United States v. Western Electric Co., 900 F.2d 283, 307 (D.C. Cir. 1990)).

VIII.

DETERMINATIVE MATERIALS AND DOCUMENTS

No documents were determinative in the formulation of the proposed Final Judgment. Consequently, the United States has not attached any such documents to the proposed Final Judgment.

Dated: June 15, 1994

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