IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Department of Justice
1401 H Street, NW, Suite 8000
Washington, DC 20530

Plaintiff,

v.

AT&T CORPORATION and
TELE-COMMUNICATIONS, INC.,

Defendants.

No. 98 3170
(Antitrust)

Filed: December 30, 1998

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"), 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

The United States filed a civil antitrust complaint on December 30, 1998, alleging that the proposed merger of Tele-Communications Inc. ("TCI") with a wholly owned subsidiary of AT&T Corporation ("AT&T") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. Among its other telecommunications businesses, AT&T is the largest provider of mobile

wireless telephone services in the nation. TCI, through a wholly owned subsidiary, holds a 23.5% equity interest in the mobile wireless telephone business of Sprint Corporation ("Sprint") another large provider of mobile wireless telephone services through its personal communications services ("PCS") subsidiary, Sprint PCS.[1] The complaint alleges that AT&T's acquisition of this interest in one of its principal competitors may substantially lessen competition in the sale of mobile wireless telephone services. The prayer for relief seeks a judgment that the proposed acquisition would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and a preliminary and permanent injunction preventing AT&T and TCI from carrying out the proposed merger.

Shortly before this complaint was filed, the Department and the defendants reached agreement on the terms of a proposed consent decree, which requires the complete divestiture of the interest in Sprint PCS now owned by TCI. The proposed consent decree also contains provisions, explained below, designed to minimize any risk of competitive harm that otherwise might arise pending completion of the divestiture. In light of this agreement, the Department

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[1]When the proposed merger with AT&T was announced, TCI (through a subsidiary) owned 23.5% of Sprint Spectrum Holdings, Co., L.P. as a general partner. This partnership was restructured on November 23, 1998, through transactions in which TCI and the other cable partners (Cox Communications, Inc. and Comcast Corporation) received Series 2 (Sprint) PCS tracking stock in exchange for their partnership interests. In relinquishing their governance rights as partners, the cable partners, including TCI, received the right to liquidate their interests over the next few years. Their Sprint PCS tracking stock has full voting power on issues relating to changing the number or nature of the PCS stock, spinoffs or acquisition of the PCS business. On all other issues TCI's shares (and those of the other two cable partners) have only one-tenth (1/10) the voting rights that shareholders of other classes of Sprint PCS stock enjoy. The restructuring contemplates that the Sprint Corporation Board of Directors will manage Sprint's PCS business, with TCI and the other cable company owners of the Sprint PCS tracking stock playing a passive or lesser role, due to their minimal voting powers on matters relating to those issues. Sprint owns 53% of the voting power and equity of Sprint PCS.

concluded that there was no competition-based reason to seek to prohibit AT&T's merger with TCI. A Stipulation and proposed Final Judgment embodying the settlement were filed simultaneously with the complaint.

The United States and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 ("APPA"). Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

Defendant AT&T is a New York corporation with headquarters in New York, New York. AT&T is a provider of a wide range of telecommunications services internationally and in the United States. Among other things, it is the largest provider of long distance telecommunications services in the United States, as well as the largest provider of mobile wireless telephone services. In 1998, AT&T's mobile wireless operations reported total revenues of approximately $5 billion.

TCI is a Delaware corporation with its headquarters in Englewood, Colorado. TCI is the second largest cable system operator in the nation. At the time of the proposed merger closing, TCI, through its wholly owned subsidiary, Liberty Media Corporation, will own a partial interest in Sprint PCS, one of the principal competitors to AT&T's mobile wireless telephone business in

a large number of markets throughout the country. In 1998, Sprint's PCS revenues totaled approximately $975 million.

On June 24, 1998, AT&T and TCI entered into an agreement pursuant to which TCI will merge with a wholly owned subsidiary of AT&T in a $48 billion transaction. Through this transaction, AT&T will acquire TCI's cable television operations, TCI's shares of the Internet Service Provider @Home and of Teleport Communications Group, and assume $11 billion of TCI debt. A variety of other assets now owned by subsidiaries of TCI, including the Sprint PCS holdings, will be transferred to Liberty Media Corp. ("Liberty").[2] Liberty will be a wholly-owned subsidiary of AT&T Corp. Although the shares of Liberty will be entirely owned by AT&T, the Class B and Class C directors of Liberty, who will hold two-thirds (2/3) of the seats on the board of directors, will be appointed prior to the merger with AT&T by the current (TCI) Liberty Media shareholders. These directors may be removed only for cause for a defined period of time.[3] AT&T will issue a separate class of stock, Liberty Media Tracking Stock, the

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[2]TCI, at the time of the merger announcement, was organized into three groups, the TCI Cable Group, the TCI Ventures Group, and the Liberty Media Group, each group having its own TCI tracking stock reflecting the assets owned by different sets of TCI subsidiaries. TCI is reorganizing so that before the merger closes, all of the TCI Cable Group and some of the TCI Ventures assets will be in the TCI Cable Group, to be managed post-merger by AT&T's Board of Directors. The remainder of TCI Ventures, including TCI's international cable plant holdings, a joint satellite venture with News Corporation Limited, an educational and training company, partial ownership of two technology companies, and the shares of Sprint PCS stock now held by TCI Wireline, Inc., will be merged with the cable programming assets of Liberty Media, into Liberty Media Corporation, a Delaware Corporation and subsidiary of TCI. Upon consummation of the merger, each share of the Liberty Media Group tracking stock issued by TCI can be exchanged for one share of Liberty Media Tracking stock to be issued by AT&T.

[3]See Schedule 2.1(c) (i) of the AT&T/TCI Merger Agreement, dated June 23, 1998.

performance of which will reflect the assets held and businesses conducted by Liberty.[4]

B. Mobile Wireless Telephone Services

The complaint alleges that the proposed merger may substantially lessen competition in the provision of mobile wireless telephone services in a number of cities throughout the United States.

Mobile wireless telephone services permit users to make and receive telephone calls using radio transmissions, while traveling by car or by other means. The mobility afforded by these services is a valuable feature to consumers. In order to provide this capability, wireless carriers must deploy an extensive network of switches and radio transmitters and receivers. Prior to 1995, mobile wireless telephone services were provided primarily by two licensed cellular carriers in each geographic area. AT&T owned cellular licenses in a large number of areas throughout the country. In 1995, the Federal Communications Commissions ("FCC") allocated (and subsequently issued licenses for) additional spectrum for PCS providers, which include mobile wireless telephone services comparable to those offered by cellular carriers. In addition, in 1996 Nextel Communications, Inc. ("Nextel") began to offer mobile wireless telephone services comparable to that offered by cellular and PCS carriers, bundled with dispatch services, using spectrum that had been allocated for the provision of specialized mobile radio ("SMR") services.

In most major metropolitan markets today, there are two cellular license holders, each of which is authorized to use 25 MHZ of spectrum, up to three PCS licensees each authorized to use 30 MHZ of spectrum, up to three PCS licensees each authorized to use 10 MHZ of spectrum, and

[4]See Exhibit D of the AT&T/TCI Merger Agreement, dated June 23, 1998.

one carrier, Nextel, that uses SMR spectrum. There is substantial variation among different geographic areas, however, in terms of the number of independent firms that are currently offering mobile wireless telephone services, the time frame in which additional firms are expected to enter the market using the PCS licenses described above, and the scope of geographic coverage that the various carriers can offer, in light of the fact that their networks have not yet been fully built. Most of the relevant geographic markets have between four and six carriers providing mobile wireless telephone services for consumers and businesses, including the two incumbent cellular providers and Nextel. The emergence of PCS providers has generally resulted in lower rates and/or higher quality services in those areas in which they have constructed their networks. Measured by current subscribers and revenues, however, the two cellular carriers still control a large share of the market, with a collective share of 80% or more in many markets.

There is significant differentiation among the mobile wireless telephone services offered by different carriers. Carriers use a variety of different technologies, offer a variety of service and pricing plans, and offer a variety of product bundles which combine wireless telephone service with other services (such as paging and messaging services) and/or with a variety of wireless telephone handsets. For a significant segment of customers, the services offered by AT&T and Sprint PCS appear to be particularly close substitutes. In contrast to other mobile wireless telephone service providers that offer services only on a local or regional basis on their own facilities, both AT&T and Sprint PCS have licenses and facilities in most large metropolitan areas and in many smaller metropolitan areas throughout the country. In addition, AT&T and Sprint are two of the largest providers of long distance telecommunications, as well as a wide

range of other telecommunications services, and therefore have a high degree of brand recognition. For customers who travel frequently, and therefore use their mobile phones frequently outside their home metropolitan areas, the broad geographic coverage provided by AT&T and Sprint is an important competitive advantage. Customers of other wireless carriers which have local or regional networks may be able to place and receive calls outside of their "home" areas, but when they do so, they typically incur significant "roaming" charges assessed by the carrier whose wireless network is being used. Both AT&T and Sprint have attempted to exploit this advantage by, among other things, offering a single-rate national plan.[5]

C. Anticompetitive Consequences of the Proposed Merger

The complaint alleges that AT&T's proposed merger with TCI, which would result in AT&T's acquisition of TCI's interest in Sprint PCS, may substantially lessen competition in the provision of mobile wireless telephone services in the metropolitan areas of New York City; Los Angeles; Dallas-Fort Worth; San Francisco-Oakland-San Jose; Miami-Ft. Lauderdale; Minneapolis-St. Paul; Seattle; Pittsburgh; Denver; Portland, OR; Sacramento; Salt Lake City; Las Vegas; and at least 18 other metropolitan markets. In each of these markets, AT&T is one of two licensed cellular service providers, and Sprint PCS provides mobile wireless telephone services pursuant to a PCS license. AT&T is the largest or second largest provider of mobile wireless telephone services in these markets, which are highly concentrated.[6]

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[5]"Single Rate" refers to plans that involve a flat per minute usage charge, regardless of the location at which the call originates or terminates. These plans usually require the purchase of a minimum number of minutes per month.

[6]The Department of Justice utilizes the Herfindahl-Hirschman Index ("HHI") as a measure of market concentration. The HHI is calculated by summing the squares of the market shares of every firm in the relevant market. A market with an HHI level greater than 1,800 is

The proposed merger may affect the incentives that govern AT&T's competitive behavior (relating to either pricing or service quality) in these markets. When a firm makes pricing decisions (or decisions on potential investments to improve service quality) it weighs two effects that its decision may produce. A higher price (or reduced investment in service quality) will generate greater revenues from those customers who continue to purchase services from the firm. But a higher price (or reduced service quality) also is likely to cause some portion of current or potential new customers to purchase services from a competitor, thereby reducing the firm's revenues. Weighing these two countervailing factors, firms attempt to choose the price (or service quality) level that will maximize their profits.

A firm that acquires a full or partial equity interest in a competitor -- as AT&T proposes to do here -- will face a different calculation of its profit-maximizing price (or service quality) after such an acquisition. After the acquisition, some portion of the customers who would turn to a competitor in response to a price increase (or decline in service quality) would likely purchase services from the firm being acquired; thus, the revenue generated by those customers' purchases will continue to be earned indirectly (through the competitor that has been acquired) by the firm raising its price (or lowering its service quality). Thus an acquisition can cause an individual firm, acting unilaterally, to raise its price more than it would have otherwise (or invest less in service quality than it would have otherwise) because its profit-maximizing price will be higher (or service quality lower) as a result of the acquisition. These adverse effects are greater to the extent that the service offered by the acquired firm is a particularly close substitute for the service

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considered highly concentrated. Department of Justice Federal Trade Commission Horizontal Merger Guidelines § 1.5 (April 2, 1992, revised April 8, 1997). Here, most if not all of the relevant markets have pre-merger HHIs well over 2500.

offered by the acquiring firm. Under those conditions, a larger share of the customers who switch service providers as a result of a price increase (or reduction in quality) will switch to the acquired firm.[7]

In light of the high level of concentration in mobile wireless telephone services markets, and the fact that AT&T and Sprint PCS services appear to be close substitutes for one another for a significant segment of customers, the Department was concerned that the acquisition of a substantial portion of the equity of Sprint PCS by AT&T could reduce AT&T's incentive to compete aggressively in those areas in which Sprint PCS is a significant rival and thereby lead to higher prices or reduced service quality for mobile wireless telephone services.[8]

It appears unlikely that, in the immediate future, entry into the relevant markets will be sufficient to mitigate this competitive harm. For at least the next two years, the only potential

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[7]Another factor that affects the magnitude of the potential price effects is the size of the equity interest that has been acquired. If a 100% equity interest has been acquired, the acquiring firm will recapture 100% of the revenue earned by the acquired firm from customers who switch as a result of the price increase. If a 20% equity interest has been acquired, only 20% of that revenue would be recaptured. Thus, all other things equal, acquisition of a larger equity interest in the acquired firm will generate larger adverse price effects than would the acquisition of a smaller interest.

[8]Acquisitions of shares with significant voting rights may raise additional competitive concerns, beyond those described here in connection with acquisitions of equity interests. An acquisition of voting rights may allow the acquiring firm to exert control or influence over the competitive behavior of the acquired firm in ways that reduce competition. These concerns are not present in this case. Sprint will retain a majority of the voting power (53%) of the Sprint PCS shares and the voting rights conferred by TCI's Sprint PCS investment are insignificant. Furthermore, Section VI.D. of the proposed Final Judgment will prohibit the trustee from even voting those shares during the pre-divestiture period. The Department also considered whether the proposed acquisition would distort the incentives of Sprint PCS to compete in this market and concluded that this was not a significant risk. The defendants will be under a court order to divest the Sprint PCS stock. Thus, there is no prospect that AT&T will ultimately control Sprint PCS and no reason to believe that Sprint PCS's incentives to compete with AT&T during the pre-divestiture period will be diminished.

entrants will be firms using the spectrum already allocated for PCS by the FCC. While the FCC may eventually allocate additional spectrum which could be used to provide mobile wireless telephone services, it is unlikely that such spectrum could be allocated and licensed, and that licensees could construct their networks and begin offering service, within the next two years. Additional entry within the next two years may come from firms using the spectrum that the FCC has already allocated for PCS. However, in that time frame, it appears unlikely that a firm could acquire a sufficient number of PCS licenses and construct its networks so as to be able to offer geographic coverage comparable to AT&T's and Sprint PCS's nearly nationwide footprint.

For these reasons, the Department concluded that the merger as proposed may substantially lessen competition, in violation of Section 7 of the Clayton Act, in the provision of mobile wireless telephone services in those markets where AT&T is one of two cellular licensees and where Sprint PCS also provides mobile wireless telephone services.[9]

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment will preserve competition in the sale of mobile wireless services in the relevant geographic markets by requiring the defendants to execute a complete divestiture of the Sprint PCS stock. This divestiture will eliminate the change in market structure caused by the merger; after this divestiture, AT&T would be unable to recapture any of the

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[9]AT&T also offers mobile wireless telephone services in other geographic areas, using PCS licenses. AT&T's market share in those markets, which it has only recently entered, is considerably smaller than its share in markets where AT&T has a cellular license. The Department has reached no judgment as to the competitive effects of the proposed merger in those markets. To the extent that the merger might produce anticompetitive effects in those markets, however, the divestiture requirements in the proposed Final Judgment would provide an effective remedy.

revenues that might be diverted from AT&T to Sprint PCS as a result of an increase in the price of AT&T's mobile wireless telephone services.

In merger cases in which the Department seeks a divestiture remedy, the Department requires completion of the divestiture within the shortest time period reasonable under the circumstances. In this case, the proposed Final Judgment requires that Liberty's holdings of Sprint PCS be reduced to 10% or less of the outstanding Sprint PCS stock by May 2002, approximately three years from the expected date of entry of the decree, and that the holding be divested completely by May 2004, approximately five years from the expected entry of the decree.

These time periods for divestiture are significantly longer than the Department ordinarily would accept. The Department believes they are appropriate in this case, however, because of concerns that a more rapid divestiture might harm competition by adversely affecting Sprint's ability to raise capital to complete the build out of its wireless network. Sprint anticipates that it will have near-term needs for a substantial amount of capital, both debt and equity, in order to purchase and deploy additional infrastructure for its wireless network. A complete divestiture in the time period required by the Department in the typical case (e.g., six months) potentially could adversely affect the value of new stock that would be issued by Sprint, thereby increasing its cost of raising additional capital and potentially delaying or limiting the completion of Sprint's wireless network construction efforts.[10]

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[10]Sprint has also expressed concerns that if AT&T were to control the divestiture of Sprint PCS stock, it could strategically time the sale of those shares so as to exacerbate, rather than mitigate, any possible adverse effect on the value of Sprint PCS stock that might be issued by Sprint. Unlike the usual divestitures in consent decrees entered into by the Department, the acquiring firm here (AT&T) will not be permitted a period of time to accomplish the divestiture;

Sprint's wireless business has recently been restructured through transactions in which TCI's former partnership interest in the business was converted to TCI's current holding of Sprint PCS stock. In connection with that restructuring, Sprint, TCI, and others negotiated contractual limitations on the ability of TCI to sell its Sprint PCS shares during the period in which Sprint would be seeking to raise capital for its build out. The proposed Final Judgment will not interfere in any way with TCI's compliance with its contractual obligations pursuant to the Sprint PCS restructuring.

The terms of the proposed Final Judgment reflect a balancing of the potential harm to competition that might arise from a divestiture that proceeds either too slowly or too rapidly. By permitting the divestiture of the Sprint PCS shares to be accomplished by a trustee over a period of five years, the proposed Final Judgment should minimize the risk of any potential adverse effect on Sprint's build out of its wireless network. The anticompetitive effects that could arise from the ownership of a substantial interest in Sprint's PCS business by a subsidiary of AT&T are addressed by the requirement that a major portion of the Sprint PCS holding be divested within three years, and that there be a complete divestiture within five years. In addition, other supplementary provisions in the Final Judgment, described below, are designed to reduce the risk that AT&T's partial ownership of Sprint PCS would create anticompetitive incentives during the interim period before the completion of the required divestitures.

Section VI.A. of the proposed Final Judgment requires all economic benefits of the Sprint PCS Holding to inure exclusively to the benefit of the holders of Liberty Media Tracking Shares, and forbids AT&T from engaging in any transaction that would directly or indirectly transfer

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rather, it will go immediately to a trustee who will effect the sale of the stock.

such benefits to AT&T or to any other class of AT&T shareholders. It also requires AT&T to adhere to the Policy Statement Regarding Liberty Tracking Stock Matters that is an exhibit to its merger agreement. Section VI.B. requires TCI to complete the amendment of the Liberty certificate of incorporation and bylaws, contemplated by its merger agreement with AT&T, and to appoint the Class B and Class C Directors of Liberty, prior to the consummation of the merger. Section VI.C. requires AT&T to form the Capital Stock Committee contemplated by its merger agreement. The Policy Statement, the amendment of Liberty's certificate of incorporation and bylaws, and the Capital Stock Committee are integral parts of the framework establishing the governance arrangements for Liberty, and controlling certain financial relationships between and among the various classes of stock issued by AT&T Corp., including the Liberty Media Tracking Stock. Section VI.F. of the proposed Final Judgment is also intended to ensure substantial separation between Liberty's Sprint PCS holding and AT&T's wireless business, by restricting Liberty's ability to acquire any interest in AT&T's wireless business.

Collectively, these provisions are meant to promote a "hold separate" relationship between AT&T and its Sprint PCS holdings during the pre-divestiture period, (i) reducing the risk that Liberty will be operated for the benefit of holders of other classes of AT&T stock (including those other shareholders who will collectively own and control AT&T's wireless business), rather than for the benefit of the Liberty Tracking Stock shareholders, and (ii) reducing the risk that AT&T could recapture any of the revenues that might be diverted to Sprint PCS as a result of an AT&T price increase, because the holders of the Liberty Media tracking stock, rather than the shareholders of AT&T's wireless business, would be the beneficiaries to the extent that AT&T customers switch to Sprint PCS.

As a general matter, the Department does not believe that decree restrictions dealing with corporate governance arrangements and the separation of economic interests among different components of a single corporate enterprise are an appropriate remedy for the anticompetitive effects that might arise from mergers and acquisitions. Such restrictions will have limited efficacy as a long-term protection against anticompetitive effects, and may require ongoing oversight of the conduct of a corporation's internal affairs that neither the Department nor a Court is well-suited to perform on an ongoing basis. The proposed settlement of this case adopts such provisions only because of the unique factors that are present here, and only as an interim measure designed to mitigate any anticompetitive incentives that could otherwise arise during the unusually lengthy period permitted for complete divestiture.

Sections IV and V of the proposed Final Judgment set forth the process and substantive requirements for the complete divestiture of the Sprint PCS Holding, a divestiture that will cure the potential anticompetitive effects of the AT&T/TCI merger. Prior to the closing of the merger, TCI is required to establish a trust, appoint a trustee, and transfer the Sprint PCS Holding to the trust. TCI must secure the Department's approval of both the terms of the trust agreement and the appointment of the trustee nominated by TCI. The trustee will have the obligation and the sole responsibility for executing the divestiture of the Sprint PCS Holding.[11] The trustee is required, by Section V.B., to exercise this responsibility in a manner reasonably calculated to maximize the value of the Sprint PCS Holding to the holders of Liberty Media Tracking Shares.

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[11]The Sprint PCS shares may be sold either in the public markets or in a private sale negotiated with an identified buyer. With respect to a private sale, the proposed Final Judgment requires prior notice to the Department, so that the Department can ensure that such a sale would not raise competitive concerns. There is no such requirement with respect to sales in the public market, where there is no means of determining in advance who the buyer would be.

The trustee is prohibited from considering possible costs or benefits of a sale to AT&T (Section V.B.), from consulting with AT&T, with any Liberty director appointed by AT&T, or with any Liberty director, officer, or shareholder who owns a substantial interest in AT&T, concerning the sale of the Sprint PCS stock (Section V.C.). The trustee will, however, consult with the Class B and Class C directors of Liberty, who will be appointed by TCI prior to the completion of the merger. The trustee is also prohibited from voting the Sprint PCS shares.

By requiring the trustee to act solely in the interests of the Liberty Media Tracking Stock shareholders, the proposed Final Judgment seeks to minimize any possibility that the divestiture would be carried out in a manner designed to provide anticompetitive benefits to AT&T's wireless business.

Collectively, these provisions of the proposed Final Judgment are meant to provide a structural remedy (i.e., complete divestiture) for the anticompetitive effects that might otherwise result from the acquisition; to minimize the risk that this structural remedy might adversely affect competition by impairing Sprint's ability to raise capital to complete its wireless build out (by affording a reasonable period of time in which to complete the divestiture); and to minimize the possibility of interim competitive harm during the period prior to completion of the divestiture.

In order to ensure compliance with the Final Judgment, Section VII authorizes plaintiff to conduct an inspection of the defendant's records. Plaintiff may copy any records under the control of the defendant, interview officers, employees and agents of the defendant, and request that the defendant submit written reports. The inspection is subject to any legally recognized privilege. All information obtained by plaintiff under section VII will be held as confidential except in the course of legal proceedings to which the United States is a party, or for purposes of

securing compliance with the Final Judgment, or as otherwise required by law.

Section IX of the proposed Final Judgment provides that the Court will retain jurisdiction over this action, and permits the parties to apply to the Court for any order necessary or appropriate for the modification of the Final Judgment. In the Department's view, a complete legal and economic separation between AT&T's wireless business and the Sprint PCS Holdings would constitute a material change in circumstances that would justify termination of the divestiture obligation. Section IX also provides for the Court's continuing jurisdiction to interpret or enforce the Final Judgment.

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 the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. 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 lawsuit that may be brought against defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The plaintiff and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United

States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Donald J. Russell
Chief, Telecommunications Task Force
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 8000
Washington, D.C. 20530

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The plaintiff considered, as an alternative to the proposed Final Judgment, action to block consummation of the merger. The plaintiff is satisfied, however, that the divestiture of the Sprint PCS Tracking Stock and other relief contained in the proposed Final Judgment will preserve competition in the provision of mobile wireless telephone services, and that there is no competition-related reason to seek to block the merger.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) 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). As the United States Court of Appeals for the D.C. Circuit recently held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft*, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, "[t]he 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."[12] Rather,

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[12] 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.

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its 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.

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

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981)); *see also Microsoft*, 56 F.3d at 1460-62. Precedent requires that

> the 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.[13]

The proposed Final Judgment, therefore, should not be reviewed under a standard of

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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, 93d Cong. 2d Sess. 8-9 (1974), *reprinted in* U.S.C.C.A.N. 6535, 6538.

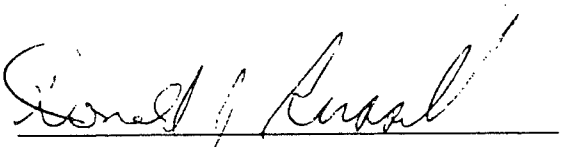
[13] *Bechtel*, 648 F.2d at 666 (emphasis added); *see BNS*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *Gillette*, 406 F. Supp. at 716. *See also Microsoft*, 56 F.3d at 1461 (whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. 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.'"[14]

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Respectfully submitted,



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Dated: December 30, 1998

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[14] *United States v. American Tel. and Tel Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983) (quoting *Gillette Co.*, 406 F. Supp. at 716); *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing PLAINTIFF'S Competitive Impact Statement were served by hand and/or first-class U.S. mail, postage prepaid, this 30th day of December, 1998 upon each of the parties listed below:

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