Transcript of Teleconference with Bill Neukom on Microsoft's Proposed Final Judgment
May 10, 2000

MR. MURRAY: Thanks for your patience. I know that everyone is on a tight deadline so we will get right to it.

I am joined by Bill Neukom who is Microsoft's executive vice-president for law and corporate affairs. Bill is going to briefly summarize the documents that we filed today and our arguments and then take questions from you. I do want people to know that this call will be available for replay. And the document that was sent out as media advisory included the wrong number for that, so let me tell you right now, in case you need to get off to file stories.

For domestic replay, the number you should call is 888-566-0450. And for international, the number on the advisory is correct, 402-998-0620.

We will also be posting a transcript of this call to Microsoft press pass within an hour or two, hopefully, of this call ending, so that you can access that in written form on our Web site. As most of you know, we have filed a number of documents today pursuant to the court's requests. We have filed our proposed final judgment in the case, our remedies, and a brief supporting that. We have filed a motion urging the Court to summarily reject the government's breakup proposal. And we have filed a memorandum outlining our position on future process and schedule for the case. There is one more document that will be posted shortly and that is our summary objection to the government's proposal from April 28. That is our initial objection. That document has not been posted to the Web site yet, but it will be posted shortly and we apologize for any inconvenience.

At this point, I want to turn it over to Bill Neukom for some initial comments and then we will take questions.

MR. NEUKOM: Hello, everyone. Thank you for taking the time to hear from us this afternoon. I want to make some brief comments and then begin the question-and-answer session.

Microsoft is asking the District Court to dismiss the government's breakup proposal immediately. Not only is the breakup an unprecedented remedy in the 110-year history of the Sherman Act, it is also an entirely unwarranted remedy under the court's findings of fact and conclusions of law. Breaking up this company would be a punitive proposal that would fundamentally harm consumers, the industry, and the American economy. Microsoft argues in our submissions filed today that draconian measures like breaking Microsoft into two companies, confiscating Microsoft's valuable intellectual property by forcing us to disclose proprietary information about our operating systems to our competitors, and intruding on Microsoft's ability to design its products based on consumer demand, far exceed any reasonable relief and are measures that are punitive in concept and in effect.

Our submissions filed today make very clear the dangers of government regulation of any technology industry. One of the government's provisions -- and I am referring here to Paragraph 3(b) -- asks the Court to order Microsoft to disclose all proprietary information concerning its operating systems products without any compensation to Microsoft and to disclose that information so that it's available even to our arch competitors.

What this would mean, in practical terms, is that companies like IBM and Sun would receive billions of dollars worth of Microsoft proprietary intellectual property, and enjoy a competitive advantage against us. We would effectively be competing against ourselves, against our own invented intellectual property.

The government's so-called OEM relations provision -- and here I am referring to Paragraph 3(a) -- would destroy the value of Windows' trademark by giving OEMs the right to create and distribute

highly modified versions of Windows, while still using the Windows' trademark. Consumers would no longer know that the Windows' trademark stands for a consistent, predictable, high-quality operating system that they will recognize and find easy and reliable to use.

This provision would also lead to the balkanization of Windows, reducing its value not just to Microsoft but to consumers and to the hundreds -- pardon me, the tens of thousands of independent software developers who write to that platform.

These confiscations of property and clear consumer harms are simply not justified under the Sherman Act, and they strike us as extremely unfair and unsupportable under the law.

Still another set of provisions -- and here I am referring to Paragraph 3(g) -- places the government squarely in the role of regulating Microsoft's design of Windows, while ignoring the harsh consequences of that intervention to consumers and to the rest of this industry. The government seems to relish the opportunity to do this, despite the guidance from the Court of Appeals in its decision in the Windows 95 case.

In addition to our motion for summary rejection of breakup and our summary objections to the DOJ proposals, we are also filing today our proposed final judgment in this matter.

As you know, Microsoft respectfully disagrees with the District Court's conclusion that Microsoft has violated the antitrust laws. But as required by the Court's April 5th order, we are submitting today a proposal that we believe addresses the Court's conclusions of law and provides full relief for each violation found by the Court.

The following requirements would be imposed upon Microsoft under our proposal:

In terms of OEM flexibility, we would be required to allow computer manufacturers to, A, delete the Internet Explorer icon from the Windows desktop and Start menu; B, offer their own Internet signup process in the initial Windows boot sequence; C, display icons for non-Microsoft platform software products on the Windows desktop; and D, configure non-Microsoft Web-browsing software as the default browser. This is an enormously broad amount of flexibility for OEMs and a very considerable concession by Microsoft.

Next, in terms of distribution and marketing agreements, Microsoft would be enjoined from entering into contracts, of those sorts, to promote any product or service through Windows in exchange for the other parties agreeing to limit distribution or promotion of non-Microsoft platform software.

Thirdly, in terms of access to APIs, Microsoft would be enjoined from denying any independent software developer timely access to the technical information that Microsoft makes available to the software development community at large, and from conditioning the provision of additional technical information on a developer's agreement not to support a competing platform. Obviously, Microsoft has done a good job of making information available to ISVs, as is witnessed by the fact that there are tens of thousands of ISVs who write to our platform.

Next, release of product for non-Microsoft platforms. Microsoft would be enjoined from withholding the release of any software product designed to run on a non-Microsoft platform that is ready for commercial release in order to urge the vendor of the platform to limit the development, manufacture, distribution, or promotion of a platform software product that competes with Microsoft.

And, finally, in terms of licensing predecessor operating systems, whenever Microsoft releases a major Windows operating system, such as Windows 95 or Windows 98, the company would be required to make the predecessor operating system available to computer manufacturers, to OEMs, at a royalty no higher than the existing royalty for that technology.

The last thing I want to mention is the recommended process and schedule for the remedy phase of this case going forward. The timetable we are proposing includes four scheduling options for the Court. The nature and scope of the procedures and the amount of time appropriate that are required at this stage depend on the kind of remedies the court is willing to consider. Obviously the more extreme the remedy, the more extensive the procedures, and the larger amount of time Microsoft deserves in order to defend its interests. The schedules are as follows: If the Court wishes to enter

final relief immediately based on the findings and conclusions already entered, Microsoft proposes that the Court enter its draft final decree, including the remedies that I have outlined, without the need for any additional process in a remedies phase. That would conclude the trial of this controversy. If the Court decides to entertain any of the government's remedy proposals, but wants to enter some relief while the remedy process is ongoing, the Court could enter Microsoft's proposed final decree as a preliminary injunction. This procedure would impose substantial temporary remedies while the appeal moves forward immediately, and it would reserve the Court's authority to conduct a comprehensive remedies process and to impose additional remedies in the future, depending on the outcome of the appeal.

If the Court rejects both the government's breakup proposal and the proposals for forced publication of the company's intellectual property, the remaining so-called conduct relief requested by the government would still be severe and unwarranted as a matter of law.

In that instance, however, the company would propose roughly 10 weeks for preparation with brief remedy hearings beginning August 7th. If the Court dismisses the breakup demand but still plans to consider government proposals, that Microsoft be required to disclose its intellectual property, the company then would request approximately four months of discovery and pretrial proceedings leading up to remedies hearings beginning on or about October 2nd.

And, finally, if the Court plans to consider the government's entire proposal of remedies, including the unprecedented breakup demand, the company would request six months of time for discovery and pretrial proceedings leading up to remedies hearings beginning on December 4th.

I'll be happy to try to answer your questions at this point.

QUESTIONER: I would like to ask a question regarding the aspect of your proposal dealing with access to APIs. As you know, Microsoft has always claimed, despite criticism to the contrary, that you have published your APIs openly and claimed that you have basically never been proven to have done otherwise, despite claims to the other side.

Is there anything in this proposal that would somehow alter the process that you have had up to this point in publishing APIs and provide any kind of independent oversight to provide more assurance to the industry that you really are providing full and open and timely disclosure of these things?

MR. NEUKOM: This provision in the decree would essentially reaffirm and, if you will, codify the practice that Microsoft has always used, which is to make available to responsible ISVs the information that they need in order to create technology that runs on our platform product. Our business as a vendor of operating systems is to attract the resources and attention of independent software vendors and to persuade them that it's a wise investment for them to write their products on our platform. And you can't do that without providing them with the information they need to port their technology to our platforms. So this is consistent with what we have done. We believe that the proof is in the pudding, that Windows is popular because there are lots of applications and utilities and tools that run on it and that's because we provide the industry with the information that it needs.

QUESTIONER: But to follow up on that, the question has always been, in those relatively rare instances where ISVs have products that compete directly with yours, that's where the questions have arisen about timely access and also access to perhaps hidden functionality within the operating systems. So I'm wondering if you would even consider something like an independent technology panel that, you know, in some secure fashion could actually look at, not just the APIs, but the source code and provide a stamp of approval that you are in fact being up-front with everything.

MR. NEUKOM: We think the stamp of approval is the virtual unanimous record of ISVs, including especially those ISVs who have competing products, getting full and timely information from Microsoft.

There are lots of instances where Microsoft does not have the most popular product in a category of products which run on our platform, and that's because we do a good job as an operating system vendor. We are also on the other side of that relationship, for example, in terms of our role as an ISV on the Mac platform. So we understand, both directly and indirectly, the needs of ISVs. It’s a fundamental part of our business strategy to make sure that ISVs, whether they are offering complimentary or or competing technology with our own technology, that those people get the

information they want, and we think that system, that market, is working very efficiently and very effectively.

QUESTIONER: Thanks much.

QUESTIONER: Under your proposed schedule, it wasn't clear to me under Option 2 if you were suggesting offering to the Court that they adopt your proposed remedy as a preliminary remedy that would not be stayed pending appeal, or would this still then be stayed pending appeal? Were you offering that it not be stayed?

MR. NEUKOM: We weren't making a decision either way on it. What we were suggesting is that the Court might want to consider a preliminary junction approach, which would both afford the government and the Court some temporary relief pending further remedies processes and at the same time perhaps afford an opportunity for an appeal of those merits. And whether that would be stayed would be a decision we have to determine on the circumstances of the time, and of course, the question would come initially to the District Court and secondly, if necessary, the Court of Appeals. And it would be up to the courts to decide whether to grant any stay, if we were to request it.

But the fundamental notion is, if the Court is not obliged to enter a final decree at this point, it could have the advantage of a preliminary injunctive approach, which would afford both further proceedings at the trial court and perhaps an appeal.

QUESTIONER: If you could also just remind us what the next steps are leading up to the 24th.

MR. NEUKOM: A week from today, the government will file its reply to our filings today. And then two weeks from today, the 24th, there is scheduled oral argument in open court.

QUESTIONER: And you wouldn't expect to hear anything from the judge until the 24th, then?

MR. NEUKOM: Under the current schedule, that's what we would expect, that we would appear for oral argument on the 24th.

QUESTIONER: Great, thank you.

QUESTIONER: How are you.

MR. NEUKOM: Hi, Mike.

QUESTIONER: Just one question I guess to clarify what Rick was asking regarding the opportunity for the judge to use your proposed final judgment as a preliminary injunction. Are you going to then -- if he does that, if the judge does this as a preliminary injunction -- will you then appeal it automatically, like you would under any other injunction?

MR. NEUKOM: We believe that that would be a possibility, but we would have to consider that in light of what the judge does. And we are suggesting one set of remedies as a preliminary injunction, and we have to see if he entered preliminary relief and if so what kind of relief.

QUESTIONER: If he followed your final judgment to the letter in that preliminary relief, would you appeal it?

MR. NEUKOM: I think we would consider that, yes.

QUESTIONER: Okay. That's really all I had, thanks.

MR. MURRAY: Operator, the next question?

QUESTIONER: Hi, guys.

MR. NEUKOM: Hi, Paul.

QUESTIONER: I was curious about how you arrived at the December 4th date, Bill. Are you hoping that Judge Jackson will be in the holiday spirit of giving then, or was there something other than that?

The other thing is --

MR. NEUKOM: We wanted to be in Washington in December. We have been there in '97, '98, '99. We want to keep our string going, I guess.

QUESTIONER: Would it make sense to wait until after the new administration takes over and kind of get a feel for which way they are headed on this?

MR. NEUKOM: Our schedule is based upon what we think is a minimum, reasonable amount of time for both Microsoft and the government plaintiff to undertake the discovery that's required if the Court is willing -- is going to consider the severe forms of relief, that is, not just the product design interference, but the forced disclosure of intellectual property and the breakup. And if all of that is being considered, then there is a good deal more evidence that would have to be developed for a rational deliberation on relief. And we have tried to trim that as much as we can, and we come up with a schedule that takes us out to on or about December 4th for the beginning of hearings.

QUESTIONER: In your response documents, one sentence caught my eye. You said that most of the conduct challenged by the government occurred over a two or three year period, and much of that conduct stopped long ago. Could you clarify a little bit about what conduct you are talking about there? What has stopped and what has not stopped?

MR. NEUKOM: The distribution of promotion contracts are a form of contract which we have discontinued and made that decision I believe in February or March of '98, Paul, and have not done anything like it since. And we are reaffirming in our proposed remedies that we would be bound by that during the term of a decree.

QUESTIONER: Okay, and which of the conduct is not -- basically has not stopped? Which is the ongoing issues, do you think? Are they the ones addressed in this or are there others?

MR. NEUKOM: Well, the technological tying case, as to Windows 98, involves practices which would have begun with the launch of Windows 98, which was in June of 1998. And the other cause of action is attempt to monopolize, and that may go back another year or so. But both the contract and the technological tying fact in this litigation are only a couple of years old.

QUESTIONER: Okay, right. Thank you.

MR. MURRAY: Operator, next question.

QUESTIONER: Hey.

MR. NEUKOM: Hello, James.

QUESTIONER: Hi, had a quick question about scheduling. If you had this remedy hearing beginning December 4th for breakup or even in any of these other instances, how long would you expect that hearing to take, how many witnesses do you think you would need in order to have an appropriate, you know, hearing? How many depositions do you think would be necessary to lead up to each of those phases you described?

MR. NEUKOM: We have only begun preliminarily analyzing that question, James. And of course, it's a matter where the judge would have the power to dispose of the schedule, and the amount and kind of discovery, and the number of witnesses and exhibits, and the like. So it would be a collaborative effort with the plaintiffs and the Court to come up with those numbers.

QUESTIONER: But sure sounds like, if we are talking about a breakup hearing, that you are at least going to seek several weeks and maybe as many witnesses as we had at trial.

MR. NEUKOM: The point of preparing for a breakup remedies trial is to bring into the record all of the evidence -- the business evidence, the technology evidence, the economics evidence -- of the consequences of this breakup. And those consequences are enormous and horrendous and affect every part of the mission of this enterprise. They have a dramatic effect on other companies in this industry. They would have a huge and negative effect on the consumers, the millions of people who rely on their PCs at work and at home, and would, I think it's perfectly fair to say from the statistics

that you all are aware of, would have a very negative effect on the economy of this country. So when you realize the breadth of the consequences from any kind of a breakup of the sort they are suggesting, you realize there is a lot of information to be mastered. And at the same time, if the Court is inclined to consider this intellectual property confiscation approach of the government, and the government design of high technology products and a series of demands the government is making completely outside of the scope of what they -- what their allegations were and what their proof was and what the Court has found, if you add those things in too, then you have a very large universe of issues that require information and legal analysis.

QUESTIONER: It sounds like several weeks. Can you even give us a ballpark of what you think you would need? Given the way you have described it, it sure sounds like it would require a lengthy, you know, at least a month-long trial.

MR. NEUKOM: Well, it's hard to predict length of trial, James. This is something that we will have to take a step at a time. The first question is what sort of discovery seems appropriate. I think there would have to be robust discovery. Again, you are dealing with a life of a unitary company, whether it's breakup or whether it is disabling the company by confiscating its most valuable intellectual property or taking away from it the ability to design products or the other kinds of conduct relief, which are quite severe. Due process, we believe, dictates that that company have an opportunity to explore the evidence and to make a proposal for what it wants to present in open court before judgment is entered. So we will take it a step at a time. We'll see what the discovery shows us. And based on the discovery, we will be in a better position to make a proposal for an appropriate trial. But there is a lot at stake here, if the Court is inclined to consider the severe measures that the government is asking for.

MR. MURRAY: Operator, any other questions? We probably have time for two or three more.

QUESTIONER: Throughout the trial, your lawyers fought awfully hard to resist any suggestions that Microsoft's conduct was in any way anti-competitive. But in offering a remedy proposal of your own, is Microsoft at all acknowledging any of the allegations made at the trial, or for that matter, any of the conclusions in the judge's finding of fact that it did act in an anti-competitive way?

MR. NEUKOM: We are not signaling that. What we are doing, and what a defendant is entitled to do at this stage in a trial, is to accept for purposes of discussion or the argument, the findings of fact and conclusions, as though they were valid. And then based on that to articulate what it considers to be full and responsive relief. And so that is the exercise that we are engaged in. And the fact that we are, in good faith, proposing to the judge this relief does not in any way interfere with our opportunity to seek review of those findings and conclusions on appeal.

So in the most straightforward situation, if the Court were inclined to enter a final judgment based on the process leading up to the oral argument, say, along the lines of the relief we have proposed, that would be the conclusion of the trial. The matter would then be ready for appeal. We would have every right on appeal to seek a careful review by the Court of Appeals of any of the findings that we thought were not valid and certainly the conclusions, and to make our points on the merits of this case.

QUESTIONER: Thank you.

MR. MURRAY: Operator, any other questions?

QUESTIONER: How are you doing? I have a question on this sliding scale timetable.

First off, is this unusual and second of all, does it require the judge to commit himself to that? In other words, is there anything to stop him once he said I won't consider this, later on from deciding the evidence, for instance, leads to a different conclusion, that in fact he should do something that would be contrary to the timetable you set up?

MR. NEUKOM: John, these are our best proposals in an effort to bring to the Court's attention useful information about how to best proceed. And the Court will decide how broad a scope of remedies it thinks are worth considering and at the end of that process will enter some relief. And again, that process could end as early as later this month or perhaps a number of months later, depending on how broad a remedy phase he wants to preside over and what he concludes at the end

of that process. We will have to see how he decides it. The notion of a series of approaches and time schedules is just common sense, and it's not at all uncommon.

QUESTIONER: Thank you.

MR. MURRAY: Thanks, Tom. Operator, we probably have time for another question. Are there any others in the queue?

QUESTIONER: Oh great, I get to wrap it up.

I don't think anybody would argue with the fact that you guys are, you know, pretty smart out there, and it seems that, you know, you have complained and harassed the Justice Department over the course of this tedious trial about how they have expanded the scope and they have brought in other evidence. If you had just proposed what you are proposing today two years ago, don't you think that it would have saved us all a lot of time and heartache? I mean it seems without all this new evidence being brought in, you know, who knows who you pissed off at the Justice Department, that if you proposed this when you guys first sat down, that it would all be over by now?

MR. NEUKOM: Brock, I thought you were having more fun than we were having at the trial. I guess not.

QUESTIONER: I guess not.

MR. MURRAY: That wouldn't be hard.

MR. NEUKOM: The fact remains, Brock, that if you look at these conclusions at the end of this lengthy process, their conclusions of law that, where the Court has found violations in three areas. And we feel very strongly that we have not violated the Sherman Act in any of those areas, and I won't bore you with all of the arguments which will come to the surface in the course of the appeal of this case. But you saw the disposition of the technological tying cause of action. We have always thought that that was the inspiration for this litigation, and we think that matter has been resolved by the Court of Appeals, and that this record plainly shows that there is only one product, Windows 98, and that there are more than facially plausible benefits to consumers, direct users of the operating system, as well as end users who are using applications that rely on that integrated operating system, benefits that derive from the integrated design of the product. Then there is the allegation about an attempt to monopolize the so-called browser market. And the authority relied on there by the government, an American Airlines case, is way outside the scope of the evidence of this case. And we believe under the well-settled Sherman Act cases cited by the federal appellate courts that there is nothing in this record that begins to support a conclusion that Microsoft undertook to monopolize that market, assuming it's a relevant market. And that leaves you with this monopoly broth approach where somehow these contracts which are found not to be anti-competitive per Section 1 purposes, are a pillar under the Section 2 monopoly maintenance case, and where a bunch of other acts, none of which constitutes a violation of the Sherman Act, is somehow by the government's theory enough of a foundation to support monopoly maintenance we think will not survive appeal.

So we are near the end of the trial process where we are when investigation was undertaken and when we were confronted by the government, and that is that we respectfully believe that the conduct of this company has not been violative of the Sherman Act. In fact, we think that the effort by Microsoft to relentlessly invent new technology, to innovate existing technology, to work with other independent companies in the industry to be part of this amazing PC phenomenon that brings remarkable technology quickly to market at lower and lower prices, that that has all been pro competition and pro consumer. And we hope that at the end of the process, and there are a number of endings to go, that our position will be vindicated.

QUESTIONER: So you believe that all this was worth it?

MR. NEUKOM: Pardon?

QUESTIONER: So all of this angst and all of this time was worth it to prove the point that you guys acted ethically and so on and so forth. I mean nobody knows for sure, but it seems if you had offered this at the very beginning, from everything that I know and sitting through that trial, it looks like the Justice Department guys would have said, “Okay sold,” and we could have saved us all a lot

of time.

MR. NEUKOM: We have always tried to be good listeners and open minded and reasonable about the extent to which the government or competitors or other observers have questions about how we do business, and we have always tried to be responsive to that in the particulars of this litigation. We tried to look very carefully at the allegations and the evidence, and believe that the company has performed, again not in a way that violates the Sherman Act, but in a way that is good for consumers and the economy, and we will continue to do whatever we can to resolve this matter as soon as possible in the best interests of this company and our customers and consumers.

QUESTIONER: Okay, thanks.

MR. MURRAY: Thank you very much. And thanks everyone for joining us on this call. I realize that the hour is late and that you all have to file stories, but for anyone that did not get the housekeeping information at the beginning, I will go through that again. For anyone that has that or doesn't need it, you can feel free to drop off at this point.

This call will be replayed until Saturday 5 P.M. Pacific time. So throughout the week and through Saturday, you will be able to hear an audio replay of this call by dialing 888-566-0450. That's the domestic replay number. That is different than the one that was on the initial advisory. That initial advisory was mistaken. The real number is 888-566-0450 for domestic. For international, it's 402-998-0620. As we mentioned earlier, there will be a transcript of this call that will be posted to our Microsoft Press Pass site where all of the various documents are posted and the news release is posted and some comments that Steve Ballmer made earlier this afternoon have been posted now. So that transcript should be posted in a couple of hours. That will enable you to review it in written form. Finally, as I mentioned at the beginning of this call, there is one more document that is yet to be posted and that is our summary objection to the government’s April 28th proposal. That document will be posted later today, and I apologize for any inconvenience on that. With that, this ends the conference call. Thank you very much for participating, and thanks for your interest in this case.