IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. U S WEST, INC. and CONTINENTAL CABLEVISION, INC., Defendants.	No. ____________ (Antitrust)

COMPETITIVE IMPACT STATEMENT

The United States pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 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

The plaintiff filed a civil antitrust complaint on November 4, 1996, alleging that the proposed acquisition of Continental Cablevision, Inc. ("Continental") by U S WEST, Inc. ("U S WEST") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. U S WEST is the dominant provider of local telecommunications services, including dedicated services, within its telephone service area in the states of Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming. Continental is the third largest cable system operator in the United States. At the time the acquisition was announced, Continental owned 20% of Teleport Communications Group, Inc. ("TCG"), a competitive access provider ("CAP") providing dedicated services in various cities across the nation, including Denver, Omaha, Phoenix and Seattle.

The complaint alleges that U S WEST's acquisition of Continental's interest in TCG would substantially lessen competition in the sale of dedicated services in the areas within Denver, Omaha, Phoenix and Seattle in which TCG provides such services. The prayer for relief seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and (2) a preliminary and permanent injunction preventing U S WEST and Continental from carrying out the proposed merger.

Shortly before this complaint was filed, a proposed settlement was reached that requires defendants to divest Continental's interest in TCG by December 31, 1998. Continental had previously reduced its share in TCG from the 20% it owned when the acquisition was announced, to approximately 11%. Continental also relinquished its seats on TCG's Board of Directors. In light of these events, the Department concluded that there was no competition-based reason to seek to prohibit U S WEST's acquisition of Continental. A Stipulation and proposed Final Judgment embodying the settlement were filed simultaneously with the complaint.

The proposed Final Judgment orders U S WEST, on or before June 30, 1997, to divest a portion of the shares of TCG Common Stock it will acquire from Continental sufficient to reduce

U S WEST's interest to less than 10% of the outstanding shares of TCG Common Stock. The proposed Final Judgment further orders U S WEST to divest its remaining shares of TCG Common Stock on or before December 31, 1998. If U S WEST does not divest the TCG Common Stock during the divestiture period, the Court may appoint a trustee to sell the stock. The proposed Final Judgment also prohibits defendants from appointing any members to or participating in meetings of the TCG Board of Directors and contains other provisions designed to bar U S WEST's access to highly sensitive TCG business information. Further, the proposed Final Judgment requires US WEST to treat the TCG interest as a passive investment, and to hold the TCG interest separate and apart from the activities and interests of US WEST. Finally, the proposed Final Judgment requires U S WEST to give the United States prior notice of any proposed divestiture, whether pursuant to a public or private sale, to insure that the divestiture is made to an appropriate purchaser or purchasers and in a manner that will not harm TCG.

The United States and U S WEST have stipulated that the proposed Final Judgment may be entered after compliance with the 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 U S WEST is a Delaware corporation with its headquarters in Englewood, Colorado. U S WEST is one of the seven Regional Bell Operating Companies ("RBOCs"). It is the dominant provider of local telecommunications services, including "dedicated services" (defined as special access and local private line services) within its telephone service area in the states of Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming. In 1995, U S WEST reported total revenues of approximately $11.7 billion.

Continental is a Delaware corporation with its headquarters in Boston, Massachusetts. Continental is the third largest cable system operator in the nation. Continental owns cable systems located in and around St. Paul, Minnesota, as well as Twin Falls, Idaho and Keokuk, Iowa.[1] Continental also has a partial interest in TCG. In 1995, Continental's total revenues were approximately $1.4 billion. TCG's 1995 revenues totaled approximately $184.9 million.

On February 27, 1996, U S WEST entered into an agreement to purchase all of the stock and assets of Continental for approximately $10.8 billion.[2] At the time the acquisition was announced, Continental owned 20% of TCG and held two seats on the TCG Board of Directors. Thereafter, Continental reduced its share of TCG to 11% and relinquished its Board seats.

B. Sale of Dedicated Services

The complaint alleges that the provision of dedicated services in areas within Denver, Omaha, Phoenix and Seattle in which TCG has constructed facilities constitutes a line of commerce and section of the country, or relevant market, for antitrust purposes. Dedicated services include "special access" (the provision of dedicated lines carrying traffic from the premises of high-volume end-users to the end-user's long distance carrier, or between a given

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[1] Continental also has a passive 34% interest in Insight Communications Company, LP, which owns cable systems located in Arizona and Utah.

[2] The deal was subsequently amended and revalued at $11.8 billion.

long distance carrier's points-of-presence ("POPs")); and "local private line services" (dedicated lines connecting multiple locations of an end-user within a given metropolitan area).

Initially, dedicated services were provided only by the RBOCs, GTE and other local exchange carriers ("LECs"). The development of fiber optics and digital electronic technology as well as changes in regulation, has enabled new dedicated service providers to emerge. The first of these new dedicated service providers were designated "competitive access providers" ("CAPs") by the FCC, because they provided the means for long distance carriers (such as AT&T, MCI and Sprint) and high-volume end-users (such as large and medium-size businesses) to bypass the monopoly LEC's facilities. The emergence of CAPs has generally resulted in lower rates and/or higher quality services in those areas in which CAPs have constructed their networks.

The complaint alleges that the provision of dedicated services are a relevant product market. There are no other economically comparable alternatives available to a dedicated services customer. A small, but significant non-transitory increase in the price of dedicated services would not cause enough customers to switch to other telecommunications services to make the price increase unprofitable. The complaint alleges that the geographic markets are the areas within Denver, Omaha, Phoenix and Seattle in which TCG provides dedicated services. Dedicated services are local by definition. Consumers of dedicated services in a given metropolitan area cannot turn to providers of dedicated services that do not provide such services in that metropolitan area. Thus, consumers of dedicated services would not turn to dedicated services providers located outside of their area in response to a small, but significant non-transitory price increase for dedicated services in the given metropolitan area.

C. Anticompetitive Consequences of the Proposed Merger

The complaint alleges that U S WEST's proposed acquisition of Continental (which would result in U S WEST's acquisition of Continental's interest in TCG) would lessen competition substantially in the provision of dedicated services in the areas of Denver, Omaha, Phoenix and Seattle in which TCG provides such services.

U S WEST is the dominant provider of dedicated services within the relevant geographic markets. An acquisition by U S WEST of Continental's interest in TCG in these markets would lessen competition between U S WEST and TCG, leading to higher prices and/or reduced quality. U S WEST's competitive strategy, including its pricing and output decisions, will be influenced by its partial ownership of a significant direct competitor. Because of its partial ownership of TCG, losses of customers to TCG would not be as detrimental to U S WEST, and it would have less incentive to lower prices or increase quality to meet the emerging competition from CAPs in these areas.

Additionally, as a Class B voting shareholder of TCG, U S WEST is entitled to receive advance and detailed notice of significant TCG business transactions, including TCG's plans for entry and expansion in U S WEST markets. U S WEST could use this confidential and proprietary information strategically to raise the cost, increase the risk, and reduce the profitability of entry and expansion by TCG, thereby limiting competitive entry and expansion that would serve to undermine U S WEST's dominance of these markets.

There are no effective substitutes for dedicated services. A price increase for dedicated services resulting from this acquisition would not be defeated by consumers' switching to other telecommunications services or providers of dedicated services located outside of the relevant geographic areas. Moreover, entry into the relevant markets sufficient to mitigate the competitive harm resulting from this acquisition is unlikely within the next two years.

For these reasons, the Department concludes that the merger as proposed would substantially lessen competition in the provision of dedicated services in areas within Denver, Omaha, Phoenix and Seattle in which TCG provides dedicated services, and would result in increased rates and/or reduced quality for dedicated services in these areas, in violation of Section 7 of the Clayton Act.[3]

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[3] TCG also competes directly with U S WEST in the provision of local exchange services in those areas in which TCG has the necessary facilities and in which it has been or has applied to become certified as a local exchange carrier, *e.g.*, Seattle. Because the proposed Final Judgment orders U S WEST to divest all of the Common Stock of TCG it acquires from Continental, it remedies any other competitive harm resulting from U S WEST's partial ownership of TCG. Accordingly, it is unnecessary to determine whether the acquisition would lessen competition in violation of Section 7 of the Clayton Act in any other markets in which U S WEST competes with TCG.

In addition, the Memorandum Opinion and Order (the "Order"), issued by the Federal Communications Commission (the "FCC") on October 18, 1996, requires U S WEST to divest Continental's wholly-owned cable systems located within U S WEST's telephone service area by August 15, 1997, and to divest Continental's passive, minority interest in the in-region systems owned by Insight Communications Company, LP by April 1, 1998. On October 24, 1996, the FCC issued another order clarifying that the wholly-owned systems which U S WEST is obligated to divest by August 15, 1997, include "nine cable systems serving about 280,000 subscribers in and around St. Paul, Minnesota," which systems Continental acquired from Meredith-New Heritage Partnership after the U S WEST/Continental transaction was first entered into. These divestitures are required by Section 652(a) of the Communications Act of 1934, as amended, which prohibits any local exchange carrier from purchasing or otherwise acquiring "directly or indirectly more than a 10% financial interest, or any management interest, in any cable operator providing cable service within the "local exchange carrier's telephone service area." 47 U.S.C. §572(a). Section 652 was enacted as part of the Telecommunications Act of 1996. The terms of the FCC's Order regarding the divestiture of the in-region systems obviates the need for the Department independently to determine whether the U S WEST/Continental transaction would violate Section 7 of the Clayton Act. The divestiture of the in-region systems by a date certain, pursuant to the Order, as amended, is substantially similar to the divestiture relief the Department would seek in the event the U S WEST/Continental transaction was deemed to violate the Clayton Act, and thus will prevent any

II. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the sale of dedicated services in areas within Denver, Omaha, Phoenix and Seattle in which TCG provides dedicated services. It requires U S WEST to divest all of Continental's interest in TCG, a direct competitor of US WEST, in a manner and over a period that will prevent short-term opportunities for anticompetitive behavior while also minimizing any disruption to TCG. The divestiture will help ensure that TCG will remain a strong competitor to U S WEST and that rates for dedicated services in areas within Denver, Omaha, Phoenix and Seattle in which TCG provides dedicated services do not increase as a result of the acquisition.

The proposed Final Judgment orders U S WEST, on or before June 30, 1997, to divest enough shares of TCG Common Stock sufficient to cause U S WEST to own less than 10% of the outstanding shares of TCG Common Stock. The proposed Final Judgment further orders U S WEST to divest any remaining shares of TCG Common Stock on or before December 31, 1998. If U S WEST does not divest the TCG Common Stock during the divestiture periods, the Court may appoint a trustee to sell the stock. If a trustee is appointed, the proposed Final Judgment provides that the defendants will pay all costs and expenses of the trustee and any professionals and agents retained by the trustee. The compensation paid to the trustee and any persons retained by the trustee shall be both reasonable in light of the value of the divestiture(s) and pursuant to a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture(s) and the speed with which it is accomplished. After appointment, the trustee will file monthly reports with the parties and the Court setting forth the trustee's efforts to

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lessening of competition that might have resulted from the transaction.

accomplish the divestiture(s) ordered under the proposed Final Judgment. If the trustee has not accomplished the divestiture(s) within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture(s), (2) the reasons, in the trustee's judgment, why the required divestiture(s) has not been accomplished, and (3) the trustee's recommendations. At the same time, the trustee will furnish such report to the parties, who will each have the right to be heard and to make additional recommendations consistent with the purpose of the trust.

The proposed Final Judgment requires US WEST to treat the TCG interest as a passive investment, and to hold the TCG interest separate and apart from the activities and interests of US WEST. The Judgment also prohibits defendants from appointing any members to or participating in meetings of the TCG Board of Directors and contains other provisions designed to bar U S WEST's access to highly sensitive TCG business information.

Finally, the proposed Final Judgment requires U S WEST to give the United States prior notice of any proposed divestiture(s), whether pursuant to a public or private sale, to insure that the divestiture(s) is made to an appropriate purchaser or purchasers and in a manner that will not harm TCG. If the plaintiff, in its sole judgment, objects to any purchaser(s) and/or the manner in which the divestiture is being carried out, the defendants shall not consummate the divestiture(s) unless approved by the Court.

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 the 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
555 4th Street, N.W., Room 8104
Washington, D.C. 20001

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 for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The plaintiff considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its complaint against defendants. The plaintiff is satisfied, however, that the divestiture of the TCG Common Stock and other relief contained in the proposed Final Judgment will preserve viable competition in the provision of dedicated services in areas within Denver, Omaha, Phoenix and Seattle in which TCG provides dedicated services. Thus, the proposed Final Judgment would achieve the relief the government would have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the complaint.

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;
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> (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."[4] Rather,

> [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

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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 (1974), *reprinted in* U.S.C.C.A.N. 6535, 6538.

> 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. ¶ 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.[5]

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

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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'").

would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'"[6]

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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[6] *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).