IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA and STATE OF NEW YORK, by and through its Attorney General, Dennis C. Vacco, Plaintiffs, v. AMERICAN RADIO SYSTEMS CORPORATION, THE LINCOLN GROUP, L.P. and GREAT LAKES WIRELESS TALKING MACHINE LLC, Defendants.	No. Civ. 96-CV-2459 (Antitrust) Filed: October 24, 1996

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 plaintiffs filed a civil antitrust Complaint on October 24, 1996, alleging that the proposed acquisition of The Lincoln Group, L.P. ("Lincoln") by American Radio Systems Corporation ("ARS") would violate Section 7 of the Clayton Act, 15

U.S.C. § 18, and that the Joint Sales Agreement ("JSA") between ARS and Great Lakes Wireless Talking Machine LLC ("Great Lakes") violates Section 1 of the Sherman Act, 15 U.S.C. § 1. The Complaint alleges that ARS and Lincoln own and operate three and four radio stations respectively in the Rochester, New York area. In addition, ARS has a JSA with a radio station owned by Great Lakes (WNVE-FM), allowing ARS post-merger to control the sale of advertising time on an eighth station as well. This acquisition would allow ARS to control advertising time on six of the top eight radio stations in the Rochester area. As a result, the combination of these companies would substantially lessen competition in the sale of radio advertising time in Rochester, New York and the surrounding area.

Moreover, the Complaint alleges that, beginning at least as early as October 1, 1995 and continuing to this day, ARS and Great Lakes entered into a contract, the purpose of which is the elimination of all pricing competition between two rival radio stations, to the detriment of purchasers of radio advertising time in the Rochester area. As such, it constitutes an illegal contract in restraint of interstate trade and commerce.

The prayer for relief seeks: (a) adjudication that ARS's proposed acquisition of Lincoln would violate Section 7 of the Clayton Act; (b) adjudication that ARS' JSA with Great Lakes is a violation of Section 1 of the Sherman Act; (c) preliminary and permanent injunctive relief preventing the consummation of the proposed acquisition and enjoining the continuation of the JSA; (d) an award to the United States of the costs of this action; and (e) such other relief as is proper.

Shortly before this suit was filed, a proposed settlement was reached that permits ARS to complete its acquisition of Lincoln, yet preserves competition in the market for which the transaction would raise significant competitive concerns. A Stipulation and proposed Final Judgment embodying the settlement were filed at the same time the Complaint was filed.

The proposed Final Judgment orders ARS to divest WHAM-AM and WVOR-FM, both currently owned by Lincoln, and WCMF-AM, currently owned by ARS. Unless the United States grants a time extension, ARS must divest these radio stations either within six months after the filing of the Final Judgment, or within five (5) business days after notice of entry of the Final Judgment, whichever is later. If ARS does not divest WCMF-AM and the Lincoln Assets within the divestiture period, the Court may appoint a trustee to sell the assets. The proposed Final Judgment also requires ARS to ensure that, until the divestiture mandated by the Final Judgment has been accomplished, all of Lincoln's present stations (including WHAM-AM and WVOR-FM) will be operated independently as viable, ongoing businesses, and kept separate and apart from ARS' other Rochester radio stations. Further, the proposed Final Judgment requires ARS to give the United States prior notice as to certain future radio station acquisitions in Rochester.

In addition, the Final Judgment requires ARS and Great Lakes to terminate the JSA that allows ARS to sell radio advertising time for WNVE within five (5) business days after receiving notice of entry of the Final Judgment, and to cease and desist from entering into any future joint sales agreements between them in

the Rochester, New York Metro Survey Area. ARS and Great Lakes also must terminate their "Option Agreement" dated September 28, 1995, between them, within five (5) business days after receiving notice of the entry of the Final Judgment, unless ARS has first assigned this agreement to any entity or entities acquiring either the Lincoln Assets or WCMF-AM. Furthermore, the proposed Final Judgment requires ARS and Great Lakes to give the United States prior notice before entering any future agreements that would grant ARS or Great Lakes the right to sell advertising time or to establish advertising prices for non-ARS radio stations in Rochester.

The plaintiffs and the defendants 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. THE ALLEGED VIOLATIONS

A. The Defendants

Defendant ARS is a Delaware corporation with its headquarters in Boston, Massachusetts. It currently owns and operates 62 radio stations in 14 metropolitan areas in the United States. In 1995, ARS reported total net revenues of approximately $97 million. ARS owns three radio stations in Rochester, and sells advertising for one other radio station (WNVE) under a JSA.

Lincoln is a New York limited partnership headquartered in Syracuse, New York. Lincoln owns four radio stations in Rochester and two in Salem, Ohio. Great Lakes is a New York limited partnership headquartered in East Rochester, New York. It owns one radio station in Rochester, WNVE-FM.

B. Description of the Events Giving Rise to the Alleged Violations

On February 23, 1996, ARS agreed to purchase Lincoln for approximately $30.5 million. As a result of the proposed transaction, ARS would own or have the right to sell advertising for six of the top eight radio stations in Rochester.

ARS and Great Lakes formerly competed for the business of local and national companies seeking to advertise in the Rochester area. This competition ended after ARS and Great Lakes entered into a JSA on September 28, 1995, giving ARS exclusive control over the sale of advertising on Great Lakes' radio station, WNVE-FM. The JSA eliminated rivalry between direct competitors, to the detriment of radio advertisers, without realizing any procompetitive benefits.

The proposed acquisition between ARS and Lincoln and the JSA between ARS and Great Lakes precipitated the Government's suit.

C. Anticompetitive Consequences of the Proposed Merger

1. Sale of Radio Advertising Time in Rochester

The Complaint alleges that the provision of advertising time on radio stations serving the Rochester, New York Metro Survey Area ("MSA") constitutes a line of commerce and section of the country, or relevant market, for antitrust purposes. The Rochester MSA is the geographical unit for which Arbitron furnishes

radio stations, advertisers, and advertising agencies in Rochester with data to aid in evaluating radio audience size and composition. The Rochester MSA includes six counties: Monroe; Wayne; Ontario; Livingston; Genesee and Orleans. Local and national advertising that is placed on radio stations within the Rochester MSA is aimed at reaching listening audiences in the Rochester MSA, and radio stations outside of the Rochester MSA do not provide effective access to this audience. Thus, advertisers would not buy enough advertising time from radio stations located outside of the Rochester MSA to defeat a small but significant nontransitory increase in radio advertising prices within the Rochester MSA.

Radio advertising time is sold by radio stations directly or through their national representatives. Radio stations generate almost all of their revenues from the sale of advertising time to local and national advertisers.

Many local and national advertisers purchase radio advertising time in Rochester because such advertising is preferable to advertising in other media for their specific needs. For such advertisers, radio time: may be less expensive and more cost-efficient than other media at reaching the advertiser's target audience (individuals most likely to purchase the advertiser's products or services); may reach certain target audiences that cannot be reached as effectively through other media; or may offer promotional opportunities to advertisers that they cannot exploit as effectively using other media. For these reasons, many local and national

advertisers in Rochester who purchase radio advertising time view radio either as a necessary advertising medium for them, or as a necessary advertising complement to other media.

Although some local and national advertisers may switch some of their advertising to other media rather than absorb a price increase in radio advertising time in Rochester, the existence of such advertisers would not prevent radio stations from profitably raising their prices a small but significant amount to those advertisers who have strong preferences for using radio over other media for some or all of their advertising campaigns. Radio stations, which negotiate prices individually with advertisers, can identify those advertisers with strong radio preferences. Consequently, radio stations can charge different advertisers different rates. Because of this ability to price discriminate between different customers, radio stations may charge higher prices to advertisers that view radio as particularly effective for their needs, while maintaining lower prices for other advertisers.

2. Harm to Competition

The Complaint alleges that ARS' proposed acquisition of Lincoln would lessen competition substantially in the provision of radio advertising time in the Rochester MSA. The proposed acquisition would create further market concentration in an already highly concentrated market, and ARS would control a substantial share of the advertising revenues in this market. ARS presently controls approximately 34% of all radio advertising revenues in Rochester

(including its JSA with Great Lakes), and its market share would rise to approximately 64% after the proposed merger. According to the Herfindahl-Hirschman Index ("HHI"), a widely-used measure of market concentration defined and explained in Exhibit A hereto, the pre-merger HHI in this market is 2704, which would rise to 4744 after the merger, with a change of 2040. This substantial increase in concentration will reduce competition and lead to higher prices and reduced services.

Advertisers select radio stations to reach a large percentage of their target audience based upon a number of factors, including, inter alia, the size of the station's audience and the characteristics of its audience. Many advertisers seek to reach a large percentage of their target audience by selecting those stations whose audience best correlates to their target audience. If a number of stations efficiently reach that target audience, advertisers benefit from the competition among such stations to offer better prices or services. Today, several ARS and Lincoln stations compete head-to-head to reach the same audiences and, for many local and national advertisers buying time in Rochester, they are close substitutes for each other based on their specific audience characteristics.

During individual price negotiations between advertisers and radio stations, advertisers will provide the stations with information about their advertising needs, including their target audience and the desired frequency and timing of ads. Radio

stations thus have the ability to charge advertisers differing prices after assessing the number and attractiveness of alternative radio stations that can meet a particular advertiser's specific target audience needs.

After the merger, advertisers attempting to reach certain audiences who now mostly listen to ARS and Lincoln stations would face less desirable choices if they buy time solely from firms other than the merged entities in order to reach these audiences. Because advertisers seeking to reach these audiences would have inferior alternatives to the merged entity as a result of the merger, the acquisition would give ARS the ability to raise its rates and reduce the quality of its service.

The Department also considered how the proposed merger would concentrate Rochester's strongest radio signals into the hands of a single entity. After the merger, ARS would own four of the seven Class B FM license radio stations in the Rochester area, and would have controlled advertising on a fifth Class B FM license radio station through its JSA with Great Lakes. ARS would also own the area's only clear channel AM station. The merger would therefore have given ARS control over advertising on six of Rochester's eight most powerful radio signals.

If ARS raised prices or lowered services to those advertisers who buy ARS and Lincoln stations because of their strength in delivering access to certain specific audiences, non-ARS radio stations in Rochester would not be induced to change their formats to attract a greater share of the same listeners and to serve better those advertisers seeking to reach such listeners. Successful radio stations are unlikely to undertake a format change solely in response to small but significant

increases in price being charged to advertisers by a multi-station firm such as ARS, because they would likely have to give up their existing audiences. Less successful stations that change format may still not attract enough listeners to provide a suitable alternative to the merged entity.

New entry into the Rochester radio advertising market is highly unlikely in response to a price increase by the merged parties. No unallocated radio broadcast frequencies exist in Rochester. Also, stations located in adjacent communities cannot boost their power so as to enter the Rochester market without interfering with other stations on the same or similar frequencies, a violation of Federal Communications Commission ("FCC") regulations.

For these reasons, the Department concludes that the merger as proposed would substantially lessen competition in the sale of radio advertising time in the Rochester MSA, eliminate actual competition between ARS and Lincoln, and result in increased rates for radio advertising time in the Rochester MSA, all in violation of Section 7 of the Clayton Act.

D. The JSA is an Illegal Restraint of Trade

The complaint alleges that the JSA between ARS and Great Lakes violates Section 1 of the Sherman Act. Before entering into the JSA, Great Lakes station WNVE-FM competed with ARS Station WCMF-FM for advertisers. Advertisers regularly played one of these stations off against the other to obtain better rates

and increased services. In the fall of 1995, ARS and Great Lakes entered into a JSA pursuant to which ARS exclusively prices and sells all radio advertising time on WNVE-FM. In return, ARS pays Great Lakes a monthly lump sum.

The JSA gives ARS complete control over the sale of the inventory of its direct competitor. In so doing, the JSA eliminates one of the most important forms of competition between two firms in an open market: independent pricing. The agreement thus gives rise to the inference that it will have anticompetitive effects.

This is the first JSA assessed by the Department. The FCC, though not purporting to address antitrust issues, has suggested that, at least in certain circumstances (without addressing the circumstances present here), some JSAs may be beneficial. Accordingly, the Department considered whether the JSA possessed any redeeming procompetitive virtues. However, the creators of this JSA have not offered any plausible procompetitive justifications for the JSA, and our examination revealed none.

Based on our investigation, we found that this JSA did not improve either the operations of the radio stations or the quality of their products. The JSA did not integrate the management or operations of the two stations. Nor did the JSA create any procompetitive benefits for advertisers. Indeed, the Department uncovered evidence that the JSA was created for the simple purpose of ending price competition between the two stations. As one key participant explicitly acknowledged, the JSA was entered into because the two stations "were fighting needlessly over the advertising dollar."

Given the JSA's inherently suspect nature and conspicuous lack of procompetitive virtues, the JSA is an unreasonable restraint that violates Section 1 of the Sherman Act. See Federal Trade Comm'n v. Indiana Federation of Dentists, 476 U.S. 447, 459 (1986).[1] Moreover, though not necessary to the conclusion that this JSA is anticompetitive, our investigation uncovered evidence that, following the creation of the JSA, advertising prices increased despite a decline in listenership.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the sale of radio advertising time in the Rochester MSA . It requires the divestiture of WHAM-AM, WVOR-FM and WCMF-AM. It ends ARS' control of WNVE advertising time. This relief will reduce the market share ARS would have achieved through the merger from over 60 percent to about 40 percent of the Rochester radio market. The divestitures will preserve choices for advertisers and help ensure that radio advertising rates in Rochester do not increase, and that services do not decline.

Unless the United States grants an extension of time, ARS must divest WHAM-AM, WVOR-FM and WCMF-AM either within six months after the Final Judgment has been filed or within five (5) business days after notice of entry of the

[1] The Department recognizes that JSAs may differ both in their terms and in their potential for realizing procompetitive efficiencies.

Final Judgment, whichever is later. Until the divestitures take place, all stations now owned by Lincoln will be maintained as independent competitors to the other stations in the Rochester MSA, including the ARS stations.

If ARS fails to divest WHAM-AM, WVOR-FM and WCMF-AM within the time periods specified in the Final Judgment, the Court, upon application of the United States, shall appoint a trustee nominated by the United States to effect these divestitures. If a trustee is appointed, the proposed Final Judgment provides that ARS 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 WHAM-AM, WVOR-FM and WCMF-AM, and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished. After appointment, the trustee will file monthly reports with ARS, the plaintiffs and the Court, setting forth the trustee's efforts to accomplish the divestiture ordered under the proposed Final Judgment. If the trustee has not accomplished the divestiture 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, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. At the same time, the trustee will furnish such report to ARS and the plaintiffs, who will each have the right to be heard and to make additional recommendations.

The proposed Final Judgment requires that ARS maintain all stations now owned by Lincoln separate and apart from ARS, pending divestiture. The Judgment also contains provisions to ensure that these Lincoln stations will be preserved, so that the stations after divestiture will remain viable, aggressive competitors.

In addition, the proposed Final Judgment requires ARS and Great Lakes to terminate the WNVE Joint Sales Agreement within five (5) business days after notice of entry of the Final Judgment, and to cease and desist from entering into any future joint sales agreements between them in the Rochester area. This prohibition prevents the parties from re-entering what the Department has already determined would be an illegal contract, and is designed to prevent a recurrence of a violation of Section 1 of the Sherman Act, not merely as a way to guard against another possible violation of Section 7 of the Clayton Act.

Moreover, ARS and Great Lakes must terminate the WNVE Option Agreement (which gives ARS the right to purchase WNVE) within five (5) business days after notice of entry of the Final Judgment, unless the option has been assigned to one of the entities that is buying either WHAM-FM, WVOR-FM or WCMF-AM. This prohibition prevents further increases in concentration by ARS without providing the government with adequate notice.

The proposed Final Judgment also prohibits ARS from entering into certain agreements with other Rochester radio stations without providing at least thirty (30) days' notice to the Department of Justice. Specifically, ARS must notify the

Department before acquiring any significant interest in another Rochester radio station, except for acquisition of one additional Class A-License FM radio station in the Rochester MSA other than WDKX-FM or WMAX-FM. Acquisitions beyond this would raise competitive concerns but might be too small to be otherwise reportable under the Hart-Scott-Rodino ("HSR") premerger notification process.

Moreover, ARS and Great Lakes may not agree to sell radio advertising time for any other Rochester radio station, or have any other Rochester radio station sell advertising time for them, without providing the United States with notice. This provision ensures that the Department will receive advance notice of any acquisition, or agreements, through which ARS or Great Lakes would increase the amount of advertising time on radio stations that they can sell. In particular, this provision requires ARS and Great Lakes to notify the Department before they enter into any joint sales agreements ("JSAs"), where one station takes over another station's advertising time, or enter into any local marketing agreements ("LMAs"), where one station takes over another station's broadcasting and advertising time, in the Rochester area. Agreements whereby ARS sells advertising for or manages other area radio station would effectively increase ARS' market share in the Rochester MSA. In analyzing the Rochester radio market, the Department treated ARS' present JSA station as if ARS owned it outright. Despite their clear competitive significance, JSAs probably would not be reportable to the Department

under HSR. Thus, this provision in the decree ensures that the Department will receive notice of and be able to act, if appropriate, to stop any agreements that might have anticompetitive effects in the Rochester market.

The relief in the proposed Final Judgment is intended to remedy the competitive effects of the proposed acquisition of Lincoln by ARS, and to eliminate a contract between ARS and Great Lakes that constitutes an illegal restraint of trade. Nothing in this Final Judgment is intended to limit the plaintiffs' ability to investigate or to bring actions, where appropriate, challenging other past or future activities of ARS or Great Lakes in the Rochester MSA, including their entry into other JSAs, LMAs, or other agreements related to the sale of advertising time.

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 plaintiffs 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:

Craig W. Conrath
Chief, Merger Task Force
Antitrust Division
United States Department of Justice
1401 H Street, N.W.; Suite 4000
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and that 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 plaintiffs considered, as an alternative to the proposed Final Judgment, a full trial on the merits of their Complaint against defendants. The plaintiffs are satisfied, however, that the divestiture of the Lincoln Assets, the termination of the JSA between ARS and Great Lakes, and other relief contained in the proposed Final Judgment will preserve viable competition in the sale of radio advertising time in the Rochester MSA. 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;

> (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). 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."[2] 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 explanations of the

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[2] 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.

> 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.[3]

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

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[3] Bechtel, 648 F.2d at 666 (citations omitted)(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' ") (citations omitted).

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.' "[4]

This is strong and effective relief that should fully address the competitive harm posed by the proposed merger and the JSA.

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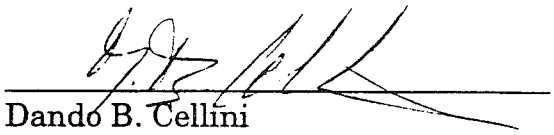
[4] United States v. American Tel. and Tel Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd. sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting Gillette Co., 406 F. Supp. at 716 (citations omitted); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

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,



Dando B. Cellini

Merger Task Force
U.S. Department of Justice
Antitrust Division
1401 H Street, N.W.; Suite 4000
Washington, D.C. 20530
(202) 307-0001

Dated: October 24, 1996

EXHIBIT A

DEFINITION OF HHI AND CALCULATIONS FOR MARKET

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty, and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the Merger Guidelines. See *Merger Guidelines* § 1.51.