UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
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	)	
Plaintiff,	)	Civil No.: 99-1119 (LFO)
	)	
v.	)	
	)	Filed: June 7, 1999
	)	
BELL ATLANTIC CORPORATION and GTE CORPORATION,	)	
	)	
	)	
Defendants.	)	
	)	

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 May 7, 1999, alleging that the proposed acquisition of GTE Corporation ("GTE") by Bell Atlantic Corporation ("Bell Atlantic") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18 by lessening competition in the markets for wireless mobile telephone services in 10 major trading areas ("MTAs"), 65 metropolitan statistical areas ("MSAs") and rural service areas ("RSAs") in Florida, Alabama,

Illinois, Indiana, Texas, Virginia, Wisconsin, New Mexico, and South Carolina. In the 10 MTAs, Bell Atlantic has a 50% interest in PCS PrimeCo, L.P. ("PrimeCo"), a firm that provides personal communications services ("PCS") in 61 MSAs and RSAs where cellular mobile telephone services are provided by GTE, or by a firm that GTE has an interest in or will acquire. In addition, this acquisition affects four additional MSAs where competing cellular mobile wireless telephone businesses are owned in whole or in part by Bell Atlantic and GTE. These areas are identified in the Complaint as the "Overlapping Wireless Markets."

Shortly before the Complaint in this matter was filed, the United States and defendants reached agreement on the terms of a proposed Final Judgment, which requires Bell Atlantic and GTE to divest one of the wireless telephone businesses in each of the Overlapping Wireless Markets. In each of the Overlapping Wireless Markets, defendants can choose which wireless business to divest. The proposed Final Judgment also contains provisions, explained below, designed to minimize any risk of competitive harm that otherwise might arise pending completion of the divestiture. The proposed Final Judgment and a Stipulation by plaintiff and defendants consenting to its entry were filed simultaneously with the Complaint.

The United States and 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. The United States and defendants have also stipulated that defendants will comply with the terms of the proposed Final Judgment from the date of signing of the Stipulation, pending entry of the Final Judgment by the Court. Should the

Court decline to enter the Final Judgment, defendants have also committed to continue to abide by its requirements until the expiration of time for any appeals of such ruling.

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

A. The Defendants and the Proposed Transaction

Bell Atlantic is one of the remaining five Regional Bell Operating Companies ("RBOCs") created in 1984 by the consent decree settling the United States' antitrust case against American Telephone & Telegraph Co. GTE is the largest non-RBOC local telephone operating company in the United States. Bell Atlantic and GTE each provide local exchange services in distinct regions, and they also provide wireless mobile telephone services, including cellular mobile telephone services and PCS, both within and outside of their local exchange service regions. Bell Atlantic is a 50% partner in PrimeCo, a firm that provides wireless mobile telephone services in many areas of the country.

Bell Atlantic, with headquarters in New York City, New York, is one of the largest RBOCs in the United States, with approximately 42 million total local telephone access lines. In 1998, Bell Atlantic had revenues in excess of $31 billion. Bell Atlantic provides local telephone services to retail customers in Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia, and West Virginia, as well as cellular mobile telephone services in those states. Bell Atlantic also provides cellular mobile telephone services in some areas outside its local exchange service region, including areas within the states of Arizona, Georgia, North Carolina, New

Mexico, South Carolina, and Texas. Through its 50% partnership in PrimeCo, Bell Atlantic provides wireless service in the states of Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Michigan, Minnesota, Mississippi, New Mexico, North Carolina, Ohio, Oklahoma, Texas, Virginia, and Wisconsin. Bell Atlantic is the nation's fourth largest wireless mobile telephone service provider, with about 6.6 million subscribers nationwide.

GTE, with headquarters in Irving, Texas, is the largest non-RBOC local telephone company in the United States, with over 23 million total local telephone access lines. In 1998, GTE had revenues in excess of $25 billion. GTE provides local telephone service to retail customers in Alabama, Alaska, Arizona, Arkansas, California, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Virginia, Washington, and Wisconsin, and it also provides wireless mobile telephone service in most of these states. GTE is a major wireless mobile telephone service provider, with about 4.8 million subscribers nationwide. GTE also has entered into an agreement, dated April 2, 1999, to acquire certain cellular mobile telephone businesses from Ameritech Mobile Phone Service of Illinois, Inc., and Ameritech Mobile Phone Services of Chicago, Inc., ("Ameritech") for $3.27 billion, which would make GTE a provider of cellular mobile telephone services in additional areas in Illinois and Indiana. The acquisition of the Ameritech cellular businesses would add about 1.7 million subscribers to GTE's total number of wireless subscribers nationwide.

On July 28, 1998, Bell Atlantic and GTE entered into a merger agreement whereby the two firms would merge in a transaction valued at approximately $53 billion dollars at the time of the agreement. If this transaction is consummated, the combined total of Bell Atlantic's and

GTE's cellular and other wireless mobile telephone service subscribers, absent divestitures, would be 13.1 million, including the number of subscribers GTE would receive from its acquisition of Ameritech cellular businesses.

B. Wireless Mobile Telephone Services

Wireless mobile 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 this service is a valuable feature to consumers, and cellular and other wireless mobile telephone services are commonly priced at a substantial premium above landline services. In order to provide this capability, wireless carriers must deploy an extensive network of switches and radio transmitters and receivers, and interconnect this network with the networks of local and long distance landline carriers, and with the networks of other wireless carriers. In 1998, revenues from the sale of wireless mobile telephone services totaled approximately $30 billion in the United States.

Initially, wireless mobile telephone services were provided principally by two cellular systems in each MSA and RSA license area. Cellular licenses were awarded by the Federal Communications Commission ("FCC") beginning in the early 1980s, within any given MSA or RSA.[1] Providers of Specialized Mobile Radio ("SMR") services typically were also authorized to operate with some additional spectrum in these areas, including the Overlapping Wireless Markets.

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[1] 25 MHz of spectrum was allocated to each cellular system in an MSA or RSA. MSAs are the 306 urbanized areas in the United States, defined by the federal government, and used by the FCC to define the license areas for urban cellular systems. RSAs are the 428 areas defined by the FCC used to define the license areas for rural cellular systems outside of MSAs.

In 1995, the FCC allocated (and subsequently issued licenses for) additional spectrum for the provision of PCS, a type of wireless telephone service that includes wireless mobile telephone services comparable to those offered by cellular carriers. In 1996 one SMR spectrum licensee began to use its SMR spectrum to offer wireless mobile telephone services, comparable to that offered by cellular providers and bundled with dispatch services, in a number of areas including some of the Overlapping Wireless Markets. While the areas for which PCS providers are licensed (MTAs and basic trading areas ("BTAs")) differ somewhat from the cellular MSAs and RSAs, they generally overlap with them. In many areas, including most of the Overlapping Wireless Markets, not all of the PCS license holders have started to offer services or even begun to construct the facilities necessary to begin offering service. The PCS providers have tended to enter in the largest cities first, entering in smaller markets only later and not on as wide a scale. Moreover, even in those areas where one or more PCS providers have constructed their networks and have started to offer service, including the Overlapping Wireless Markets, the incumbent cellular providers, such as Bell Atlantic and GTE, still typically have substantially larger market shares than the new entrants.

C. Anticompetitive Consequences of the Proposed Acquisition

Bell Atlantic and GTE, or firms in which they have an interest, are or will be competing providers of wireless mobile telephone services in 65 cellular license areas in nine states. These areas are referred to in the Complaint as follows:

I. PCS/Cellular Overlap Areas

A. Jacksonville MTA
   1. Jacksonville MSA
   2. Florida 5- Putnam RSA

B. Miami-Fort Lauderdale MTA
    1. Fort Myers MSA
    2. Florida 1- Collier (B1) RSA
    3. Florida 2- Glades (B1) RSA
    4. Florida 3- Hardee RSA
    5. Florida 11- Monroe (B2) RSA

C. Tampa-St. Petersburg-Orlando MTA
    1. Tampa-St. Petersburg MSA
    2. Lakeland-Winter Haven MSA
    3. Sarasota MSA
    4. Bradenton MSA
    5. Florida 2- Glades (B1) RSA
    6. Florida 3- Hardee RSA
    7. Florida 4- Citrus (B1) RSA

D. New Orleans-Baton Rouge MTA
    1. Mobile, AL MSA
    2. Pensacola, FL MSA

E. Chicago MTA
    1. Aurora-Elgin, IL MSA
    2. Bloomington-Normal, IL MSA
    3. Champaign-Urbana-Rantoul, IL MSA
    4. Chicago, IL MSA
    5. Decatur, IL MSA
    6. Fort Wayne, IN MSA
    7. Gary-Hammond-East Chicago, IN MSA
    8. Joliet, IL MSA
    9. Kankakee, IL MSA
    10. Rockford, IL MSA
    11. Springfield, IL MSA
    12. Illinois 1- Jo Daviess RSA
    13. Illinois 2- Bureau (B1) RSA
    14. Illinois 2- Bureau (B3) RSA
    15. Illinois 3- Mercer RSA
    16. Illinois 4- Adams (B1) RSA
    17. Illinois 5- Mason (B2) RSA
    18. Illinois 6- Montgomery RSA
    19. Illinois 7- Vermilion RSA
    20. Indiana 1- Newton (B1) RSA
    21. Indiana 1- Newton (B2) RSA
    22. Indiana 3- Huntington RSA

F. Dallas-Fort Worth MTA
    1. Dallas-Fort Worth MSA
    2. Austin MSA
    3. Sherman-Denison MSA
    4. Texas 10- Navarro (B3) RSA
    5. Texas 11- Cherokee (B1) RSA
    6. Texas 16- Burleson RSA

G. Houston MTA
    1. Houston MSA
    2. Beaumont-Port Arthur MSA
    3. Galveston MSA
    4. Bryan-College Station MSA
    5. Victoria MSA
    6. Texas 10- Navarro (B3) RSA
    7. Texas 11- Cherokee (B1) RSA
    8. Texas 16- Burleson RSA
    9. Texas 17- Newton RSA
    10. Texas 20- Wilson (B2) RSA
    11. Texas 21- Chambers RSA

H. San Antonio MTA
    1. San Antonio MSA
    2. Texas 16- Burleson RSA
    3. Texas 20- Wilson (B2) RSA

I. Richmond-Norfolk MTA
    1. Norfolk-Virginia Beach-Portsmouth MSA
    2. Richmond MSA
    3. Newport News-Hampton MSA
    4. Petersburg-Colonial Heights MSA
    5. Virginia 7- Buckingham (B1) RSA
    6. Virginia 8- Amelia RSA
    7. Virginia 9- Greensville RSA
    8. Virginia 11- Madison (B1) RSA
    9. Virginia 12- Caroline (B1) RSA
    10. Virginia 12- Caroline (B2) RSA

J. Milwaukee MTA
    1. Wisconsin 8- Vernon RSA

II. Cellular MSA Overlap Areas

A. Greenville, SC MSA
B. Anderson, SC MSA
C. El Paso, TX MSA
D. Las Cruces, NM MSA

In the Overlapping Wireless Markets, the population potentially addressable by wireless mobile telephone systems exceeds 25 million.

GTE and Bell Atlantic are direct competitors in wireless mobile telephone services in the Cellular MSA Overlap Areas. The cellular businesses owned in whole or in part by Bell Atlantic and GTE are the only two providers of cellular mobile telephone services, and the two primary providers of all wireless mobile telephone services, in the Cellular MSA Overlap Areas. In addition, GTE and PrimeCo, and Ameritech and PrimeCo, are direct competitors in wireless mobile telephone services in the PCS/Cellular Overlap Areas. In each of the Overlapping Wireless Markets, the wireless businesses owned or to be owned in whole or in part by Bell Atlantic and GTE compete to sell the best quality service at the lowest possible rates and are among each other's most significant competitors. In each of the PCS/Cellular Overlap Areas, the cellular business to be acquired or owned in whole or in part by GTE and the PCS business owned by PrimeCo are two of a small number of providers of wireless mobile telephone services.

Therefore, Bell Atlantic's acquisition of GTE would cause the level of concentration among firms providing wireless mobile telephone services in each of the Overlapping Wireless Markets to increase significantly. A high level of concentration in the provision of wireless mobile telephone services already exists in each of the Overlapping Wireless Markets. In the Cellular MSA Overlap Areas, Bell Atlantic's and GTE's individual market shares, measured on the basis of the number of subscribers, exceed 35%. The combined market share of GTE and Bell Atlantic

in the provision of wireless mobile telephone services, measured by the number of subscribers, is in the range of 75 to 95%, taking into account other operational wireless mobile competitors. As measured by the Herfindahl-Hirschman Index ("HHI"), which is commonly employed by the Department of Justice in merger analysis and is explained in more detail in Appendix A to the Complaint, concentration in these markets is already in excess of 2800, well above the 1800 threshold at which the Department normally considers a market to be highly concentrated. After the merger, the HHI in these markets will be in excess of 5500.

In each of the PCS/Cellular Overlap Areas, the GTE or Ameritech cellular business has one of the two largest market shares in the provision of wireless mobile telephone services, and PrimeCo is one of a small number of new PCS entrants into these markets. In some of these markets, such as Richmond, Houston, and Tampa, PrimeCo was the first new PCS entrant, is the third largest wireless firm in terms of number of subscribers, and has managed to garner a significant share. Competition between PrimeCo and GTE or Ameritech, created by PrimeCo's entry into markets that were previously an effective duopoly, has resulted in lower prices and higher quality in these markets than would otherwise have existed absent such competition. There is already a high level of concentration in the provision of wireless mobile telephone services in the PCS/Cellular Overlap Areas. In virtually all, the individual shares of the two cellular carriers--one of which is GTE or Ameritech--are in the range of 30 to 40% and the HHI exceeds 2000. In the PCS/Cellular Overlap Areas, the combined market share of PrimeCo and the cellular business in question is generally in the 35 to 50% range.

If GTE and Bell Atlantic merge, and GTE completes its acquisition of the Ameritech cellular businesses, the PCS/Cellular Overlap Areas will become significantly more concentrated,

and the competition between PrimeCo and GTE or Ameritech in wireless mobile telephone services in these markets will be eliminated. As a result of the loss in competition between the PrimeCo and GTE or Ameritech cellular businesses, there will be an increased likelihood both of unilateral actions by the combined firm in these markets to increase prices, diminish the quality or quantity of service provided, or refrain from making investments in network improvements, and of coordinated interaction among the limited number of remaining competitors that could lead to similar anticompetitive results. Therefore, the likely effect of the merger of Bell Atlantic and GTE is that prices would increase, and the quality or quantity of service together with incentives to improve network facilities would decrease, in the provision of wireless mobile telephone services in the PCS/Cellular Overlap Areas.

It is unlikely that entry within the next two years into wireless mobile telephone services in the Overlapping Wireless Markets would be sufficient to mitigate the competitive harm resulting from this acquisition, if it were to be consummated.

For these reasons, the United States concluded that the merger as proposed may substantially lessen competition, in violation of Section 7 of the Clayton Act, in the provision of wireless mobile telephone services in the Overlapping Wireless Markets.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. The Divestiture Requirement

The proposed Final Judgment will preserve competition in the sale of mobile wireless telephone services in each of the Overlapping Wireless Markets by requiring defendants to divest one of their two wireless telephone businesses in each of the Overlapping Wireless Markets. This

divestiture will eliminate the change in market structure caused by the merger.

The divestiture requirements of the proposed Final Judgment, as stated in Sections IV.A and II.E, direct defendants to divest one of their their wireless telephone businesses (to be selected by defendants) in each of the Overlapping Wireless Markets. Section IV.C permits different wireless businesses in separate Overlapping Wireless Markets to be divested to different purchasers, but requires that, for any individual wireless business, the Wireless System Assets be divested entirely to a single purchaser, unless the United States otherwise consents in writing.

The proposed Final Judgment's divestiture provisions are intended to accomplish the "complete divestiture of the entire business of one of the two wireless systems in each of the Overlapping Wireless Markets," as Section II.E states. Section II.E also specifies in detail the types of assets to be divested, which collectively are described throughout the consent decree as "Wireless System Assets," and addresses some special circumstances concerning the divestiture of those assets. In all of the Overlapping Wireless Markets, Wireless System Assets means all types of assets, tangible and intangible, used by defendants in the operation of each of the wireless businesses to be divested, including the provision of long distance telecommunications service for wireless calls. Section II.E enumerates in detail, without limitation, particular types of assets covered by the divestiture requirement.

For the most part, the divesting defendant is required to transfer to the purchaser the complete ownership and/or other rights to the Wireless System Assets. However, the merged firm will retain a number of other wireless businesses in areas that do not overlap, and prior to the merger each defendant may have had certain assets that were used substantially in the operations of its overall wireless business and that must be retained to some extent to continue the existing

operations of the wireless businesses not being divested. Section II.E permits special divestiture arrangements for such assets if they are not capable of being divided between the divested and retained wireless businesses, or if the divesting defendant and the purchaser agree not to divide them. For these assets, the divestiture requirement is satisfied if the divesting defendant grants to the purchaser, at the election of the purchaser, an option to obtain a non-exclusive, transferable license for a reasonable period to use the assets in the operation of the wireless business being divested, so as to enable the purchaser to continue to operate the divested wireless businesses without impairment.

The definition of Wireless System Assets in Section II.E contains special provisions relating to intellectual property. One addresses intellectual property rights that defendants may have under third-party licenses that could not be transferred to a purchaser entirely or by license without the consent of the third-party licensor. If any such assets are used by the wireless businesses being divested, defendants must identify them in a schedule submitted to plaintiff and filed with the Court as expeditiously as possible following the filing of the Complaint, in any event, prior to any divestiture and before the Court approves the proposed Final Judgment. Defendants must explain the necessary consents and how a consent would be obtained for each asset. This proviso is not intended to afford defendants any opportunity to withhold intellectual property rights over which they have any control, which could impair the ability of a purchaser to use the divested wireless business to compete effectively. It relates only to intellectual property assets that defendants have no power to transfer themselves, and defendants must do all that is possible to transfer the entire business of the divested wireless businesses. To make this clear, Section IV.G obligates defendants to cooperate with any purchaser as well as a trustee, if any, to

seek to obtain the necessary third-party consents, if any assets require such consents before they may be transferred to a purchaser.

Another proviso relates to certain specific trademarks, trade names and service marks. Section II.E, defining the Wireless System Assets to be divested, generally requires the divestiture of trademarks, trade names and service marks, with the sixteen specified exceptions which contain names under which defendants' retained wireless businesses, or their corporate parents or affiliates, do business. Such trademarks, trade names and service marks, like other assets, are either to be divested in their entirety, except for marks and names that must be retained to continue the existing operations of defendants' remaining wireless properties and that are not capable of being divided (or that the divesting defendant and purchaser agree not to divide), which are to be made available to the purchaser through a non-exclusive, transferable license.

Under limited circumstances, defendants are allowed to retain specified portions of the Wireless System Assets in the Overlapping Wireless Markets. First, Section II.E.1 provides that if defendants elect to divest Bell Atlantic's interest in a PCS business in one of the PCS/Cellular Overlap Areas, defendants may retain up to 10 MHz of broadband PCS spectrum within that PCS/Cellular Overlap Area upon completion of the divestiture of the Wireless System Assets. In this instance, defendants will still be required to divest the entire PCS business, including 20 MHz of broadband PCS spectrum, to insure that the market structure does not change as a result of the merger and that the divested business will be able to compete as effectively under new ownership as under its current ownership.

Second, Section II.E.2 of the Final Judgment allows defendants to request approval from plaintiff to partition the PCS license along BTA geographic boundaries and retain assets in one or

more specified non-overlapping BTAs, in the event that defendants elect to divest Bell Atlantic's interest in a PCS business in one of the PCS/Cellular Overlap Areas. Plaintiff's approval of the request shall be subject to a determination by plaintiff in its sole discretion that the assets to be sold in the non-overlapping BTAs are not needed to assure the competitive viability of the divested business in the remainder of the MTA, and that the purchaser of the Wireless System Assets in the remainder of the MTA will be able to operate the divested PCS business as a fully competitive entity. Section II.E.2 requires defendants to seek this approval at least 90 calendar days prior to the consummation of the Bell Atlantic/GTE Merger.

Finally, Section II.E.3 allows, with approval from plaintiff, the merged entity to retain both Bell Atlantic's PCS business and GTE's non-controlling minority interest in an overlapping cellular business in a PCS/Cellular Overlap Area. Plaintiff's approval of the request shall be subject to a determination by plaintiff in its sole discretion that the retention of a non-controlling minority interest will be entirely passive and will not significantly diminish competition. GTE has a number of non-controlling minority interests in cellular businesses, ranging from 2% to 40%, in the Overlapping Wireless Markets. To be permitted to retain a minority cellular interest, defendants will be required to demonstrate that the interest they wish to keep is entirely passive, such that they receive no competitively sensitive information about the competing cellular business, and have no input into the business decisions of the competing cellular provider that could have anticompetitive consequences. Plaintiff, in its sole discretion, will determine that the retention of the non-controlling minority interest will not significantly diminish competition before approval will be granted for the merged firm to retain a minority interest. Section II.E.3 requires defendants to seek this approval at least 90 calendar days prior to the consummation of the Bell

Atlantic/GTE Merger.

Section IV contains other provisions to facilitate divestiture, including notification of the availability of the Wireless System Assets for purchase in Section IV.D, access to information about the Wireless System Assets in Section IV.E, and preservation of records in Section IV.H. In addition, to ensure that a purchaser will be able to operate the divested wireless businesses without impairment, Section IV.F prohibits defendants from interfering with a purchaser's negotiations to retain any employees who work or have worked with the Wireless System Assets since the date of the announcement of the merger, or whose principal responsibility relates to the Wireless System Assets.

B. Timing of Divestiture

In antitrust cases involving mergers in which the United States seeks a divestiture remedy, it requires completion of the divestiture within the shortest time period reasonable under the circumstances. The proposed Final Judgment in this case requires, in Section IV.A, the divestitures of the Wireless System Assets in the Overlapping Wireless Markets on a strict schedule, but provides defendants with some flexibility in recognition of the special circumstances regarding Bell Atlantic's interest in PrimeCo.

Currently, Bell Atlantic has a 50% interest in PrimeCo, and its ability to divest this interest is limited by its partnership agreement. Bell Atlantic has publicly announced plans to dissolve the PrimeCo partnership. If this dissolution does occur, Bell Atlantic may take full ownership of some or all of the PrimeCo PCS businesses, and the other PrimeCo partner, Airtouch, may also take full ownership of some or all of the other PrimeCo PCS businesses. To the extent that Bell Atlantic's interest in one or more of the PrimeCo businesses is transferred to Airtouch, one or

more of the wireless overlaps would be eliminated, thereby obviating the need for any further divestiture. To the extent that Bell Atlantic takes full control over one or more PrimeCo properties, it will enhance its ability to completely and satisfactorily divest its interest to an interested purchaser.

Under Section II.A, defendants must divest the Wireless System Assets in the Cellular MSA Overlap Areas to a purchaser or purchasers approved by the United States on or before consummation of the Bell Atlantic/GTE merger. Similarly, if Bell Atlantic has acquired 100% ownership of one or more of the PCS businesses currently operated by PrimeCo in MTAs in the PCS/Cellular Overlap Areas more than ninety (90) calendar days prior to consummation of the Bell Atlantic/GTE Merger, defendants will be required to divest the Wireless System Assets in the PCS/Cellular Overlap Areas on or before consummation of the Bell Atlantic/GTE Merger.

If, ninety (90) calendar days prior to consummation of the Bell Atlantic/GTE Merger, the PrimeCo dissolution is not complete and Bell Atlantic has not acquired 100% ownership of one or more of the PCS businesses currently operated by PrimeCo in MTAs in the PCS/Cellular Overlap Areas, defendants will submit to plaintiff, on or before consummation of the Bell Atlantic/GTE Merger, a definitive Divestiture List identifying the specific Wireless System Assets in each of the PCS/Cellular Overlap Areas that will be divested. The cellular MSA and RSA businesses on the Divestiture List are required to be divested within ninety (90) calendar days after consummation of the Bell Atlantic/GTE Merger; except that if Bell Atlantic acquires 100% ownership of one or more of the PCS businesses currently operated by PrimeCo in MTAs in the PCS/Cellular Overlap Areas within the ninety (90) calendar day period prior to consummation of the Bell Atlantic/GTE Merger, the cellular MSA and RSA businesses on the Divestiture List shall be divested on or

before consummation of the Bell Atlantic/GTE Merger. Additionally, the PCS MTA businesses on the Divestiture List shall be divested within 90 calendar days after Bell Atlantic acquires 100% ownership of one or more of the PCS businesses currently operated by PrimeCo in MTAs in the PCS/Cellular Overlap Areas, but in no event later than one hundred eighty (180) calendar days after consummation of the Bell Atlantic/GTE Merger. If all Wireless System Assets have not been divested upon consummation of the Bell Atlantic/GTE merger, there will be no adverse impact on competition, because defendants are required to operate the businesses independently, pursuant to the Hold Separate Order contained in Section IX of the Final Judgment. Defendants are also required by Section IV.B to use their best efforts to accomplish the divestitures of the Wireless System Assets in the Overlapping Wireless Markets and to obtain all required regulatory approvals as expeditiously as possible.

The divestiture timing provisions of the proposed Final Judgment will ensure that the divestitures are carried out in a timely manner, and at the same time do not burden the parties unnecessarily. Although the proposed Final Judgment, in some circumstances, permits the parties to retain both wireless properties for some period of time after closing, the primary reason for this involves the nature of Bell Atlantic's interest in PrimeCo. The proposed Final Judgment is designed to provide time for the PrimeCo partnership to be dissolved. The additional time period, beyond the closing date of the Bell Atlantic/GTE merger, in which the merged firm can hold both wireless properties pending divestiture applies only to PCS/cellular overlaps and is dependent in part on when Bell Atlantic takes control of one or more PrimeCo properties. However, in no event can the merged firm retain both wireless properties beyond 180 days after closing. Thus, the Final Judgment strikes a balance between allowing the parties time to resolve their special

situation and guaranteeing a timely divestiture. The period in which the merged firm will own both entities should not pose any significant competitive risks because the Hold Separate Order, contained in Section IX, will be in place during this time, and the time will be short.

In addition, the proposed Final Judgment requires in Section IV.B that, in carrying out the divestitures, defendants comply with all of the applicable rules of the FCC, or any waiver of such rules or other authorization granted by the FCC. These rules include 47 C.F.R. § 20.6 (spectrum aggregation) and 47 C.F.R. § 22.942 (cellular cross-ownership).[2] These FCC requirements may add to, but cannot subtract from or impair, the requirements of the proposed Final Judgment, since Section IV.B specifies that authorization by the FCC to conduct divestiture of a wireless business in a particular manner will not modify any of the requirements of the decree. The provisions of the proposed Final Judgment have been designed to avoid any conflict with the FCC's rules. Since the FCC's approval is required for the transfer of the wireless licenses to a purchaser, Section V.F provides one exception to the 180-day divestiture period. If applications for transfer of a wireless license have been filed by the FCC within the 180-day period, but the FCC has not granted approval before the end of that time, the period for divestiture of the specific Wireless System Assets covered by the license that cannot yet be transferred shall be extended until five days after the FCC's approval is received. This extension is to be applied only to the

[2] The FCC's spectrum aggregation rules, in 47 C.F.R. § 20.6, do not permit a licensee to have an attributable interest in more than 45 MHz of spectrum licensed for cellular, PCS or SMR with significant overlap in any geographic area. The FCC will attribute an interest if it is controlling, or if in most cases it is 20% or more of the equity, outstanding stock or voting stock of the licensee. The FCC's cellular cross-ownership rules, in 47 C.F.R. § 22.942, also prohibit a licensee or any person controlling a licensee from having a direct or indirect ownership interest of more than 5% in both cellular systems in an overlapping cellular geographic service area, unless such interests pose "no substantial threat to competition."

individual wireless license affected by the delay in approval of the license transfer and does not entitle defendants to delay the divestiture of any other Wireless System Assets for which license transfer approval has been granted.

C. Use of a Trustee Subsequent to Consummation of the Acquisition

The proposed Final Judgment provides in Section IV.A that Bell Atlantic and GTE must divest the Wireless System Assets in each of the Overlapping Wireless Markets in accordance with the schedule contained therein, either to purchasers acceptable to plaintiff in its sole discretion, or to a trustee designated pursuant to Section V of the Final Judgment. As part of this divestiture, Bell Atlantic and GTE must relinquish any direct or indirect financial ownership interests and any direct or indirect role in management or participation in control. Pursuant to Section V of the proposed Final Judgment, the trustee will own and control the systems until they are sold to a final purchaser, subject to safeguards to prevent Bell Atlantic and GTE from influencing their operation.

Section V details the requirements for the establishment of the trust, the selection and compensation of the trustee, the responsibilities of the trustee in connection with divestiture and operation of the Wireless System Assets, and the termination of the trust. If defendants have not divested all of their Wireless System Assets in the Overlapping Wireless Markets to approved purchasers in accordance with Section IV.A, Section V.A requires: (1) defendants to identify the Wireless System Assets in each Overlapping Wireless Market to be divested; (2) the Court to appoint a trustee, which shall be selected by the United States; (3) defendants to submit a form of Trust Agreement consistent with the terms of the Final Judgment, and which form agreement must have received approval by the United States; and (4) defedants, after receiving FCC

approval for the license transfers, to divest irrevocably the unsold Wireless System Assets to the trustee.

The trustee will have the obligation and the sole responsibility, under Section V.B, for the divestiture of any transferred Wireless System Assets. The trustee has the authority to accomplish divestitures at the earliest possible time and "at the best price then obtainable upon a reasonable effort by the trustee." In addition, notwithstanding any provision to the contrary, plaintiff may, in its sole discretion, require defendants to include additional assets that substantially relate to the wireless mobile telephone business in the Wireless System Assets to be divested if it would facilitate a prompt divestiture to an acceptable purchaser. This provision allows plaintiff, in its discretion, to require defendants to divest additional Wireless System Assets that substantially relate to the wireless mobile telephone business to insure that the trustee can promptly locate and divest to a purchaser acceptable to plaintiff. Defendants are not entitled to object to divestiture based on the adequacy of the price the trustee obtains or any other ground, unless the trustee's conduct amounts to malfeasance. The terms of the trustee's compensation, under Section V.C, will provide incentives based on the price and terms of the divestiture and the speed with which it is accomplished. As provided by Sections V.B and V.C., defendants will pay the compensation and expenses of the trustee, and of any investment bankers, attorneys or other agents that the trustee finds reasonably necessary to assist in the divestiture and the management of the Wireless System Assets.

The trusteeship mechanism has been used by the FCC, in a variety of contexts, to provide a short period of time in which to complete a sale of a spectrum licensee that must be divested, while permitting the broader merger or acquisition that necessitates the divestiture to go forward.

In this context, the critical feature of the trusteeship arrangement is that the trustee will not only have responsibility for sale of the Wireless System Assets, but will also be the authorized holder of the wireless license, with full responsibility for the operations, marketing and sales of the wireless business to be divested, and will not be subject to any control or direction by defendants. Defendants will no longer have any role in the ownership, operation or management of the Wireless System Assets to be divested following consummation of their merger, as provided by Section V.H, other than the right to receive the proceeds of the sale, and certain obligations to provide cooperation to the trustee in order to complete the divestiture, as indicated in Section V.D. Defendants are precluded under Section V.H from communicating with the trustee, or seeking to influence the trustee, concerning the divestiture or the operation and management of the wireless businesses transferred, apart from the limited communications necessary to carry out the Final Judgment and to provide the trustee with the necessary resources and cooperation to complete the divestitures. Defendants and the trustee are subject to an absolute prohibition on exchanging any non-public or competitively sensitive marketing, sales or pricing information relating to either of the wireless businesses in the Overlapping Wireless Markets. These safeguards will protect against any competitive harm that could arise from coordinated behavior or information sharing between the two wireless businesses during the limited period while sale of the Wireless System Assets is not yet complete. They ensure that the trusteeship arrangement is consistent with the FCC's rules.

D. Criteria for the United States' Approval of Purchasers

Under the proposed Final Judgment, the United States has an important role in the approval of purchasers for each of the divested wireless businesses, to ensure that the purchasers

chosen by defendants or the trustee are adequate from a competitive viewpoint. The United States' approval or rejection of a purchaser is at its sole discretion, as Section IV.A specifies, but the consent decree also embodies certain criteria that the United States will apply in making the approval decision.

In the case of any divestiture, by defendants or the trustee, it is important to ensure that the ongoing wireless businesses go to purchasers with the capability and intent to operate them as effective competitors in the lines of business they already serve, and that there are no conditions restricting competition in the terms of the sale. Specifically, Section IV.C of the proposed Final Judgment requires that the divestitures of Wireless System Assets be made to a purchaser or purchasers for whom it is demonstrated to plaintiff's sole satisfaction that: (1) the purchaser(s) has the capability and intent ot compete effectively in the provision of wireless mobile telephone service using the Wireless System Assets; (2) the purchaser(s) has the managerial, operational and financial capability to compete effectively in the provision of wireless mobile telephone service using the Wireless System Assets; and (3) none of the terms of any agreement between the purchaser(s) and either of defendants shall give defendants the ability unreasonably (i) to raise the purchaser(s)'s costs, (ii) to lower the purchaser(s)'s efficiency, (iii) to limit any line of business which a purchaser(s) may choose to pursue using the Wireless System Assets, or otherwise to interfere with the ability of the purchaser(s) to compete effectively. All of these criteria must be satisfied whether the divestiture is accomplished by defendants or the trustee.

E. Other Provisions of the Decree

Section III specifies the persons to whom the Final Judgment is applicable, and provides for the Final Judgment to be applicable to certain Interim Parties to whom defendants might

transfer the Wireless System Assets, other than purchasers approved by the United States.

Section VI obliges defendants, or the trustee if applicable, to notify the United States of any planned divestiture of Wireless System Assets within two business days of executing a binding agreement with a purchaser. It enables the United States to obtain information to evaluate the chosen purchaser as well as other prospective purchasers who expressed interest and establishes a procedure for the United States to notify defendants and the trustee whether it objects to a divestiture. The United States' notification of its lack of objection is necessary for a divestiture to proceed. This section also provides for an objection by defendants to a sale by the trustee under the limited situation of alleged malfeasance, but in that case it is possible for the Court to approve a sale over defendants' objection.

Section VII establishes affidavit requirements for defendants to report to the United States on their compliance with the proposed Final Judgment, their activities in seeking to divest the Wireless System Assets prior to consummating their merger, and their actions to preserve the Wireless System Assets to be divested. Under V.E, the trustee also has monthly reporting obligations concerning the efforts made to divest the Wireless System Assets.

Section VIII prohibits defendants from financing all or any part of a purchase made by an acquirer of the Wireless System Assets, whether the divestiture is carried out by defendants or by the trustee.

Section IX, the Hold Separate Order, contains important requirements concerning the operation of the wireless businesses before divestiture is complete, and the preservation of the Wireless System Assets as a viable, ongoing business. The obligations of Section IX.A fall on both defendants and both wireless businesses in any Overlapping Wireless Market, obliging them

to ensure that such wireless businesses continue to be operated as separate, independent, ongoing, economically viable and active competitors to the other wireless mobile telecommunications providers in the same area. Section IX.A requires separation of the operations of the two wireless businesses and their books, records and competitively sensitive information. The requirements of Section IX.A serve to ensure that defendants maintain their two wireless businesses in the Overlapping Wireless Markets as fully separate competitors prior to consummating their merger, notwithstanding their expectations that the merger will take place, and reinforce the provisions of Section V.H concerning the separation of defendants and the trustee after the merger is consummated but while there are still Wireless System Assets awaiting sale.

Section IX.B requires the defendant whose assets will be divested (or both, if it has not yet been decided which system will be divested in a particular market) to take certain specified steps to preserve the assets in accordance with past practices. These steps include maintaining and increasing sales, maintaining the assets in operable condition, providing sufficient credit and working capital, not selling the assets (except with approval of plaintiff), not terminating, transferring or reassigning employees who work with the assets (with certain limited exceptions), and not taking any actions to impede or jeopardize the sale of the assets. Section IX.D obliges each defendant, during the period while they still control Wireless System Assets, to appoint persons not affiliated with the other defendant to oversee the Wireless System Assets to be divested and to be responsible for compliance with the Final Judgment.

In order to ensure compliance with the Final Judgment, Section X gives the United States various rights, including inspection of defendants' records, the ability to conduct interviews and take sworn testimony of defendants' officers, directors, employees and agents, and to require

defendants to submit written reports. These rights are subject to legally recognized privileges, and information the United States obtains using these powers is protected by specified confidentiality obligations, which permit sharing of information with the FCC under a customary protective order issued by that agency or a waiver of confidentiality. Under Section III.B, purchasers of the Wireless System Assets must also agree to give the United States similar access to information.

The Court retains jurisdiction under Section XI, and Section XII provides that the proposed Final Judgment will expire on the tenth anniversary of the date of its entry, unless extended by the Court. Although the required divestitures will be accomplished in a considerably shorter time, defendants are also precluded from reacquiring the divested properties within the term of the decree.

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 that 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

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 United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the responses 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

The proposed Final Judgment provides, in Section XI, that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate to carry out or construe the Final Judgment, to modify any of its provisions, to enforce compliance, and to punish any violations of its provisions.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, seeking an injunction to block consummation of the merger and a full trial on the merits. The United States is satisfied, however, that the divestiture of Wireless System Assets and other relief contained in the proposed Final Judgment will preserve competition in the provision of wireless mobile telephone services in the Overlapping Wireless Markets. This proposed Final Judgment will also avoid the substantial costs and uncertainty of a full trial on the merits on the violations alleged in the complaint. Therefore, the United States believes that there is no reason under the antitrust laws to proceed with further litigation if the divestitures of the Wireless System Assets are carried out in the manner required by the proposed Final Judgment.

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 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."[3] 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 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

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[3] 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, 93d Cong. 2d Sess. 8-9 (1974), *reprinted in* U.S.C.C.A.N. 6535, 6538.

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.[4]

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 would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. American Tel. & 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).

Moreover, the court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Since "[t]he court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in

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[4] *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'").

the first place," it follows that the court "is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id.*

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.

Consequently, the United States has not attached any such materials to the proposed Final Judgment.

Respectfully submitted,

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Dated: June 7, 1999

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Plaintiff United States'Competitive Impact Statement, were served via U.S. Mail, first class postage prepaid, on this 7th day of June, 1999 upon each of the parties listed below:

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