UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. HICKS, MUSE, TATE & FURST INCORPORATED, and CAPSTAR BROADCASTING PARTNERS, INC., and SFX BROADCASTING, INC., Defendants	)	Hon. Civil Action No. CV 98 2422 Filed: March 31, 1998

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 March 31, 1998, alleging that a proposed acquisition of SFX Broadcasting, Inc. ("SFX") by Capstar Broadcasting Partners, Inc. ("Capstar")[1] would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The complaint alleges

[1]Capstar is wholly owned by Hicks, Muse, Tate & Furst, Incorporated ("Hicks Muse"). Hicks Muse is also the largest and controlling shareholder of Chancellor Media Corporation.

that Capstar, or its related entity, Chancellor Media Corporation ("Chancellor"), and SFX own and operate several radio stations throughout the United States, and that the transaction will combine radio station assets such that defendants would control stations that have approximately 74 percent of the radio advertising revenue in Greenville-Spartanburg ("Greenville"), SC, 41 percent in Houston, TX, 49 percent in Jackson, MS, 45 percent in Pittsburgh, PA, and 65 percent in Suffolk County, NY.[2] This acquisition would give defendants the majority of the most competitively significant radio signals in the Greenville, Houston, Jackson, Pittsburgh and Suffolk markets, and a significant share of radio advertising in these markets. As a result, this acquisition would substantially lessen competition in the sale of radio advertising time in the Greenville, Houston, Jackson, Pittsburgh and Suffolk markets.

The prayer for relief seeks: (a) adjudication that Capstar's proposed acquisition of the radio stations from SFX would violate Section 7 of the Clayton Act; (b) preliminary and permanent injunctive relief preventing the consummation of the proposed acquisition; (c) an award to the United States of the costs of this action; and (d) such other relief as is proper.

Shortly before this suit was filed, a proposed settlement was reached that permits Capstar to complete its acquisition of SFX, yet preserves competition in the markets 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 Capstar and Hicks Muse to divest WESC-FM,

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[2]Following the acquisition, defendants and Chancellor would own eight radio stations in the Greenville area (6 FMs and 2 AMs), nine radio stations in the Houston area (6 FMs and 3 AMs), six radio stations in the Jackson area (4 FMs and 2 AMs), seven radio stations in the Pittsburgh area (5 FMs and 2 AMs) and six radio stations in the Suffolk area (4 FMs and 2 AMs).

WESC-AM, WJMZ-FM and WTPT-FM in Greenville; KKPN-FM in Houston; WJDX-FM in Jackson and WTAE-AM in Pittsburgh; WBLI-FM, WBAB-FM, WHFM and WGBB-AM in Suffolk (the "divestiture stations"). Unless the United States grants an extension of time, Capstar and Hicks Muse must divest these radio stations within six months after the filing of the Final Judgment (three months in the case of the Suffolk stations). If the parties do not divest these stations within the divestiture period, the Court shall appoint a trustee to sell the assets. The proposed Final Judgment also requires the defendants to ensure that, until the divestitures mandated by the Final Judgment have been accomplished, the divestiture stations will be operated independently as viable, ongoing businesses, and kept separate and apart from the other radio stations of Capstar, Chancellor and SFX in the Greenville, Houston, Jackson, and Pittsburgh areas.[3] The proposed Final Judgment also requires that the divestitures be made to an acquirer or acquirers that have the capability and intent to compete effectively as radio station operators in the Greenville, Houston, Jackson, Pittsburgh and Suffolk markets.

The plaintiff 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.

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[3]In Suffolk County, the Chancellor and SFX stations are currently being operated together by Chancellor under a local marketing agreement. Under the terms of another proposed Final Judgment, the parties have agreed to terminate this agreement on or before August 1, 1998, after which time, the parties must operate the Chancellor and SFX stations as separate entities, pending the divestiture required by this Final Judgment.

II. THE ALLEGED VIOLATION

A. The Parties

Defendant Capstar is a Delaware corporation headquartered in Austin, Texas. Capstar currently owns and operates approximately 245 radio stations in 60 markets in the United States. In 1997, its revenues were approximately $190 million. In Greenville, Capstar currently owns WJMZ-FM, WTPT-FM, WESC-FM and WESC-AM. In Jackson, Capstar owned WJMI-FM, WKXI-FM, WOAD-AM and WKXI-AM; until a recent sale made in anticipation of this lawsuit. Capstar is wholly owned by Hicks Muse.

Defendant Hicks Muse is an investment firm headquartered in Dallas, Texas. Hicks Muse, through investment funds it controls, owns all the stock of Capstar and has a significant ownership interest in Chancellor.

Chancellor is a Delaware corporation headquartered in Irving, Texas. In 1997, it was the second largest owner of radio stations in the United States and owned 97 radio stations in 22 major U.S. markets, including in each of the 12 largest markets. Chancellor revenues in 1997 were approximately $582.1 million. In Houston, Chancellor owns KLDE-FM, KKBQ-FM, KLOL-FM, KTRH-AM and KKBQ-AM. In Pittsburgh, Chancellor owns WWSW-FM and WWSW-AM. In Suffolk, Chancellor owns WALK-FM and WALK-AM. Chancellor is a Hicks Muse-related company. Hicks Muse owns a significant portion of Chancellor stock and Hicks Muse management and owners influence or control Chancellor competitive behavior to such an extent that Chancellor/Capstar ownership of otherwise competing radio stations would substantially lessen competition.

Defendant SFX is a Delaware corporation headquartered in New York, New York. SFX

owns and operates approximately 85 radio stations located in 23 markets in the United States. SFX revenues in 1997 were approximately $322 million. In Greenville, SFX owns WSSL-FM, WTPT-FM, WYMI-FM, WROQ-FM and WGVL-AM. In Houston, SFX owns KKPN-FM, KODA-FM, KKRW-FM and KQUE-AM. In Jackson, SFX owns WMSI-FM, WJDX-FM, WSTZ-FM, WKTF-FM, WZRX-AM and WJDS-AM. WJDX-FM was recently acquired by SFX, in 1996. In Pittsburgh, SFX owns WDVE-FM, WVTY-FM, WXDX-FM, WJJJ-FM and WTAE-AM. In Suffolk, SFX owns WBAB-FM, WBLI-FM, WHFM-FM and WGBB-AM.

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

On or about August 24, 1997, Capstar agreed to purchase SFX for approximately $2.1 billion. Capstar or Chancellor and SFX own or operate radio broadcast stations in five overlapping markets in which there would be a lessening of competition: Greenville, Jackson, Houston, Pittsburgh and Suffolk. As a result of this transaction, defendants and Chancellor would control stations that have approximately 74 percent of radio advertising revenue in Greenville, 41 percent in Houston, 49 percent in Jackson, 45 percent in Pittsburgh and 65 percent in Suffolk. Prior to the agreement, the Capstar/Chancellor and SFX stations in the Greenville, Houston, Jackson, Pittsburgh and Suffolk markets were vigorous competitors of each other. The proposed acquisition of SFX by Capstar, and the threatened loss of such competition that would be caused thereby, precipitated the Government's suit.

C. Anticompetitive Consequences of the Proposed Merger

1. Sale of Radio Advertising Time In Greenville, Houston, Jackson, Pittsburgh and Suffolk.

The Complaint alleges that the sale of advertising time on radio stations serving the

Greenville, Houston, Jackson, and Pittsburgh Metro Service Areas ("MSA") each constitute a line of commerce and section of the country—or relevant market—for antitrust purposes. The Greenville MSA includes four counties: Anderson, Greenville, Pickens and Spartanburg. The Houston MSA includes eight counties: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery and Waller. The Jackson MSA includes three counties: Hinds, Madison and Rankin. The Pittsburgh MSA includes six counties: Allegheny, Beaver, Butler, Fayette, Washington and Westmoreland. The relevant market for Suffolk County is Suffolk County. Local and national advertising that is placed on radio stations within Greenville, Houston, Jackson, Pittsburgh and Suffolk markets is aimed at reaching listening audiences in each of these markets, and radio stations located outside of Greenville, Houston, Jackson, Pittsburgh and Suffolk do not provide effective access to these audiences. Thus, if there were a small but significant nontransitory increase in radio advertising within one of these markets, advertisers would not buy enough advertising time from radio stations located outside the Greenville, Houston, Jackson, Pittsburgh and Suffolk markets to defeat the increase.

The defendants' radio stations, like most commercial radio stations, generate almost all their revenues from the sale of advertising time. In general, radio stations attract listeners, and then sell access to those listeners (that is, advertising time) to businesses who wish to advertise their products.

Radio stations price their advertising time in large part on the basis of the number of listeners that they reach. Traditionally, this is expressed on a cost-per-thousand (CPM) basis. When buying radio advertising time, advertisers consider the CPM and the overlap of the number and demographic characteristics of a radio station's listeners with the advertisers' likely customers.

If a station individually or number of stations in combination efficiently reach an advertiser's likely customers (target audience), the advertiser has a choice in how to reach its potential customers. This choice creates competition between radio stations and results in lower prices and better services.

In Greenville, Houston, Jackson, Pittsburgh and Suffolk, the defendants' radio stations compete to serve a single distinct geographic area. When the Capstar/Chancellor and SFX stations operate independently, they are good substitutes for each other. The stations compete head-to-head to reach listeners. Many local and regional advertisers seeking to reach listeners in Greenville, Houston, Jackson, Pittsburgh and Suffolk can reach a target audience efficiently by purchasing time on Capstar and Chancellor or SFX stations or by using a combination of Capstar, Chancellor, SFX and other stations in the market. However, other stations, either alone or in combination with other stations, cannot offer a sufficient number of listeners in demographic groups to be an effective substitute for Capstar, Chancellor and SFX stations.

When the Capstar and SFX stations operate independently, advertisers can obtain lower prices by "playing off" Capstar-owned or Chancellor-owned stations against SFX stations. Advertisers use the threat to move their business between the Capstar/Chancellor and the SFX stations to get more favorable prices and services at each. Advertisers in Greenville, Houston, Jackson, Pittsburgh and Suffolk have paid less for advertising as a result of price competition between the Capstar/Chancellor and SFX radio stations.

2. Harm to Competition

The Complaint alleges that Capstar's acquisition of the SFX will give defendants the ability to raise price to many advertisers—especially local and regional advertisers. Price increases made

possible by the acquisition are likely to be profitable. Radio stations see other radio stations as their principal competition. Moreover, for many advertisers, other media do not serve as substitutes for radio advertising. Radio enjoys unique access to certain audiences. A radio is portable; people can listen to radio anywhere especially in places and situations where other media are not present, such as in the car. In addition, radio formats can target listeners in specific demographics. These features make it a more effective means for many advertisers to achieve what the advertising industry refers to as "frequency."

Many advertisers who purchase time on radio stations consider such purchases preferable to purchases of other media to meet their specific needs. When these advertisers use radio as part of a "media mix," they often view the other advertising media (such as television or newspapers) as a complement to, and not a substitute for, radio advertising.

Radio stations also provide certain value-added services or promotional opportunities -- such as contests, disc jockey endorsements, live remote broadcasts and greater flexibility in ad placement -- that many advertisers significantly value, and which many advertisers cannot exploit as effectively using other media.

For many advertisers, radio advertising is more cost effective than other media, like television and newspapers, in reaching their likely customers. Many advertisers who use radio as part of a multi-media campaign do so because they believe that the radio component enhances the effectiveness of their overall advertising campaign. Many advertisers, especially local and regional advertisers, would not switch their radio advertising purchases to other media if radio prices rose a small but significant amount in relation to other media prices.

Because radio stations in Greenville, Houston, Jackson, Pittsburgh and Suffolk would be

able to charge higher prices to these customers without losing the business of other advertisers, a small but significant price increase would be profitable. This is because Capstar will be able to raise price selectively without losing a significant amount of business. Radio stations know a great deal about how likely an advertiser is to turn to an alternative. In the negotiation process, for example, radio stations obtain significant information about an advertiser's objectives. As a result, radio stations know that some advertisers are more likely than others to turn to alternatives. Because prices are set through individual negotiation, stations can charge higher prices to advertisers that are less likely to use alternatives, while charging lower prices to those advertisers that would more readily switch. Consequently, defendants will be able to raise price profitably to the many advertisers that would readily switch between Capstar and Chancellor and SFX long before they would consider other alternatives.

Accordingly, the complaint alleges that the relevant product market within which to assess the competitive effects of this acquisition is the sale of radio advertising time in the Greenville, Houston, Jackson, Pittsburgh and Suffolk markets.

Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI"), explained in Appendix A annexed hereto, the transaction would substantially increase concentration in the Greenville, Houston, Jackson, Pittsburgh and Suffolk radio advertising markets.

a. Greenville

After the proposed transaction, defendants' share of the Greenville market will be 74 percent, measured by radio advertising revenues. The acquisition would yield a post-merger HHI of 5836, representing an increase of 2571. Post-merger, defendants will own and operate

WSSL-FM and WESC-FM, the only two successful country stations in the market. Accordingly, advertisers who desire to target country listeners will not be able to buy around defendants' stations.

b. Houston

In Houston, after the acquisition, defendants and Chancellor together would have a 41 percent market share, measured by radio advertising revenues. The acquisition would yield a post-merger HHI of 2230, representing an increase of 765.

c. Jackson

In Jackson, defendants' share of the market would be 49 percent, measured by radio advertising revenues. After the acquisition, there would be an HHI of 3320; it would have been significantly higher, if certain stations had not already been sold by defendant Capstar in anticipation of this lawsuit. Furthermore, the prior acquisition of WJDX-FM by defendant SFX previously had increased the HHI by 1080. That acquisition substantially lessened competition and resulted in a market in which defendants would own three out of the four top-rated stations.

d. Pittsburgh

In Pittsburgh, after the acquisition, defendants and Chancellor together would have a 45 percent market share, measured by radio advertising revenues. The acquisition would yield a post-merger HHI of 3162, representing an increase of 626. The ownership of some Pittsburgh stations by Chancellor and others by defendants would substantially lessen competition because of the relationship between Chancellor and defendants Capstar and Hicks Muse.

e. Suffolk

In Suffolk, Chancellor and SFX are the number one and number two radio companies.

After the proposed acquisition, defendants and Chancellor together would control over 65 percent of the radio advertising market. A previous attempt to combine the Chancellor and SFX stations in Suffolk was the subject of an earlier lawsuit, United States v. Chancellor Media Co. and SFX Broadcasting, Inc., CV 97-6497. A proposed final judgment in that matter also was filed today, pursuant to which that transaction will be abandoned.

For the reasons outlined above, the Department of Justice concludes that the acquisition of SFX by Capstar would substantially lessen competition in the sale of radio advertising time in Greenville, Houston, Pittsburgh and Suffolk, and result in increased prices and reduced quality of service for radio advertising time in each of these overlapping markets, and that the prior acquisition of WJDX in Jackson similarly substantially lessened competition, all in violation of Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the sale of radio advertising time in Greenville, Houston, Jackson, Pittsburgh and Suffolk. It requires the divestiture of several radio stations in the affected markets. This relief will reduce the market share Capstar would have achieved through the acquisition in the overlapping markets. The divestitures will preserve choices for advertisers, preserve competition among these radio stations, and help ensure that radio advertising rates do not increase and that services do not decline in the overlapping markets as a result of the acquisition.

The divestitures will ensure that the affected markets will remain competitive. First, no firm will dominate the competitively significantly radio signals in any market. Second, advertisers will have sufficient alternatives to the merged firm in reaching groups of radio listeners most

affected by the transaction; that is, advertisers can reasonably efficiently reach such audiences ("buy around") without using the merged firm. Third, the ownership structure in each market is such that it allows for the possibility of at least three significant competitors who may compete for advertisers' business.

Unless the United States grants an extension of time, the parties must divest the divestiture stations within six months after the Final Judgment has been filed (three months in Suffolk). Until the divestitures take place, these stations will be maintained as independent competitors to the other stations in Greenville, Houston, Jackson, Pittsburgh and Suffolk. If the parties fail to divest any of the divestiture stations and their respective Assets within the time period specified in the Final Judgment, or extension thereof, the Court, upon application of the United States, shall appoint a trustee nominated by the United States to effect the required divestiture or divestitures. 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 stations, and shall be based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestitures and the speed with which they are accomplished. After appointment, the trustee will file monthly reports with the plaintiff, the defendants and the Court, setting forth the trustee's efforts to accomplish the divestitures ordered under the proposed Final Judgment. If the trustee has not accomplished the divestitures within three (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 divestitures, (2) the reasons, in the trustee's judgment, why the required divestitures have

not been accomplished, and (3) the trustee's recommendations. At the same time, the trustee will furnish such report to the plaintiff and defendants, 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 that defendants maintain each of the divestiture stations separate and apart from their other stations, pending divestiture of those stations, in the Greenville, Houston, Jackson and Pittsburgh areas. The Judgment also contains provisions to ensure that these stations will be preserved, so that they will remain viable, aggressive competitors after divestiture. The defendants, without providing advance notification to the plaintiff, may not acquire any assets in any Non-Hicks Muse Radio Stations. Also, the defendants may not, without providing advance notice to the plaintiff, enter into any agreement (including a Local marketing agreement or a Joint Sales Agreement), that would allow a defendant to market or sell advertising time or to establish adverting prices for any Non-Hicks Muse Radio Station.

The Judgment requires that the defendants or the trustee notify the plaintiff of any proposed divestitures, within two (2) days following the execution of a definitive agreement. Within fifteen (15) days of receipt by plaintiff of notice, the plaintiff may request additional information regarding the proposed divestiture and the proposed purchaser. The defendants and the trustee must furnish the additional information within fifteen (15) days of the receipt of the request. Within thirty (30) days after receipt of the notice, or within twenty days after plaintiff has been provided the additional information requested from the defendants, the proposed purchaser or purchasers, and any third party, plaintiff will provide written notice to the defendants or the trustee stating whether or not it objects to the proposed divestiture. Absent written notice that plaintiff does not object to the proposed divestiture, a divestiture may not be consummated.

The relief in the proposed Final Judgment is intended to remedy the likely anticompetitive effects of the proposed acquisition of SFX by Capstar. Nothing in this Final Judgment is intended to limit the plaintiff's ability to investigate or bring actions, where appropriate, challenging other past or future activities of defendants in Greenville, Houston, Jackson, Pittsburgh and Suffolk or any other markets, including their entry into any JSAs, LMAs, or any 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 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 its entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Any such 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 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 divestiture stations and other relief contained in the proposed Final Judgment will preserve viable competition in the sale of radio advertising time in Greenville, Houston, Jackson, Pittsburgh and Suffolk. 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."[4] Rather,

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[4] 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

> [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. ¶ 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

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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.

[5] 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).

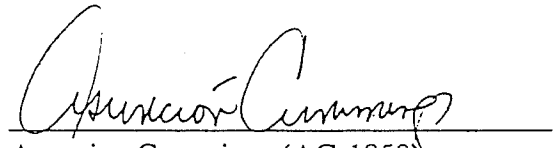
certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree 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.'"[6]

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

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,



Asuncion Cummings (AC-1850)
Merger Task Force
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Dated: March 31, 1998

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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 (citations omitted); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

APPENDIX A
HERFINDAHL-HIRSCHMAN INDEX CALCULATIONS

"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 Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. See *Merger Guidelines* § 1.51.

CERTIFICATE OF SERVICE

I hereby certify that, on this 31st day of March 1998, I caused to be served by hand delivery a copy of the foregoing Competitive Impact Statement upon the following:

David A. Clanton
Baker & McKenzie
815 Connecticut Avenue, N.W.
Washington, D.C. 20006-4078

Neil Imus
Vinson & Elkins
1455 Pennsylvania Avenue, N.W.
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