IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. WORLDCOM, INC., INTERMEDIA COMMUNICATIONS, INC. Defendants.	)	Case No. 1:00CV02789 Judge: Richard W. Roberts Filed: December 21, 2000

COMPETITIVE IMPACT STATEMENT

The United States of America, 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

On November 17, 2000, the United States filed a civil antitrust Complaint alleging that the proposed acquisition of Intermedia Communications, Inc. ("Intermedia") by WorldCom, Inc. ("WorldCom") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleges that WorldCom and Intermedia are two leading providers of Internet backbone service. As explained below, the acquisition of Intermedia by WorldCom will substantially lessen competition in the market for Tier 1 Internet backbone services in violation of Section 7 of the Clayton Act.

The request for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; (2) a permanent injunction preventing WorldCom and Intermedia from merging; and (3) such other relief that the Court deems proper.

Shortly before the United States filed its Complaint, the United States and defendants reached agreement on the terms of a proposed Final Judgment. The proposed Final Judgment would permit WorldCom and Intermedia to complete their merger, and thus enable WorldCom to acquire ownership of a controlling stock interest in Digex, Inc. now owned by Intermedia, but it would require WorldCom thereafter to divest all of Intermedia's businesses and assets (except for the Digex stock) as an integrated, ongoing concern. Subject to the possibility of extensions under certain limited circumstances, the divestiture must occur within one hundred eighty days of WorldCom's closing of the Intermedia transaction. The proposed Final Judgment, along with the Hold Separate Stipulation and Order, also contain provisions restricting WorldCom from interfering in the ongoing operations of Intermedia's business, or from participating in the management or governance of Intermedia, in order to minimize the risk of competitive harm that otherwise might arise pending completion of the divestiture.

The United States 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 the 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, consistent with the proposed Final Judgment, to a number of requirements designed to maintain the business and assets of Intermedia as a fully

separate, competitive business pending entry of the proposed Final Judgment and pending the divestiture.

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

A. The Defendants And The Proposed Transaction

WorldCom, Inc., formerly known as MCI WorldCom, Inc., is a corporation organized and existing under the laws of the State of Georgia, with its principal place of business in Clinton, Mississippi. It is one of the largest global telecommunications providers. WorldCom's 1999 annual revenues totaled approximately $37 billion.

WorldCom's UUNET subsidiary is by far the largest provider of Internet backbone services in the world, whether measured by revenues or Internet traffic carried. UUNET offers a wide range of retail and wholesale Internet backbone services, including "dial-up" (i.e., through shared modem banks) and dedicated Internet access (i.e., through direct connections to the customer), as well as value-added services such as Internet protocol virtual private networks ("IP/VPNs"), web site hosting, applications hosting, and Internet security services.

Intermedia Communications, Inc. is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business in Tampa, Florida. Intermedia is a broad-based, integrated telecommunications provider that primarily offers local and long distance voice and data communications solutions to business and government customers. In addition to its other voice and data business, Intermedia operates a significant nationwide Internet backbone network, offering a broad suite of dedicated and dial-up Internet connectivity services to Internet

Service Providers ("ISPs"), businesses and government customers. In 1999, Intermedia served approximately 90,000 business and government customers, and had consolidated revenues of approximately $906 million. Intermedia also owns a controlling stake -- approximately 94% of the voting securities and 62% of all outstanding common shares -- in Digex, Inc., a publicly traded Delaware corporation headquartered in Beltsville, Maryland. Digex is a leading provider of managed web site hosting and related services. Digex's revenues during the last twelve months were approximately $108 million.

On September 5, 2000, WorldCom and Intermedia entered into an agreement whereby WorldCom will acquire Intermedia by assuming Intermedia's debt and issuing its stock in exchange for the Intermedia shares. The transaction is valued at approximately $6 billion, which reflects approximately $3 billion in equity and $3 billion in debt and preferred stock.

On October 23, 2000, the Defendants filed an application for the transfer of control of various licenses issued by the FCC to Intermedia that are necessary for it to conduct its business. Unless and until their FCC application is granted, the Defendants cannot consummate the merger.

B. Markets To Be Harmed By The Proposed Merger

The explosive growth of the Internet over the past several years has transformed the American economy as well as the lifestyles of millions of American consumers and businesses. Indeed, the Internet is fast becoming as much a part of daily life as the television and the telephone. From a basic network that served primarily the military and academic institutions, the Internet has expanded into a global network of public and private networks which enables end users to communicate with each other and access large amounts of information, data, and

educational and entertainment services. These end users -- individuals, businesses, content providers, governments, and universities -- obtain access to the Internet either through a "dial-up" modem or other consumer Internet access connection (e.g., cable modem or digital subscriber line service), or through a dedicated high-speed facility ("dedicated access") provided by one of thousands of ISPs. ISPs provide access to the Internet on a local, regional, or national basis. While ISPs operate their own networks of varying size, most have limited facilities.

An ISP can connect any customer on its network to any of the other customers on its network. In order to allow its customers to communicate with the many end users connected to other networks, however, an ISP must establish direct or indirect interconnections with those other networks. Interconnection agreements between networks are voluntary and consensual in nature, and are not subject to governmental regulation.

Because the Internet comprises thousands of separate networks, direct interconnections between each of those networks and all other networks would be impractical. Instead, an Internet "backbone" provider ("IBP") aggregates the connections between these smaller networks into a large "network of networks" served by that backbone. These large IBP networks are able to use high-capacity long-haul transmission facilities to interconnect their own customers with each other. In addition, these IBPs can establish interconnections with other IBPs to provide access to the ultimate "network of networks" known generally as the Internet, in which customers of one IBP are able to connect with customers of another network. This hierarchical structure dramatically reduces the number of direct and indirect interconnections that have to be negotiated, created and managed. One impact of the hierarchical structure of the Internet is that a large IBP

controls the physical path of access to a large base of customers.

Physically, connectivity between networks is similar whether the connection is from an end user to an ISP, from an ISP to an IBP, or between two IBPs, in that a transmission interface between the two sides of each data exchange is established and packets of data are sent from one side of the interface to the other and processed based on a common standard. The precise type of infrastructure chosen and method of payment for the data exchange vary depending on the relative bargaining positions and capabilities of the parties on each side of the interconnection. Sometimes the transmission facilities are dedicated solely to data exchanges between two parties and sometimes there are shared access facilities for interchange, such as modem banks or the public interconnection facilities -- the Network Access Points ("NAPs") and Metropolitan Area Exchanges ("MAEs").[1]

There are a variety of relationships at the points of interconnection. Mass market customers typically pay an ISP for the right to connect, typically using the shared public telephone infrastructure, to the ISP's network and through it to all the networks to which the ISP is connected directly or indirectly. Corporate customers typically pay an ISP for a dedicated connection to the ISP's network and to the other networks to which it is connected. Likewise, the relationship between an ISP and an IBP typically involves the ISP buying access to the IBP's own network and through it to the other IBP networks and, thus, to the ISPs who chose to

---

[1] The NAPs and MAEs are public interconnection facilities operated private parties, through which an ISP or IBP can exchange traffic with another network if both chose to do so. UUNET owns and operates three of the largest and busiest public interconnection points (MAE-East, MAE-West, and MAE-Central), along with four smaller regional public MAEs.

connect first to the other IBPs.

In contrast, the connectivity IBPs offer to each other is more variable. Some IBPs interconnect over private facilities, sharing the cost evenly and without regard to the balance of traffic flowing in each direction, but agreeing only to deliver packets addressed to users on their own network (and those of their customers). Such a relationship is often referred to as a "private peering" agreement. "Peering" stands in stark contrast to "transit" agreements where one IBP offers another IBP interconnection on the same kinds of terms as it offers connectivity to other customers, i.e., the ability to interconnect with the transit provider's customers and the customers of any other network to which the IBP is connected. Intermediate arrangements, such as "paid peering" and peering only at public interconnection sites also occur between IBPs.[2]

An IBP's willingness to peer privately with another IBP typically depends in large part on the relative volumes of traffic the IBPs would send to or receive from one another. A small number of IBPs have such large networks of customers that they have the ability to ensure that they always receive interconnection with other IBPs that are on terms at least as favorable to themselves as to the other side of the interconnection and the ability to ensure as much as possible any desired level of quality for the interconnection. These large IBPs ("Tier 1 IBPs") typically connect with each other through private, unpaid peering connections. In contrast, smaller IBPs

[2] During the past few years, the explosive growth of the Internet has overwhelmed the public interconnection points. Despite the expansion of existing public access points and the addition of new public access points to accomodate this growth, the NAPs and MAEs remain chronically congested. Private interconnections thus tend to offer considerably higher quality connections between networks in part because the quality is not affected by the volume of traffic coming from or between other networks, as it would be at a congested public facility.

are frequently customers -- either transit customers of Tier 1 IBPs or paid peering customers -- or have lower quality interconnection because they peer only at public interconnection points. These arrangements for connectivity between IBPs are, in effect, resold as a bundle when an IBP offers to provide general Internet connectivity (i.e., the kind of arrangement typically sold by an IBP to its dedicated access customers), and the terms of these IBP-interconnection arrangements are important determinants of an IBP's ability to compete for sales of the bundled product. IBPs with less traffic that must purchase a significant amount of their connectivity to other IBPs operate at a substantial cost disadvantage compared to Tier 1 IBPs, which tend to rely exclusively on peering.

Tier 1 IBPs also have significant competitive advantages compared to lower tier IBPs in terms of their ability to provide higher-quality general Internet connectivity service. A customer purchasing general Internet connectivity from a Tier 1 IBP will more often be exchanging data efficiently over direct and private interconnections than would be the case for the same customer purchasing general Internet connectivity from a lower-tier IBP that has to rely more on indirect transit service or on the inferior and congested public interconnection points.

Because of these differences, the provision of Tier 1 backbone services is distinguished from that provided by other IBPs for customers seeking general Internet connectivity. For connectivity limited to the specific network (and customers) of a Tier 1 IBP, connectivity to a different IBP is not an effective substitute.

A relevant product market affected by this transaction is the provision of Internet connectivity by Tier 1 IBPs. Because providing customers with Tier 1 IBP connectivity in the United States requires domestic operations, such customers are unlikely to turn to any foreign

providers that lack these domestic operations in response to a small but significant and nontransitory increase in price by domestic Tier 1 IBPs. There are no substitutes for this connectivity sufficiently close to defeat or discipline a small but significant nontransitory increase in price.

C. Anticompetitive Consequences Of The Merger

WorldCom's wholly owned subsidiary, UUNET, is by far the largest Tier 1 IBP by any relevant measure and is already approaching a dominant position in the Internet backbone market. Based upon a study conducted by the Department of Justice in February 2000, UUNET's share of all Internet traffic sent to or received from the customers of the 15 largest Internet backbones in the United States was about 37%, more than twice the share of the next-largest Tier 1 IBP, Sprint. Although far smaller than UUNET, Intermedia is also a significant provider of Internet backbone service to dedicated Internet access customers. The 15 largest backbones represent approximately 95% of all U.S. dedicated Internet access revenues.

As is true in network industries generally, the value of Internet access to end users becomes greater as more and more end users can easily be reached through the Internet. The benefit that one end user derives from being able to communicate effectively with additional users is known as a "network externality." Under some conditions, this network externality creates strong incentives for IBPs to negotiate efficient interconnection arrangements between one another. By doing so, each IBP can improve the quality and minimize the cost of the services it offers to its own customers.

When two IBPs are comparable in size, they are likely to be in a position of rough parity

with one another in negotiating interconnection arrangements. A substantial size disparity between IBPs, however, may alter the bargaining leverage between those IBPs. In this context, the smaller IBP may suffer greater harm than the larger IBP from a failure to achieve interconnection, since that failure would adversely affect the cost and quality of a larger proportion of the communications of the smaller IBP's customers than of the communications of the larger IBP's customers. In an extreme case, when a IBP grows to a point at which it controls a substantial share of the total Internet end user base and its size greatly exceeds that of any other network, the dominant IBP may be able to "tip" the market. By degrading the quality or increasing the price of interconnection with smaller networks it can obtain advantages in attracting customers to its network. Customers will recognize that they can communicate more effectively with a larger number of other end users if they are on the largest network, and this effect feeds upon itself and becomes more powerful as larger numbers of customers choose the largest network. Faced with a reduction of quality or an increase in the cost of interconnection with the dominant IBP, rivals may be unable to compete on a long-term basis and may exit the market. If rivals decide to pass on these costs, users of connectivity will respond by selecting the dominant network as their provider. Once this occurs, restoring the market to a competitive state could require extraordinary means, including some form of government regulation.

Given UUNet's current position in the IBP market, a significant increase in UUNet's size relative to other IBPs would create an unacceptable risk of anticompetitive behavior. UUNet might be able to charge higher prices for interconnection to another IBP, convert non-paying IBPs to paying IBPs, avoid giving better prices to small IBPs, or lower the quality of

interconnection to the smaller IBPs, increasing the likelihood of a "tipping" of the Internet backbone market towards monopoly.

Entry into the Tier 1 Internet backbone services market would not be timely, likely, or sufficient to remedy the proposed merger's likely anticompetitive harm. Entry barriers are already high, and the proposed transaction will raise barriers to entry even higher. Entry sufficient to offer a significant competitive constraint on the provision of connectivity by Tier 1 IBPs requires substantial time and enormous sums of capital to build a network of sufficient size and capacity to attract the relevant base of customers, and to attract and retain the scarce, highly skilled technical personnel required for its operations. Through this transaction, UUNET/Intermedia would enhance its ability to control and inhibit successful entry by refusing to interconnect with new entrants or by limiting those connections in order to control the growth of its rivals. By degrading the quality of interconnection and raising its rivals' costs, UUNET/Intermedia would further prevent entry and expansion by other IBPs. Moreover, through its control of public interconnection facilities (e.g., MAE-East, MAE-West) and its refusal to upgrade these facilities, UUNET would be able to limit opportunities for existing rivals and new entrants to build their traffic volumes through public peering.

For these reasons, the United States concluded that the WorldCom/Intermedia merger as proposed may substantially lessen competition in violation of Section 7 of the Clayton Act, in the market for the provision of Internet connectivity by Tier 1 IBPs.

III.
EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Divestiture Requirement

The proposed Final Judgment will preserve competition in the market for the provision of Internet connectivity by Tier 1 IBPs by limiting UUNET's increase in its control over Internet traffic. Section IV of the proposed Final Judgment requires WorldCom, within one hundred eighty (180) calendar days from the closing of WorldCom's underlying acquisition of Intermedia, to divest all of the Intermedia assets, except for the voting interest in Digex, as an ongoing, viable business to an acquirer acceptable to the United States. Thus, although the proposed Final Judgment permits WorldCom to retain Intermedia's interest in Digex, it prohibits UUNET from acquiring Intermedia's Internet backbone connectivity network, business, customer relationships and traffic.

Through the sale of Intermedia assets, the proposed Final Judgment's prohibitions will help to prevent UUNET from increasing its level of customer traffic relative to other Tier 1 IBPs and thus will help to preserve competition. Absent these prohibitions, the likely result of a combined WorldCom and Intermedia would be higher prices and lower output than there otherwise would be for connectivity to Tier 1 IBPs. As discussed above, Digex is primarily a provider of managed web-hosting services.

Intermedia and Digex currently operate as independent companies with virtually no shared employees. Intermedia has a controlling voting interest in Digex which it will transfer to WorldCom. The entity that currently constitutes Intermedia, which includes the Internet backbone provider business, will be divested as a whole. The proposed Final Judgment, along

with the Hold Separate Stipulation and proposed Order, ensures that the Intermedia assets and businesses are maintained wholly separate from WorldCom pending both the closing of the WorldCom-Intermedia merger and the divestiture of Intermedia to a qualified buyer. Section XI of the proposed Final Judgment prohibits WorldCom from reacquiring any part of the divested Intermedia assets during the ten year term of the decree. In the event that WorldCom has not completed the divestiture within the specified time period, including possible extension pursuant to Section IV(A), Section V provides for the appointment of a trustee who shall have the power and authority to accomplish the divestiture.

B. Other Decree Provisions

In order to monitor and ensure compliance with the Final Judgment, Section IX requires periodic affidavits on the fact and manner of defendants' compliance with divestiture and the Final Judgment. Section X gives the United States various rights, including the ability to inspect the defendants' records, to conduct interviews and to take sworn testimony of the defendants' officers, directors, employees and agents, and to require defendants to submit written reports. These rights are subject to legally recognized privileges, and any information the United States obtains using these powers is protected by specified confidentiality obligations.

The Court retains jurisdiction under Section XII, and Section XIII provides that the proposed Final Judgment will expire on the tenth anniversary of the date of its entry, unless extended by the Court.

IV.
REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15. U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal courts to recover three times the damages a person has suffered, as well as costs and reasonable attorney's 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 the defendants.

V.
PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States 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
United States Department of Justice
Antitrust Division
1401 H Street, N.W., Suite 8000
Washington, DC 20530

The proposed Final Judgment provides in Section XII 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 WorldCom/Intermedia merger and a full trial on the merits. The United States is satisfied, however, that the divestiture of Intermedia as an ongoing business and other relief contained in the proposed Final Judgment will preserve competition in the market for the provision of Internet connectivity by Tier 1 IBPs. 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 Intermedia is sold 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 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 Case. (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. 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.[4]

---

[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.

[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 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 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,

A. Douglas Melamed
Acting Assistant Attorney General

Constance K. Robinson
Director of Operations and
Merger Enforcement

Donald J. Russell
Chief

/s/
David F. Smutny (DC Bar No. 435714)
J. Parker Erkmann
Lorenzo McRae II

Trial Attorneys
U.S. Department of Justice
Antitrust Division
Telecommunications Task Force
1401 H. Street, N.W., Suite 8000
Washington, D.C. 20530
(202) 514-5621

Dated: December 21 2000