UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. LIBERTY LATIN AMERICA LTD., *et al.* Defendants.	Civil Action No. 1:20-cv-03064-TNM

COMPETITIVE IMPACT STATEMENT

The United States of America, under Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (the "APPA" or "Tunney Act"), 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

Defendant Liberty Latin America Ltd. ("Liberty") and Defendant AT&T Inc. ("AT&T") entered into an agreement, dated October 9, 2019, pursuant to which Liberty would acquire the assets of AT&T's wireless and wireline telecommunications businesses in Puerto Rico and the United States Virgin Islands. The United States filed a civil antitrust Complaint on October 23, 2020, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to substantially lessen competition in the market for the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time the Complaint was filed, the United States filed an Asset Preservation Stipulation and Order and proposed Final Judgment, which are designed to remedy the loss of competition in Puerto Rico alleged in the Complaint. Liberty does not compete with AT&T in the U.S. Virgin Islands. Under the proposed Final Judgment, which is explained more fully below, Liberty is required to divest the fiber-based Columbus network in the metropolitan San Juan area, and additional fiber assets, including fiber facilities and indefeasible rights of use, on Liberty's fiber-optic network across the rest of Puerto Rico (the "Divestiture Assets") to a third-party acquirer. Under the terms of the Asset Preservation Stipulation and Order, Defendants will take certain steps to ensure that the Divestiture Assets are operated as ongoing, economically viable competitive assets and will preserve and maintain the Divestiture Assets and AT&T's aerial fiber-optic core network during the pendency of the required divestiture. In addition, the proposed Final Judgment requires Liberty to provide the acquirer with several options that would allow the acquirer to broaden the reach of its fiber-optic network.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

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

A. The Defendants and the Proposed Transaction

Liberty—a Bermuda corporation with its executive offices in Denver, Colorado—is a leading telecommunications provider in Latin America and the Caribbean. Across this region, Liberty provides video services, internet access, and home telephony services to more than 6 million subscribers and provides mobile wireless service to approximately 3.6 million

subscribers. Liberty generates approximately $3.9 billion in annual revenues. Through its subsidiary Liberty Communications of Puerto Rico LLC ("LCPR"), Liberty operates the largest cable company in Puerto Rico. In 2016, Liberty expanded its Puerto Rico operations by acquiring Cable & Wireless Communications Plc, which controlled Columbus International Inc., a leading provider of fiber-based connectivity and telecommunications services on the island. Today, Liberty operates a network that includes more than 3,000 route miles of fiber-optic facilities in Puerto Rico. Liberty uses this network to provide fiber-based connectivity and telecommunications services to enterprise customers located throughout the island.

AT&T—a Delaware corporation headquartered in Dallas, Texas—is a leading provider of telecommunications, media, and technology services globally. AT&T generates approximately $180 billion in annual revenues. Beyond its well-known mobile wireless and residential telecommunications businesses, AT&T is also one of the largest providers of telecommunications services to enterprise customers in the United States. AT&T entered the Puerto Rico market in 2009 through its acquisition of the wireless and wireline operations of Centennial Communications Corp. Today, AT&T provides fiber-based connectivity and telecommunications services to enterprise customers across Puerto Rico over a network that includes over 3,500 route miles of fiber-optic facilities.

On October 9, 2019, Liberty announced that it had agreed to purchase AT&T's wireless and wireline telecommunications operations in Puerto Rico and the U.S. Virgin Islands for $1.95 billion in cash. Upon closing of the transaction, Liberty would take ownership of certain AT&T assets in Puerto Rico, including its wireless and wireline networks, wireless spectrum, contracts, real estate, and most of AT&T's customer relationships on the island.[1]

[1] The transaction does not include AT&T's DIRECTV assets in Puerto Rico, any submarine cables and landing

B. Anticompetitive Effects of the Proposed Transaction

1. Relevant Markets

As alleged in the complaint, the provision of fiber-based connectivity and telecommunications services to enterprise customers is a relevant product market under Section 7 of the Clayton Act. Wireline telecommunications services provided over fiber-optic networks generally provide a higher level of quality and reliability than other types of wireline telecommunications services, such as those provided over legacy copper telephone network facilities or coaxial cable facilities. Enterprise customers—including business of all sizes and other institutions, such as universities, hospitals, and government agencies—generally require higher-quality and more-reliable telecommunications services than the residential telecommunications services that are purchased by consumers. For example, many enterprise customers require very high levels of dedicated bandwidth to allow them to transmit large volumes of data among their offices, and many require services that offer penalty-backed service quality guarantees in order to ensure business continuity. Fiber-based services often carry these features. Accordingly, many enterprise customers depend on fiber-based services to enable their day-to-day operations.

Enterprise customers that purchase fiber-based connectivity and telecommunications services would not turn to other connectivity technologies (such as copper or coaxial cable) in sufficient numbers to make a small but significant increase in price of fiber-based connectivity and telecommunications services unprofitable for a hypothetical monopolist provider of these services. Thus, as alleged in the Complaint, the provision of fiber-based connectivity and

stations, certain "global" customer contracts, or spectrum in the 3650-3700 MHz and 39 GHz ranges.

telecommunications services to enterprise customers constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act, 15 U.S.C. § 18.

The Complaint alleges that the relevant geographic market under Section 7 of the Clayton Act is no larger than the island of Puerto Rico. The relevant geographic market is best defined by the locations of the customers who purchase fiber-based connectivity and telecommunications services. Enterprise customers located in Puerto Rico purchase fiber-based connectivity and telecommunications services from providers that can provide service to their locations. Enterprise customers located in Puerto Rico are unlikely to move their offices or other buildings in order to purchase fiber-based connectivity and telecommunications services from firms that do not offer service to their locations. For these reasons, a hypothetical monopolist of fiber-based connectivity and telecommunications services for enterprise customers in Puerto Rico likely would increase its prices in that market by at least a small but significant and non-transitory amount. Therefore, Puerto Rico is a relevant geographic market and "section of the country" within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

2. Competitive Effects

Liberty and AT&T possess two of the three most extensive fiber-based networks in Puerto Rico. Each owns thousands of last-mile fiber connections, fiber facilities in municipalities across the island, and a fiber-optic "ring" that connects the municipalities to one another. The only other provider with a comparable fiber-based network is the incumbent local telephone company on the island, Puerto Rico Telephone Company, Inc., which does business as "Claro."

Together, Liberty, AT&T, and Claro account for the vast majority of sales of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico. While

other providers offer service in Puerto Rico, they collectively account for a small fraction of sales. These smaller providers generally do not own networks of sufficient scale to enable them to compete effectively in many parts of the island. In light of the large share of enterprise customers served by Liberty, AT&T, and Claro, this market is highly concentrated as that term is defined by the U.S. Department of Justice and Federal Trade Commission's Horizontal Merger Guidelines.[2]

As alleged in the Complaint, Liberty and AT&T compete directly with one another in this highly concentrated market. For many buildings on the island, Liberty and AT&T are either the only two providers, or two of only three providers, that own a last-mile fiber connection to the building. For many other buildings, Liberty and AT&T are the only two providers, or two of only three providers, with fiber located close enough to the building to be able to construct such a connection economically. Some enterprise customers purchase service for individual locations. Many customers, however, have multiple locations spread throughout Puerto Rico and demand service from a single provider that can serve all of their locations over its network. Given the breadth of their networks, Liberty and AT&T compete particularly closely for these customers.[3]

Competition between Liberty and AT&T for enterprise customers takes several forms. In some instances, Liberty or AT&T offers promotional rates or discounts in order to attract customers away from the other. In other instances, customers can extract concessions from Liberty or AT&T by threatening to switch to the other. Liberty or AT&T may also construct

[2] *See* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, at 19 (issued Aug. 19, 2020) (defining "highly concentrated markets" as those in which the Herfindahl-Hirschman Index exceeds 2500), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf.

[3] A provider that does not own a last-mile connection to a particular customer location can serve enterprise customers at that location by purchasing a last-mile connection from a wholesale provider. However, providers that do not own island-wide networks, including a significant number of last-mile connections, are limited in their competitiveness because they are reliant on their wholesale providers for fiber-based connectivity and constrained by the terms set by those providers.

new fiber facilities in order to attract customers away from the other. Enterprise customers throughout Puerto Rico have experienced the benefit of this competition in the form of lower prices and higher-quality services.

According to the Complaint, without the proposed remedy, the acquisition of AT&T's wireline telecommunications operations in Puerto Rico by Liberty would represent a loss of this competition. The highly concentrated market for the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico would become even more concentrated, leading to a presumption under the Horizontal Merger Guidelines that the proposed transaction would likely enhance market power.[4] The loss of Liberty and AT&T as independent competitors would leave many customers with only one alternative provider and others with no competitive choice at all. This change would likely result in increased prices and lower-quality services for enterprise customers across the island.

The entry of new competitors in the relevant market is unlikely to prevent or remedy the proposed transaction's anticompetitive effects. Barriers to entry include (i) the substantial amount of time and expense required to construct a fiber-optic network, (ii) the need for a firm seeking to construct such a network to obtain the permits and approvals required to do so, (iii) the significant level of expertise required to successfully offer telecommunications services to enterprise customers, and (iv) the need for a provider to establish a brand and reputation that would allow enterprise customers to entrust the provider with supporting their day-to-day operations. In addition, the proposed transaction would be unlikely to generate verifiable,

[4] *See* Horizontal Merger Guidelines at 19 (explaining that "[m]ergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power").

merger-specific efficiencies sufficient to reverse or outweigh the anticompetitive effects that are likely to occur.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The relief required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by establishing an independent and economically viable competitor in the market for the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico. Paragraph IV.A of the proposed Final Judgment requires Liberty, within 30 calendar days after the entry of the Asset Preservation Stipulation and Order by the Court, to divest the Divestiture Assets, subject to extension if regulatory approval from another government entity is required.[5] The assets must be divested in such a way as to satisfy the United States in its sole discretion that they can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the market for the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and must cooperate with the acquirer.

Liberty has reached an agreement to divest the Divestiture Assets to WorldNet Telecommunications, Inc. ("WorldNet"). The terms of the proposed Final Judgment govern the divestiture to WorldNet and also would govern in the event that Defendants were to divest the Divestiture Assets to a different acquirer approved by the United States.

A. Divestiture Assets

The Divestiture Assets include the Columbus Divestiture Assets, the LCPR Divestiture

[5] *See* Proposed Final Judgment ¶ 4.B. In this instance, the United States expects that Defendants will be required to seek approval from the Federal Communications Commission, which will likely affect the timing of the divestiture.

Assets, and the LCPR IRU.

The Columbus Divestiture Assets include the fiber-optic Columbus network in the San Juan metropolitan area. Liberty acquired this network as part of its 2016 acquisition of Cable & Wireless Communications and currently uses it to serve enterprise customers. The Columbus Divestiture Assets include the accounts of enterprise customers that Liberty serves over this network, subject to limited exceptions.

The LCPR Divestiture Assets include certain components of Liberty's LCPR network, which is distinct from the Columbus network. Liberty uses the LCPR network both to provide fiber-based services to enterprise customers and to serve Liberty's other customers in Puerto Rico, such as residential cable customers, which Liberty will continue serving after closing of the divestiture. The LCPR Divestiture Assets include the accounts of enterprise customers to which Liberty provides fiber-based services over the LCPR network, subject to limited exceptions, as well as Liberty's network facilities that are used to serve those customers exclusively. The LCPR Divestiture Assets do not include shared network facilities that are used by Liberty both to serve the customers being transferred and to serve Liberty's other customers on the island. These shared network facilities are covered by the LCPR IRU.

The LCPR IRU provides the acquirer with an indefeasible right to use these shared assets to provide fiber-based connectivity and telecommunications services for a fixed term of years. Paragraph IV.E of the proposed Final Judgment specifies, among other things, that the LCPR IRU must include all rights and interests necessary to enable the acquirer to provide such services; must provide the acquirer with repair, maintenance, and installation capabilities of the same quality and speed that LCPR utilizes for its own network; and must not require Acquirer to pay a monthly or other recurring fee to preserve or make use of its rights.

B. Acquirer Options

The proposed Final Judgment also requires Liberty to provide the acquirer with several options that would allow the acquirer to broaden the reach of its fiber-optic network. Paragraph IV.J requires Liberty to provide the acquirer with the option to acquire AT&T's aerial fiber-optic core network on a segment-by-segment basis within three years after the closing of the divestiture. Paragraph IV.K requires Liberty to maintain the full economic viability, marketability, and competitiveness of these segments until Liberty makes them available for the acquirer to purchase. Paragraph IV.L requires Liberty to provide the acquirer with the option to attach fiber-optic facilities to Liberty's telephone poles at any time during the term of the Final Judgment on commercially reasonable terms comparable to those found in Liberty's other pole attachment agreements. Paragraph IV.M requires Liberty to provide the acquirer with the option to acquire space in Liberty's underground conduit and deploy fiber optic facilities therein at any time within three years of the closing of the divestiture. The acquirer may choose to use these options to expand the fiber-optic network that it acquires as part of the Divestiture Assets and reduce its reliance on the LCPR IRU over time.

C. Other Obligations

In order to preserve competition and facilitate the success of the acquirer, the proposed Final Judgment contains additional obligations for the Defendants.

Paragraph IV.N requires Liberty to facilitate the acquirer's efforts to hire certain employees. Specifically, this paragraph requires Liberty to provide the acquirer with organization charts and information relating to certain employees and to make them available for interviews. It also provides that Liberty must not interfere with any negotiations by the acquirer to hire these employees. In addition, for employees who elect employment with the Acquirer,

Liberty must waive all non-compete and non-disclosure agreements, vest all unvested pension and other equity rights, provide any pay pro-rata, provide all compensation and benefits that those employees have fully or partially accrued, and provide all benefits that those employees otherwise would have been provided had those employees continued employment with Liberty, including but not limited to any retention bonuses or payments. In addition, the Defendants may not solicit to hire any employees who elect employment with the acquirer, unless that individual is terminated or laid off by the acquirer or the acquirer agrees in writing that the Defendants may solicit or hire that individual. The non-solicitation period runs for six months from the date of the divestiture.

Paragraph IV.P facilitates the transfer to the acquirer of customers and other contractual relationships that are included within the Divestiture Assets. Liberty must transfer all contracts, agreements, and relationships to the Acquirer and must make best efforts to assign, subcontract, or otherwise transfer contracts or agreements that require the consent of another party before assignment, subcontracting, or other transfer.

Paragraph IV.R of the proposed Final Judgment requires Liberty, at the acquirer's option, to enter into a transition services agreement for back office, billing, provisioning, human resources, accounting, employee health and safety, and information technology services and support for the Divestiture Assets for a period of up to 18 months. The paragraph further provides that the United States, in its sole discretion, may approve one or more extensions of this transition services agreement for a total of up to an additional six months.

Paragraph IV.S prohibits Liberty from initiating customer-specific communications to solicit any customer transferred to the acquirer in connection with the divestiture for a period of one year following the divestiture. Liberty may respond to inquiries initiated by such customers

and enter into negotiations at the request of such customers, but it must maintain a log of any such inquiries and requests. Liberty must also ensure that its construction contractors do not initiate any communications with such customers, except in specified circumstances. This paragraph does not prevent Liberty from initiating customer-specific communications with any AT&T customer with respect to those services provided by AT&T to such customer as of the closing of Liberty's acquisition of AT&T's operations. This paragraph will help the acquirer establish and maintain important customer relationships.

Paragraph XI.A requires Liberty to implement a firewall to prevent the acquirer's information from being used by other parts of Liberty's business. Specifically, Liberty must implement and maintain reasonable procedures to prevent competitively sensitive information from being disclosed, by or through implementation and execution of the obligations in the Final Judgment or any associated agreements, between Liberty's employees involved in Liberty's relationship with Acquirer and any other employee of Liberty. Under Paragraph XI.B, Liberty must, within 30 days of the entry of the Asset Preservation Stipulation and Order, submit a document setting forth in detail the procedures implemented to effect compliance with Section XI. The United States will determine, in its sole discretion, whether to approve or reject Liberty's proposed compliance plan.

D. Monitoring Trustee

The proposed Final Judgment provides that the United States may appoint a monitoring trustee with the power and authority to investigate and report on Liberty's compliance with the terms of the proposed Final Judgment and the Asset Preservation Stipulation and Order during the pendency of the divestiture, including the terms governing the sale of the Divestiture Assets and the options described above. The monitoring trustee will not have any responsibility or

obligation for the operation of Liberty's business. The monitoring trustee will serve at Liberty's expense, on such terms and conditions as the United States approves, and Liberty must assist the monitoring trustee in fulfilling its obligations. The monitoring trustee will provide periodic reports to the United States and will serve until the expiration of the Final Judgment, unless the United States, in its sole discretion, determines a shorter period is appropriate.

E. Divestiture Trustee

If Liberty does not accomplish the divestiture within the period prescribed in Paragraph IV.A of the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to effect the divestiture. If a divestiture trustee is appointed, the proposed Final Judgment provides that Liberty will pay all costs and expenses of the trustee. The divestiture trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After the divestiture trustee's appointment becomes effective, the trustee will provide monthly reports to the United States setting forth his or her efforts to accomplish the divestiture. If the divestiture has not been accomplished within six months of the divestiture trustee's appointment, the divestiture trustee and the United States may make recommendations to the Court, which will enter such orders as appropriate, in order to carry out the purpose of the Final Judgment, including by extending the trust or the term of the divestiture trustee's appointment.

F. Enforcement Provisions

The proposed Final Judgment also contains provisions designed to promote compliance and make enforcement of the Final Judgment as effective as possible. Paragraph XV.A provides that the United States retains and reserves all rights to enforce the Final Judgment, including the

right to seek an order of contempt from the Court. Under the terms of this paragraph, Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

Paragraph XV.B provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to restore competition that the United States alleges would otherwise be harmed by the transaction. Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XV.C of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that a Defendant has violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph XV.C provides that in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, that Defendants will reimburse the United States

for attorneys' fees, experts' fees, and other costs incurred in connection with any effort to enforce the Final Judgment, including the investigation of the potential violation.

Paragraph XV.D states that the United States may file an action against a Defendant for violating the Final Judgment for up to four years after the Final Judgment has expired or been terminated. This provision is meant to address circumstances such as when evidence that a violation of the Final Judgment occurred during the term of the Final Judgment is not discovered until after the Final Judgment has expired or been terminated or when there is not sufficient time for the United States to complete an investigation of an alleged violation until after the Final Judgment has expired or been terminated. This provision, therefore, makes clear that, for four years after the Final Judgment has expired or been terminated, the United States may still challenge a violation that occurred during the term of the Final Judgment.

Finally, Section XVI of the proposed Final Judgment provides that the Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestiture has been completed and that continuation of the Final Judgment is no longer necessary or in the public interest.

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 neither impairs nor assists 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 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 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 60 days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Scott Scheele
Chief, Telecommunications and Broadband Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW, Suite 7000
Washington, DC 20530
ATR.TEL-Information@usdoj.gov

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

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Liberty's acquisition of AT&T's wireless and wireline assets in Puerto Rico and the U.S. Virgin Islands. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for the provision of fiber-based connectivity and telecommunications services to enterprise customers in Puerto Rico. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States 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 THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public

interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, 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)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "make de novo

determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[t]he 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." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19-2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Id.* at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.") (internal citations omitted); *United States v. Republic Servs., Inc.*, 723 F.

Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case"). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co.*, 900 F.2d at 309).

Moreover, the Court's role under the APPA 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; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "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 did not pursue. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using consent judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added the unambiguous instruction that "[n]othing in

this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[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." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

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.

Dated: November 9, 2020

Respectfully submitted,

/s/ Matthew Jones

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CERTIFICATE OF SERVICE

I, Matthew Jones, hereby certify that on November 9, 2020, I caused a copy of the foregoing Competitive Impact Statement to be served on Defendants Liberty Latin America Ltd., Liberty Communications of Puerto Rico LLC, and AT&T Inc. through the Court's ECF system to their duly authorized legal representatives as follows:

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