

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

MOTOROLA, INC. and
NEXTEL COMMUNICATIONS, INC.
Defendants.

CASE NUMBER 1:94CV02331

JUDGE: Thomas F. Hogan

DECK TYPE: Antitrust

DATE STAMP: 10/27/94

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. §16(b)-(h), the United States, submits this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry against Nextel Communications, Inc. ("Nextel") and Motorola, Inc. ("Motorola") in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF PROCEEDING

On October 27, 1994, the United States filed a civil antitrust complaint, under Section 15 of the Clayton Act, as amended, 15 U.S.C. §25, against Nextel and Motorola, alleging that an agreement between Nextel and Motorola violates Section 7 of the Clayton Act, as amended, 15 U.S.C. §18. That agreement would transfer ownership of a substantial portion of Motorola's specialized mobile radio ("SMR") business to Nextel and control of most of Motorola's remaining SMR business.

The complaint alleges that the Nextel/Motorola transactions are likely to reduce competition substantially in fifteen (15) major cities in the United States in the market for "trunked SMR services." SMR service is a form of dispatch service that enables a customer to communicate with a fleet of vehicles, such as delivery trucks, repair trucks and messenger services. SMR service also enables a vehicle to communicate with another member of the fleet. The transactions would allow Nextel to control virtually all the service alternatives available for persons with a need for trunked SMR services in those cities and increase the prices of or reduce the quality of such services. The complaint seeks, among other relief, to enjoin the combination of Nextel's and Motorola's trunked SMR operations and thereby to preserve competition in the relevant markets.

On October 27, 1994, the United States, Nextel and Motorola filed a Stipulation by which they consented to the entry of a proposed Final Judgment designed to eliminate the anticompetitive effects of the transactions. Under the proposed Final Judgment, Nextel and Motorola will divest themselves of substantially all of their SMR channels in the 900 MHz radio band and release upon request of the license holder substantially all the 900 MHz SMR channels they manage in the cities of Boston, Massachusetts; Chicago, Illinois; Dallas and Houston, Texas; Detroit, Michigan; Los Angeles and San Francisco, California; Miami and Orlando, Florida; New York, New York; Philadelphia, Pennsylvania; Seattle, Washington; and Washington, D.C. In addition, Nextel's and Motorola's freedom in the future to acquire 900 MHz channels in these cities and in Denver,

Colorado would be significantly constrained. In Atlanta, Georgia, either Nextel or Motorola will sell 42 800 MHz channels to an independent SMR service provider.

The United States, Nextel and Motorola have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the government withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations of the Judgment.

II.

FACTS GIVING RISE TO THE ALLEGED VIOLATION

A. Product Market

SMR service is a type of land mobile communications service used by customers such as contractors, service companies and delivery services that have significant field operations and need to provide their personnel with the ability to communicate directly with each other, either on a one-to-one or one-to-many basis. This type of service is commonly referred to as "dispatch" service. SMR service is provided pursuant to licenses granted by the Federal Communications Commission in the 800 MHz and 900 MHz radio bands.¹

SMR services may be "conventional" or "trunked." Conventional SMR service is a method of operation in which one or more radio frequency channels

¹ The regulations allocating the spectrum and governing its use are contained in 47 C.F.R. Part 90, Subpart S, §§90.601-90.659. A similar service is provided in the 220 MHz band, as discussed below.

are assigned to mobile and base stations on a non-exclusive, first come, first served, basis. Users listen to hear if the channel is being used by others and wait until other conversations on the channel are completed before using it themselves. Trunked SMR service allows a number of customers to share a number of channels by electronically assigning a channel to a customer when he or she wishes to use the system. Trunked SMR service affords customers greater privacy and more reliable channel availability than conventional service.

SMR systems have historically utilized high-elevation base stations to receive signals from transmitting radios, to allocate the signals among available channels and to transmit the enhanced signal to the intended recipients. In this deployment, SMR base stations have had a broad range, allowing users to communicate within the area of broadcast. An 800 MHz SMR system will generally broadcast throughout the entire area of the license, which covers a radius of 35 miles from the base station transmitter. A 900 MHz SMR system will cover a designated filing area as defined in 52 Fed. Reg. 1302 (January 12, 1987). In contrast, cellular telephone companies "reuse" spectrum by dividing a licensed service area into "cells" and reusing a frequency within the same system. Several cells would have to be used to transmit a communication to reach a group of vehicles; consequently, this method of operation is not well suited for SMR customers who need the capability of sending frequent, short messages over a broad area to one or to many recipients. Moreover, the FCC prohibits cellular companies from providing one-to-many dispatch service.

The FCC initially allocated 280 800 MHz channels for trunked SMR service in every market.² In 1988 the FCC allocated an additional 200 900 MHz channels to trunked SMR services in 50 major cities across the country where allocated 800 MHz channels appeared inadequate to meet consumer demand for SMR service. In a few markets the FCC has taken back some 900 MHz channels because of the failure of licensees to construct their systems. Recently, the FCC has announced plans to auction the 900 MHz SMR spectrum it has taken back and the 900 MHz spectrum in markets where it had not previously been allocated. Even though the mobile radios used on 800 MHz and 900 MHz systems are not compatible with each other, 800 MHz and 900 MHz systems provide interchangeable service.

In 1991 the FCC announced its intent to allocate channels in the 220 MHz bandwidth for SMR services. The FCC allocated 100 channels for non-nationwide trunked use including private systems and SMR systems. Initiation of SMR service in the 220 MHz band, however, was delayed by litigation which was settled in March 1994. The delays led the FCC to extend the time holders of 220

² More than 280 800 MHz channels are currently being used for trunked SMR service in some cities through "intercategory sharing." Regulations permit SMR licensees to include in their SMR systems unallocated channels assigned to industrial, land transportation or other private dispatch use in the 800 MHz band under certain conditions. In metropolitan areas where all 800 MHz channels have been allocated, intercategory sharing involves an agreement between an SMR service provider and a license holder of a channel allocated to one of these other service categories. In exchange for providing trunked SMR service to the industrial or other licensee, the SMR service provider is able to use the remaining capacity of the channel in its commercial SMR operations. Most private systems, however, utilize virtually all of the capacity of their channels and are unwilling to participate in intercategory sharing arrangements.

MHz licenses had to construct their systems until April 4, 1995. If the systems are not constructed by that date, the licenses will revert to the FCC.

SMR service in the 220 MHz band will be a substitute for SMR services in the 800 MHz and 900 MHz bands at some point in the future. At present, however, the only constructed 220 MHz SMR systems are in California. Systems are planned for, among other cities, Atlanta, Boston, Chicago, Dallas, Houston, Los Angeles, New York, Philadelphia, San Francisco, and Washington D.C., but the scope of expected implementation varies by city. Further, 220 MHz service will require some time to gain commercial acceptance, just as 800 MHz and 900 MHz services required when they were first implemented. As a result, when 220 MHz systems are constructed, they will not adequately discipline the parties' control of 800 MHz and 900 MHz systems in the 15 cities.

The product market consists of trunked SMR service in the 800 MHz, 900 MHz and 220 MHz bands. Conventional dispatch service is not a substitute for trunked SMR service because it affords lesser privacy and lower reliability. Cellular telephone service is not a substitute because it is significantly more expensive than SMR service, is significantly more difficult for customers to restrict communications to a defined fleet or group, and because it cannot be provided on a one-to-many dispatch basis.

B. Geographic Market

SMR channels in the 800 MHz band are licensed by the FCC for a 35 mile radius from a specific location. Subsequent applicants for licenses may apply for

the same channel if they protect the coverage area of the first licensee. Channels in the 900 MHz band are licensed for designated filing areas, which generally approximate metropolitan statistical areas.

SMR service providers seek to place their broadcast antennas in locations that will afford their users geographic coverage that will correspond to the area served by their fleet of vehicles. Consequently, frequently used sites include centrally located skyscrapers and mountains that shadow metropolitan areas, such as Stone Mountain outside Atlanta. Antenna sites are also placed to ensure coverage of high traffic areas, particularly downtown areas and important traffic arteries.

The geographic markets consist of the license areas in which the FCC has authorized the provision of SMR service. In any particular city, the geographic market can be considered to include the twenty-five mile radius from city center because SMR service providers must be able to cover the high-traffic downtown area.

C. Developments in the 800 MHz band

The FCC's early licensing policies of 800 MHz spectrum led to an industry of many small SMR service providers. Applicants could apply for up to five trunked channel pairs per market. To retain channels, an SMR provider had to build its facilities within one year and meet certain loading requirements. Trunked SMRs were required to be "loaded" to 70 radio units per channel within five years. Systems not meeting the standards would have unloaded channels

reassigned to applicants on a waiting list. Initially, the FCC limited radio equipment manufacturers, like Motorola, to one 20 channel trunked system nationwide.

The FCC permitted Motorola and others to manage licenses held by other persons in exchange for a percentage of the revenues of the operation. Such "management" agreements commonly assign the managing company responsibility for daily operations, grant the managing company the right to select the type of infrastructure equipment to be deployed by the system, and grant the managing company a right of first refusal in the event the licensee receives an offer to purchase the system. While the FCC requires that management agreements technically leave control of the operations in the hands of the licensee, managing companies generally have effective control of the channels they manage.

In the last five years Nextel has become the primary supplier of trunked SMR services in the United States through its acquisition of dozens of small SMR companies, principally in the 800 MHz band. Nextel has also assumed responsibility for many contracts providing for the management of SMR licenses held by others.

Nextel recently moved to establish a nationwide presence in the 800 MHz band through its agreements of July 13, 1994, to acquire OneComm Corporation, which had been accumulating 800 MHz spectrum in sixteen Western states, and of August 5, 1994 to acquire Dial Page, Inc., which had been accumulating 800 MHz spectrum in twelve Southeastern states. As a result, Nextel controls far more 800

MHz SMR channels in the United States than any other company. It also owns or manages a large number of 900 MHz SMR channels in cities across the United States.

Nextel's numerous acquisitions of 800 MHz SMR service providers are part of a plan to replace the currently deployed analog technologies in those systems with the new Motorola Integrated Radio System ("MIRS") digital technology developed by Motorola. The technology will be deployed in a multi-site configuration, much like that employed by cellular service providers. Use of digital technology and frequency re-use on Nextel's 800 MHz channels will greatly increase each system's capacity and, Nextel believes, allow it to implement a variety of services, including a more reliable and better quality telephone interconnect service that would compete with the cellular providers, and to continue as a dispatch service provider in the markets it serves.

Motorola is the second largest provider of trunked SMR services in the United States. It owns or manages a substantial number of 800 MHz and 900 MHz channels it has used to provide trunked SMR services.

On August 4, 1994, Motorola and Nextel signed an agreement providing that Motorola would sell and Nextel would buy Motorola's 800 MHz SMR business, including both owned (licensed) and managed channels. The agreement also provided that Nextel would manage Motorola's 900 MHz SMR business for three years; the agreement can be renewed for subsequent periods of two years. In return for its SMR business, Motorola would receive twenty-four percent (24%)

of Nextel's voting securities. By agreements entered into the same day, Nextel committed to purchase Motorola equipment for its 800 MHz SMR business.

D. Harm to Competition Resulting from the Transactions

The combination of Nextel's and Motorola's owned and managed 800 MHz SMR channels as well as the parties' owned and managed 900 MHz channels would result in Nextel holding virtually all of the SMR spectrum in the markets of Atlanta, Georgia; Boston, Massachusetts; Chicago, Illinois; Dallas and Houston, Texas; Denver, Colorado; Detroit, Michigan; Los Angeles and San Francisco, California; Miami and Orlando, Florida; New York, New York; Philadelphia, Pennsylvania; Seattle, Washington; and Washington, D.C. As a result of the consolidation, there would be few, if any, alternatives available to SMR customers in those areas, and the combined entity would have the ability to raise prices or reduce the quality or quantity of service.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States brought this action because the effect of the Nextel/Motorola transactions may be substantially to lessen competition in trunked SMR services in the relevant geographic markets in violation of Section 7 of the Clayton Act. The risk to competition posed by the transaction would be substantially eliminated by the relief provided in the proposed Final Judgment which will ensure that alternative trunked SMR service providers will be available in all the relevant geographic markets.

Nextel's planned acquisition of Motorola's 800 MHz channels, following its numerous acquisitions of other SMR service providers, and its planned management of Motorola's 900 MHz SMR services would have the effect of eliminating all but a few suppliers of trunked SMR services in a number of cities in the United States. In San Francisco, for example, within 25 miles of the center of the city, Nextel currently owns or manages approximately 209 800 MHz channels and 42 900 MHz channels. Motorola is the largest remaining provider of SMR services in San Francisco. It owns or manages approximately 45 800 MHz channels and 12 900 MHz channels there. The several other providers of trunked SMR services there currently hold, in total, licenses for approximately 35 800 MHz and 900 MHz channels on which they can provide trunked SMR service. While SMR service providers in the 220 MHz band have not yet completed construction of their systems, approximately half of the licensed 220 MHz channels are likely to be fully available service alternatives within the next two years.^{3/} Even allowing for entry by 220 MHz operators, the resulting market concentration exceeds the

³ The precise number of 220 MHz channels that will be operational in any particular city within the next two years cannot be determined. It is unlikely that all allocated 220 MHz channels that have been allocated for SMR services will be constructed in that time. However, even if all allocated 220 MHz channels in the fifteen cities are constructed and become operational within the next two years, given the overwhelming dominance of Nextel, those 220 MHz services and the few independent 800 MHz and 900 MHz services will be inadequate, without more, to discipline Nextel's services.

levels the Antitrust Division has generally found to indicate that a transaction may be anticompetitive.⁴

Nextel's consolidation of SMR spectrum, however, may enable it to create a third mobile telephone service to compete with established cellular services. The result could be a wider variety of wireless services at a lower cost in the near future. The Department saw substantial benefits to new competition in another market (the cellular telephone market) if Nextel could obtain sufficient capacity at 800 MHz to enable it to enter that market. Thus, the Department decided to limit the relief it sought in this action to the 900 MHz band (with the single exception of Atlanta).

MIRS technology cannot be deployed on 900 MHz spectrum, and Nextel's ownership or control of 900 MHz spectrum is not necessary to obtain the benefits of new competition to the cellular companies. Rather, Nextel's ownership and management of a significant portion of 900 MHz spectrum in cities where it will own and manage virtually all of the 800 MHz spectrum serves to enhance its power over customers requiring trunked SMR services. Absent judicial

⁴ The Antitrust Division's Horizontal Merger Guidelines provide for the Division to consider the post-merger concentration and the increase in concentration resulting from a merger. The increase in concentration is measured by the Herfindahl-Hirschman Index which is calculated by summing the squares of the individual market shares of all the participants. The HHI thresholds are exceeded in each of the 15 cities. Without considering the affect of 220 MHz channels, the HHI is currently greater than 2200 in each city and the transaction will increase the HHI by more than 1400 points. If 220 MHz services are included, the premerger HHI will be more than 1550 in each city and the transaction will increase the HHI by more than 600 points.

intervention, Nextel will be able to raise prices and reduce the quality or quantity of service to such customers and inhibit the deployment of alternative technologies.

The proposed Final Judgment preserves competition for trunked SMR customers by limiting the 900 MHz spectrum Nextel and Motorola will own and control for the next ten years. Nextel and Motorola together will have the power to control, by license and by management agreement, no more than 30 900 MHz channels in Boston, Massachusetts; Chicago, Illinois; Dallas and Houston, Texas; Los Angeles and San Francisco, California; Miami and Orlando, Florida; New York, New York; Philadelphia, Pennsylvania; and Washington, D.C.; or 10 900 MHz channels in Detroit, Michigan and Seattle, Washington.⁵ Nextel and Motorola would be permitted to continue to own or manage a limited amount of spectrum indefinitely because: (1) Nextel's deployment of its 800 MHz digital mobile network will be facilitated by its control of a limited number of 900 MHz channels to use to transfer customers to the new service; (2) the number of channels required by the decree to be sold or released will be sufficient to permit the entry of new trunked SMR service providers for customers with a need for dispatch services; and (3) excluding Motorola from the 900 MHz band might foreclose its experimentation with new technologies there.

⁵ Nextel and Motorola would be limited to a combined 10 900 MHz in Seattle and Detroit because those are border cities where, by international agreement, only half of the available spectrum may be licensed by the United States.

Where Nextel and Motorola together currently own more than the permitted number of 900 MHz channels, the proposed Final Judgment requires that the channels in excess of the permitted amount be sold to a purchaser approved by the plaintiff. If they are unable to complete the sales within 180 days of the entry of the Final Judgment, upon application by plaintiff, the Court would appoint an agent to effectuate the mandated sales.

The proposed Final Judgment also requires that Nextel and Motorola release management agreements relating to 900 MHz channels in affected cities at the request of the licensee unless Nextel and Motorola hold fewer than a specified number of channels in that particular market.^{6/}

Channels to be divested or released are defined as those within 25 miles of the center point of each relevant city. This is to ensure that would-be competitors are able to secure spectrum in the central city areas where spectrum is most difficult to obtain and must be obtained in order to provide a competitive service.

The proposed Final Judgment prohibits Nextel and Motorola from acquiring, either directly or indirectly, any ownership interest in or entering into new management agreements for 900 MHz channels in affected cities without the

⁶ It is possible that Nextel and Motorola may control a greater number of 900 MHz channels in the relevant geographic markets if the licensees of managed systems do not request to be released from their management agreements. In any case, neither Nextel nor Motorola would be able to preclude the licensees from moving their licensed channels to other managers, networks or technologies.

plaintiff's prior written permission.⁷ The Defendants may, however, enter into new management agreements with respect to channels either Motorola or Nextel owned or managed as of August 4, 1994, provided that the new agreements are subject to section IV. paragraphs C and D of the proposed Final Judgment. The proposed Final Judgment also prohibits the parties from acquiring, either directly or indirectly, more than a five percent ownership interest in any entity that itself owns, controls, or manages 900 MHz channels in those cities without the prior written permission of the United States, except that prior approval will not be required where the acquisition of ownership will not cause Motorola's and Nextel's combined channel position to exceed applicable thresholds.

In Atlanta, due to the existence of a viable purchaser, the parties are required to divest 42 800 MHz channels to a purchaser or purchasers acceptable to plaintiff.

The United States, Nextel and Motorola have stipulated that the proposed Final Judgment may be entered by the Court at any time after compliance with the APPA. The proposed Final Judgment constitutes no admission by either party as to any issue of fact or law. Under the provisions of Section 2(e) of the APPA,

⁷ Neither Motorola nor Nextel own or manage any 900 MHz spectrum in Denver, Colorado and much of the 900 MHz SMR channels there reverted to the FCC because the license holders did not construct or load the systems. The proposed Final Judgment addresses the competitive problems in this market by limiting the amount of 900 MHz spectrum the defendants may obtain in the future to 30 channels.

entry of the proposed Final Judgment is conditioned upon a determination by the Court that the proposed Final Judgment is in the public interest.

The term of the proposed Final Judgment is 10 years. It provides that the Court retains jurisdiction over this action, and any party may apply to the Court for any order necessary or appropriate for its modification, interpretation and enforcement. Such a request will be subject to common law standards of decree modification for five years after entry of the judgment. Thereafter, a party seeking modification may rely upon events that were known and foreseeable at the time of entry of the proposed Final Judgment, provided the grounds for modification at common law are otherwise met. The parties contemplate that a complete extinguishment of Motorola's relationship with Nextel would be a significant changed circumstance under the decree.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. §15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages 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 action under the Clayton Act. 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 private lawsuit that may be brought against the defendant.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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 the comments, determine whether it should withdraw its consent, and respond to the comments. The comments and response(s) of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to George S. Baranko, Attorney, Communications and Finance Section, Antitrust Division, U.S. Department of Justice, 555 Fourth Street, N.W., Room 8104, Washington, D.C. 20001.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered litigation seeking to limit the number of 800 MHz channels Nextel held in each affected city. The United States rejected that alternative for two reasons: first, it is satisfied that the relief it has obtained relating to 900 MHz frequencies will adequately address the harm to competition alleged in the complaint; second,

the Department did not want to inhibit Nextel's ability to offer cellular telephone service.

The United States also considered the desirability of requiring the modification of the ancillary equipment agreements under which Nextel will purchase from Motorola infrastructure and subscriber equipment to construct its digital network. The United States rejected that alternative because Motorola's equipment pricing practices are likely to be constrained by those of other wireless equipment suppliers to the cellular service providers and to the personal communications service providers, which are expected to be soon authorized by the FCC.

VII.

STANDARD OF REVIEW UNDER THE TUNNEY ACT FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States are subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination,

the court may consider--

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public

benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. §16(e) (emphasis added). The courts have recognized that the term "public interest" "take[s] meaning from the purposes of the regulatory legislation." NAACP v. Federal Power Comm'n, 425 U.S. 662, 669 (1976). Since the purpose of the antitrust laws is to "preserv[e] free and unfettered competition as the rule of trade," Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958), the focus of the "public interest" inquiry under the Tunney Act is whether the proposed Final Judgment would serve the public interest in free and unfettered competition. United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984); United States v. Waste Management, Inc., 1985-2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C. 1985). In conducting this inquiry, "the 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."⁸ Rather,

absent a showing of corrupt failure of the government to discharge its duty, the Court, in making the public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order

⁸ 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. §16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

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).

It is also unnecessary for the district court to "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) quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). 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.⁹

A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the

⁹ United States v. Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F.2d at 565.

parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

The proposed consent decree, 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.' (citations omitted)."^{10/}

¹⁰ United States v. American Tel. and Tel Co., 552 F. Supp. 131, 150 (D.D.C.), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1982) quoting United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky 1985).

VIII.

DETERMINATIVE DOCUMENTS

No documents were determinative in the formulation of the proposed Final Judgments. Consequently, the United States has not attached any such documents to the proposed Final Judgment.

Respectfully submitted,


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