gases and residual products. These processes do not include the incidental separation of individual components of a gas during its conveyance through a pipeline.

Additional Rule 4 reflects the substantial transformation of uncalcined petroleum coke of subheading 2713.12 to calcined petroleum coke of subheading 2713.11.

Additional Rule 5(a) enumerates preparatory operations involved in refineries and processing plants that are not considered to be origin conferring.

Additional rule 5(b) provides that blending of bituminous materials of subheading 27.13.20 or heading 27.14 to produce bituminous mixtures of heading 27.15 is not to be considered origin conferring.

[FR Doc. 95–23981 Filed 9–26–95; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–369]

Certain Health and Beauty Aids and Identifying Marks Thereon; Notice of Commission Determination Not To Review an Initial Determination Terminating the Investigation on the Basis of a Settlement Agreement

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's (ALJ's) initial determination (ID) in the above-captioned investigation terminating the investigation on the basis of a settlement agreement.

FOR FURTHER INFORMATION CONTACT: Rhonda M. Hughes, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone 202–205–3083.

SUPPLEMENTARY INFORMATION: On December 2, 1994, Redmond Products, Inc. filed a complaint with the Commission alleging a violation of section 337 of the Tariff Act of 1930 in the importation, the sale for importation, and the sale within the United States after importation of health and beauty aids bearing marks that infringe Redmond's registered and common law trademarks.

The Commission instituted an investigation of the complaint, and published a notice of investigation in the Federal Register on January 19, 1995. 60 FR 3,875 (1995). The notice named Belvedere International, Inc. of Ontario, Canada as respondent.

On July 13, 1995, complainant and respondent filed a joint motion to terminate the investigation on the basis of a settlement agreement. On August 25, 1995, the ALJ granted the joint motion and issued an ID (Order No. 17) terminating the investigation on the basis of a settlement agreement. No petitions for review were received.

This action is taken under the authority of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, and Commission rule 210.42, 19 CFR 210.42.

Copies of the ALJ's ID, and all other nonconfidential documents filed in connection with this investigation, are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202–205–2000. Hearing-impaired persons are advised that information on the matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

Issued: September 19, 1995.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 95–23979 Filed 9–26–95; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

[Civil Action No. 94–01555 (HHG), D.D.C.]

United States v. AT&T Corporation and McCaw Cellular Communications, Inc.; Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16 (b)–(h), the United States publishes below the comments received on the proposed Final Judgment in *United States* v. *AT&T Corporation and McCaw Cellular Communications, Inc.*, Civil Action 94–01555 (HHG), United States District Court for the District of Columbia, together with the response of the United States to the comments.

Copies of the response and the public comments are available on request for inspection and copying in Room 200 of the U.S. Department of Justice, Antitrust Division, 325 7th Street, NW., Washington, DC 20530, and for inspection at the Office of the Clerk of the United States District Court for the District of Columbia, United States Courthouse, Third Street and Constitution Avenue, NW., Washington, DC 20001.

Constance Robinson,

Director of Operations, Antitrust Division.

United States District Court for the District of Columbia

In the Matter of: United States of America, Plaintiff, v. AT&T Corp. and McCaw Cellular Communications, Inc., Defendants. Civil Action No. 94–01555 (HHG). Received July 25, 1995.

Response to Public Comments to the Proposed Final Judgment

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16 (b)–(h) (1994) (''APPA''), the United States of America hereby files its Response to Public Comments to the proposed Final Judgment in this civil antitrust proceeding. The United States has reviewed the comments on the proposed Final Judgment and remains convinced that its entry is in the public interest.

A proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with this Court.[1] The proposed Final Judgment is subject to approval by the Court after the expiration of the statutory sixty-day public comment period and compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. 16 (b)–(h).

I. Compliance with the APPA

The APPA requires a sixty-day period for the submission of public comments on the proposed Final Judgment, 15 U.S.C. 16(b). The United States has received four comments[2] and a response

[1] See 59 FR 44,158 (1994).

[2] Comments objecting to the proposed decree were submitted to the Department by Bell Atlantic and NYNEX (jointly), SBC Communications Inc. (''SBC''), BellSouth Corp. (''BellSouth'') and the Ad Hoc Association Long Distance Carriers (''Ad Hoc IXCs''). SBC requested permission from the Court to file supplemental comments on January 17, 1995; however, that request has not been granted by the Court. SBC's supplemental comments request that the decree be clarified and modified to provide that pending conversion of the McCaw systems to equal access, AT&T is prohibited from (1) expanding its calling areas, and (2) advertising its existing interLATA calling areas so as to disadvantage cellular systems that are competing with the McCaw systems. SBC also believes that AT&T should be required to restrict the scope of such calling areas pending conversion to equal access. AT&T's response to these comments asserts that it has not expanded the McCaw calling areas, and that the purpose of the proposed decree is not to establish identical calling areas with those of the Bell Operating Companies (BOCs). Further, AT&T maintains that to impose additional requirements pending the completion of its conversion to equal access this fall would simply encourage additional frivolous complaints with no competitive benefit and could delay the conversion of its cellular systems to equal access. The Department believes that the changes proposed by SBC are

Continued

to those comments from AT&T,[3] all of which are filed with this response. Upon publication of the comments and this response in the Federal Register, pursuant to 15 U.S.C. 16(d) of the APPA, the procedures required by the APPA will be completed. The United States will then move the Court for entry of the proposed Final Judgment, and the Court may then enter it.

Under the APPA, the primary responsibility for enforcing the antitrust laws and protecting the public interest in competitive markets rests with the Department of Justice.[4] In carrying out its responsibilities, the Department has very broad discretion in prosecuting alleged antitrust violations and determining appropriate relief for the settlement of cases.[5] Before entering a proposed consent decree, the Court must determine that the decree is in the public interest, 15 U.S.C. 16(e).[6] That test, however, is limited to ensuring that the government has met its public interest responsibilities—that is, determining that the proposed Final Judgment falls within the range of the government's antitrust enforcement discretion.[7]

II. Background

The transaction giving rise to the government's complaint was the acquisition by AT&T Corp. (''AT&T'') of the stock of McCaw Cellular Communications Inc. (''McCaw'') in exchange for AT&T stock valued at $12.6 billion. The transaction was the largest acquisition in the history of the telecommunications industry. Immediately upon the announcement of the transaction, the Department received complaints from competitors of McCaw and cellular equipment customers of AT&T expressing concerns as to the possible anticompetitive effects of the proposed transaction.

The Department commenced an extensive investigation of the acquisition during which these complaints were thoroughly examined. The Department received more than one million pages of documents from AT&T, McCaw, other cellular service providers including the BOCs, and AT&T's cellular equipment competitors. In addition, the Department conducted more than a dozen on the record interviews with employees and officers of AT&T and McCaw and interviewed dozens of persons in various positions in the wireless industry.[8]

AT&T is the largest domestic long distance provider with about 60% of the overall interexchange market and a higher percentage of the cellular long distance market.[9] McCaw is one of the largest cellular mobile telephone providers and owns interests in systems that provide service to about 17% of cellular customers.[10] McCaw's systems all operate in the ''A Block'' of the cellular spectrum that was originally assigned by the FCC to non-local exchange carriers.[11]

Cellular carriers provide mobile telephone service using transmitters that are located in multiple ''cell sites'' to establish radio connections with the customers' terminal equipment. These cell sites are linked to centralized mobile telephone switching offices (''MTSO's'') by either fixed microwave radio links or landline transmission facilities. In general, calls to telephones within the service area of the cellular system are completed over connections from the MTSO to the local landline telephone company that are arranged for by the cellular provider.

Calls originating on the cellular system to telephones outside the cellular service area, with some exceptions, are transported from the MTSO to an interexchange carrier either through direct trunks or through the switched network of the local telephone company. These long distance calls are generally charged to the customer separately from the cellular service and are provided either as a service rendered to the customers directly by the interexchange carriers or as a resold service provided by the cellular carrier. Prior to its acquisition by AT&T McCaw mostly provided long distance service by reselling AT&T services, which it procured at wholesale rates. McCaw also did not offer its customers their choice of interexchange carriers, except in those systems which it jointly owned with a BOC.

Under the Modification of Final Judgment entered in *United States* v. *Western Electric Co.* (''MFJ''),[12] the BOCs are required to provide equal access to all interexchange carriers for the origination and termination of interexchange calls. Interexchange calls under the MFJ are those which transit the boundary of an exchange area or ''LATA.'' The LATAs applicable to the BOC's cellular systems have been modified by numerous waivers granted by the Court. Pursuant to a request made by the BOCs, the District Court has recently ruled on a waiver request for the BOCs to provide interexchange services from cellular systems.[13]

III. The Complaint and Proposed Final Judgment

The Complaint alleges that the proposed acquisition by AT&T of McCaw violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, in the markets for cellular service, cellular infrastructure equipment, and interexchange service to cellular subscribers. On the same day that the complaint was filed, the Department also filed a proposed Final Judgment that would mitigate the anticompetitive consequences of the transaction in each of these markets.

First, the proposed Final Judgment contains provisions that substantially mitigate the incentive and ability of the merged AT&T-McCaw to disadvantage other cellular companies which compete against McCaw. It requires that

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inappropriate, and that the scheduled conversion of the McCaw systems will achieve the competitive benefits sought by the proposed decree.

[3] Defendant's Response to the Public Comments on the Proposed Final Judgment, submitted to the Department of Justice on March 15, 1995.

[4] *United States* v. *Waste Management, Inc.,* 1985–2 Trade Cas. (CCH) ¶ 66,651 at page 63,045 (D.D.C. June 6, 1985).

[5] *United States* v. *Microsoft,* Nos. 95–5037, 95–5039, slip op. (D.C.Cir. June 16, 1995); *United States* v. *Mid-America Dairymen, Inc.,* 1977–1 Trade Cas. (CCH) ¶ 61,508 at page 71,980 (W.D. Mo. May 17, 1977) (citing *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683, 689 (1961) and *Swift & Co.* v. *United States,* 276 U.S. 311, 331–32 (1928)).

[6] This determination can be properly made on the basis of the Competitive Impact Statement and this Response. The additional procedures of 15 U.S.C. 16(f) are discretionary, and 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 *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538.

[7] *United States* v. *Microsoft,* Nos. 95–5037, 95–5039 slip op. (D.C.Cir. June 16, 1995); *United States* v. *Western Electric Co.,* 993 F.2d 1572, 1577 (D.C. Cir. 1993).

[8] In order to complete the transaction, AT&T needed the approval of the FCC for the transfer to it of McCaw's radio licenses. After the Department completed its investigation of the transaction and filed the proposed consent decree with the district court, the FCC approved the license transfers. Applications of Craig O. McCaw and AT&T, File No. ENF–93–44, Memorandum Opinion and Order, FCC 94–238 (Sept. 19, 1994). The Court of Appeals recently affirmed the FCC action after considering some of the same issues that were raised by the commenters in this proceeding. *SBC Communications Inc.* v. *FCC,* Nos. 94–1637, 94–1639, slip op. (D.C. Cir. June 23, 1995).

[9] AT&T Response at 57.

[10] AT&T Response at 9.

[11] The ''B Block'' spectrum was awarded to the local telephone companies serving the areas covered by the cellular licenses. After these licenses were issued, the local exchange carriers were permitted to purchase the systems of the nonwireline carriers in areas where they did not have the wireline licenses, and the BOCs and GTE then acquired a substantial portion of these licenses as well. *See* Cellular Communications Systems, 86 FCC 2d 469, 493–95 (1981); 47 C.F.R. § 22.901(d) (1994).

[12] *United States* v. *American Tel. and Tel. Co.,* 552 F. Supp. 131 (D.D.C. 1982), *aff'd mem. sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983).

[13] *United States* v. *Western Electric Co.,* Civ. No. 82–0192 (D.D.C. April 28, 1985) (''April 28 Order'').

McCaw's wireless systems be maintained in a separate subsidiary from AT&T and restricts the flow of certain confidential information between these entities and within the AT&T unit that sells cellular infrastructure equipment. It obligates AT&T to continue to deal with unaffiliated cellular equipment customers on terms established prior to the acquisition, and on terms not less favorable than those offered to McCaw after the acquisition. In addition AT&T is required to assist, and not to interfere with, an incumbent customer's decision to change infrastructure suppliers, and to buy back network equipment sold to a competitor/customer if AT&T fails to comply with its obligations to that customer under Section V of the judgment. The decree does not, however, prohibit AT&T from using information relating to its own interexchange customers to market cellular services.

Second, to mitigate the anticompetitive concerns in the cellular interexchange market, the proposed Final Judgment requires McCaw cellular systems to provide equal access to interexchange competitors of AT&T, which McCaw did not provide prior to the acquisition in its systems (other than systems jointly owned by McCaw and a BOC). The provisions of equal access on these systems will increase competition in interexchange services to cellular customers. Finally, the proposed Final Judgment restrains McCaw from providing certain confidential information related to its cellular infrastructure equipment suppliers to AT&T's manufacturing division to prevent anticompetitive harm to the cellular infrastructure equipment market.

IV. Comments on the Proposed Decree

A. Concerns That the Vertical Relationship Created by Merging AT&T's Manufacturing Business With McCaw Will Have Anticompetitive Effects on McCaw's Cellular Competitors

The Joint Bell Atlantic and NYNEX Comments (''Joint Comments'') argue that the merger of the manufacturing business of AT&T with the McCaw cellular operations will have anticompetitive effects on cellular markets that are not sufficiently mitigated by the terms of the proposed decree. These alleged effects are primarily the result of the ''lock-in'' that occurs when a cellular system operator purchases a cellular switch and associated radio equipment from a manufacturer. Once a cellular operator selects a manufacturer, it must purchase upgrades and additional equipment from the same manufacturer, as other manufacturers' equipment will not function with the existing equipment. The interfaces between the switches, radios, and software are today generally proprietary. Thus, the cellular operator cannot change equipment vendors without replacing most or all of the system's equipment, and is to an extent ''locked-in'' to the manufacturer for further purchases of radio equipment to expand or enhance its services.[14]

The Joint Comments allege that the injunctive provisions of the proposed decree intended to remedy the lock-in problem are not sufficient, and that in order to prevent anticompetitive harm the government should either (1) require the divestiture of McCaw, (2) require the divestiture of AT&T's cellular equipment business, or (3) require AT&T, along with other injunctive relief, to build switches and other equipment pursuant to publicly available standards and to license the use of any necessary intellectual property so that third parties could manufacture and sell equipment fully compatible with AT&T equipment.[15] The provisions of the proposed Final Judgment are insufficient, according to Bell Atlantic and NYNEX, because AT&T can engage in certain anticompetitive activities that would be difficult to police and punish. They state ''AT&T can raise equipment prices in a disparate fashion without an appearance of discrimination.'' [16] and ''AT&T can restrict or delay equipment customers' access to important new features or technologies without detection.'' [17] Finally, although the decree prohibits the transfer of commercial information of AT&T's equipment customers to McCaw, NYNEX and Bell Atlantic maintain that the prohibitions are inadequate because they allow such information to go to senior officers of AT&T's manufacturing unit, who may use that information for the benefit of McCaw.[18]

AT&T has responded to the Joint Comments largely by contending that the ''lock-in'' effect is much less significant than alleged by McCaw's cellular competitors. In fact, AT&T claims to face intense competition for its cellular equipment business, even where it is the incumbent supplier.[19] In addition, AT&T argues that courts have rejected ''lock-in'' as a basis for establishing market power and, therefore, additional relief cannot be predicated on its alleged impact.[20] AT&T maintains that the telecommunications equipment market is very competitive and that because it is a significant market for AT&T,[21] it has very incentive to bend over backwards to satisfy its customers. Finally, AT&T contends that the proposed decree adequately protects competing cellular systems from anticompetitive conduct since it expressly enjoins each type of anticompetitive activity of concern to the Department, and also contains provisions that reduce the alleged ''lock-in'' effect and that increase AT&T's incentives to abide by the restrictions contained in the decree.

The Department concluded that certain competitors of McCaw were ''locked-in'' to AT&T cellular equipment and, therefore, disagrees with AT&T's attempts to minimize this problem. However, the Department has concluded that the provisions contained in the proposed Final Judgments combined with other market factors would constrain AT&T's ability to impede competition in cellular markets. As described in the CIS, the proposed decree contains provisions aimed specifically at preventing anticompetitive abuse by AT&T of

[14] To a somewhat lesser degree, the cellular operator may also face a ''lock-in'' effect with regard to the purchase of additional switches within a cellular operating area, since there are proprietary interfaces between switches that are more efficient than the open interfaces that have been standardized by the industry.

[15] Joint Comments at 2. The Joint Comments argue that such relief is appropriate because evidence exists that AT&T has engaged in efforts to thwart the development of open standards for cellular equipment sponsored by other industry manufacturers. Joint Comments at 3. In order to comply with such a requirement, AT&T would presumably have to design and implement an additional open interface which would allow other manufacturers' radio equipment to work with its switches, and possibly would also need to disclose proprietary engineering data about its current system design. The imposition of such a requirement would necessarily involve the Department and the Court in determinations of numerous technical and controversial issues of system design and is unnecessary in light of the ability of the proposed decree to alleviate the potential problems associated with the acquisition.

[16] Joint Comments at 4. Apparently, the concern is that AT&T will be able to selectively alter prices of cellular infrastructure equipment so as to disadvantage the cellular systems it competes with in a manner that would not violate the proposed decree or would not be detectable by the parties or the Department.

[17] Joint Comments at 5.

[18] Joint Comments at 6.

[19] AT&T notes that there have been several ''swap-outs'' of recently installed infrastructure equipment in the last few years and that progress in the development of open standards for interconnecting different manufacturers' equipment is lessening whatever barriers currently exist to switching between different vendors' products. AT&T Response at 19–23.

[20] AT&T Response at 5, 35–40.

[21] AT&T maintains that its $10 billion manufacturing business is too important to it to risk engaging in predatory conduct against its customers. AT&T Response at 5.

cellular systems which use AT&T equipment and which compete against McCaw systems. Misuse of nonpublic information is prohibited by section V.A of the decree to prevent McCaw from gaining access to information AT&T obtains as an equipment vendor to its wireless competitors. The details of how these provisions will be implemented are to be set forth in the implementation plan required by Section VII.A to be filed with the Department. Section V.A.4.b assures that nonpublic information of unaffiliated wireless infrastructure equipment customers is not misused by AT&T as a result of any proprietary development work it performs for these customers.

The proposed Final Judgment also contains provisions that will prevent AT&T from raising the costs of McCaw's wireless competitors that are currently using AT&T equipment. Section V.B.1 requires AT&T to provide its unaffiliated cellular infrastructure equipment customers with the following products and services, in accordance with the same pricing and business practices that prevailed prior to August 1, 1993: (a) Technical support and maintenance; (b) installation, engineering, repair and maintenance services; (c) additional switching and cell site equipment to be deployed in that system; (d) upgrades and other AT&T cellular infrastructure equipment developed for use with these systems; and (e) spare, repair or replacement parts. AT&T also may not discriminate in favor of McCaw cellular systems or McCaw minority owned cellular systems in the way in which such products or services are made available to cellular systems that compete with McCaw or McCaw minority owned cellular systems. If AT&T discontinues offering any cellular infrastructure equipment service, part or product, it must either arrange an alternative source of supply for the product or, if unsuccessful, provide any affected cellular carrier with the licenses to use (and rights to sublicense) whatever technical information is necessary to provide such services, parts or products (to the extent AT&T is able to do so), so that the carrier can obtain the service, part or product from another source.

The proposed decree will also prevent AT&T from discriminating against McCaw wireless competitors that are using AT&T equipment by failing to provide or develop new products and features. If AT&T engages in the development of new features or functions for use with AT&T equipped cellular systems that are not intended for a single customer, AT&T shall disclose such enhancements to unaffiliated carriers at the same time it discloses them to McCaw or McCaw minority owned cellular systems, and shall make them available to unaffiliated customers at the same time it makes them available to McCaw.

Section V.D contains provisions that would make it easier for customers that desire to replace AT&T equipment to do so. In the event that a customer has deployed or contracted to deploy an AT&T equipped cellular system prior to the entry of the judgment, and the customer wishes to redeploy the AT&T equipment (*e.g.*, to facilitate its replacement) or to replace or supplement it with another manufacturer's equipment, AT&T is required to provide reasonably necessary technical assistance and cooperation to allow the customer to accomplish such replacement or redeployment and to permit inter-operation of the AT&T equipment with the new manufacturer's equipment.

To provide additional assurance that AT&T will abide by these requirements, Section V.E provides that AT&T will be required to buy back the cellular infrastructure equipment it has sold to an unaffiliated customer that competes with McCaw if the Department determines that it has violated any of its duties under Section V of the decree.

Finally, Section III requires that, so long as the judgment is in effect, McCaw and McCaw affiliates that are involved in the operation of wireless systems and the provision of local wireless services shall be maintained as corporations or partnerships separate from AT&T, and a structural separation plan is to be filed for approval by the United States pursuant to section VII.A. McCaw and McCaw affiliates are to maintain their own officers and personnel, and books, financial or operating records, and to retain all wireless service licenses and title and control of the wireless infrastructure equipment used by its systems, and the responsibility for the operation of their wireless services. It may not delegate substantial responsibility for such business activities to AT&T.

Although the Department recognizes that some forms of discrimination feared by the BOCs may be hard to detect and prove, McCaw's cellular competitors are very sophisticated customers of infrastructure equipment and are well informed about the quality and prices of equipment provided to the industry. They therefore are able to identify and report any conduct that might violate the decree. In view of the likelihood of detection and the severe sanctions that would befall AT&T's manufacturing business if an investigation were to determine that it had discriminated against its equipment customers to advantage its affiliate wireless services business, the Department considers the likelihood of such conduct by AT&T to be minimal.[22] If prohibited conduct should occur, the proposed decree provides adequate authority to correct such abuses so that any substantial damage to competition would be punished.

The proposed final judgment contains substantial constraints on the operation of AT&T's equipment business. These constraints were formulated after extensive consultation with, among others, the firms that are now objecting to the settlement. Other constraints suggested by the commenters were considered and rejected, such as development of an open interface, which the Department believed would not be feasible in the short term, would require the cooperation of other equipment suppliers not parties to this transaction, and in any event would not alleviate the ''lock-in'' of customers who had already installed AT&T equipment.

The Department believes that the constraints contained in the proposed decree are sufficient to alleviate the potential harms to McCaw's cellular competitors from this acquisition and, therefore, additional relief is unwarranted.

B. The Effect on Competition From the Combination of McCaw's and AT&T's Cellular Long Distance Businesses

As stated in the CIS, the merger will ''foreclose competition between the two largest providers of interexchange service in the highly concentrated markets in which McCaw currently provides interexchange service to its cellular customers.'' 59 FR 44,169 (1994). NYNEX and Bell Atlantic argue that the antitrust violation resulting from the acquisition of AT&T's strongest competitor for cellular long distance is not cured by the proposed decree because the decree's equal access provisions cannot make up for the loss of McCaw itself as an independent long distance provider. Although McCaw provided long distance services to its cellular customers primarily by reselling services procured from interexchange carriers (mainly AT&T), it also deployed some of its own interexchange facilities. The Joint Comments state that ''McCaw's long distance network was already significantly completed at the state and regional levels * * *

[22] It is also not in AT&T's business interest to treat its existing equipment customers unfairly as AT&T must compete against other equipment manufacturers for new business (including the sale of PCS equipment) to these same customers.

particularly the Pacific Northwest and Florida.'' [23] The Joint Comments also allege that the evidence developed in their private case showed that AT&T regarded McCaw as a potentially powerful interexchange competitor.[24]

AT&T responds to the concerns raised in the Joint Comments by maintaining that there really is not a cellular long distance market separate from the overall long distance market, and that in an overall long distance market, McCaw is not a significant competitor. AT&T argues that, in any event, the proposed decree mitigates the effect of the acquisition on long distance competition by imposing on McCaw's cellular systems equal access requirements that are more stringent than those to which AT&T stated publicly it would commit and assures that the acquisition will create competition for the first time in the provision of long distance services used by McCaw's customers.[25]

The Department agrees with the comments of BellSouth and NYNEX that the acquisition of McCaw by AT&T without the proposed decree would have substantially reduced cellular long distance competition. Although McCaw resold AT&T long distance service, it was free to use another interexchange carrier, or to build its own facilities, and, thus, was in competition with AT&T just as other resellers compete with AT&T. The Department investigation showed that McCaw has insisted that its customers for cellular services use its long distance services, and has refused customers' requests to use alternative long distance providers' services, thereby preventing the customer from establishing a separate relationship with an interexchange carrier. McCaw's customers in geographic areas where the other cellular carrier was not providing equal access were only able to choose between McCaw's cellular service combined with its interexchange service or the competing cellular carrier and the long distance services offered by that system. Where the competing cellular carrier offered equal access to long distance carriers, its customers were able to choose among a number of interexchange carriers including AT&T. In such markets, AT&T held a predominant share of the long distance business and was clearly competing at the retail level with McCaw's package of cellular and long distance services.

The Department found that in areas where both McCaw and AT&T long distance services were offered, McCaw's long distance service differed in rates and calling areas from AT&T's. Particularly in the case of large business customers, AT&T offered discounts for cellular long distance services that were not available to McCaw's customers. In some instances, AT&T encouraged corporate customers to purchase cellular services from an equal access carrier in order to obtain AT&T long distance offerings which included the ability of employees to access the corporations's private network services from their cellular phones, a feature not available from McCaw. If after AT&T and McCaw merged their operations, and McCaw had been permitted to continue its refusal to allow equal access to other interexchange carriers, there would have been many areas in which competition would have been lessened, as customers would have had fewer alternatives and AT&T-McCaw would have had less incentive to offer competitive long distance services to cellular customers.

The Department disagrees with Bell Atlantic and NYNEX, however, on whether the stringent equal access conditions contained in the decree are sufficient to remove the adverse effect on long distance competition from the AT&T-McCaw acquisition. The Department believes that the decree, on balance, will enhance competition in long distance services. By giving the other interexchange carriers access to McCaw's cellular exchange customers for the first time, the Department expects the proposed decree to offer substantial new opportunities for reducing the concentration in the provision of long distance cellular service. Many of McCaw's ''captive'' customers are presumably customers of other long distance carriers who will now have the option of using the same carrier for cellular and wireline interexchange calling.

The equal access requirement also removes a possible impediment to competition in the overall long distance market by assuring that AT&T will not be the only interexchange carrier able to offer its customers the ability to combine its cellular long distance service with its landline long distance services to obtain volume discounts or to offer additional services to employees using cellular phones, such as private network services. Thus, the Department believes that subject to the terms of the proposed decree, the acquisition will not adversely affect competition for long distance cellular services.

C. Concerns Relating to Use of Competitively Sensitive Information About AT&T's Customers

The Joint Comments and SBC Comments contend that allowing McCaw to use information regarding AT&T's cellular long distance customers in marketing cellular services will cause serious anticompetitive harm. Use of this information allegedly will permit McCaw to target its marketing effort on the BOCs' customers that have the most attractive usage patterns.[26] AT&T strenuously defends its right to use information regarding its own cellular long distance customers for marketing other services, including wireless services. AT&T maintains this is consistent with the FCC's policies on the use of customer information.[27]

The Department believes that interexchange carriers preselected by a customer in an equal access process should be able to use the interexchange usage information they obtain from serving those customers to market other services or equipment. All the interexchange carriers (not just AT&T) providing services to customers of the BOCs' and McCaw's wireless exchange systems will naturally accumulate information about their customers' interexchange usage patterns.

D. The Application of the Decree to Cellular Properties Where McCaw Has Only 50% Ownership

BellSouth comments on the provision that imposes obligations on systems in which McCaw is a 50–50 partner with BellSouth and in which McCaw has only ''negative control,'' i.e., the ability to veto actions with which it disagrees. BellSouth argues that the proposed decree should not be construed to apply to such systems, arguing that in such situations, McCaw ''would lack 'the power to direct or to cause the direction of the management and policies' of the cellular system.''[28]

The Department rejects this suggested clarification from BellSouth. The purpose of the decree language applying the equal access requirements to systems with ''negative control'' was in part intended to avoid a situation where the BOCs and AT&T are 50–50 partners in a system and both claim that they do

[23] Joint Comments at 7.

[24] Bell Atlantic and NYNEX filed a private suit against AT&T that raised issues common to the Department's action. They suggest that the Justice Department should review the record in their case. Although the Department has reviewed selected materials from that case, it was not necessary, in light of the extensive investigation that the government conducted in connection with this transaction, that the entire record of the private litigation be reviewed. Subsequent to filing their comments, Bell Atlantic and NYNEX reached a settlement with AT&T and dismissed their action.

[25] AT&T Response at 6–7.

[26] SBC comments at 9–10, 14.

[27] AT&T Response at 50–58.

[28] BellSouth Comments at 13.

not have the authority to implement equal access and nondiscrimination requirements. BellSouth's proposal would create exactly this situation, where both parties could seek to avoid responsibility for such conduct.

E. Concerns Regarding Alleged Disparities Between the Terms of the Proposed AT&T-McCaw Decree and the MFJ

BellSouth argues that the Court should not consider the entry of the proposed AT&T-McCaw decree until after it has acted on the generic wireless waiver and determined whether the BOCs wireless operations are subject to the interexchange prohibition of the MFJ.[29] Since the Court has denied BellSouth's motion seeking to have the Court find that the MFJ is not applicable to wireless, and ruled on the BOCs' motion for an interexchange wireless waiver,[30] this point is now moot.

BellSouth also contends that the proposed decree is deficient by not covering possible future AT&T wireless ventures in the PCS spectrum band. It argues that PCS and cellular services will be competitive with each other and that there is no justification for applying the equal access obligations only to McCaw's cellular systems. The basis for BellSouth's concern is that the MFJ waiver under which it would be permitted to provide interexchange services from wireless exchange systems requires that such systems provide equal access regardless of whether they operate on the cellular or PCS spectrum band.

The Department believes that it was correct in not extending the proposed decree's equal access obligations to include possible PCS operations of AT&T. The equal access provisions of the proposed decree are intended to remedy the effects of the acquisition on cellular long distance competition in the geographic markets where McCaw and AT&T competed prior to the acquisition. Absent this provision, AT&T would have been able to control the use of McCaw's exchange access facilities which constituted about half of the spectrum available for mobile services in those markets. Under the FCC regulations, McCaw's use of one of the cellular frequency blocks in those markets substantially restricts the ability of AT&T to acquire PCS spectrum in those geographic markets. If AT&T were to acquire any PCS spectrum for use in the McCaw markets, it would not be as a result of this acquisition. In addition, it is not possible at this time, to predict if the services to be offered using the smaller PCS spectrum bands will be directly competitive with the services of the cellular carriers.

Both the Joint Comments and SBC Comments complain the McCaw is not prohibited from providing interexchange routing from its cellular switches while the waiver that would permit the BOCs to provide interexchange services from wireless systems prohibits such a function. SBC maintains that because it would be limited under the wireless interexchange waiver to the resale of switched services, they would be effectively prohibited from obtaining the efficiencies from the implementation of MTSO to MTSO trunking of interexchange calls.[31] Although the Department agreed to permit McCaw to provide interexchange routing, the proposed decree would only permit such a function if it could be offered to all interexchange carriers on a nondiscriminatory basis. It is our understanding that this function cannot presently be implemented so that it would be equally available to all interexchange carriers, and AT&T equal access plan for its wireless systems contains no indication that AT&T intends to provide interexchange routing. If McCaw, in the future, develops such a capability, the Department will determine in its review of changes to the equal access plan whether it will in fact be nondiscriminatory.

The Joint Comments and SBC also maintain that the AT&T-McCaw decree is inappropriate as it does not impose the same requirement for a separate sales force as is required under the BOCs' wirelessinterexchange waiver of the MFJ.[32] The complaint seems to substantially misread the requirements of the proposed decree. The decree requires that AT&T maintain the McCaw cellular operations in a separate subsidiary, which will have responsibility for the marketing of cellular services. It does permit certain joint marketing of cellular and interexchange services, as long as the services are not offered as packages with interdependent pricing of the two services. Essentially the same approach was incorporated in the BOCs' wireless interexchange waiver, except that the BOCs were not required to put their interexchange operations in a separate subsidiary from their cellular businesses.

BellSouth argues that the proposed decree permits the provision of ''local cellular service in 19 areas that are larger than those available to the BOCs'' cellular system under the MFJ.[33] The Joint Comments specifically complain that the AT&T McCaw decree permits a broader calling area in the Pittsburgh, PA-West Virginia region than Bell Atlantic is permitted to serve under the MFJ.[34] The BellSouth and Joint Comments also assert that while AT&T-McCaw is automatically given the benefit of any waiver expanding the calling areas under the MFJ, the BOCs have not been given equal treatment regard to the expanded calling areas provided for in the proposed AT&T-McCaw decree.[35] Finally, the Joint Comments complain that Section IV(G) of the AT&T-McCaw decree provides a procedure whereby AT&T can apply for relief from the Department if there is not sufficient demand for interexchange access from any of its cellular systems.[36] Under this procedure, the provision of access could be centralized to encompass more than a single LATA.

AT&T maintains that the BOCs are in a fundamentally different position than McCaw, in light of their control of the wireline bottleneck facilities that are used in connection with most cellular calls, and, therefore, terms of the AT&T/McCaw decree need not be the same as the MFJ.[37] Since the BOCs and AT&T submitted their comments, the Court has acted on the BOC's request for an MFJ waiver to permit them to provide interexchange services from wireless exchange systems. In that proceeding the Court denied the broader relief sought by the BOCs which they had argued, in part, should be granted based on the impending competition they would be facing after the merger of AT&T and McCaw. In view of this development the BOCs' ''disparity'' complaints have already been addressed.

The purpose of this proceeding is to decide whether the proposed Final Judgment is in the public interest in alleviating concerns raised by the AT&T/McCaw transaction, not whether the MFJ places the BOCs at a competitive disadvantage vis-a-vis a non-BOC cellular provide. Therefore, the Department believes that the complaints raised by BellSouth and SBC are irrelevant. In any event, BellSouth and SBC remain free under the provisions of the MFJ to Requests appropriate waivers modifying the cellular exchange areas.

[29] BellSouth Comments at 2.

[30] April 28 Order.

[31] SBC Comments at 20–22.

[32] Joint Comment at 13; SBC Comments at 23–25.

[33] BellSouth Comments at 10.

[34] Joint Comments at 13.

[35] BellSouth Comments at 11–12.

[36] Joint Comments at 14–15.

[37] AT&T Response at 8–9.

F. Concerns Raised by AD Hoc Interexchange Carriers.

The comments of the Ad Hoc IXCs relate to alleged past anticompetitive conduct at AT&T and, thus, do not raise any issues germane to the competitive effects of the transaction that was the subject of the government's complaint. Therefore, we will not respond to those comments here, although we will consider the statements contained therein in connection with our other responsibilities for enforcing the antitrust laws.

V. Conclusion

After careful consideration of the comments, the United States continues to believe that, for the reasons stated herein and in the Competitive Impact Statement, the proposed Final Judgment is adequate to remedy the antitrust violations alleged in the Complaint. There has been no showing that the proposed settlement constitutes an abuse of discretion by the United States or that it is not within the zone of settlements consistent with the public interest. Therefore, entry of the proposed Final Judgment should be found to be in the public interest and it should be entered.

Respectfully submitted,
Dated: July 25, 1995.

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Attachments

1. Defendants' Response to the Public Comments on the Proposed Final Judgment.
2. Comments of Bell Atlantic Corporation and NYNEX Corporation on Proposed Final Judgment in United States v. AT&T Corp. and McCaw Cellular Communications, Inc.
3. Comments of BellSouth Corporation on Proposed Final Judgment.
4. Comments of SBC Communications Inc. on Proposed Final Judgment.
5. Comments and Objections of the Ad Hoc IXCs to the Proposed Final Judgment Between the United States, AT&T Corp. and McCaw Cellular Communications, Inc.

United States District Court for the District of Columbia

In the matter of: UNITED STATES OF AMERICA, Plaintiff, v. AT&T CORP. and McCAW CELLULAR COMMUNICATIONS, INC., Defendants. Civil Action No. 94–01555 (HHG).

TO: THE JUSTICE DEPARTMENT

Defendants' Response to the Public Comments on the Proposed Final Judgment

At the Justice Department's request, defendants AT&T Corp. (''AT&T'') and McCaw Cellular Communications, Inc. (''McCaw'') respectfully submit their joint response to the public comments on the Proposed Final Judgment (''Proposed Decree'') [1]—for inclusion in the response that the United States files hereafter.

Introduction and Summary

This Tunney Act proceeding presents an antitrust issue that is both very narrow and very straightforward. The Proposed Decree settles the challenges to the AT&T-McCaw merger that are raised in the Complaint that the Justice Department simultaneously filed under Section 7 of the Clayton Act. In determining whether this Proposed Decree is in the ''public interest,'' the question is whether the Proposed Decree is virtually certain to harm competition or whether the Justice Department otherwise acted irrationally, in bad faith, or contrary to its duties to the public in settling its claims on these terms. *See United States* v. *Western Electric Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993). As explained in detail below, it is patent that no such determinations could be made and that the Proposed Decree can now be approved summarily, especially given the extensive public records that already exist on the competitive effects of this merger.

The overriding fact is that the Department agreed to the Proposed Decree because the Department concluded that the AT&T-McCaw merger can produce substantial procompetitive benefits and that the provisions of the Proposed Decree are adequate to prevent each of the threats to competition that the Department believed might otherwise result from the merger. These conclusions are rational. Indeed, they are unassailable.

Foremost, the AT&T-McCaw merger will *promote* competition and benefit consumers in many significant respects. The Justice Department, the FCC, and the California and New York state utility commissions previously found—and no commentor here disputes—that the merger will foster competition in cellular and other local telecommunications markets which the divested Regional Bell Operating Companies (''RBOCs'') and other local exchange carriers (''LECs'') ''traditionally have provided on a monopoly basis.'' [2] For example, the merger will offset some of the RBOCs' immense advantages in providing cellular services and enable the debt-laden McCaw to ''compete more vigorously with the BOCs'' by strengthening McCaw financially, by giving it a strong brand name, by enhancing its customer support, technological, and marketing capabilities, and by enabling AT&T-McCaw efficiently to offer one-stop-shopping and engage in ''cross-selling.'' [3] As the Department stated, the merger, as conditioned by the Proposed Decree, will bring the ''benefits of competition to millions of consumers of cellular telephone service'' by leading to ''lower prices'' and ''better service.'' DOJ Press Release, pp. 1–2 (July 15, 1994). In addition, the preservation of McCaw as an independent firm with no affiliation with landline monopolies will further foster the development of cellular alternatives to landline bottleneck monopolies if and when that becomes economically and technologically feasible.[4]

Those are all the reasons that the Department had argued in 1982, and Judge Greene then found, that it would be ''antithetical to the purposes of the antitrust laws'' and detrimental to the public interest to prohibit AT&T from participating in local cellular markets through alliances with firms like McCaw or otherwise.[5] Conversely, as was also recognized in 1982, there is no realistic possibility that such a merger could otherwise harm competition. AT&T and McCaw do not directly compete in any market, and neither controls a bottleneck monopoly that

[1] Pursuant to 15 U.S.C. § 16(d), comments have been filed by SBC Communication Corporation (''SBC''), by BellSouth Corporation (''BellSouth''), by Bell Atlantic Corporation and NYNEX Corporation (''Bell Atlantic/NYNEX''), and by the Ad Hoc Interexchange Carriers (''Ad Hoc IXCs'').

[2] *Applications of Craig O. McCaw and AT&T*, File No. ENF–93–44 (''*AT&T-McCaw FCC Proceeding*''), Memorandum Opinion and Order (''*FCC Order*''), ¶ 60, FCC 94–238 (Sept. 19, 1994), *appeals pending sub nom. Southwestern Bell Corp.* v. *FCC*, Nos. 94–1637, 94–1639 (D.C. Cir.); *see Joint Application of the American Telephone & Telegraph Company, et al.*, Decision 94–04–042, pp. 30–31 (Cal. Pub. Utils. Comm'n Apr. 6, 1994) (''*California PUB Decision*''); *Joint Petition of AT&T, Ridge Merger Corporation, and McCaw Cellular Communications, Inc.*, Case 93–C–0777, Order Asserting Jurisdiction and Approving Transaction, p. 6 (N.Y. Pub. Serv. Comm's Dec. 31, 1993) (''*N.Y.P.S.C. Order*'').

[3] *FCC Order*, ¶¶ 57–60, *see California PUC Decision*, pp. 30–33.

[4] *FCC Order*, ¶ 60; *accord N.Y.P.S.C. Order*, p. 6.

[5] *United States* v. *AT&T*, 552 F. Supp. 131, 175–76 (D.D.C. 1982) (''*MFJ Opinion*''), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

could be leveraged into an adjacent market. To the contrary, AT&T's long distance and manufacturing businesses and McCaw's cellular business each depend on access to different sides (or aspects) of the LECs' local exchange monopolies.

In this regard, while the Department's Complaint raised two basic challenges to the merger, defendants believe—as Professors Lawrence Sullivan, Robert Willig, and Douglas Bernheim previously testified before the FCC—that each of these theories is unsound as a matter of law, fact, and economics, and that the merger could not be found to violate Section 7 of the Clayton Act if there were a trial in this case. In all events, because the provisions of the Proposed Decree enjoin even these theoretical threats to competition, it patently was reasonable for the Department to settle each of its challenges to the merger under the terms of the Proposed Decree.

First, the Department's complaint alleges that the merger could lead AT&T to use its position as a telecommunications equipment manufacturer to harm competition in those cellular services markets where McCaw's rival (an RBOC or GTE) uses AT&T cellular equipment. In particular, while the manufacture of telecommunications equipment is an intensely competitive business, the Department's Compliant alleges that the RBOCs and GTE will nonetheless be ''locked-in'' to AT&T for the purchase of certain types of cellular equipment during an interim period and that the merger would give AT&T an incentive to raise the costs, or degrade the services, of the RBOCs and GTE during this interim ''lock-in'' period.

However, there is substantial, indeed overwhelming, evidence that there in fact is no ''lock-in.'' Further, even if there were, it would be suicidal for AT&T to engage in the hypothesized predatory conduct. That would cause the customers (GTE and the RBOCs) on whom AT&T's $10 billion manufacturing business depends to, in the Second Circuit's words, ''retaliat[e]'' by ''shifting'' present and future purchases of cellular and landline equipment alike to AT&T's competitors—which is why courts have rejected indistinguishable ''lock-in'' claims when they were raised in prior case. *See Fruehauf Corp.* v. *FTC,* 603 F.2d 345, 355 (2d Cir. 1979).

In any case, the Proposed Decree removes any possible doubt on this issue and precludes any claim that it is likely, much less virtually certain, that the merger would lead AT&T's manufacturing unit to engage in the predatory conduct that the Department had feared. The Proposed Decree not only expressly enjoins each type of predatory conduct that the Department has hypothesized, but also contains other provisions that both further reduce the alleged ''lock'in'' and otherwise dramatically reinforce AT&T's overwhelming incentives to treat all its equipment customers equally and to satisfy their needs.

Second, the Department's Complaint also alleges that the merger would cause McCaw to use market power over local cellular radio service to favor AT&T's putatively ''dominant'' long distance service and thereby reduce horizontal competition in a purported ''market'' for the provision of ''cellular long distance service.''[6] However, there is overwhelming evidence that there is no such competition between AT&T and McCaw today and no such market. McCaw now provides all the long distance services that originate on its cellular systems (which represent less than 0.1% of national long distance usage), and it does so by reselling the *same* AT&T long distance services that are provided to landline customers. Because AT&T had further independently committed that McCaw will begin offering presubscription and other basic features of equal access to all long distance carriers following the merger, the merger would have promoted competition in long distance markets, and reduced AT&T's role, even if there had been no decree.

In any case, here, too, the Proposed Decree removes any doubt on this score. It imposes equal access obligations on McCaw cellular systems that go far beyond those to which AT&T had voluntarily committed, and assures that the merger will create competition for the first time in the provision of long distance services used by McCaw's customer.

Indeed, that the Department acted reasonably in settling its two challenges on these grounds is vividly confirmed by the conduct of the only two commentors who discuss the adequacy of the Proposed Decree to address the Department's concerns: Bell Atlantic and NYNEX. As their joint comments note, they had filed a private antitrust suit that sought to enjoin the merger on each of the two grounds alleged in the Department's Complaint. However, Bell Atlantic and NYNEX thereafter abandoned their horizontal long distance claim, and then (on the eve of trial) they dismissed the vertical manufacturing claim with prejudice after AT&T and these RBOCs entered into a settlement agreement.

Finally, none of the other comments even challenge the sufficiency of the Proposed Decree to prevent either of the potential competitive harms addressed in the Department's Complaint. Rather, they seek to use this proceeding collaterally to attack the 1982 Decree that broke up the Bell System (''MFJ'') and otherwise to challenge *Procompetitive* features of the AT&T-McCaw merger that the Department appropriately did not challenge.

Most prominently, three of the RBOCs (SBC, NYNEX, and Bell Atlantic) claim that the Decree will not be in the public interest unless a provision is added that bars AT&T-McCaw from directly marketing cellular service to AT&T long distance customers who are existing cellular customers of RBOCs. The RBOCs recognize that AT&T has many satisfied customers, and the RBOCs fear that the ''power of the AT&T-McCaw brand'' and the ability to offer attractive services may cause cellular customers who have presubscribed to AT&T's long distance service to choose to obtain cellular service from AT&T if it engages in this direct marketing.

However, extending these choices benefits consumers, and courts have thus uniformly held that it is procompetitive for integrated firms to be free to offer new services to customers of their existing offerings and that this is a legitimate efficiency that all multi-product firms enjoy. The RBOCs overlook that the antitrust laws protect competition, not the RBOC's selfish interests as competitors. Further, the RBOCs' claims are hypocritical because the ability of AT&T-McCaw to make such offers could only marginally offset some of the immense other advantages that the RBOCs enjoy by reason of their bottleneck monopolies and these RBOCs are seeking to preserve advantages for themselves, not create ''parity.''

In addition, despite Judge Greene's prior rejections of these claims, the RBOCs also continue to argue that the approval of the Proposed Decree should be conditioned on removal of the MFJ's ban on their provision of interexchange services to wireless customers, and they claim that a series of additional ''equal access'' restrictions should be imposed on AT&T-McCaw in the interest of ''parity'' unless the Court removes the MFJ's restriction. While some of the RBOCs' individual claims here rest on misunderstandings of the Proposed

[6] The Department similarly raised the concern that McCaw's market power as a cellular equipment buyer might enable it to impede ''upstream'' equipment manufacturing competition by sharing nonpublic information of AT&T's cellular equipment competitors with AT&T. The Proposed Decree contains structural and injunctive provisions to bar any such conduct as well.

Decree, the short answer to the RBOCs is that they are properly subject to different restrictions from AT&T-McCaw because the RBOCs have bottleneck landline monopolies and AT&T-McCaw to not—as Judge Greene and now the FCC have repeatedly held.

Background

This is an unusual Tunney Act proceeding in that the AT&T-McCaw merger has been the subject of extensive prior proceedings before the FCC, the New York Public Service Commission, the California Public Utilities Commission, judge Greene (in the MFJ section I(D) waiver proceeding), and a federal court in Brooklyn. These proceedings created extensive records regarding the competitive effects of the merger, and it is thus possible to highlight the salient facts about the cellular service, equipment manufacturing, and long distance markets—with citations to affidavits and other filings from the prior proceedings.

1. McCaw's Cellular Service and the Reasons for the Merger

McCaw Cellular Communications, Inc., its wholly-owned subsidiaries, and its 52%-owned LIN Broadcasting subsidiary (collectively referred to as ''McCaw'') have interests in a number of cellular radio, paging, air-to-ground, and other mobile radio services. In particular, McCaw has interests in cellular systems that collectively serve about 17% of the nation's cellular subscribers. McCaw has small minority interests in a number of these systems (*e.g.*, St. Louis), has what could loosely be referred to as joint control with an RBOC or successor to an RBOC in others (San Francisco Bay, Kansas City, Los Angeles, Houston, and Galveston), and has a majority and unilateral controlling interest in a number of others (*e.g.*, Seattle, Portland, Denver, Las Vegas, Minneapolis, Miami, Tampa, Jacksonville, Dallas, Oklahoma City, Pittsburgh, and New York City). The systems in which McCaw has ''unilateral'' control serve about 13% of the nation's cellular subscribers.

All of McCaw's interests are in ''A'' Block cellular systems that were initially reserved for ''nonwireline carriers.'' Each system further competes with the RBOC or other LEC with the local telephone monopoly in that area. As shown in the Appendix to this filing, the dispersed nature of McCaw's systems means that it competes with only a fraction of the systems of any one RBOC or LEC (and with an even smaller fraction of any one AT&T-equipped cellular system that individual RBOCs or LECs have).

Because McCaw entered this business as a start-up company, it inherently faced severe disadvantages in competing with the well-known, well-financed, and technologically adept affiliates of RBOCs and other LECs. In this regard, while the FCC imposed separate subsidiary requirements on RBOC cellular systems, the FCC's regulations place no significant restrictions on the RBOCs' financing of their cellular operations, and these regulations further allow the RBOCs to use their well-known trade names in marketing cellular services and jointly to advertise cellular and monopoly landline service. *See Cellular Communications Services*, 86 FCC 2d 469, 493–95 (1981); 47 C.F.R. § 22.901(d)(1).

One disadvantage arises because cellular systems require interconnections with landline exchange monopolies, and substantial portions of the revenues of cellular systems are remitted to local telephone monopolies to compensate them for terminating cellular-originated calls. RBOCs previously used this monopoly power to frustrate cellular competitors (*see United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 551 (D.D.C. 1987)), and McCaw had to expend time and resources obtaining appropriate interconnections.[7]

These disadvantages, in turn, were radically compounded by the regulatory preferences that the RBOCs and other LECs received. Whereas McCaw generally had to pay fair market value for initial licenses in each licensing area, the FCC reserved one of the two cellular licenses (the ''B'' Block license) for an affiliate of the RBOC or other LEC that had the landline monopoly in the Metropolitan Statistical Area (''MSA'') or Rural Service Area (''RSA'') in question, such that the RBOCs generally acquired ''B'' Block cellular licenses at no cost.[8] Second, because RBOCs provide landline exchange services in contiguous areas throughout their regions, the FCC's regulations also meant that RBOCs automatically received licenses in the contiguous MSAs and RSAs that comprise natural mobile markets. By contrast, McCaw and other nonwireless carriers had to incur large amounts of debt to acquire their licenses and consolidate them in contiguous areas.[9] Even today, there are many areas in which RBOCs have established cellular systems that serve areas that are larger than McCaw or their other ''A'' Block competitors.[10]

Third, the FCC gave the RBOCs and other ''B'' Block carriers substantial headstarts—of one to three years—over their ''A'' Block competitors. In particular, the FCC granted the RBOCs these headstarts in face of claims by ''A'' Block competitors that the RBOCs would thereby have an initial monopoly over the customers with the greatest demand for cellular service, thereby both allowing the RBOCs to earn monopoly profits during the headstart period and forcing their nonwireline competitors to seek to dislodge existing customers of an incumbent monopolist when the ''A'' Block systems became operational.[11]

The net result of these disadvantages is that McCaw (as well as other nonwireline carriers) had to borrow heavily to acquire and consolidate its licenses, to construct its systems, and to finance each system's operations for a period of many years after it commenced operations. One reflection of the significance of these disadvantages is that every significant nonwireline carrier other than McCaw ended up selling its ''A'' Block licenses to RBOCs or other LECs, which eliminated the ''independent'' cellular systems that the FCC sought to create and meant that RBOCs and GTE control ''A'' Block systems serving some 60% of the nation's population.[12] In the case of McCaw, it became a highly-leveraged firm with some $5.7 billion in debt and a debt ratio of over 70%.[13] Further, McCaw is saddled with an additional, unique obligation. It cannot retain some of its most significant properties—the New York City, Houston, Los Angeles, and Dallas interests of McCaw's 52%-owned LIN subsidiary—unless McCaw can raise what is likely to be in excess of $3 billion required to purchase the remaining 48% of LIN in 1995.[14]

[7] *See AT&T-McCaw FCC Proceeding*, AT&T's and McCaw's Opposition to Petitions to Deny and Reply to Comments (''AT&T-McCaw FCC Opp.'') (Dec. 2, 1993), Affidavit of James L. Barksdale, ¶ 15 (''Barksdale FCC Aff.''); *United States* v. *Western Elec. Co.*, Civ. No. 82–0192 (D.D.C.), Memorandum in Support of AT&T's Motion for a Waiver of Section I(D) of the Decree Insofar as It Bars the Proposed AT&T-McCaw Merger (May 31, 1994) (''AT&T's Section I(D) Mem.''), Affidavit of James Barksdale and Wayne Perry, ¶ 7 (''Barksdale/Perry Section I(D) Aff.'').

[8] *See* Barksdale FCC Aff., ¶ 15; Barksdale/Perry Section I(D) Aff., ¶ 16.

[9] *See* Barksdale FCC Aff., ¶¶ 16–17; Barksdale/Perry Section I(D) Aff., ¶ 17.

[10] *See* Barksdale FCC Aff., ¶¶ 15–17; Barksdale/Perry Section I(D) Aff., ¶¶ 16–18.

[11] *See* Barksdale FCC Aff., ¶¶ 15, 17; Barksdale/Perry Section I(D) Aff., ¶¶ 16–18.

[12] *See* Barksdale FCC Aff., ¶ 17; Barksdale/Perry Section I(D) Aff., ¶ 18.

[13] *See* Barksdale FCC Aff., ¶¶ 13, 19; Barksdale/Perry Section I(D) Aff., ¶ 14.

[14] *See United States* v. *Western Elec. Co.*, Civ. No. 82–0192 (D.D.C.), AT&T's Reply in Support of Its Motion for a Waiver of Section I(D) of the Decree Insofar As It Bars the Proposed AT&T-McCaw

Continued

Against this background, McCaw determined that just as other ''A'' Block nonwireline carriers had exited the business, it could not be an effective competitor with RBOCs, other LECs, and other participants in emerging wireless businesses unless it formed an alliance with a financially strong firm like AT&T.[15] In particular, McCaw had concluded that it could not obtain the billions of dollars that it needed to maintain and enhance its cellular and other mobile systems at an acceptable cost in traditional debt and equity markets.[16] McCaw further determined that an alliance with AT&T would otherwise strengthen McCaw. It would provide technological strengths that McCaw lacks, and McCaw identified a number of service improvements that an alliance with AT&T would permit. AT&T has a strong brand and relationships with satisfied customers of other AT&T offerings, Phone Stores, and other marketing resources that would enable McCaw to market its services more efficiently and effectively. AT&T further has unique customer care and support resources (and standards of quality)—as reflected in the Baldridge Award that AT&T's Universal Card received and its revolution of the credit card business.[17]

AT&T found the merger with McCaw attractive for these, and other, reasons.[18] AT&T determined that the quality of the cellular service provided by McCaw and its competitors alike had been poor, and transmission quality (as well as blockage rates) is not what it could be.[19] Customer education, care, and satisfaction had been low—as reflected in the higher industry churn rates. Fraud is such as serious problem that it absorbs some 8% of industry revenues. AT&T perceived an immense opportunity to improve the quality of McCaw's service and to offer cellular services that adhere to the high quality standards that the use of the AT&T name warrants. In this regard, AT&T believed that satisfied customers of other AT&T services (*e.g.*, long distance, CPE, the Universal Card) would find an AT&T cellular service very attractive, and that AT&T's relationship with these customers would enable AT&T-McCaw to market cellular service them at a lower cost. Further, while cellular today is not a substitute for the landline exchanges, it could conceivably develop into a substitute hereafter, and AT&T believed that an alliance with McCaw could cause that to happen more rapidly.[20]

Entry in cellular was also attractive to AT&T in light of the unrelenting efforts of the RBOCs to obtain (through legislation or otherwise) premature removals of the MFJ's core long distance restriction: *i.e.*, before the RBOCs lose the ability to leverage local bottleneck monopolies. While premature removal of the restriction would allow RBOCs to use their local monopolies to capture large percentages of the long distance business, AT&T believed that these harms could be somewhat reduced if AT&T were providing cellular service.

While there are today only two cellular service licensees in each market, the FCC is now in the process of licensing an additional five carriers to provide ''personal communications services'' or PCS services.

2. Long Distance Service

Since it commenced its operations, McCaw has provided the ''long distance'' as well as the ''local'' services of its cellular subscribers. In particular, with the exception of the McCaw cellular systems that are ''BOCs'' within the meaning of the MFJ, no cellular system in which McCaw has an interest has provided equal access, and its customers generally have been unable to reach other interexchange carriers on 1+ or a 10XXX basis. Rather, subscribers have used a ''McCaw'' long distance service, which McCaw has offered by reselling long distance services obtained from AT&T under a long-term service contract.[21] As RBOCs have correctly stated in proceedings under the MFJ, the long distance rates that McCaw has generally charged are the same ''retail'' MTS rates that AT&T charges.[22]

The RBOCs have emphasized in their marketing literature and activities that they offer presubscription and the ability to presubscribe not only to the interexchange carrier of the customers choice, but also to particular services (*e.g.*, AT&T's SDN or MCI's VNET).[23] AT&T believes that McCaw's failure to offer presubscription makes McCaw's cellular services less attractive. Shortly after the August 16, 1993 announcement of the merger, AT&T committed to Congress and to the FCC that McCaw would offer presubscription after the merger is consummated.[24]

There are several hundred firms that resell long distance services of AT&T, Sprint, MCI, WilTel, and other facilities-based interexchange carriers. There are numerous such firms whose long distance revenues from resale are substantially in excess of the approximately $38 million in long distance revenues that McCaw had in 1993.[25]

3. The Competitive Telecommunications and Wireless Equipment Manufacturing Markets

Following AT&T's January 1, 1984 divestiture of the RBOCs, competition in the manufacture of telecommunications equipment intensified, and the divested RBOCs established relationships with multiple suppliers and played them off against one another. AT&T's share of the RBOCs' purchases of ''landline'' switching products, transmission equipment, transmission media, and other telecommunications products thus has dropped from over 90% before divestiture to less than 40% today. AT&T competes for these sales in a global market with Northern Telecom (of Canada), Siemens (of Germany), Alcatel (of France), Ericsson (of Sweden), NEC (of Japan), and many other firms.

AT&T Network Systems, and each of its business units, critically depend on sales to the seven RBOCs and GTE. Of AT&T Network Systems' approximately $10 billion in 1994 external sales, roughly $6 billion were to the seven RBOCs and GTE and roughly $5 billion were to the seven RBOCs. The seven RBOCs regularly use their leverage as purchasers of landline equipment to seek to affect AT&T's behavior in other areas.

Cellular and other wireless infrastructure equipment is a critical and rapidly growing segment of

Merger (July 18, 1994), Supplemental Affidavit of Wayne Perry, ¶¶ 2–4; AT&T Section I(D) Mem., Affidavit of Alex J. Mandl, ¶¶ 3, 25 (''Mandl Section I(D) Aff.'').

[15] *See* Mandl Section I(D) Aff., ¶¶ 17–21.

[16] *See* Barksdale/Perry Section I(D) Aff., ¶¶ 19–20; Mandl Section I(D) Aff., ¶ 18.

[17] *See* Barksdale FCC Aff., ¶¶ 12, 25; Barksdale/Perry Section I(D) Aff., ¶ 24; Mandl Section I(D) Aff., ¶ 20.

[18] *See* Mandl Section I(D) Aff., ¶ 20.

[19] *See* Mandl Section I(D) Aff., ¶¶ 20–24, 26.

[20] *See Mandl* Section I(D) Aff., ¶¶ 21–24.

[21] McCaw owns private microwave facilities that are used for certain connections of cell sites and cellular switches (''MTSOs'') or between MTSOs serving contiguous areas. These facilities are overwhelmingly intraLATA, and the few facilities that cross LATA boundaries provide connections within systems or between contiguous systems and generally serve the same functions as interLATA facilities that RBOC cellular systems are permitted to lease in areas where they are authorized to provide cellular services on a multiLATA basis pursuant to MFJ waivers.

[22] *See* Barksdale/Perry Section I(D) Aff., ¶¶ 10–11.

[23] *See* AT&T's Further Opposition to RBOC's Motion to Exempt ''Wireless'' Services from Section II of the Decree, pp. 19–23 (May 3, 1993).

[24] *See* Transcript of Hearing of U.S. Senate Committee on Commerce and Transportation, p. 102 (Sept. 8, 1993) (testimony of AT&T Chairman Robert Allen) (''It would be our intent to give all of our cellular subscribers equal access to any interexchange carrier they wish''); AT&T McCaw FCC Opp., pp. 54–55; *FCC Order*, ¶ 64.

[25] *See* AT&T-McCaw FCC Opp., p. 52.

telecommunications equipment manufacturing. Of AT&T's approximately $1.25 billion in anticipated 1994 sales, approximately $650 million was to the seven RBOCs and GTE; nearly $500 million was to the seven RBOCs, and over $130 million was to Bell Atlantic and NYNEX.[26] In addition to cellular infrastructure equipment, AT&T's wireless infrastructure unit is actively developing equipment for use in providing PCS. Total domestic PCS equipment sales are estimated to amount to billions of dollars by 1997.

Cellular infrastructure equipment (which includes cell sites and MTSOs) is manufactured and sold in a worldwide market in which AT&T competes with Ericsson, Motorola, Northern Telecom (NTI), Nokia, Siemens, Hughes, and others. The competitiveness of the markets is reflected in shifts in market positions from year to year, with Motorola having lost share (until it rebounded in 1994), and AT&T and a recent new entrant (Nokia) having gained. AT&T has estimated worldwide shares of cellular infrastructure equipment sales between 1988 and 1993 as follows:

Year	Ericsson (percent)	Motorola (percent)	AT&T (percent)	NTI (percent)	Nokia (percent)	Other (percent)
1988	33.0	25.0	7.9	6.0	0.0	28.1
1989	33.0	25.0	9.9	6.0	0.0	26.1
1990	33.0	25.0	10.5	6.0	2.0	23.5
1991	33.0	25.0	17.1	6.0	5.0	13.9
1992	34.2	19.0	14.1	6.9	7.8	18.0
1993	34.7	18.5	14.3	6.1	8.6	17.8

Percentages of sales of the specific cellular equipment manufactured to the U.S. AMPS and related standards used in North America, South America, and certain Asian countries have been estimated by AT&T as follows:

Year	Ericsson (percent)	Motorola (percent)	AT&T (percent)	NTI (percent)	Other (percent)
1988	20.0	35.0	24.2	5.0	15.8
1989	21.0	33.0	26.1	5.0	14.9
1990	23.0	29.0	24.3	5.0	18.7
1991	25.0	26.0	35.0	5.0	9.0
1992	28.8	20.0	29.9	5.0	16.3
1993	28.2	19.5	34.3	5.0	13.0

Swap-Outs of Equipment. A cellular carrier typically will make procurement decisions in a cycle in which it requests bids and proposals to meet its needs over a period of years. A cellular carrier will issue a request for proposals and purchase an initial integrated system of MTSOs and associated cell sites from the successful vendor. Thereafter, the carrier buys new cell sites and upgrades and supplemental equipment from that vendor until (1) the vendor's equipment or support fails to be satisfactory to the cellular carrier, or (2) new technological developments provide a basis for a substantial overhaul of the existing network system. In either instance, a ''swap-out'' can result. In fact, there have been a large number of instances in which cellular carriers have replaced, in whole or in part, the cell sites and other cellular infrastructure equipment of their incumbent vendors with those of another manufacturer.

In particular, cellular carriers have ''swapped out'' one vendor's cell sites and MTSOs and replaced them with another's long before the equipment was obsolete when the carrier was not satisfied with the original vendor's performance. For example:

—In 1988, McCaw swapped out recently-installed AT&T cellular equipment in Florida. It relocated the AT&T cell sites and switches to other markets.

—U S West is in the process now of replacing AT&T Series II equipment in Phoenix and four other markets in Arizona with Motorola equipment.

—Ameritech recently swapped out a system in St. Louis.

—GTE has swapped out Motorola equipment and replace it with AT&T equipment in a number of markets.

—In 1993, McCaw swapped out Motorola equipment in Dallas and replaced it with Ericsson equipment.

—In 1994, McCaw swapped out Northern Telecom equipment in Minneapolis and replaced it with AT&T equipment.

—Southwestern Bell is in the process of swapping out Motorola equipment in Boston.

—BellSouth recently announced that Hughes will replace its existing vendors in many systems.

Notably, while the Department is correct (Competitive Impact Statement, p. 8) that the rapid growth in cellular services has meant that aggregate investment in cellular equipment in each market is greater today than it was previously, the costs *per subscriber* of a swap-out have remained constant, or even declined. Moreover, carriers who ''swap out'' existing equipment can recover all or most of the current value of that equipment by relocating the equipment to other markets, by selling the equipment themselves, or, most frequently, by negotiating substantial buy-back or credit arrangements with the new supplier.

Further, in addition to these complete ''swap-outs,'' a cellular carrier can replace an existing supplier's equipment in part by purchasing new equipment to serve part of an existing service area or certain customers in an area. These ''partial'' swap-outs are made increasingly possible by developments that have allowed calls to be handed off between switches of different manufacturers. In particular, a standard (IS–41) was developed for an interface between two different manufacturers' MTSOs. While initial versions of IS–41 (Rev. O and Rev. A) did not allow all calling features to follow the call, the current version of IS-41 (Rev. B) allows key features to do so, and the

[26] By contrast, McCaw's principal supplier of cellular infrastructure equipment is Ericsson.

subsequent version approved in 1994 (Rev. C) would allow for transfer of nearly all existing features.

Manufacturers are further constantly making proposals to replace incumbent vendors in whole or in part. Indeed, this is a significant aspect of ongoing competition between manufacturers in the equipment market. Consequently, even when swap-outs end up not occurring, carriers have used the threat of complete or partial swap-outs to obtain more favorable pricing and other commitments from AT&T and other suppliers. For example, in 1993 (after the AT&T-McCaw merger was announced), a large AT&T cellular infrastructure customer negotiated new contracts in which it would obtain additional price discounts and other valuable rights if it continued to purchase cell sites from AT&T in markets that already had AT&T MTSOs and cell sites. Similarly, other price protection clauses have been demanded by customers, and agreed to by AT&T, since the AT&T-McCaw merger was announced.

In this regard, one RBOC recently requested proposals that would cap its purchase of AT&T's equipment in a major market. It sought proposals from Motorola and others to provide cell sites and MTSOs that would be used to provide digital cellular service in portions of the cellular service area and that would rely on IS–41 connections for handoffs with AT&T MTSOs in that area. AT&T then made a counterproposal to provide the digital capability by upgrading the already-installed AT&T equipment to digital.

Other pending or impending developments will make swap-outs even easier for cellular carriers. The imminent improvements in IS–41 will make partial swap-outs easier, especially as more and more features are offered through centrally located advanced intelligent network (''AIN'') computers, not MTSOs. Finally, because RBOCs and other AT&T equipment customers have increasingly requested an ''open'' interface between cell sites and MTSOs, AT&T is proposing an industry standard interface for these connections and will, once any such standard is adopted, manufacture equipment that will enable customers to mix and match different vendors' cell sites and MTSOs. While these efforts were underway previously, this undertaking was a publicly-announced feature of AT&T's settlement with Bell Atlantic and NYNEX.[27]

In AT&T's internal assessment of the merger with McCaw, AT&T recognized that the merger could have a severe negative effect on its manufacturing businesses unless AT&T demonstrated its continued reliability as a supplier. In particular, AT&T personnel believed that some RBOCs might have strong adverse reactions to an AT&T alliance with McCaw and retaliate by swapping out AT&T in some cellular markets and by buying less landline and wireless equipment. Accordingly, AT&T personnel launched elaborate programs both to bend over backwards to preclude any RBOC concerns about unfair treatment and to communicate the conviction and assurance that the McCaw alliance would not affect AT&T Network Systems' commitment to meet all its customers' needs.[28]

4. The Prior Proceedings

The AT&T-McCaw merger could not be consummated until it received the prior approvals of the FCC and the state utility commissions in California, New York, and other states, and a waiver of Section I(D) of the MFJ. In these proceedings, RBOCs not only raised the same challenges to the merger that are resolved by the Proposed Decree, but also sought to use the proceedings to force modifications of the MFJ's restrictions on the RBOCs or to obtain conditions that would nullify procompetitive features of the merger in order to achieve ''parity'' for RBOCs. Each body rejected these claims.

Each regulatory body found that the merger would serve the public interest by *promoting* competition in wireless and other local telecommunications services that are offered by RBOCs and other local telephone monopolists (and Judge Greene granted the Section I(D) waiver because the *Rufo* standard for modifying consent decrees[29] was met). Each regulatory body further found that the merger, as conditioned, can realistically have no adverse effects on competition in any market, that the merger would otherwise benefit the public in a number of ways, and that there was no basis to impose conditions that nullify these benefits to create ''parity for parity's sake.''[30] Similarly, Judge Greene rejected RBOC efforts to consolidate the Section I(D) waiver and Proposed Decree with the RBOCs' pending request for MFJ relief.[31]

Argument

While four sets of comments have been filed on the Proposed Decree, only one (Bell Atlantic/NYNEX) even suggests that the Decree does not reasonably address the competitive concerns raised in the Department's Complaint. Otherwise, the commentors challenge the Decree because it does not address other concerns that they have. Part I will demonstrate that the Proposed Decree's provisions are palpably in the public interest. Part II will demonstrate that the extraneous other claims are out of order and challenge procompetitive features of the merger.

I. The Provisions of the Proposed Decree Are in the Public Interest

No commentor has claimed that the Proposed Decree is itself virtually certain to harm competition.[32] Nor has any commentor claimed that the Proposed Decree is not a reasonable settlement of the two claims that the Department raised in its Complaint. Indeed, the only comments that even address these issues are those of Bell Atlantic/NYNEX. Yet they make no attempt to show that the Proposed Decree is outside ''the reaches of the public interest.'' *United States* v. *Western Elec. Co.*, 900 F.2d 283, 306 (D.C. Cir. 1990) (quoting *United States* v. *Bechtel Corp.*, 648 F.2d 600, 666 (9th Cir. 1981)). Indeed, Bell Atlantic/NYNEX's comments here merely summarize the arguments that these commentors had intended to advance in a private antitrust suit that they brought against the AT&T-McCaw merger in federal court in Brooklyn. However, in

[27] *See* Joint Press Release of AT&T, Bell Atlantic, and NYNEX (Nov. 7, 1994).

[28] AT&T's manufacturing subsidiary strengthened AT&T's already rigorous existing procedures for safeguarding any information that cellular (and other) purchasers' equipment have designated as confidential or proprietary. When RBOCs responded adversely to the merger announcement by threatening to swap out AT&T's cellular infrastructure equipment, AT&T negotiated more favorable arrangements with them.

[29] *See Rufo* v. *Inmates of Suffolk County Jail,* 112 S. Ct. 748 (1992).

[30] *See, e.g., FCC Order,* ¶¶ 32, 57–61, 68–70, 90, 97–100, 104–05; *California PUC Decision,* pp. 12–16, 37; *N.Y.P.S.C. Decision,* pp. 6–7.

[31] *See United States* v. *Western Elec. Co.*, Civ. No. 82–0192, Opinion, pp. 22–26 (D.D.C. Aug. 25, 1994) (''*Section I(D) Waiver Opinion*''), *aff'd,* No. 94–5252 (D.C. Cir. Feb. 17, 1995).

[32] BellSouth has used its comments here to repeat its claims (from the Generic Wireless proceeding under the MFJ) that the imposition of equal access requirements on cellular systems is contrary to the public interest. Quite apart from the fact that these claims have been previously rejected by the Department, Judge Greene, and now also the FCC (*FCC Order,* ¶ 68), BellSouth ignores that the Proposed Decree would impose no such provisions or obligations in the unlikely event that BellSouth's claims were accepted in the pending MFJ proceeding. In that event, just as RBOCs could provide cellular-originated calls to anyone in the world with no equal access duty under the MFJ, McCaw cellular systems would have that same right under Section X(A) of the Proposed Decree.

that private suit, Bell Atlantic/NYNEX first abandoned their horizontal long distance claims (after the district court in Brooklyn criticized them)[33] and then (on the eve of trial) dismissed their manufacturing claims with prejudice after settling them with AT&T-McCaw—which vividly confirms that the Justice Department acted reasonably in settling its claims rather than litigating the lawfulness of the proposed merger.

However, because Bell Atlantic and NYNEX have not withdrawn these aspects of their comments, AT&T-McCaw will briefly reiterate why the Department's settlement is reasonable. In reality, each of the antitrust challenges to the merger rests on legal theories that are novel, that have been rejected in other indistinguishable contexts, and that would prevent procompetitive benefits of the merger—which is why the Department and Judge Greene previously stated that restriction on AT&T's entry into cellular radio would be detrimental to the public interest.[34] In any event, while the merger, in AT&T's view, could not have been found to violate Section 7 of the Clayton Act if there were a trial, the Proposed Decree specifically enjoins each of the hypothetical threats to competition raised in the Department's Complaint.

A. The Justice Department Reasonably Settled Its Challenges to the Putative ''Horizontal'' Combination of AT&T's and McCaw's Long Distance Businesses

One of the two claims raised in the complaint is that the merger would enable McCaw to use its alleged market power as one of two cellular carriers (and its undisputed ability to program its cellular switches to prevent long distance carriers from reaching McCaw's customers) to favor AT&T and reduce competition in competitive long distance markets. In this regard, the Department also alleged that the merger would eliminate competition between the two largest participants in various ''cellular long distance markets'' and that the merger would lead to increased long distance prices or reduced output.

However, while the provision of equal access by McCaw and other cellular carriers is indisputably in the public interest, AT&T submits that the horizontal allegations in the Department's Complaint could not have been proven at trial and that it plainly was reasonable for the Department to settle these claims under the provisions of the Proposed Decree.

First, contrary to the Department's allegation, the merger does not eliminate long distance competition between AT&T and McCaw. There has never been any such competition. AT&T has been unable to offer interexchange services to McCaw cellular customers, for McCaw has not provided equal access, but has provided the interexchange services used by its customers (by reselling AT&T services). Conversely, McCaw has not offered long distance service to any other customers, for it has not competed with AT&T in providing interexchange service to any cellular customers (or landline customers) of RBOCs or any other carriers. In short, no cellular or other customers today can choose between AT&T and McCaw for their long distance service.[35]

In this regard, rather than eliminate existing competition, it was clear long before this suit was filed that the AT&T-McCaw merger would *create* competition for McCaw cellular customers for the fist time by enabling them to choose long distance services other than the AT&T long distance services that McCaw resold under its own name. In particular, shortly after the August 16, 1993 announcement of the merger, AT&T committed to Congress and to the FCC that McCaw cellular systems would offer each customer the ability to presubscribe to the interexchange carrier of his or her choice and that the McCaw cellular systems would be reconfigured so that local cellular service is provided, on an unbundled basis, in geographic areas that are always comparable, and generally identical, to those applicable to the RBOCs under the MFJ. *See* p. 17 & n.24, *supra*. In this regard, in approving the merger, the FCC stated that it expected AT&T to comply with these commitments,[36] and the FCC relied on the increased choices that McCaw cellular customers would thereby receive in finding that the public interest would be ''served'' by the merger.[37]

Second, even if AT&T and McCaw had previously competed, AT&T submits that the Department could not have proven at trial that the merger could lessen long distance competition in a ''cellular long distance service market'' or otherwise. The reality is that AT&T and other long distance carriers provide the *same* long distance services at the same price to landline and cellular long distance customers. Because McCaw provides less than 0.1% of long distance services nationally and does so by reselling AT&T service, there is no possibility that the AT&T-McCaw merger would increase the price or reduce the output of long distance services used by cellular or other customers. In particular, even if AT&T could attempt to increase long distance prices to cellular customers alone, those customers could readily turn to other long distance carriers, including carriers that today serve only landline customers. These facts both show that there is no ''cellular long distance market'' and establish, in all events, that there is no threat to competition.

The Department's suggestion that there is a separate ''cellular long distance market'' rests on the ground that cellular customers pay a premium for mobility—an airtime charge of up to 40 cents per minute for use of the cellular system, which is incurred whenever the customer places or receives any call, be it long distance or local. However, that is the charge imposed on the customer by the cellular system, and the long distance rates charged by long distance carriers for long distance service are the same, regardless of whether the customer accesses a long distance network from a cellular phone or from a landline phone. Thus, the Department's suggestion ultimately rests on the ground that the demand of cellular customers is less elastic than that of landline customers: *i.e.*, that even though cellular customers do *not* pay higher rates for long distance calls than do landline customers, cellular customers may well be willing to do so.

However, even if true, that does not establish that the cellular subclass of all long distance customers is a separate market. All services and products (be they corn flakes or long distance) are used by subclasses of customers who would be willing to pay more than the market rate, but these subclasses of customers do not constitute separate

[33] *See Bell Atlantic Corp.* v. *AT&T Corp.*, No. 94–CV–3682 (ERK), Transcript of Cause for Civil Hearing, pp. 27–28, 45–46 (Sept. 13, 1994).

[34] *See MFJ Opinion*, 552 F. Supp. at 175–76; *United States* v. *Western Elec. Co.*, Civ. No. 82–0192 (D.D.C.), Response of the United States to Public Comments on Proposed Modification of Final Judgment, pp. 72–73 (May 20, 1982); *id.*, Brief of the United States in Response to the Court's Memorandum of May 25, 1982, p. 49 (June 14, 1982).

[35] The Department and Bell Atlantic/NYNEX suggest that there is ''indirect'' competition between AT&T and McCaw long distance services in the sense that any cellular customer who subscribes to McCaw cannot obtain retail interexchange services from AT&T. But there is no evidence that the existence of this attenuated and indirect alleged ''competition'' had any effect on the price of long distance services offered by McCaw, and, by affording McCaw customers equal access to the carrier of their choice, the merger allows McCaw customers a choice of long distance carriers for the first time.

[36] *See FCC Order*, ¶ 70.

[37] *See FCC Order*, ¶ 57.

antitrust markets unless suppliers could in fact single them out to charge higher prices.[38] There has been no allegation that long distance carriers could charge higher prices for calls originating on cellular telephones, and the fact that none do (despite the less elastic demand of these customers) is potent evidence that charging them higher rates is infeasible for regulatory, practical, and other reasons.[39]

More fundamentally, such price increases could not be maintained because cellular customers receive the same long distance services provided to landline customers. Even if AT&T had a monopoly on long distance calling by cellular customers, it could not impose even a ''small but significant and nontransitory increase in price,'' for cellular customers (or carriers) could then subscribe to the long distance services used by landline customers. The reality is that because the same long distance services are used by landline and cellular carriers alike, any long distance carrier can easily supply interexchange services to cellular systems, and would do so if incumbent long distance providers sought to raise prices above competitive levels. In turn, because McCaw represents less than 0.1% of total long distance calling and was indistinguishable from hundreds of other resale long distance carriers,[40] the merger of AT&T and McCaw would not have any effect on competition in long distance markets or on the price or output of long distance services used by cellular or any other customers even if AT&T and McCaw had competed, as they had not. Indeed, in this circumstance, the Department's Merger Guidelines,[41] the nation's antitrust authorities,[42] and judicial decisions[43] all agree that a merger threatens no harm to competition.

Finally, in all events, the provisions of the Proposed Decree constitute a palpably reasonable settlement of the Department's claims and are in the public interest. They impose equal access, nondiscrimination, and antibundling requirements that go considerably beyond the voluntary commitments that AT&T made. They require the balloting of all existing customers; they prohibit any wide area calling plans in which discounted rates are offered only when local and long distance services are ''bundled'' through wide area calling plans or otherwise; and they contain detailed other provisions designed to afford all interexchange carriers an equal opportunity to serve McCaw customers. These provisions reasonably assure that McCaw customers will hereafter have choices other than the AT&T long distance services that McCaw has resold these customers and that all interexchange carriers will have access to McCaw's cellular customers.

B. The Proposed Decree Represents a Reasonable Settlement of the Department's Vertical Manufacturing Allegations

The other allegation advanced in the Department's Complaint is that the merger could lead AT&T to use its position as a cellular equipment supplier to engage in predatory conduct that could impede competition in certain local cellular service markets: *i.e.*, those in which McCaw competes with a cellular carrier that uses AT&T cellular equipment. In advancing this claim, the Justice Department acknowledged that telecommunications manufacturing generally, and cellular equipment manufacturing in particular, are intensely competitive businesses in which AT&T and other manufacturers are dependent on the RBOCs, GTE, and other LECs, and in which a carrier has a choice of multiple vendors when it is installing or replacing (''swapping out'') a system. *See* pp. 17–23, *supra.*

However, the Department claims there is a short-term interim period in which individual LECs are nonetheless dependent on AT&T's manufacturing unit for certain essential inputs to their cellular service and that the merger would give AT&T-McCaw the ability and incentive to exploit this short term ''monopoly power'' to disadvantage these companies in those markets where they compete with McCaw. In particular, the Department alleged that (1) those RBOCs and GTE that purchased AT&T cellular systems (*i.e.*, MTSOs and cell sites) in fairly recent years would incur such substantial costs if they sought to replace this AT&T equipment in whole or in part that they are ''locked-in'' to AT&T for upgrades to these systems during an interim period, and (2) the merger would give AT&T the incentive to exploit this lock-in by charging RBOCs inflated prices for the new cell sites and switching software needed to expand or enhance their systems, by providing them inferior service, by sharing their confidential information with McCaw, or by discriminating in favor of McCaw.

It was patently reasonable for the Department to settle these claims under the provisions of the Proposed Decree. The competitive theories are exceedingly tenuous ones, and the Department, in AT&T's view, could not have proven a violation of Section 7 of the Clayton Act at trial. In all events, the Proposed Decree contains prophylactic injunctions—backed by unusual and severe sanctions—that would prohibit each of the kinds of predatory misconduct that the Department fears, that further would reduce the alleged lock-in, and that thus reduce even the tenuous risks of predatory conduct that harms competition.

The Risks of Competition Harm Were Virtually Nonexistent Even in the Absence of a Decree. Foremost, the Department's allegations represent an exceedingly novel theory for challenging a vertical merger. The theory is not supported by the Department's merger guidelines.[44]

[38] *See* Department of Justice Federal Trade Commission Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104, § 1.12 at 20,573 (1992) (''Merger Guidelines'').

[39] *See AT&T-McCaw FCC Proceeding,* AT&T's and McCaw's Response to Comments on Hart-Scott-Rodino Materials (July 1, 1994), Affidavit of Robert D. Willig and B. Douglas Bernheim: An Analysis of the Alleged Anticompetitive Effects of the AT&T-McCaw Combination, pp. 12–13.

[40] Indeed, as the FCC found, McCaw was far less likely to develop into a major facilities-based long distance carrier than other resellers. McCaw's current debt of $5.7 billion (and debt ratio of over 70%), its need to raise over $3 billion in 1995 merely to *retain* some of its most important properties, and its need to raise additional untold billions to acquire PCS licenses all made it improbable in the extreme that McCaw ''would be able to embark on any large-scale investment in interexchange facilities in the foreseeable future.'' *FCC Order,* ¶ 30 & n.73.

[41] *See* Merger Guidelines, § 3.0 at 20,573 (where entry is easy, ''the merger raises no antitrust concern and ordinarily requires no further analysis'').

[42] *See, e.g.,* Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, IIA *Antitrust Law* 257 (1995) (''Of course, whichever market definition is employed, relative ease of entry by other firms should always be taken into account. The one course that would be clearly wrong would be to define the market as *A* alone while ignoring the ease of entry from *B* producers'').

[43] *See, e.g., Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.,* 792 F.2d 210, 218 (D.C. Cir. 1986) (''Because the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the 'relevant market' rests on a determination of available substitutes''); *Vollrath Co.* v. *Samni Corp.,* 9 F.3d 1455, 1461–62 (9th Cir. 1993) (''No matter how the market is defined * * * the ease of entry into it and the number of potential participants on every level of it abundantly demonstrates that [market power] would never be possible'').

[44] The Department's guidelines provide for challenges to vertical mergers in only three narrow circumstances, none of which is present here. The first is when the vertical merger would substantially raise entry barriers because two markets would (as a consequence of the merger) be so integrated that entrants to one market would also have to enter the other market simultaneously. *See U.S. Dept. of Justice 1984 Merger Guidelines* § 4.21 (reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,103 (1984)). The second is where the vertical merger would facilitate collusion in an upstream market either by permitting vertically integrated manufacturers more

Professors Lawrence Sullivan, Robert Willig, and Douglas Bernheim submitted testimony that rejected the hypothesized harms to competition.[45] Further, this basic theory was rejected as a matter of law in the only case in which it has been raised under Section 7 of the Clayton Act: *Fruehauf Corp.* v. *FTC*, 603 F.2d 345 (2d Cir. 1979).

Fruehauf concluded that even if a manufacturer in an otherwise competitive market will have market power over the supply of particular essential products during a short time period (there due to an assumed shortage), a vertical merger cannot be found to create a ''reasonable probability'' of harm to competition in violation of Section 7 of the Clayton Act[46] based merely on the theory that the merger gives the manufacturer an incentive to use that power to discriminate in favor of a merger partner and against its competitors. 603 F.2d at 355. To the contrary, the Second Circuit held that it was ''highly unlikely'' that the manufacturer would then engage in such opportunistic misconduct, for it would recognize that (1) The other customers could thereafter ''retaliat[e]'' and ''could cause it greater economic harm'' by ''shifting to competing suppliers not only their [future] purchases of the [allegedly 'locked-in' product] but of other products presently bought from [the manufacturer],'' and (2) such predatory conduct ''would invite antitrust damage actions.'' *Id.* at 355. In this regard, AT&T is aware of no case that supports challenging a vertical merger on such grounds.[47]

In this case, AT&T's manufacturing subsidiary has far less ability to engage in the hypothesized misconduct than did the firm in *Fruehauf* and radically greater competitive economic and legal incentives not to do so. Indeed, this case is a much clearer one than *Fruehauf* in that the provisions of the Proposed Decree preclude any reasonable risk of the competitive harms that the Department initially feared and palpably are within the broad reaches of the public interest.

The Claimed ''Lock-In'' Is Tenuous, and, in AT&T's View, Nonexistent. First, while AT&T would have overwhelming economic and legal incentives not to engage in the hypothesized conduct even if it could, AT&T will not have anything remotely approaching ''monopoly'' power over ''essential inputs'' required by RBOCs or other LECs even in the immediate future. In this respect, RBOCs epitomize large sophisticated purchasers who can and do protect themselves against exploitative behavior in ''aftermarket'' transactions and who have done so since the merger. *Eastman Kodak,* 112 S. Ct. at 2086–87.

Further, the assertions that RBOCs and other cellular equipment customers are ''locked-in'' to AT&T is, in AT&T's view, unsustainable and could not have been proven at trial. It is true that some RBOCs (and GTE) acquired AT&T cellular equipment in the past and that they will need to purchase more cellular equipment to expand and improve their systems in the future. However, there is no basis for any allegation that the costs of switching cellular infrastructure equipment suppliers are so prohibitive that these customers are absolutely locked-in to AT&T and have no choice except to buy new cell sites, MTSOs, and upgrades from it in existing markets.

The short answer to this allegation is that cellular carriers can, and regularly do, swap out an incumbent equipment supplier when they are dissatisfied with its performance, even when the equipment had been recently purchased. *See* pp. 19–21, *supra.* RBOCs and other LECs use threats of complete swap-outs or partial swap-outs (through use of IS–41 interface) to extract more favorable terms from AT&T and other independent suppliers. *See* pp. 21–22, *supra.* This practical experience refutes any theoretical claim that switching costs are ''prohibitive'' or that it is harmful to *competition* for cellular carriers to incur those costs. These are grounds on which the FCC rejected the RBOC's lock-in claims.[48]

In addition, the facts on which a lock-in is claimed will themselves dissipate rapidly over time. Industry efforts are underway to establish an open and satisfactory cell-site-to-MTSO interface that will enable cellular customers to obtain cell sites and switches from different vendors (*see* pp. 22–23, *supra*), and the IS–41 interface (allowing incompatible switches in a single market) has recently been improved so that virtually all existing features can be handed off with calls. *See* p. 21, *supra.* Further, with each passing day, recently-purchased cellular systems are further depreciated, and the other

easily to monitor price in retail markets or by eliminating a particularly disruptive buyer in a downstream market. *See id.,* § 4.22. The third is where the vertical merger involves a regulated monopoly utility and would enable it to evade rate regulation. *See id.,* § 4.23.

[45] *See AT&T-McCaw FCC Proceeding,* AT&T-McCaw Opp., Affidavit of Lawrence A. Sullivan, pp. 2–3, 6–11, 17–19, 22–24; *id.,* Affidavit of Robert D. Willig & B. Douglas Bernheim: An Analysis of the Alleged Anticompetitive Effects of the AT&T-McCaw Combination, pp. 36–55.

[46] It is well settled that a merger cannot violate Section 7 unless there is a ''reasonable probability'' that it will ''lessen competition'' (*i.e.,* harm consumers) in a relevant market and that a ''mere possibility'' of these harms is insufficient. *See, e.g., Brown Shoe Co.* v. *United States,* 370 U.S. 294, 323 & n.39 (1962).

[47] In prior challenges to the merger, RBOCs have relied on the Supreme Court's decision in *Eastman Kodak Co.* v. *Image Technical Services, Inc.,* 112 S. Ct. 2072 (1992). But *Kodak* was *not* a case to enjoin a merger under Section 7 of the Clayton Act on the theory it was likely to lead to harm to competition. Rather, it was a case under Sections 1 and 2 of the Sherman Act in which an independent photocopy repair service firm challenged a tie-in in which *Kodak* had concededly *in fact* excluded independent firms from the equipment repair market by refusing to supply them spare parts for Kodak copying machines. The RBOCs ironically have relied on the Supreme Court's rejection (by a vote of 6–3) of Kodak's attempt to defend against otherwise unlawful exclusionary conduct by arguing that, as a matter of law, no consumer could be harmed by Kodak's conduct. Kodak had contended that the market for original sales of photocopiers was competitive, and that interbrand competition in this market meant, as a matter of law, that Kodak could not have market power in a separate ''aftermarket'' for repair of machines and could thus not use that power to exploit consumers. The Supreme Court held that while this latter claim might be correct as a matter of fact, it could not be sustained purely as a matter of law ''in the absence of any evidentiary support.'' *Id.* at 2087. The Supreme Court reasoned that while ''large-volume, sophisticated purchasers'' could be presumed to take steps to protect themselves from exploitative behavior in the ''aftermarket,'' smaller, unsophisticated consumers might lack the necessary information and buying power to take protective steps before they need repairs and will ''tolerate some level of service-price increases before changing equipment brands'' ''[i]f the cost of switching is high.'' *Id.* at 2086–87.

Here, the only relevance of *Kodak* is that it undercuts any ''lock-in'' claims. RBOCs epitomize the large sophisticated customers who can, under *Kodak,* be presumed to protect themselves from exercises of ''market power'' after initial purchases are made. Indeed, RBOCs vigorously negotiate supply contracts prior to large purchases and use threats of complete or partial swap-outs to renegotiate those supply contracts both before and after the AT&T-McCaw merger was announced.

[48] The FCC stated as follows:

[W]e are unpersuaded by the BOCs' arguments about ''lock-in'', which occurs when a cellular service provider is unable to switch to the equipment of a different manufacturer for technical or financial reasons. As an initial matter, we find the argument unpersuasive because, at the same time the BOCs complain of the technical and financial impediments to switching equipment suppliers in their systems, they allege that AT&T/McCaw will replace McCaw's Ericsson equipment with AT&T equipment. If the difficulties of switching are so great, we doubt that AT&T/McCaw will be able to rush to switch equipment. On the other hand, if AT&T/McCaw could switch so readily, we find it difficult to believe that the BOCs would have much greater difficulty in switching their systems if AT&T/McCaw product or product servicing quality dropped. More importantly, the advent of the recently-adopted IS–41 standard of the Telecommunications Industry Association, which facilitates the use of different suppliers' equipment within the same cellular system, should reduce the cost of switching cellular equipment providers and, consequently, any potential ''lock-in'' effect. Finally, affiants on both sides of the debate agree that the merger of AT&T and McCaw will not enhance AT&T's ability to discriminate or exploit ''lock-in.''

FCC Order, ¶ 98 (footnotes omitted).

provisions of the Proposed Decree (facilitating re-location and sales of a carrier's cell site equipment and requiring AT&T's cooperation in a partial swap-out) will further reduce existing costs of switching suppliers. A procompetitive merger cannot be held unlawful and enjoined based on short term conditions that are dissipating.

Competition Otherwise Precludes the Hypothesized Predatory Conduct. Even if AT&T's manufacturing arm could have some degree of ''market power'' over certain customers in an interim period, it is even clearer here than it was in *Fruehauf* that it is ''highly unlikely'' that the merger will lead to predatory misconduct that harms competition in local wireless markets. The competition that AT&T's manufacturing unit faces in equipment manufacturing generally—and its dependence on RBOCs and GTE—creates a greater inhibition on discrimination against those firms than was present in *Fruehauf.*

Quite simply, competition means that AT&T's manufacturing arm has overwhelming incentives not to engage in any conduct that degrades any customer's service or that discriminates in favor of McCaw—or that even creates an appearance of such misconduct. The consequences of such conduct for AT&T's manufacturing arm would not merely be severe, but devastating. It would not merely assure AT&T's replacement with another cellular equipment vendor at the end of the claimed ''lock-in'' period. Cellular carriers can and do swap out a vendor whenever they are dissatisfied with its performance, regardless of whether the incumbent vendor is thought to have engaged in actionable or provable misconduct (*see* pp. 19–20, *supra*), so AT&T would then risk immediately being replaced in those markets. Further, as in *Fruehauf,* the discriminatory misconduct would also lead RBOCs and other customers to ''retaliat[e]'' by refusing to purchase other products that they ''*presently*'' purchase from AT&T. *Compare Fruehauf* v. *FTC,* 603 F.2d at 355 (emphasis added). For example, if such discrimination by AT&T were even suspected, RBOC wireless subscribers would refuse to buy AT&T's PCS equipment (which they would use to compete with McCaw in many markets) and which should be a multibillion dollar market given the imminent issuance of PCS licenses. Even more significant, RBOCs and GTE could then also buy less *landline* equipment.

In this regard, in contrast to *Fruehauf,* moreover, McCaw's competitors are not ''insubstantial'' customers of AT&T Network Systems. *Compare Fruehauf,* 603 F.2d at 354. To the contrary, McCaw's competitors (RBOCs and GTE) accounted for some $6 billion of Network Systems' $10 billion in 1994 revenues, and it would be devastating if any significant portion of these sales were lost to competitors.

That market forces preclude any substantial concerns was explained in detail by the FCC when it rejected the RBOCs' claims that the competitiveness of equipment manufacturing markets creates potent disincentives for any of the conduct that the RBOCs purport to fear:

> We believe that market forces will largely eliminate AT&T's ability to discriminate unreasonably. AT&T/McCaw cellular affiliates by themselves are not a large enough consumer of AT&T products to make it profitable for AT&T/McCaw to provide poor products or service to other customers, especially customers with the market power and sophistication of the BOCs, who have the choice of buying from other cellular equipment suppliers. Moreover, if unhappy with AT&T/McCaw's cellular products or servicing of those products, the BOCs also could shift their purchases of wireline network equipment to other suppliers. These threats to AT&T/McCaw's equipment sales create a powerful incentive for AT&T/McCaw to offer all of its cellular equipment customers, not just its cellular affiliates, quality products and services. As we have previously stated, AT&T's sales could otherwise decline as the fact of discrimination became known.[49]

On that basis, the FCC found that the ''market forces combined with the threat of litigation [if administrative duties are breached] will adequately deter AT&T/McCaw from discriminating in favor of its cellular affiliate, even in the subtle ways described by [the RBOCs],'' and that the merger, as conditioned by the FCC, cannot realistically have any adverse effect on competition.[50]

The Proposed Decree's Provisions Enjoin the Hypothesized Misconduct. The provisions of the Proposed Decree reduce even the slight risks that exist. It requires that McCaw be maintained as a separate corporation with separate officers and personnel who cannot delegate responsibility for the operation of McCaw's cellular systems to AT&T and that McCaw obtain services and products from AT&T under filed tariffs or by contract. Further, the Proposed Decree contains detailed provisions enjoining each kind of predatory misconduct that RBOCs purport to fear.

First, the Proposed Decree requires AT&T's manufacturing subsidiary to treat its customers in the same way it would have if no merger had occurred. It requires AT&T to continue to provide each of its existing equipment customers with additional equipment, upgrades, technical support, maintenance, spare parts, and all other related products and services ''in accordance with the *same pricing and other business practices* that prevailed prior to August 1, 1993'' (a date before the merger was announced). § V(B)(1) (emphasis added).[51] Any deviation from pre-merger practices in the timing of delivery of cell sites, in the provision of upgrades and support, and in the manner in which prices are determined would violate this prohibition.

Second, the Proposed Decree prohibits AT&T from discriminating against McCaw's competitors in the development of new features and functions. If AT&T develops new features or functions that are intended for more than one customer prior to the date the AT&T-McCaw Decree is entered, it must make them available to all affiliated customers at the same time as it does to McCaw. § V(C)(1). If AT&T develops features or functions for McCaw that are technologically applicable only to McCaw's network or proprietary to McCaw, it must provide all other carriers with the opportunity to contract for such features and functions on the same or more favorable terms. § V(C)(2–3).

Third, the Proposed Decree contains detailed protections against any misuse of competitive information that AT&T might obtain in the course of providing equipment to unaffiliated cellular carriers. It requires AT&T to establish separate sales and marketing teams to serve McCaw and unaffiliated cellular carriers and separate equipment development teams for proprietary equipment development work. § V(A)(4). It prohibits AT&T from disclosing ''Nonpublic Information'' of an unaffiliated equipment customer ''for any reason'' to McCaw (including any system in which McCaw has only a minority interest), to any McCaw personnel, to any person marketing any McCaw service or AT&T telecommunications service, or to any of the marketing, sales, or equipment

[49] *FCC Order,* ¶ 97 (footnotes omitted). For the same reasons, the FCC found it unlikely that AT&T Network Systems would engage in the misuse of proprietary information. *Id.,* ¶ 112.

[50] *FCC Order,* ¶ 100.

[51] AT&T is further prohibited from ''discriminat[ing] in favor of McCaw * * * in the way in which such services or products are made available'' to other cellular carriers. § V(B)(1). And if AT&T discontinues the offering of any such product or service, it is required to seek to arrange an alternative source of supply or provide the carrier with whatever licenses and technical information are required to provide the product or service. § V(B)(2).

personnel that market to or perform development work for AT&T or McCaw. § V(A)(1).

Fourth, the Proposed Decree requires AT&T to facilitate the replacement of its equipment, in whole or in part, with integrated systems of switches and cell sites of competing manufacturers if AT&T's existing customers wish to do so. AT&T must waive any contractual provisions granting it rights of prior notice or consent if the customer chooses to redeploy AT&T equipment to a new location, and must provide all reasonably necessary technical assistance and cooperation to help the customer replace its equipment and operate AT&T's system in conjunction with systems of AT&T competitors in whole or in part. § V(D).

The AT&T-McCaw Decree contains elaborate compliance and enforcement provisions. For example, in addition to penalties for imprisonment or fines for contempt of court, the Proposed Decree provides that if the Department determines that AT&T has violated any of the Decree's requirements in its dealings with McCaw cellular competitors who purchased AT&T equipment prior to the Decree's entry, the Department will have the authority to require AT&T to ''buy back'' that equipment at the original purchase price, less depreciation calculated on the straight line basis with useful lives of ten years for switches and eight years for all other hardware—irrespective of any shorter depreciation schedule actively used by any carrier. § V(E). The Department would have ''sole and unreviewable discretion'' to make that determination, and AT&T ''irrevocably waive[s] any right it may have to appeal, contest, or otherwise challenge any adverse determination.'' *Id.*

Bell Atlantic/NYNEX appear to concede that these provisions mean that it is improbable that AT&T's manufacturing or other personnel would engage in any misconduct that is detectable and provable. They are thus reduced to suggesting that AT&T's manufacturing arm could engage in subtle misconduct that would degrade their cellular service but that would not be ''detectable.'' However, anything that degrades an RBOC's cellular service is by definition detectable by it (otherwise it could have no competitive consequences), and anything that is detectable in this way can be the subject of complaints and potentially of proof and adverse findings. Indeed, the only way that AT&T conceivably engage in misconduct that would degrade an RBOC's service in markets where it competes with McCaw, but that would not be provable, would be if AT&T engaged in the identical misconduct in every market in the country in which AT&T supplies cellular equipment, including the vast majority of AT&T-equipped systems that do *not* compete with McCaw. *See* Appendix (attached hereto). Obviously, AT&T has powerful *dis*incentives to engage in such conduct in these other areas for no benefits to McCaw could offset harm to AT&T.

Procompetitive Effects of the Merger. For all these reasons, the provisions of the Proposed Decree—and sanctions availble—reduce the already tenuous risks that AT&T would engage in the hypothesized misconduct. *See Fruehauf,* 603 F. 2d at 355; *Emhart Corp.* v. *USM Corp.,* 527 F.2d 177 (1st Cir. 1975). Furthermore, the Department was also entitled (and required) to weigh the fact that, in addition to the remote threat that AT&T could use its manufacturing position to impede competition in local cellular markets, the merger would otherwise *promote* competition and benefit consumers in these same local cellular markets and potentially landline services as well. *See* pp. 2–3, 24, *supra.* In short, there is no question that the Department acted rationally in not seeking to enjoin an otherwise procompetitive merger and in instead settling its vertical manufacturing claim.

II. The Ad Hoc IXC's and RBOCs' Claims That the Proposed Decree Should Be Modified To Create ''Parity'' Are Outside the Scope of This Proceeding and Constitute Hypocritical Attempts To Nullify Procompetitive Features of the Merger

The foregoing discussion establishes that, if anything, the provisions of the Proposed Decree go far beyond what is reasonable to address the Department's concern that the combined AT&T-McCaw could use their positions in cellular services or in manufacturing to harm competition in adjacent markets. Nothing more need be said to establish that the Proposed Decree is in the public interest.

However, four of the RBOCs and a group of switchless resellers of interexchange services (the ''Ad Hoc IXCs'') claim that the Proposed Decree is contrary to the public interest because it does not contain other provisions that address a *different* set of purported competitive concerns that these commentors have, but that the Department does not. These RBOCs claim that AT&T-McCaw could enjoy ''advantages'' over their cellular businesses by reason of the MFJ's restriction on RBOCs and AT&T's putatively ''dominant'' position in interexchange services. On this basis, the RBOCs contend that the Proposed Decree will not be in the public interest unless ''parity'' is achieved by (1) barring AT&T-McCaw from using names, addresses, and usage information of AT&T's long distance customers to market cellular services to any individuals who are cellular customers of RBOCs, and (2) granting the RBOCs' motion for ''generic wireless'' relief from the MFJ's long distance restriction and imposing the same equal access restrictions on AT&T-McCaw as apply to the RBOCs cellular systems under the MFJ. Similarly, the Ad Hoc IXCs appear to fear that the combined AT&T-McCaw could extend AT&T's long distance ''dominance'' by converting McCaw's cellular systems into alternatives to the landline exchange monopolies.

The short answer to these claims is that they go beyond the violations alleged in the Department's Complaint and they therefore cannot be raised in this Tunney Act proceeding. *See* 15 U.S.C. § 16(e). The Department's Complaint alleged *only* that the combined AT&T-McCaw could use power in manufacturing and cellular services to impede competition in adjacent markets. Although RBOCs have previously raised (and the FCC rejected) it, the Complaint does not make the allegation that the RBOCs and Ad Hoc IXCs make: that AT&T's putatively dominant position in long distance services could give it advantages in cellular markets. The Department's failure to pursue these claims is not reviewable in a Tunney Act proceeding.[52]

Further, even if the Department's decision not to pursue these claims could be reviewed, there is not the slightest doubt that the Department's determination was reasonable and, indeed, was compelled by the antitrust laws. Because AT&T neither has a bottleneck over long distance services nor controls any facilities or information that is essential to cellular carriers or their customers, the four RBOC's and Ad Hoc IXCs' claim is *not* that AT&T has power over them or their customers that it could exercise to distort free choice in cellular markets. Rather, it is that AT&T's position in long distance RBOCs ''[b]ecause of MFJ requirements'' (Bell Atlantic/NYNEX, p. 10), that the RBOCs may lose certain customers and profits because of these AT&T advantages, and that the ''public interest'' therefore requires ''parity.''

[52] *See* U.S.C. § 16(e); S. Rep. No. 298, 93d Cong., 1st Sess. 3 (1973); *In re IBM Corp.,* 687 F.2d 591 (2d Cir. 1981) (Justice Department's decision to dismiss competitive claims is not reviewable under the Tunney Act).

However, it is elementary that ''the purpose of antitrust policy * * * is not to make competitors equal, or to avoid all forms of advantage; the antitrust laws are for the protection of competition, not competitors.'' *Environmental Action, Inc.* v. *FERC*, 939 F.2d 1057, 1061 (D.C. Cir. 1991). As Judge Greene has elsewhere held, the antitrust laws are not intended ''to assure positive results for [individual] competitors'' but to ''protect the competitive process.'' *United States* v. *Western Electric*, 698 F. Supp. 348, 363 (D.D.C. 1988).

Further, it is sheer hypocrisy for the RBOCs to complain about a lack of parity and about the MFJ. The Department has previously found that the MFJ has not competitively disadvantaged the RBOCs in competing with McCaw.[53] To the contrary, the RBOCs' exchange monopolies have given their cellular businesses immense regulatory and other advantages over McCaw and other nonwireline carriers, and the RBOCs' newly-found interest in ''parity'' is simply an attempt to nullify legitimate efficiencies of the merger that could offset some of the advantages that the RBOCs have received from their bottleneck monopolies. In this regard, Judge Greene and now even the FCC have repeatedly rejected the RBOCs' claims that the MFJ's restrictions could either be removed from the RBOCs (or be imposed on firms that have no bottleneck monopolies) in the name of ''parity.''

In this regard, all of the specific claims that the RBOCs and Ad Hoc IXCs advance constitute challenges to procompetitive features of the merger.

A. The RBOCs' Proposal for a Marketing Restriction Is Both Antithetical to the Antitrust Laws and Hypocritical

The four RBOCs' principal claim is that the Proposed Decree would be anticompetitve and contrary to public interest unless a new marketing/solicitation restriction were added that barred AT&T-McCaw from using the names, addresses, and long distance usage information of AT&T's *long distance* customers to market cellular service to any individual who is also an existing cellular customer of an RBOC. *E.g.*, SBC, pp. 6–15; Bell Atlantic/NYNEX, pp. 10–12. The RBOCs assert that AT&T-McCaw would otherwise obtain ''anticompetitive'' advantages from its ''dominance'' in long distance service, that the customer information in question is the RBOCs' ''property'' which the Proposed Decree (and the MFJ) elsewhere protect, and that it was thus ''inexplicable'' and ''inconsistent'' for the Department to allow AT&T-McCaw to use this information.

These claims are not merely baseless. They are transparent attempts to prevent competition for RBOC customers and to preserve advantages that the RBOCs derive from their control over bottleneck local telephone monopolies.

The Claims Are Antithetical to Antitrust. First, the marketing restrictions that the RBOCs seek are antithetical to the antitrust laws. As courts have uniformly held and as the RBOCs have elsewhere argued, the ability of a firm to offer new services (*e.g.*, cellular) to customers of its *own* services (*e.g.*, long distance) is procompetitive and beneficial to consumers. Here, moreover, the ability of AT&T-McCaw to engage in this ''cross-selling'' is one of the principal ways in which the merger would create genuine efficiencies and consumer benefits that would offset advantages the RBOCs derive from their local exchange monopolies.

In particular, AT&T provides an array of telecommunications services and products to actual or potential cellular customers—long distance services, cellular and other CPE, computers, and the AT&T Universal Card (a combined telephone calling/credit card). The relationships that AT&T has with these customers will enable the combined AT&T-McCaw both to identify actual or potential customers of cellular services and to inform them about AT&T cellular service at very low cost: *e.g.*, through inserts in billing envelopes, direct mailings, or the like.[54] In this regard, because AT&T has provided high quality services, superior customer support, and attractive prices, the AT&T brand is a strong warranty of quality, and there may be many existing AT&T customers who would value receiving an ''AT&T cellular service'' offering that same quality and who would choose to do so if AT&T engages in this direct marketing to its customers.

At the same time, contrary to the RBOCs' suggestions (*e.g.*, Bell Atlantic/NYNEX, pp. 10–11), such marketing efforts would not and could not themselves cause any customer to switch to AT&T. Rather, they would merely be an efficient, low-cost way for AT&T to give its own long distance (and other) customers information about AT&T cellular service and the *choice* whether to use it or not. Those customers who are satisfied with the RBOC cellular service, who believe it will be improved, or who otherwise do not regard the AT&T-McCaw cellular offering as more attractive would say ''no'' to the AT&T offer. Conversely, those customers who value dealing with AT&T, who were dissatisfied with RBOCs, and who perhaps have dealt with them only because of doubts about McCaw, might say ''yes'' to the AT&T offer. In either event, consumers will benefit from the solicitation because additional choices will have been extended to them efficiently and because rivalry for their business will increase.

In this regard, these RBOCs have elsewhere admitted that they are seeking to block these AT&T marketing efforts in order to protect the RBOCs' customer bases and profit margins, not to benefit consumers and competition. In particular, when NYNEX and Bell Atlantic unsuccessfully sought this same restriction on AT&T-McCaw at the FCC, these RBOCs claimed that the ''power of AT&T-McCaw brand'' and the ability to offer cellular packages that contain this same warranty of quality could cause the RBOCs to lose significant percentages (''10% to 25%'') of their existing customers ''in the first year.''[55] These assertions are likely hyperbole, for it is difficult to believe that even a slothful monopolist could have offered such poor service and so alienated its customers that so many would immediately switch to AT&T-McCaw. However, the RBOCs have one and only remedy under the antitrust laws if they have created such a situation. It is to compete on the merits and to seek to retain customers, and to win back any that are lost, by improving the quality of their cellular services, reducing their price, or otherwise making their own cellular offerings more attractive. That would benefit consumers, and it is extraordinary that RBOCs would suggest that an antitrust court should seek to protect an RBOC's customer base and profits from competition.

Similarly, SBC makes the anticompetitive and paternalistic assertion that many of its customers would be better off if they were protected from competition because they spend ''as little [*sic*] as'' $100 a

[53] *See United States* v. *Western Elec. Co.*, Civ. No. 82–0192 (D.D.C.), Memorandum of the United States in Response to the Bell Companies' Motions for Generic Wireless Waivers, pp. 18–19 (July 25, 1994) (''DOJ Generic Wireless Memorandum'').

[54] Contrary to the RBOCs' suggestions (*see* SBC, Affidavit of John T. Stupka, ¶ 7), the Proposed Decree prohibits AT&T from providing long distance services on more favorable terms to cellular customers of McCaw than to other cellular customers (*see* § IV(F)(1)), so AT&T could not make ''targeted offers'' for long distance services that would not be available to RBOCs' cellular customers.

[55] *See AT&T-McCaw FCC Proceeding*, Petition of NYNEX Corporation and Bell Atlantic Corporation for limited Reconsideration, p. 7 (Oct. 19, 1994).

month and are thus not ''sophisticated.'' SBC, p. 13. In particular, SBC contends that these customers would not know to respond to AT&T's solicitations by seeking better ''offers'' from competitors.[56] Quite apart from the fact that the antitrust laws reject this paternalism, SBC ignores that the RBOCs are always free themselves to make these ''better offers'': *e.g.*, by reducing the price or improving the value of their services, by making ''counter offers'' to any customers who seek to terminate cellular service to go elsewhere, or by making targeted offers to ''win back'' customers who leave. Again, that is the competition that the antitrust laws seek to foster, and SBC's argument is an admission that it is seeking restrictions that would harm consumers and diminish rivalry.

It is for these reasons that federal courts have uniformly held that restrictions on customer solicitations are alien to the antitrust laws. For example, courts of appeals have held that the antitrust laws cannot be used to enjoin or punish a firm's use of customer lists to market services even when the lists may have been *misappropriated* from a competitor in violation of state unfair competition laws[57]—as AT&T's lists of its own long distance customers were not. These courts hold that the customer solicitation ''enhance[s] rivalry rather than reducing it,'' that it benefits consumers to receive additional choices, and that while regulatory statutes and ''unfair competition laws'' may place some constraints on these activities, the antitrust laws cannot, for they are designed to protect competition, not competitors.[58]

Indeed, courts have thus uniformly held that it raises no issue under the antitrust laws when, as here, a large integrated firm uses its own customer lists to market new services (like cellular) to existing customers of its *own* services (like long distance). In particular, it is well-settled that when no essential facilities are involved, it is efficient and procompetitive for a large multi-product firm to take advantage of its integration in the same way a smaller multi-product firm would. *See Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979). On this basis, courts have held that it is procompetitive and raises no issue under the antitrust laws when even a local gas monopoly uses lists of its own gas customers to advertise and market related products (there, gas vent dampers) because no essential facilities are involved and the conduct constitutes a legitimate and procompetitive efficiency of integration, not an abuse of monopoly. *See Catlin* v. *Washington Energy Co.*, 791 F.2d 1343, 1345–48 & n.1 (9th Cir. 1986) (rejecting claim of a group of suppliers of vent dampers that the gas company ''should be barred from permitting its merchandising division to use the list [of gas company customers] to advertise vent dampers to the detriment of competit[ors] in the vent damper market'') (internal quotation omitted).

In this regard, the RBOCs' contention that AT&T is a ''dominant'' long distance carrier with ''market power'' is both erroneous and irrelevant. The claims are erroneous because the RBOCs' claims rest on FCC findings that were made in 1982 and that have no current validity.[59] The reality is that AT&T faces up to 35 long distance competitors in each RBOC cellular system. Whereas AT&T believes that its share of cellular-originated long distance calling is not materially different from its share of switched long distance calling (currently 57.8% of minutes),[60] the fact is that each AT&T long distance customer freely chose AT&T in a competitive market. In all events, the RBOCs' claims are irrelevant, for the foregoing cases squarely hold that it is procompetitive and beneficial to consumers for even ''the dominant firm in any market * * * [to] create demand for [its] new products'' by marketing new services to its existing customers.[61]

In this regard, whereas regulatory agencies have authority to adopt solicitation restrictions, the FCC has also concluded that it promotes competition and benefits consumers to allow AT&T to market other products or services to its long distance customers. For example, at a time in which AT&T's long distance market share was 90%, the FCC held that AT&T could use lists of its long distance customers and their usage information to market CPE and enhanced services to any customer who did not notify AT&T that it did not wish to receive such solicitations,[62] and the FCC extended the same regulation to AT&T's marketing of cellular service in the order approving the AT&T-McCaw merger.[63] In this regard, the FCC found that the ability of AT&T-McCaw to engage in joint marketing and ''cross-selling'' is one of the principal ways in which the merged entity can compete more effectively with the local RBOC monopoly and that the RBOCs' ''parity for parity's sake'' arguments are contrary to the Communications Act as well as the antitrust laws.[64]

The RBOCs' Claims Are Hypocritical. The RBOC pleas for ''parity'' are not only anticompetitive, but also hypocritical, for they are simply seeking to preserve (and extend) advantages that the RBOCs received because of their

[56] *See Southwestern Bell* v. *FCC*, Nos. 94–1637 & 94–1639 (D.C. Cir.), Brief for Appellant SBC Communications Inc., p. 29 (Dec. 28, 1994).

[57] *See, e.g., Northwest Power Products, Inc.* v. *Omark Industries, Inc.*, 576 F.2d 83 (5th Cir. 1978) (rejecting claim that it violated antitrust laws for dealer and new distributor to conspire to take away plaintiff old distributor's customers by hiring a contingent of its employees, together with a customer list); *accord Seaboard Supply Co.* v. *Congoleum Corp.*, 770 F.2d 367, 375 (3d Cir. 1985).

[58] *See Northwest Power Products*, 576 F.2d at 88–91 (noting that the challenged conduct, even if unfair, ''*enhanced* rivalry rather than reducing it,'' and holding that ''the purposes of antitrust law and unfair competition law generally conflict. The thrust of antitrust law is to prevent restraints on competition. Unfair competition is still competition and the purpose of the law of unfair competition is to impose restraints on that competition. The law of unfair competition tends to protect a business in the monopoly over the loyalty of its employees and its customer lists, while the general purpose of the antitrust laws is to promote competition'') (emphasis added).

[59] The RBOCs rely on the fact that AT&T is classified as a ''dominant'' carrier because the FCC previously found AT&T to possess market power. However, AT&T was so classified in 1982. Since that time, the FCC has eliminated price cap and other economic regulations of AT&T's 800 and large business services (Baskets 2 and 3). *See Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5893–96, 5908 (1991) (Basket 3); *id.*, 8 FCC Rcd 3668, 3671 (1993) (Basket 2). In addition, based on its finding of ''adequate competitive alternatives,'' the FCC recently announced its intention to remove *all* commercial long distance services from Basket 1. *See Revisions to Price Cap Rules for AT&T Corp.*, CC Docket No. 93–197, 1995 FCC LEXIS 250, ¶ 26 (Jan. 12, 1995). The FCC has retained price cap regulation of AT&T's residential services only because the FCC stated that it cannot determine (one way or another) whether AT&T has market power in these segments of the long distance market. *See Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd at 5908 (''there are unresolved issues and insufficient information in the record about the competitiveness of Basket 1 operator services''); *Price Cap Performance Review for AT&T*, 8 FCC Rcd 6968, 6970 (1993). Finally, AT&T has now shown that it has no such market power and should be classified as ''nondominant.'' *See* Motion for Reclassification of American Telephone & Telegraph Company as a Nondominant Carrier, CC Docket No. 79–252 (FCC, filed September 22, 1993).

[60] The FCC has reported that, in the third quarter of 1994, some 71% of telephone lines were presubscribed to AT&T, but it has only 57.8% of total minutes. The discrepancy reflects that customers who make no, or few, long distance calls disproportionately select AT&T, which gives it a higher percentage of presubscribed lines that AT&T has of actual long distance calling. Similarly, whereas the Department has found that in excess of 70% of cellular customers select AT&T (Competitive Impact Statement, pp. 12–13), that figure does not reflect the percentage of cellular-originated calls or minutes that AT&T carries.

[61] *Foremost Pro Color, Inc.* v.*Eastman Kodak Co.*, 703 F.2d 534, 546 (9th Cir. 1983). *Accord Berkey Photo*, 603 F.2d at 273–76; *Catlin* v. *Washington Energy*, 791 F.2d at 1345–48.

[62] See Amendment of Section 64.702 of the Commission's Rules and Regulations, 104 FCC 2d 958, 1089 (1986).

[63] *See FCC Order*, ¶ 83.

[64] *See FCC Order*, ¶¶ 32, 83.

local exchange monopolies. These monopolies meant that the RBOCs received ''B'' Block cellular licenses at no cost in their franchised monopoly territories, that they received one to three year headstart monopolies over nonwireline competitors which guaranteed the RBOCs the exclusive right initially to sign up the best cellular customers, and that the RBOCs are able to ''piggy back'' (SBC, p. 12) on the local exchange monopoly through use of common trade names and joint advertisements and the receipt of monopoly financing. *See* pp. 10–12, *supra*. These factors help explain why every significant nonwireline carrier (save McCaw) was forced to sell out to RBOCs, and why McCaw has the $5.7 billion debt, and marketing weaknesses, that led to the merger. *See* pp. 12–13, *supra*. The RBOCs previously defended *this* lack of ''parity.'' *See* pp. 10–13, *supra*.

In this regard, if there were any basis for Bell Atlantic/NYNEX's prediction that they could immediately lose significant numbers of customers to AT&T-McCaw, the only possible explanation would be that these RBOCs have acquired and retained many of their customers solely because of the foregoing advantages. In particular, that prediction could be accurate only if these RBOCs had obtained and retained these customers solely by exploiting fears about McCaw's weaknesses and competence and the benefits of dealing with large, experienced telecommunications carriers, *not* because these RBOCs in fact provided high quality and competitively-priced services.

Further, the RBOCs' proposal is hypocritical for the added reason that they have elsewhere argued the precise opposite of what they here urge. As noted above, there are conditions in which the FCC has the authority to impose the kinds of marketing/solicitation restrictions that RBOCs seek, and the RBOCs have opposed the adoption or continuation of these restrictions on the RBOCs' offerings. The RBOCs have argued to the FCC on the basis of *Catlin* and other authorities cited above that it is procompetitive for RBOCs to be free to use their *monopoly* local exchange customer lists and usage information to market competitive enhanced services and CPE to their customers.[65] Indeed, the RBOCs succeeded, on that basis, in overturning FCC regulations that previously barred these direct solicitations.[66] In each instance, the RBOCs are able to market their CPE and enhance services to local exchange customers who currently use other vendors for those competitive offerings and who are, in the RBOCs' words, a ''joint'' customers of an RBOC and an independent CPE and enhanced services vendor.

Even more pertinently, the RBOCs seek the same rights in cellular. While FCC cellular regulations have barred RBOCs from using local exchange customers' information in marketing cellular service (47 CFR § 22.901(d)), the RBOCs are seeking to overturn these restrictions and obtain the same rights to use their customers' information in the marketing of cellular radio service that AT&T possesses.[67]

The RBOCs also argue that AT&T would not have independent long distance customer relationships with RBOCs cellular subscribers if the MFJ did not bar RBOCs from providing interexchange services and require them to provide equal access. But that claim is irrelevant and erroneous. The plaintiffs in *Catlin* and the RBOCs' CPE and enhanced services competitors were legally barred from providing the monopoly gas and exchange services, but courts and the FCC nonetheless held that it was efficient and procompetitive for the monopolies in *Catlin* (and the RBOCs) to use their customer lists in marketing competitive products and services. Those principles apply *a fortiori* in the case of AT&T, for its long distance services are competitive.

More fundamentally, the RBOCs' arguments simply confirm the wisdom of the MFJ. The MFJ restrictions on the RBOCs have been upheld by Judge Greene, the Court of Appeals, and the Supreme Court precisely because of the substantial likelihood that RBOCs would otherwise use their bottleneck monopolies to impede long distance competition, harm consumers, and thwart the objectives of the antitrust laws. The RBOCs are here seeking to prevent AT&T-McCaw from competing more effectively with the RBOCs' cellular services by claiming that they would now have long distance monopolies if the MFJ did not exist. That shows that the MFJ promotes competition in cellular as well as long distance services.

The Information at Issue Is the Customers' Property, Not the RBOCs'. The RBOCs also claim that information that AT&T possesses consists of ''property'' or ''trade secrets'' that the Proposed Decree (and the MFJ) elsewhere protect, and that the Department acted inconsistently by allowing AT&T-McCaw to use AT&T's long distance customer information in marketing cellular services. There is no basis for this claim. The information that AT&T has consists of the names, addresses, and long distance usage information of AT&T's own long distance customers who freely choose AT&T services and who allow AT&T to use the information to offer other products or services. In this regard, the pertinent FCC regulations recognize that this information is the *customer's* not any carrier's, and the customer controls how the information is to be used. By contrast, the only information that the Proposed Decree protects is the nonpublic information of cellular *carriers* in their capacity as *customers* of equipment manufacturers.

Preliminarily, there is no basis for the RBOCs' insinuations that AT&T's long distance arm has the lists and cellular usage information of the RBOCs' cellular customers. Lists of RBOC cellular customers and usage information are not provided to AT&T or any other long distance carrier when cellular systems ''cut over'' to equal access or otherwise. For example, to the extent that long distance carriers mail out marketing literature to cellular customers, they do so by providing the literature to independent agents who receive the customer lists from the RBOCs and who mail out the long distance carrier's literature. That has been the practice under the MFJ, and the Proposed AT&T-McCaw Decree similarly limits the use of McCaw's cellular lists to the marketing of long distance services. Proposed Decree, § IV(C).

Conversely, when a cellular customer selects an individual interexchange carrier, that customer's name, address,

[65] For example, in defending against ''competitive equity'' challenges to the Commission's regulations that allow RBOCs to use *their* customers' names and usage information (''CPNI'') to market ''enhanced services,'' the RBOCs, citing *Catlin*, ''argue[d] that their access to CPNI is no different from an unregulated company's access to its customer records and should therefore be permitted.'' *Computer III Remand Proceedings*, 6 FCC Rcd. 7571, 7608 (1991).

[66] *See Furnishing Customers Premises Equipment by the Bell Operating Telephone Companies*, 2 FCC Rcd 143, 152–53 (1987) (removing restrictions on RBOCs' use of local customer information in marketing CPE); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 FCC 2d 958, 1091 (1986) (removing restrictions on RBOCs' use of local exchange customer information to market enhanced services), recon., 2 FCC Rcd 3072, 3094–95 (1987), *recon.*, 3 FCC Rcd 1150, 1162–63 (1988), *recon.*, 4 FCC Rcd 5927 (1989), *vacated and remanded, California* v. *FCC*, 905 F.2d 1217 (9th Cir. 1990), *on remand*, 6 FCC Rcd 7571, 7609–14 (1991), *vacated and remanded in part and affirmed on this ground, California* v. *FCC*, 39 F.3d 919, 930–31 (9th Cir. 1994).

[67] *See, e.g.*, Petition of Bell Atlantic, NYNEX, and Southwestern Bell for Investigation and for Order to Show Cause pp. 3, 12–14, FCC File No. MSD 93–13 (Jan. 27, 1993) (arguing that these and other Part 22 restrictions on RBOCs should be removed).

and long distance (but *not* local cellular) usage information is forwarded to the long distance carrier to whom the customer subscribes.[68] Long distance carriers, in turn, are free to use *that* information to offer their long distance customers any other products or services, be they CPE, enhanced service, or cellular service, subject only to FCC regulations. Notably, contrary to these RBOCs' assertions (*e.g.*, SBC, p. 8), the same rule applies under the Proposed Decree. If a McCaw cellular customer subscribes to Sprint, MCI, or any other AT&T competitor, that firm obtains the foregoing information from its customers and is free to use that information in offering other products or services, including cellular service or substitutes for cellular service (*e.g.*, PCS), subject only to FCC regulations.

Further, the FCC regulations reject these RBOCs' claims that any information about their cellular customers is the RBOCs' property and hold, to the contrary, that the uses of the information should be controlled by the *customer*, not by any carrier. In particular, the FCC regulations applicable to AT&T provide that, upon a customer's request, AT&T must (1) make that customer's usage and other information available to AT&T competitors, and (2) prohibit AT&T personnel involved in marketing cellular service (or CPE and enhanced services) from using the customer's name, address, and long distance usage information.[69]

Against this background, there is no basis for the RBOCs' claims that the absence of a restriction on AT&T's solicitation of its own customers is inconsistent with other provisions of the Proposed Decree that protect cellular carriers' and cellular manufacturers' trade secrets and other nonpublic information. In particular, the RBOCs refer to the Proposed Decree's provisions that prohibit AT&T's manufacturing arm from disclosing to McCaw nonpublic information about its competitors' cellular systems (and that prohibit McCaw from giving AT&T's manufacturing arm nonpublic information of other cellular equipment manufacturers).

But there is no inconsistency. In each event, it is the *customer* who controls dissemination of information. An RBOC cellular carrier is the customer of AT&T's manufacturing arm, and the Proposed Decree prohibits AT&T from disclosing to McCaw nonpublic information about the RBOC cellular system which the RBOC owns and has a legal right to protect, which is provided to AT&T under contractual provisions requiring that it not be disclosed to competing cellular carriers, and which (in the Department's view) the RBOC is required to continue providing AT&T by virtue of the alleged ''lock-in.'' AT&T and McCaw readily agreed to these provisions because each unit of AT&T will always safeguard nonpublic information that customers (or suppliers) provide AT&T in confidence.[70] Competition requires all suppliers to protect customers' proprietary information (and vice versa), so the Proposed Decree merely enjoins AT&T and McCaw to behave as all firms behave in competitive markets.

By contrast, the names, addresses, and long distance usage information of AT&T's long distance customers are not information from or about the RBOCs' cellular system. Rather, it is information about AT&T's customers which those individual long distance customers provide to AT&T by freely choosing AT&T's long distance service. Further, those customers can decide not to receive cellular or other solicitations from AT&T and are also free to reject any such solicitations from AT&T and are also free to reject any such solicitations (and to change long distance carriers). There is no competitive or other basis to prohibit AT&T from marketing cellular or other services to those customers who allow these solicitations. To the contrary, as explained above, that would be anticompetitive and harmful to consumers.

B. The RBOCs' Other Attempts to Obtain ''Parity'' Are Spurious Challenges to the MFJ

In addition to the foregoing claims, the four RBOCs also argue that the Proposed Decree is not in the ''public interest'' because it does not otherwise achieve strict ''parity'' between the RBOCs and AT&T-McCaw. In particular, while the Proposed Decree's equal access provision and interexchange services restriction on McCaw eliminate ''disadvantages'' of which the RBOCs formerly complained—*e.g.*, McCaw's ability to offer the ''City of Florida'' and other such ''bundled'' wide area calling plans—the RBOCs object that there are a number of respects in which the Proposed Decree otherwise contains different provisions from the MFJ. On the basis, these RBOCs claim that the Proposed Decree will not be in the public interest unless the MFJ's interexchange services restriction on RBOC wireless services is first removed and the Court adopts *identical* equal access and long distance restrictions for AT&T-McCaw and for RBOCs.

These claims are baseless. While many of the RBOCs' claims are based on misinterpretations of the Proposed Decree, Judge Greene (and the FCC) have repeatedly held that the public interest patently does not require ''parity'' between AT&T-McCaw and the RBOCs and that the RBOCs are properly subjected to different restrictions under the MFJ because they alone have bottleneck monopolies.

Foremost, Judge Greene has so held in a number of decisions under the MFJ. In particular, the RBOCs have repeatedly sought to modify the MFJ's long distance and other restrictions by claiming that doing so was necessary to enable them to compete with AT&T and others on equal terms. In each case, Judge Greene flatly rejected these claims on the ground that the RBOCs have bottleneck monopolies that can be used to impede long distance competition and AT&T and others do not.[71]

Further, the FCC has now agreed with Judge Greene. In particular, the FCC

[68] SBC concedes the point, for it is reduced to making contrived arguments to the effect that AT&T could make *guesses* about whether a particular AT&T long distance customer is an ''above-average'' cellular customer of an RBOCs. *See* SBC, p. 9. For example, SBC states that many cellular customers (an alleged 75%) who make over 275 minutes of long distance calls a month are above average local cellular users—meaning that 25% of even the heaviest long distance users are below average cellular customers. Conversely, as SMC's charts show, there are a significant percentage of ''above average'' customers (50%) that make few long distance calls (120 minutes) and a significant percentage of ''above average'' cellular customers (10%) that make no long distance calls. *See id.*, Stupka Aff., Attach. A. That reflects the reality that long distance calling represents a small fraction (an average of 10% according to the RBOCs) of total cellular usage.

[69] *See Furnishing of Customer Promises Equipment and Enhanced Services by AT&T*, 102 FCC 2d 655 (1985); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 FCC 2d 958 (1986), *recon.*, 2 FCC Rcd 3072 (1987), *recon.*, 3 FCC Rcd 1150 (1988), *recon.*, 4 FCC Rcd. 5927 (1989), *vacated in part on other grounds*, *California* v. *FCC*, 905 F.2d 1217 (9th Cir. 1990). *See also FCC Order*, ¶ 83. Further, just as the FCC recognized that customers should control uses of information, the FCC stated that ''[i]f a cellular carrier could prove that AT&T/McCaw misappropriated [customer information] or misused such information entrusted to it, that carrier would have a remedy through the Commission complaint process or the courts.'' *FCC Order*, ¶ 83.

[70] Further, because it is the Department's view that some of the information in question could not directly be exchanged between competing cellular carriers without facilitating collusion between carriers (*see United States* v. *Container Corporation of America*, 393 U.S. 333 (1969)), the Proposed Decree provides that AT&T cannot pass such information on to McCaw even if the RBOCs consent.

[71] *See, e.g.*, *United States* v. *Western Elec. Co.*, 627 F. Supp. 1090, 1098–1104 (D.D.C. 1986) (shared tenant services); *United States* v. *Western Elec. Co.*, 592 F. Supp. 846, 868 (D.D.C. 1984) (BellSouth NASA waiver).

rejected the same arguments that these RBOCs here press in its order that approved the AT&T-McCaw merger. The FCC held that ''the rationale for the MFJ's limitations on the BOCs—the existence of a long-entrenched exchange service bottleneck encompassing virtually every home and business in the BOCs' territories—does not apply to AT&T/McCaw,'' that there is no competitive or other public interest reason for imposing additional restrictions on AT&T/McCaw, and that neither the antitrust laws nor the Communications Act permits the creation of ''parity for parity's sake.'' [72]

Nor is there any merit to the four RBOCs' startling claim that the Proposed Decree is ''contingent'' on removal of the MFJ's interexchange services restriction on RBOC cellular systems and the adoption of ''parity.'' BellSouth, p. 4; *see* SBC, p. 19. The proposed Decree says no such thing. The reason is that while the Department has urged (erroneously in AT&T's view) this modification of the MFJ under certain conditions, the Department recognized that AT&T opposed this proposal and that it would not be granted unless the Court concluded the proposal satisfied the standard set forth in Section VIII(C) of the MFJ. Further AT&T is a party to the Proposed Decree, and it would not have agreed to it if it were conditioned on modification of the MFJ.

Indeed, in arguing otherwise, the four RBOCs rely on the Department's assertion in the Competitive Impact Statement that the equal access provisions in the Proposed Decree are ''modeled on'' the MFJ and ''*largely* identical to the conditions recommneded by the United States for provision of interexchange cellular service by the Bell Companies.'' Competitive Impact Statement, p. 15 (emphasis added). However, as the Department has made explicit, the two sets of conditions are identical only insofar as each is designed to prevent cellular carriers from using market power in cellular services to deny cellular customers the ability to select their interexchange services provider,[73] and it is also the Department's view that the RBOCs' control of landline exchange monopolies require additional restrictions that apply to the RBOCs alone.[74]

The foregoing facts dispose of all the RBOCs' claims of lack of ''parity.'' However, many of the RBOCs' specific claims rest on misunderstandings of the AT&T-McCaw Decree, and each of them is otherwise meritless.

Interexchange Traffic Routing. First, three of the RBOCs (SBC and Bell Atlantic/NYNEX) object that the Proposed AT&AT-McCaw Decree allows McCaw's switches to perform ''interexchange traffic routing,'' [75] but the Department has not proposed that the RBOCs be able to perform this function. This claim is baseless.

Preliminarily, it is not the case that the Proposed Decree unqualifiedly allows interexchange traffic routing by McCaw. To the contrary, it allows McCaw to perform this function for AT&T only if McCaw is able to offer to do so for other interexchange carriers on the same terms and conditions. Proposed Decree, § IV(D)(1). Further, while McCaw believes that it will perform these routing functions during the life of the Decree, it has no plans to engage in interexchange traffic routing in the immediate future or to do so on the scale hypothesized by the RBOCs. *Compare* SBC, pp. 20–21.

Further, the difference in treatment between AT&T-McCaw and the RBOCs is abundantly justified. Because McCaw does not own the bottleneck landline access facilities that connect its MTSOs to interexchange carrier networks, there is no risk that McCaw's provision of interexchange traffic routing functions could lead to discrimination against competing interexchange carriers in access to essential facilities or to cross-subsidization of competitive services with monopoly revenues. By contrast, if an RBOC cellular system were authorized to provide functions from its MTSOs, its control of local bottlenecks would enable it to discriminate at will in pricing and provisioning monopoly exchange facilities. In particular, because its MTSO would then become part of its interexchange network, it could then preferentially provide itself bottleneck facilities on the ground that those facilities are not performing access functions, but are part of its ''competitive'' long distance business.

In this regard, it is revealing that the only way the RBOCs can claim that they should be allowed to provide these interexchange traffic routing functions is by claiming, once again, that interexchange carriers are not dependent on RBOCs for the access facilities connecting interexchange carrier points of presence (''POPs'') to MTSOs, but can obtain these access facilities from their parties. *See* SBC, pp. 21–22. However, that assertion is false—as AT&T and MCI have elsewhere demonstrated.[76]

Sales Agency. The RBOCs next object that, whereas the Department's generic wireless proposal requires RBOCs to have separate sales forces for cellular services, the Proposed AT&T-McCaw Decree (the RBOCs claim) allows AT&T's long distance arm ''to perform all marketing of local and long-distance cellular services for McCaw.'' SBC, p. 25; *see* Bell Atlantic/NYNEX, p. 13. However, that claim is based on a misreading of the Proposed Decree.

The Proposed Decree requires that McCaw be maintained as a separate corporation that is responsible for ''the operation * * * and the marketing'' of its wireless systems, that McCaw cannot ''delegate substantial responsibility for the performance of [these functions] to AT&T,'' and that McCaw cannot provide or market long distance service after a system converts to equal access. § III(C). Because the ability of AT&T to use its long distance and other personnel to market cellular service and to engage in joint marketing of local cellular and long distance services through these other channels is a major procompetitive efficiency of the merger (*see* pp. 51–58, *supra*), the Proposed Decree also provides that AT&T is allowed to act as McCaw's ''agent'' in marketing cellular service and in jointly marketing long distance and cellular service. However, this ''agency'' provision does not mean AT&T can perform all marketing for McCaw. The Decree requires McCaw to retain its own independent retail marketing outlets and sales channels.

Customer Location Databases. Bell Atlantic/NYNEX further claim that the Proposed Decree is unlike the MFJ in that it purportedly does not require McCaw to provide interexchange carriers with nondiscriminatory access to McCaw's customer location databases. However, this claim, too, rests on a misunderstanding of the Proposed Decree. Although the Proposed Decree's definition of MTSO may not include customer location databases (*compare* Bell Atlantic/NYNEX, p. 3 *with* Proposed Decree, § II(W)), the Proposed Decree requires that all interexchange carriers obtain ''customer location information for use

[72] *FCC Order,* ¶ 32 (footnote omitted).

[73] *See Competitive Impact Statement,* pp. 14, 16–17; DOJ Generic Wireless Memorandum, pp. 19–21.

[74] DOJ Generic Wireless Memorandum, pp. 40–42.

[75] *I.e.,* sorting long distance calls by destination and routing them to different circuits depending on the destination of the call.

[76] *See United States* v. *Western Elec. Co.,* Civ. No. 82–0192 (D.D.C.), AT&T's Reply to the Response of the Bell Companies to AT&T's Supplemental Comments on the Motion for a Generic ''Wireless'' Modification of the Decree's Interexchange Services Restriction, pp. 3–5 (Nov. 23, 1994); *id.,* Transcript of Oral Argument Concerning Generic Wireless Waiver Request, pp. 49–54 (Dec. 14, 1994).

in routing calls'' in the ''same manner'' and under the same ''terms and conditions'' as does AT&T. Proposed Decree, § IV(D)(1).

Boundaries After Equal Access Conversions. The Proposed Decree provides that after individual McCaw cellular systems convert to equal access, each system generally will be limited to the same local calling areas as apply to RBOCs under the MFJ. However, several RBOCs object that McCaw would be authorized to provide cellular service in 19 multiLATA areas in which RBOCs do not currently have MFJ waivers to provide cellular service. BellSouth, pp. 10–11; Bell Atlantic/NYNEX, pp. 13–14. The Decree contains this exception because McCaw has been licensed to serve the MSAs that comprise these areas and McCaw has established a single integrated cellular system that serves MSAs in the remote LATAs through one or more central switches that are located in a different LATA.

But there is no lack of ''parity'' in these areas, and no possible claim that this feature of the Proposed Decree is virtually certain to impede competition. Quite apart from the fact that there are many areas in which the RBOCs' cellular systems serve larger areas than do the competing McCaw systems, the overriding fact is the RBOCs are not licensed to serve the same MSAs that comprise any of these 19 multiLATA local cellular calling areas or otherwise have had no occasion to seek a comparable waiver under the MFJ for these areas. Further, each of these 19 areas is comparable in size and other characteristics to areas in which RBOCs have received MFJ waivers in the past, and the criteria that Judge Greene has applied under the MFJ would, in AT&T's view, support a waiver in each such area. For this reason, AT&T would not oppose an RBOC request for an identical MFJ waiver if an RBOC were to have reason to seek one. Finally, AT&T has also stipulated that the Justice Department can challenge any of these calling areas if it hereafter determines that they are too large.

Decree Duration. Next, BellSouth objects that whereas the MFJ has no fixed termination date, the Proposed Decree provides that it expires after ten years. However, these differences merely reflect the reality that no one can predict when the conditions that led to the MFJ—the RBOCs' control over bottleneck local exchange monopolies—will end. By contrast, the Proposed AT&T-McCaw Decree is premised on the alleged ''lock in'' of certain cellular carriers to AT&T equipment and the alleged absence of effective competition with today's cellular carriers. Given the rapid rate at which cellular equipment becomes obsolete and the imminent licensing of PCS systems, it can confidently be predicted that the conditions that gave rise to the Proposed Decree cannot last another ten years (and will almost certainly disappear much earlier). Further, because there is no statute of limitations on challenges to mergers, the Department will have the authority at the end of ten years to seek other injunctive relief against the merger in the unlikely event that conditions could then so warrant.

The Proposed Decree's Inapplicability to PCS. Similarly, BellSouth complains that the MFJ restrictions apply to all RBOC services (including PCS), but that the Proposed Decree applies only to ''McCaw Cellular Systems.'' But here, too, these differences merely reflect the different competitive reasons for the two decrees. The restrictions on AT&T-McCaw are predicated on the alleged lack of effective competition among today's cellular systems, and if and when PCS systems are implemented, they will compete with today's entrenched cellular systems and provide alternatives to them. By contrast, the MFJ restrictions on RBOCs rest on the RBOCs' control over bottleneck landline monopolies that connect interexchange carriers to end user customers, and just as cellular systems have not created alternatives to landline exchanges to date, there is no basis for predicting that PCS systems will do so. However, if they do, the RBOCs will be entitled to removal of the MFJ's restrictions.

Purportedly Different Modification Standards. BellSouth and Bell Atlantic/NYNEX also complain that the two decrees have different modification provisions. In particular, they state that the Proposed Decree allows McCaw to move for modifications that parallel any waivers that the RBOCs obtain under the MFJ by making a competitive and public interest showing (§ X), that McCaw can obtain rights to provide access to interexchange carriers at centralized points upon a similar showing (§ IV(G)), but that there is ''no apparent way for McCaw's relief to inure to the benefit of its competing Bell cellular company'' (Bell Atlantic/NYNEX, p. 15). However, just as AT&T-McCaw can seek modifications of the Proposed Decree that are parallel to any MFJ waivers, the RBOCs are free to seek modifications of the MFJ that parallel any modifications or waivers that are obtained under the AT&T-McCaw Decree. Whether modifications or waivers of either decree are granted depends on whether the necessary competitive and public interest showings are made.

BellSouth's Challenge to Definition of ''Control''. Finally, BellSouth challenges the Proposed Decree's definition of ''control,'' apparently because BellSouth fears the provisions of the Proposed Decree that govern ''McCaw Cellular Systems'' could be held applicable to the Los Angeles and Houston systems in which BellSouth and McCaw have what could loosely be described as ''joint control.'' However, this ''joint control'' was held sufficient to make these cellular systems ''BOCs'' under the MFJ, and it would be neither anomalous nor inappropriate if the systems were held to be ''McCaw Cellular Systems'' under the Proposed Decree. Further, the assertions that BellSouth and McCaw each have only ''negative'' control in these systems is not accurate. McCaw has the ability to cause management changes in these systems (over BellSouth's objection) if it can persuade the independent tie-breaking director to side with McCaw, and BellSouth has the same ability to impose changes over McCaw's objection if the independent director votes with BellSouth.

C. The Ad Hoc IXCs Are Challenging Procompetitive Features of the Merger

Finally, comments have been filed by the Ad Hoc IXCs, a group of switchless interexchange resellers who own and operate no facilities, but make money solely through arbitrage. They have used their comments here—as they did in prior filings before the FCC and before Judge Greene in the Section I(D) waiver proceeding—to repeat allegations that AT&T has violated regulatory or contractual commitments in its dealings with these resellers. AT&T believes that these allegations will be rejected in the pending cases and appeals that the Ad Hoc resellers cite, but the short answer to them is that they do not implicate the antitrust laws,[77] much less issues raised in the Department.

Stripped of its rhetoric, moreover, the comments of the Ad Hoc IXCs have only a single substantive objection to the Proposed Decree: that it does not prohibit the combined AT&T-McCaw from offering alternatives to today's landline exchange monopolies if and when it becomes economically and technologically possible for cellular systems to do so. However, as Judge Greene and the Department have previously concluded, that would be a procompetitive development and it would be antithetical to the antitrust laws to prevent AT&T from doing so.

[77] For example, in the case cited (*Central Office Telephone, Inc.* v. *AT&T*, No. 91–1236 (D. Or.)), the District Court dismissed the plaintiff's antitrust claims and allowed only breach of contract and tort claims.

Similarly, as the FCC and the New York PSC have found, the merger means that these procompetitive developments are more likely.

Conclusion

For the reasons stated, the Proposed Decree is in the public interest within the meaning of the Tunney Act.

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APPENDIX—EXTENT OF COMPETITION BETWEEN MCCAW AND INDIVIDUAL LECS

Majority owner*	Total number of majority-owned systems	Number of majority-owned systems that compete with McCaw majority-owned systems	Total number of AT&T-equipped majority-owned systems	Number of systems with AT&T equipment that compete with McCaw
Ameritech	24	0	22	0
Bell Atlantic	28	2	10	1
BellSouth	43	6	9	2
General Cellular Corporation	8	0	1	0
GTE (Contel & Mobilnet)	76	13	61	12
Independent Cellular	7	4	7	4
NYNEX	13	1	12	1
Pacific Northwest Cellular	5	0	5	0
PacTel Corporation	5	0	1	0
Southern New England Telecommunications	5	0	5	0
Southwestern Bell (SBMS)	30	4	13	3
United States Cellular	35	6	2	0
U S West	25	16	4	2
Vanguard	16	0	1	0
Total	320	52	153	25

*Majority ownership consists of a greater than 50% interest.

Comments of Bell Atlantic Corporation and NYNEX Corporation on Proposed Final Judgment in United States v. AT&T Corp. and McCaw Cellular Communications, Inc.

Bell Atlantic Corporation and NYNEX Corporation submit these comments in response to the Department of Justice's public notice and invitation for comments on the Proposed Final Judgment in *United States* v. *AT&T Corp. and McCaw Cellular Communications, Inc.*, Civil Action No. 94–01555 (HHG). 59 Fed. Reg. 44158 (Aug. 26, 1994).

Bell Atlantic and NYNEX have filed a private action pursuant to Section 7 of the Clayton Act challenging the lawfulness of the AT&T-McCaw merger. *Bell Atlantic Corp. et al.* v. *AT&T Corp. et al.*, No. CV 92–3682 (ERK) (E.D.N.Y.). Although we do not propose to present in this Tunney Act proceeding all the claims that we have raised in the private action, we summarize briefly below some of our concerns about the effectiveness of the proposed decree, concerns that we intend to develop fully in the upcoming trial in New York. Moreover, because the extensive pretrial and trial record of that case may inform the Department's and the Court's consideration of the proposed decree, AT&T should be directed to make available to all interested parties in this proceeding the full record of the New York case, including the trial proceedings that are scheduled to begin on November 1, 1994.

I. The Proposed Decree Does Not Sufficiently Rectify the Antitrust Violation Caused by the AT&T-McCaw Merger

Bell Atlantic and NYNEX believe that the proposed decree is fundamentally inadequate to protect against the anticompetitive effects of the AT&T-McCaw merger alleged in the Department's Complaint and summarized in the Competitive Impact Statement.

A. The Vertical Effects

The antitrust violation that results from combining AT&T's cellular equipment business with McCaw's cellular service business can be cured only by a *structural* remedy—one that either eliminates AT&T's equipment lock-in power or uncouples that power from the economic incentive to exploit it. An effective structural remedy would require the combined AT&T-McCaw (1) to divest McCaw (thereby removing AT&T's incentive to suppress competition in local cellular service markets); or (2) to divest AT&T's cellular equipment business (thereby removing the source of AT&T's lock-in power over its equipment customers); or (3) as one of several components of effective injunctive relief, to build switches and other cellular infrastructure equipment pursuant to publicly available standards, and to license the use of any necessary intellectual property, so that third parties can manufacture and sell equipment fully compatibly with AT&T equipment (thereby permitting meaningful competition in equipment markets and loosening AT&T's lock-in power).

Divestiture is the most straightforward structural solution. While AT&T's equipment customers would remain locked-in to their supplier, divestiture would ensure that their supplier does not also become their direct competitor. By keeping the power and the incentive to abuse it in separate hands, divestiture would best protect against the

anticompetitive harms threatened by the vertical aspects of the AT&T-McCaw merger.

Opening equipment interfaces would attempt to attack AT&T's lock-in power at its source. If effectively implemented, that solution might enable other manufacturers to build equipment that could operate compatibly with AT&T switches, thereby weakening AT&T-McCaw's power to restrain competition in cellular service markets. Evidence to be presented in the New York private action will demonstrate that AT&T has developed and successfully pursued a covert policy, revealed in its own documents, of thwarting industry-wide open interfaces as part of a strategy to deter competition. The evidence will also show that competing manufacturers of cellular network equipment—including Motorola, one of AT&T's largest equipment competitors, and ADC Kentrox, a small but ambitious new entrant—have a strong interest in uniform and open industry standards and are prepared to build to such standards in direct competition with AT&T as soon as the currently proprietary interfaces are opened up.[1]

The Proposed Final Judgment does none of these things. Instead of devising an effective structural solution, the decree attempts to address the merger's serious anticompetitive problems exclusively through *conduct* restrictions. But the proposed decree's general provisions—prohibiting discrimination and requiring the merged entity to operate under the same pricing and other business practices in effect prior to the merger—do not address many of the key competitive concerns and, as to those that are addressed, are far too vague to be enforceable at any reasonable cost or to deter potentially injurious anticompetitive conduct.

Our evidence in the private action will demonstrate that AT&T-McCaw can inflict anticompetitive injury without engaging in detectable discrimination or otherwise violating the provisions of the proposed decree. Among the problems are the following:

1. AT&T can raise equipment prices in a disparate fashion without an appearance of discrimination. AT&T does not publish fixed prices for its equipment; rather, its prices vary widely depending on a range of supposedly customized hardware and software features and capacities. AT&T will find it all too easy to justify higher prices to McCaw's competitors on the theory that they have ''unique'' equipment needs. Since the decree does not require AT&T to make public the terms of its equipment contracts—and since the contracts themselves forbid its customers from doing so—McCaw's competitors will have no basis for determining whether they are being discriminated against unreasonably. Moreover, AT&T can unfairly advantage McCaw by raising prices across the board to all its equipment customers. Because McCaw currently uses predominantly non-AT&T equipment, an increase in AT&T equipment prices will not hurt McCaw as much as its competitors. Any incidental impact on McCaw of an AT&T price increase is, in any event, merely an intracorporate accounting entry having no effect on the combined AT&T-McCaw's financial position. Only intrusive cost-based equipment price controls could effectively protect competitors and subscribers from unreasonable pricing by AT&T.

2. AT&T can restrict or delay its equipment customers' access to important new features or technologies without detection. Because its customers lack detailed information concerning the quality and quantity of resources that AT&T has devoted to meeting their equipment and software needs, they cannot hope to demonstrate that AT&T's refusal to supply equipment or software on a timely basis results from discrimination.

3. The decree nowhere prohibits AT&T from discriminating in favor of its non-McCaw allies in cellular service markets. The combined AT&T-McCaw plans to establish nationwide cellular alliances with other operators in markets not served by McCaw. In each such market, AT&T will be free under the decree to discriminate in pricing and service to favor the competitors of its locked-in customers.

4. The decree's terms cannot legislate the kind of cooperative behavior that lies within AT&T's broad commercial discretion. Going the extra mile is not an enforceable standard of conduct, and yet it is often critical to an equipment customer's competitive success. AT&T's economic interests no longer justify taking the discretionary extra step to enhance the competitive position of McCaw's rivals, and nothing in the decree does or can require it to do so.

5. Although the proposed decree prohibits AT&T from disclosing the confidential information of its equipment customers directly to McCaw, Proposed Decree § V(A)(1)(a), it expressly *allows* senior officers of AT&T's manufacturing unit—the very employees with authority to allocate developmental resources and personnel—to receive precisely such confidential information, and it nowhere forbids them from using that information for the competitive benefit of McCaw. *Id.* § V(A)(1)(c). Moreover, even assuming that an effective Chinese Wall can be erected between AT&T and McCaw, a remedy of that sort can aspire only to prevent improper *dissemination* of information, not *misuse* of information in the hands of AT&T manufacturing employees who already have it. No regulation can effectively bar AT&T's employees from considering such information in promoting the overall economic interests of their own employer.

6. The proposed decree specifically permits AT&T to perform ''proprietary development'' for McCaw (§§ II(Y), V(A)(4)(b), V(C)(3)), and it affirmatively *prohibits* AT&T from disclosing to unaffiliated cellular operators the nature of any such proprietary work for McCaw (*id.* § V(A)(1)(b)). These provisions will enable AT&T to reserve exclusively for McCaw the most promising operating improvements and new features, thereby placing other operators at a critical technological disadvantage in local cellular service markets.

B. The Horizontal Effects

As the Department correctly observed in the Competitive Impact Statement, the AT&T-McCaw merger will ''foreclose competition between the two largest providers of interexchange service in the highly concentrated markets in which McCaw currently provides interexchange service to its cellular customers.'' 59 Fed. Reg. at 44169. Before the merger, McCaw competed primarily by purchasing long-distance service in bulk at wholesale from a facilities-based carrier—predominantly AT&T—and reselling to its customers at a higher retail price. Apart from its role as a major reseller, however, McCaw also had been developing its own facilities-based long distance network in further competition with AT&T. In fact, before AT&T arrived as a suitor, McCaw had proclaimed its intention to construct a nationwide cellular network, consisting of both

[1] If the Department were prepared to consider a modification of the proposed decree designed to open equipment interfaces and alleviate AT&T's lock-in power, it should incorporate provisions specifically requiring AT&T to (1) support in industry standards bodies, and participate actively in the development of, industry-wide open equipment interfaces that would allow non-AT&T cellular network equipment to perform as well as equipment connected through AT&T's proprietary interfaces; (2) to publish and continue to support its proprietary interfaces; (3) to license on reasonable terms the patents and other intellectual property that a third party would need to build equipment fully compatible with AT&T equipment; and (4) to offer its customers equipment built either to industry-wide or AT&T open interfaces by a reasonable date certain.

owned and leased facilities, that would allow it to serve the whole country independent of other carriers. McCaw's long distance network was already significantly completed at the state and regional levels, with large regional clusters in some of the country's most active markets, particularly the Pacific Northwest and Florida. Its growth strategy mirrored the strategy that MCI and Sprint used to mount their challenge to AT&T.

The public record in the New York private action reveals that before the merger AT&T saw McCaw as a potentially powerful long distance competitor. For example, a May 1991 internal memorandum warned that McCaw's plans for ''a nation wide network to link cellular systems * * * should strike terror into the heart of AT&T communications. What McCaw is planning is a separate national network that could as time goes by * * * siphon traffic from our long distance network.'' Similarly, an AT&T strategic study, also in May 1991, concluded that non-RBOC cellular providers like McCaw ''have linked their own switches to bypass interexchange carriers and provide interlata service'' and that such providers ''could threaten AT&T's core long distance business.

AT&T's answer to this looming competitive threat was to eliminate it. The merger utterly destroys McCaw as AT&T's most significant cellular long distance competitor, enhancing AT&T's existing market power and intensifying concentration in markets already exceptionally concentrated. There can be no doubt that the merger substantially lessens competition in violation of Section 7 of the Clayton Act. It also nips in the bud McCaw's ambitious plan to establish a nationwide long distance network of its own in further competition with AT&T.

The antitrust violation that results from merging AT&T's and McCaw's directly competing cellular long-distance businesses is not cured by the proposed decree. On the contrary, a key provision of the decree actually *codifies* the violation. It specifically *requires* McCaw, ''on a phased-in basis and no later than 21 months following the commencement of this action, [to] cease providing Interexchange Services.'' Proposed Decree § IV(B).

The Department may believe that its support of generic wireless relief will mitigate the merger's anticompetitive horizontal effects by allowing the entry of seven additional cellular long distance competitors. But AT&T seeks to frustrate even that objective by opposing the requested relief and subjecting it to a more rigorous standard of review. AT&T should be required, as a condition for approval of a decree that eliminates an important long distance competitor, to support, or at least not to oppose, additional entry to the extent supported by the Department of Justice.

The proposed decree's ''equal access'' provisions (Proposed Decree §§ IV(B)–(D)) do not make up for the loss of McCaw itself as an independent long distance provider. McCaw currently offers consumers in its service areas an important *additional* choice. In New York, for example, cellular subscribers can choose from among AT&T, MCI, or Sprint if they select NYNEX/Bell Atlantic as their local cellular provider. Alternatively, subscribers can choose McCaw for cellular long-distance service by selecting McCaw as their local cellular provider. Because a subscriber drawn to McCaw is a retail long distance customer lost to AT&T, MCI, or Sprint, McCaw's presence as a long distance competitor exerted downward competitive pressure on retail cellular long distance rates. McCaw's disappearance as a long distance provider will deprive consumers of a potentially attractive alternative source of supply and will tend to increase cellular long distance prices.

II. The Proposed Decree Does Not Prevent AT&T From Abusing Competitively Sensitive Information Acquired in Its Capacity as the Dominant Cellular Long Distance Carrier

Aside from the proposed decree's fundamental inadequacies, we urge the Department to address a glaring but unexplained omission that threatens serious anticompetitive harm. As developed by SBC Communications, Inc., in its separate comments in this proceeding, the decree unjustifiably allows AT&T to exploit, to the competitive disadvantage of Bell company cellular providers in McCaw markets, the highly sensitive customer information that AT&T acquires as the dominant provider of cellular long distance service to the Bell companies' local cellular customers. We agree with SBC's comments on this issue.

Because of MFJ requirements, AT&T has access to detailed information concerning the cellular telephone usage patterns of each Bell Atlantic and NYNEX customer that selects AT&T as its long distance carrier. Armed with that valuable information, and in the absence of any decree provisions to the contrary, AT&T can concentrate its marketing of McCaw services on our best cellular customers, effectively expropriating without charge one of our most valuable assets. We would never voluntarily turn over to our direct competitor our customer lists and usage information. It is simply indefensible to allow the combined AT&T-McCaw to target its local cellular service marketing at our best customers on the basis of information acquired solely in its capacity as the dominant cellular long distance carrier.

It is no answer to say that these are AT&T customers and that AT&T should be free to use its own customer information. These are *joint* customers. The only thing that AT&T provides is long distance service, but long distance usage is not the only information that AT&T would use to market McCaw's cellular service. The critical information is that these subscribers, *in addition* to being long distance customers of AT&T, are cellular customers of Bell Atlantic and NYNEX. Although we obviously cannot object to AT&T's use of information about our joint customers' long distance usage to market its long distance service, we can and do object to its opportunistic use of information about their cellular usage to market McCaw cellular service.

Allowing AT&T to exploit this information offers no public benefits. On the contrary, AT&T's ability to use our customer lists as a free-rider burdens competition in much the same way as patent infringement—one competitor's incentive to market its service aggressively will soon evaporate if another can gain the full advantage of those efforts without incurring any cost of its own. The proposed decree itself embraces that view. It specifically provides that McCaw shall provide customer lists to unaffiliated long distance carriers ''for use solely in connection with marketing their Interexchange Services.'' Proposed Decree § IV(C). The absence of a comparable restriction on AT&T's use of equivalent information about Bell company customers is an anomaly that should be corrected.

We accordingly endorse SBC's proposed addition of a new § IV(J).

III. The Proposed Decree Embodies Other Unexplained Inequities That Should be Eliminated

A. Interexchange Routing

As SBC persuasively explains, the proposed decree would allow AT&T-McCaw to engage in interexchange routing, even though Bell cellular companies are barred by the MFJ from providing such service and the Department has opposed giving Bell companies relief from that restriction in the generic wireless proceeding. We

agree with SBC's analysis of this unexplained disparity and with the proposed alternative solutions.

We note in addition that permitting this inequity to persist would give AT&T an additional incentive to behave anticompetitively. For example, it could create new wireless long distance offerings that depend on the provision by local wireless carriers of access services that include interexchange routing. McCaw would be able to offer the new long distance service to its cellular customers because it has authority to provide interexchange routing; Bell company customers, by contrast, would be excluded because the Bell cellular companies lack such authority and therefore cannot participate in the new service. The disparity should be eliminated to prevent the inevitable competitive distorations that will otherwise result.

B. Sales Forces

We agree with SBC that there is no justification for requiring Bell companies to establish redundant sales forces for local services and wireless long distance services, while imposing no similar inefficiencies on AT&T-McCaw. If such a condition is upheld in the generic wireless proceeding, a similar requirement should be added to the AT&T-McCaw decree.

C. Other Disparities That Warrant Correction

The proposed decree would create several additional inconsistencies between AT&T-McCaw and its Bell company competitors. Each is unexplained, and each should be eliminated to avoid unwarranted competitive dislocations.

1. Under the proposed decree, McCaw is expressly permitted to aggregate its Pittsburgh system with its properties in West Virginia to create a non-equal-access calling area. Proposed Decree § II(Q)(xix) (defining McCaw's Pittsburgh LATA to include the West Virginia MSAs). By contrast, Bell Atlantic whose Pittsburgh cellular system competes head-to-head with McCaw's, is barred from creating the same aggregated calling area. A disparity of this sort confers on McCaw an unwarranted, and presumably unintended, competitive advantage. It should be corrected, either by extending the same privilege to Bell Atlantic or by eliminating § II(Q)(xix) from the proposed decree.

2. Under the proposed decree, McCaw automatically benefits from any enlargements of the Bell company LATAs, which apply to McCaw ''as if'' it were a Bell operating company. Proposed Decree § II(Q). But the reverse is not true. The 19 geographic waivers provided to McCaw in § II(Q) do not extend to the Bell companies. If there is a cogent reason for this one-way ratchet, it is not set forth in the Competitive Impact Statement. To avoid causing needless competitive imbalances, similar waivers should be granted to the competing Bell wireless companies. At a minimum, the Department and AT&T-McCaw should state their commitment on the record of this proceeding to supporting parallel geographic waivers for the Bell companies.

3. The proposed decree does not require McCaw to open up its customer location databases. It defines McCaw's ''MTSO'' as the Mobile Telephone Switching Office ''and the equipment used therein.'' Proposed Decree § II(W). The Department's proposed wireless waiver, by contrast, defines a Bell company MTSO to include customer location databases, ''wherever located,'' that facilitate call completion services (§ VIII(L)(1)(a)), and it provides that ''MTSO functions used to provide this service shall be available to other carriers, including interexchange carriers'' (§ VIII(L)(2)(e)). This disparity likewise is not explained. It too should be corrected, either by conforming the wireless waiver to the AT&T-McCaw decree or by conforming the AT&T-McCaw decree to the wireless waiver. There is no reason for differing treatment of direct wireless competitors.

4. Under the proposed decree, if there is insufficient demand for access to a McCaw cellular system within particular LATAs, McCaw may request from the Department a certification that would allow it to provide access to interexchange carriers at ''centralized points'' instead of providing equal access handoffs in each LATA. Proposed Decree § IV(G). No similar relief is available to Bell companies, and there is no apparent way for McCaw's relief to inur to the benefit of its competing Bell cellular company. The differing treatment is unjustified and unexplained. It should be eliminated.

Respectfully submitted,

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October 25, 1994.

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VIA HAND DELIVERY

October 25, 1994

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Assistant Chief
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United States Department of Justice
555 Fourth Street, N.W.
Washington, D.C. 20001

Re: *United States v. AT&T Corp.*, Civ. No. 94-01555 (D.D.C. filed July 15, 1994)

Dear Mr. Liebeskind:

Enclosed are an original and five copies of the Comments of BellSouth Corporation on Proposed Final Judgment which we hereby submit pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h).

Very truly yours,

Michael P. Goggin

Enclosures

cc: Walter H. Alford, Esq.
John F. Beasley, Esq.
William B. Barfield, Esq.

BILLING CODE 4410–01–C

In the United States District Court for the District of Columbia

In the matter of: United States of America, Plaintiff, v. Western Electric Co., Inc., *et al.*, Defendants. Civil Action No. 82–0192 (HHG).

Comments of BellSouth Corporation on Proposed Final Judgment

Introduction

BellSouth Corporation (''BellSouth'') submits these comments on the proposed Final Judgment, United States v. AT&T Corp., Civ. No. 94–01555 (D.D.C. filed July 15, 1994) (''Proposed Final Judgment''), pursuant to the Tunney Act, 15 U.S.C. § 16(b)–(h). BellSouth believes that the Court cannot fully evaluate the competitive effects of the merger between AT&T Corporation (''AT&T'') and McCaw Cellular Communications, Inc. (''McCaw'') without first considering the motions of BellSouth and the other Bell Operating Companies (''BOCs'') for generic wireless relief.[1] BellSouth further believes that the Court should decide that it is inappropriate to extend equal access obligations and interexchange restrictions to the BOCs' wireless services and, therefore, to AT&T/McCaw's wireless services. If the Court decides otherwise, it should, at a minimum, ensure that the BOCs and AT&T/McCaw are bound by identical restrictions and obligations. Finally, BellSouth believes that the term ''McCaw Cellular Systems'' should be clarified to specify that it does not include cellular franchises in which McCaw does not possess affirmative control.

Comments

1. The Court Should Decide the BOCs' Motion for Generic Wireless Relief Before Deciding Whether the Proposed Final Judgment is in the Public Interest

The Tunney Act requires the Court to ''determine [whether] the entry of [the proposed final] judgment is in the public interest.'' 15 U.S.C. § 16(e). Central to this inquiry is the likely competitive impact of the Proposed Final Judgment. *Id*. In BellSouth's view, the Court cannot fully evaluate the competitive impact of this Proposed Final Judgment without first considering the BOCs' motions for generic wireless relief. Only then will the Court have a clear view of the competitive landscape. In particular, the Court cannot determine whether the Proposed Final Judgment adequately protects competition without first deciding whether the wireless operations of the BOCs are subject to (and should remain subject to) the interexchange prohibition and equal access restrictions of Section II of the MFJ.

The local calling area restrictions and the equal access obligations of the Proposed Final Judgment are premised on the assumption that similar restrictions will apply to the BOCs' wireless franchises. According to the United States, ''[t]he equal access arrangements prescribed by Section IV are modeled on the analogous provisions of the Modification of Final Judgment * * * [and] are [purportedly] largely identical to the conditions recommended by the United States for provision of interexchange cellular service by the Bell Companies.'' Competitive Impact Statement at 15, United States of America v. AT&T Corp., (D.D.C. filed Aug. 5, 1994) (''CIS''). Indeed, the United States previously has acknowledged that ''the BOCs' generic wireless waiver request * * * raises a number of issues in common with the AT&T-McCaw transaction.'' Memorandum of the United States in Support of AT&T's Motion for a Waiver of Section I(D) of the Decree at 3, United States v. Western Elec. Co., Civ. No. 82–0192 (D.D.C. filed July 15, 1994). The United States considered the BOCs' motions for generic wireless relief together with the Proposed Final Judgment in order to reach a consistent result and encouraged the Court to decide the two issues consistently. Transcript of Hearing, July 21, 1994, at 50–51, United States v. Western Elec. Co., Civ. No. 82–0192 (D.D.C. filed July 21, 1994).

The Proposed Final Judgment reflects the United States' view that the local calling area restrictions and the equal access obligations imposed on AT&T are contingent upon similar restrictions and obligations being applied to the BOCs' wireless services. Section X provides as follows:

> If BOC Wireless Systems are relieved in whole or in part of any or all of the comparable equal access or nondiscrimination obligations of the MFJ as a result of legislation, judicial orders, or agency orders that vacate, modify, supersede, or interpret the provisions of the MFJ, the provisions of Article IV of this final judgment shall be modified or vacated to provide the same relief to AT&T or McCaw upon their showing that competitive conditions do not require a different obligation for AT&T and McCaw and that this modification is equitable and in the public interest.

Proposed Final Judgment § X. Moreover, although the Department of Justice (the ''Department'') and AT&T have agreed to permit AT&T/McCaw to offer ''Local Cellular Service'' in many areas larger than those authorized for the BOCs, the definition of ''Local Cellular Service Areas'' will automatically change to conform to the size of any areas in which the BOCs are permitted ''to provide cellular exchange services without any equal access obligation under the provisions of the MFJ.'' Proposed Final Judgment § 11(Q).

The appropriateness and scope of the BOCs' local calling area restrictions and equal access obligations are now squarely before the Court. All the BOCs have filed motions for generic wireless relief. BellSouth has asked the Court to declare that the equal access obligations and interexchange restrictions of the MFJ do not apply to wireless services; BellSouth and Southwestern Bell have asked the Court to waive those equal access obligations and interexchange restrictions to the extent they apply to wireless services; and all of the BOCs have requested narrower wireless relief. Given that the local calling area restrictions and equal access obligations of the Proposed Final Judgment are contingent upon the MFJ's similar restrictions, the Court should examine the MFJ's restrictions before examining the restrictions of the Proposed Final Judgment. The BOCs' motions some of which were first filed with the Department in 1991, are fully briefed and ripe for decision. Now that the AT&T/McCaw merger has been completed, there is no conceivable justification for considering the Proposed Final Judgment before deciding the BOCs' long pending motions.

Indeed, it is difficult to understand how the Court could appropriately review the Proposed Final Judgment without first considering the BOCs' generic wireless waiver motions. The Court, in essence, is reviewing the discretion of the Attorney General; ''its task [is] to determine whether the Department of Justice's explanations [are] 'reasonable under the circumstances.'' ' United States v. Western Elec. Co., 993 F.2d 1572, 1577 (D.C. Cir. 1993). The Department, however, found it necessary to review the merger and the BOCs' generic wireless waiver motions together to reach a consistent result; and its

[1] BellSouth has filed a motion for an order declaring that the equal access and interexchange restrictions of Section II of the Decree entered in United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 226–34 (D.D.C. 1982), aff'd mem. sub nom., Maryland v. United States, 460 U.S. 1001 (1983) (''MFJ''), do not apply to the BOCs' wireless facilities, or, in the alternative, for a waiver of those restrictions. Southwestern Bell also has sought a waiver of Section II's restrictions insofar as they may apply to the BOCs' wireless facilities. All of the BOCs have joined in a motion for narrower wireless relief. These motions re fully briefed and ripe for decision.

position on the Proposed Final Judgment assumes that the Court will order the relief the United States has proposed in response to the BOCs' generic wireless waiver motions. The proper scope of generic wireless relief for the BOCs is for the Court to decide, however, not for the Department of Justice. Accordingly, to evaluate whether the Department's explanations of its support for the Proposed Final Judgment are reasonable, the Court must at least ascertain whether it agrees with the wireless relief the Department has supported for the BOCs.

Moreover, this is the first time the Court has had to address squarely the question of whether it is the public interest to impose equal access in wireless markets. The Department maintains that the MFJ requires it, and the BOCs have always offered it, but the Court has never squarely held that the MFJ requires equal access in wireless markets. See BellSouth Reply at 3–8. More important, the Court has never decided whether the extension of equal access to wireless markets is in the public interest. Wireless services were not at issue in the MFJ case. Compare Complaint ¶ 29C, United States v. AT&T, No. 74–1698, with Plaintiff's Third Statement of Contentions and Proof (Jan. 10, 1980). Thus, in the Tunney Act proceedings in connection with the approval of the MFJ, the Court did not consider whether the public interest required the application of equal access to wireless facilities. In view of the Department's assumptions regarding the application of equal access to the BOCs' wireless facilities in its explanation of the Proposed Final Judgment, the Court should first decide the BOCs' motions for generic wireless relief and then determine whether the Department's position on the merger is reasonable in light of the relief ordered by the Court on the generic wireless waiver motions.

II. The Court Should not Impose an Equal Access Paradigm on the Wireless Market

The Proposed Final Judgment is premised on the notion that AT&T/McCaw and BOCs' cellular franchises should be governed by similar rules. While BellSouth believes that the Proposed Final Judgment would not achieve such a result, see infra pp. 10–12, it agrees with the notion that a single paradigm should govern wireless markets: there should not be one set of rules for BOCs and another for non-BOCs. BellSouth, however, disagrees with the proposition that wireless markets should be divided into limited local calling areas with each local provider obligated to provide equal access to the entrenched interexchange providers.

The Department has taken the view that the equal access obligations of the BOCs under the MFJ should apply to their wireless operations. The Proposed Final Judgment would impose equal access on McCaw's cellular systems as well. As a result of the Department's regulatory initiatives under the MFJ and in the Proposed Final Judgment, a substantial portion of cellular subscribers would be forced to buy wireless services in separate ''local'' and ''long distance'' components. Unconstrained competitors would have little incentive not to charge their own subscribers a separate fee for the ''long distance'' component of their service because AT&T/McCaw and the BOCs would not be permitted to sell integrated service. As a result, customers would pay two per-minute charges on all but the shortest distance wireless calls. Thus, by adopting artificially narrow market definitions at the outset and crafting decree restrictions to fit them, the Department would create regulatory boundaries to constrain the market to fit its artificial definition.

Such a vertical division of wireless markets is unjustified. As AT&T's own consultants have noted, the local/long distance division is an artificial regulatory construct. Excerpt from Michael E. Porter, ''Competition in the Long Distance Telecommunications Market: An Industry Structure Analysis'' at 7 (Oct. 1987) (attached as Exhibit 13 to Affidavit of Donald G. Kempf, Jr., Bell Atlantic Corp. v. AT&T Corp., Civ. No. 94–3682 (E.D.N.Y. filed Sept. 8, 1994)). The equal access requirements of the Federal Communications Commission (the ''FCC'') and the Decree were designed to permit the development of a competitive landline telephone system to the extent possible. Competition in local telephone service was not thought to be possible because it was thought to be a natural monopoly and was a legal monopoly by state law in many states.[2] To ensure that these ''bottlenecks'' were not used to prevent competition in the telephone service generally, providers of local monopoly telephone service were obligated to provide nondiscriminatory access to these ''essential facilities.'' United States v. American Tel. & Tel. Co., 552 F. Supp. at 160–65, 188.

Wireless facilities, on the other hand, are not bottleneck or essential facilities. See, e.g., AT&T's Opposition to the Motions for ''Generic'' Wireless Waiver of the Decree's Core Provisions at 18 n.22, United States v. Western Elec. Co., Civ. No. 82–0192 (filed Aug. 10, 1994). Competitive alternatives exist. In every area of the country, there are two facilities-based cellular providers. Consequently, there is no antitrust justification for requiring equal access in wireless markets. BellSouth Reply at 26–28. The empirical data show why: equal access already has cost wireless subscribers hundreds of millions of dollars. BellSouth Reply at 22. This is not surprising given the fact that the interexchange market, which is dominated by AT&T, is more concentrated, and less competitive, than wireless markets. BellSouth Reply at 17–21.

AT&T's motivation for accepting limited calling areas and equal access obligations is no mystery. Like MCI, AT&T support equal access because it allocates a portion of the wireless market to the entrenched interexchange carriers and confines wireless providers to small, inefficient local calling areas. AT&T provides over 70 percent of all ''interexchange'' service to wireless customers who are subject to equal access, CIS at 12–13, and controls over 80 percent of the business of BellSouth's subscribers. BellSouth Reply at 18. If equal access is imposed in wireless markets, AT&T is sure to dominate the resulting wireless long distance market just as it dominates the landline interexchange market.

If the Court determines that no equal access requirement should be imposed in wireless markets, AT&T/McCaw will have to compete on equal terms with other wireless providers who are not members of the interexchange oligopoly. The FCC has noted industry estimates that there likely will be more than 60 million wireless subscribers by the year 2002. Second Report and Order, In the Matter of the Commission's Rules to Establish New Personal Communications Services, 8 F.C.C. Rcd 7700, 7710 (1993), recon. Memorandum Opinion and Order, FCC 94–144 (June 13, 1994). The long distance traffic generated by wireless providers might, in time and absent equal access, eventually provide a challenge to the tripartie domestic long distance cartel. This is what AT&T hopes to prevent.

Thus, not surprisingly, AT&T has argued that its own acceptance of local calling areas and equal access obligations should lead the Court to

[2] Experience has proven incorrect the assumption that local landline telephone service is a natural monopoly. See Memorandum of Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, and Southwestern Bell Corporation in Support of Their Motion to Vacate the Decree at 53–67, United States v. Western Elec. Co., Civ. No. 82–0192 (D.D.C. filed July 6, 1994).

deny the BOCs' motions for generic wireless relief. Furthermore, AT&T has foreshadowed its ultimate gambit. It hopes that this Court will create momentum which will cause the FCC to impose a vertical market allocation on the wireless industry as a whole. Memorandum in Support of AT&T's Motion for a Waiver of Section I(D) of the Decree Insofar As It Bars the Proposed AT&T-McCaw Merger at 71, United States v. Western Elec. Co., Civ. No. 82–0192 (D.D.C. filed May 31, 1994). Indeed, AT&T already is citing the Proposed Final Judgment to the FCC as a justification for saddling the entire industry with an equal access requirement. Comments of AT&T at 5, In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC No. 94–54 RM–8012 (F.C.C. filed Sept. 12, 1994). Such a market paradigm will ensure that AT&T retains its dominant share of interexchange telecommunications services.

According to the Department, ''the market power of each cellular duopolist'' justifies an equal access requirement. Memorandum of the United States in Response to the Bell Companies' Motions for Generic Wireless Waivers at 3, United States v. Western Elec. Co., Civ. No. 82–0192 (filed July 25, 1994) (''U.S. Response''). See also, id. at 19–20. This justification rings hollow. If any anticompetitive harm resulted from providing integrated wireless services, the Department, which, by its own account, has been closely investigating this market since 1991, surely would have sued McCaw and other non-BOC providers under the antitrust laws for refusing to permit interexchange carriers''equal access'' to their wireless systems. The Department's reticence in this regard is understandable. The antitrust laws do not require that owners of non-essential facilities offer equal access. BellSouth Reply at 27–28. The unrefuted empirical data emphatically demonstrate why: in wireless markets, consumers are better off without equal access. Id. at 22.

In many areas of the country, moreover, cellular competitors have been joined by providers of Enhanced Specialized Mobile Radio (''ESMR'') service, which competes directly with cellular service. Id. at 15. In addition, in six weeks the FCC will begin licensing several additional wireless competitors in each area in which cellular services are provided. On December 5, 1994, the FCC will auction spectrum for broadband Personal Communications Service (''PCS'') providers. Experience with PCS demonstrates that it will compete directly with cellular. Id. The fact that competing alternatives are available to wireless customers, and that many more soon will be, demonstrates that it is not in the public interest to extend equal access to the BOCs' wireless operations, and apart from correcting the competitive imbalance created by the MFJ, it is not in the public interest to impose equal access on AT&T/McCaw.

Deciding that there is no basis specific to the BOCs and AT&T/McCaw for imposing equal access on their wireless systems, moreover, would clear the slate for uniform action by the FCC. At the urging of MCI, the FCC has announced that it will consider adopting an equal access requirement for cellular services similar to that which applies to landline services. The FCC's broad public interest inquiry should not be fettered by the reality of existing (but unjustified) equal access obligations on some market participants.

III. The Court Should Ensure the Terms of Competition Between the BOCs and AT&T/McCaw are Equal

If the Court nonetheless artificially divides the wireless market into separate local and long distance components and requires equal access, it should, at a minimum, ensure that the conditions of competition for the BOCs and AT&T/McCaw are equal. The Proposed Final Judgment, however, would give AT&T/McCaw preferences over the BOCs, even if the Court ultimately adopted the Department's view of the proper scope of generic wireless relief for the BOCs.

For example, the Proposed Final Judgment would apply only to AT&T/McCaw's cellular systems (excluding cellular digital packet data services). Proposed Final Judgment at § IV. The Department, on the other hand, supports equal access and local calling areas for other wireless services which may be provided by the BOCs, such as broadband PCS. U.S. Response at 27–45. There is no conceivable justification for this disparity.

McCaw is also permitted to provide local cellular service in1 9 areas larger than those available to the BOCs. Proposed Final Judgment § II(Q). Again, there is no conceivable justification for this discriminatory treatment. Nor does the Department offer one, noting only that the Department reserves the right to seek an order confining AT&T/McCaw to LATA boundaries in the future. CIS at 24. The Department supports equal access restrictions for AT&T/McCaw for the same reasons it recommends them for the BOCs. Thus, it makes little sense to restrict the BOCs to LATAs while permitting AT&T/McCaw to provide service within multi-LATA clusters without equal access.

Furthermore, AT&T/McCaw will be permitted to provide facilities-based interexchange service to its wireless subscribers. The Department would permit the BOCs only to resell interexchange service and to purchase no more than 45 percent of such service from any one interexchange carrier. Id. at ¶ 2(1). These additional restrictions are flagrantly anticompetitive. They could prevent BOC cellular systems from purchasing a sufficient volume of service from a single provider to obtain the highest possible discounts; they ensure that AT&T will control a significant portion of the BOCs' wireless interexchange traffic; and they prevent full, facilities-based interexchange competition. Reply of the Bell Companies to Comments on Their Motion for a Modification of Section II of the Decree to Permit Them to Provide Cellular and Other Wireless Services Across LATA Boundaries at 36–40, United States v. Western Elec. Co., Civ. No. 82–0192 (D.D.C. filed Sept. 2, 1994). One hardly needs to be an accomplished analyst to discern from AT&T's financial statements that it is not in need of a set aside.

AT&T/McCaw also enjoys the benefits of a ''most-favored-nation'' clause which will permit them to obtain relief from the Proposed Final Judgment in the event that the BOCs are permitted to offer wireless service in expanded calling areas or without an equal access requirement. Proposed Final Judgment §§ II(Q), X. The BOCs, quite inexplicably, would have no reciprocal right. This disparity is exacerbated by Section X of the Proposed Final Judgment, which is more lenient than either the standard announced in Rufo v. Inmates of Suffolk County Jail, 112 S. Ct. 748, 760 (1992), or Section VIII(C) of the MFJ. As a result, AT&T/McCaw is guaranteed any benefits of relief obtained by the BOCs, but the BOCs will be denied the benefits of relief obtained by AT&T/McCaw unless they can satisfy a more stringent standard for relief. If the Department views this as ''equal treatment,'' then it obviously considers some participants to be ''more equal'' than others.

There also is no justification for including a 10 year expiration provision in the Proposed Final Judgment. Neither the MFJ, which is over 12 years old, nor the equal access requirements the Department proposes to apply to the BOCs' wireless services (see U.S. Response) include any expiration provision. Inasmuch as the Department has justified imposing equal access on the BOCs and AT&T for the same

reasons and intends that the obligations be equivalent, it would be illogical and unfair to include an expiration provision in the Proposed Final Judgment.

IV. The Term ''McCaw Cellular System'' Should Be Clarified

BellSouth also requests that the Proposed Final Judgment be clarified to specify that the term ''McCaw Cellular System'' includes only cellular franchises in which McCaw has affirmative control. Section II(T) defines ''McCaw Cellular System'' as any cellular system ''in which McCaw controls, directly or through its affiliates, a direct or indirect voting interest of more than fifty percent (50%), or the right, power or ability to control, * * *'' ''Control'' is defined in Section II(K) as ''the power to direct or cause the direction of the management and policies of a corporation or a partnership, whether through ownership of voting securities, by contract, or otherwise.''

Read together, these definitions appear to limit the requirements of Section IV to those cellular systems in which McCaw has affirmative control, or the power to direct the company to implement AT&T's obligations under the Proposed Final Judgment. A system in which AT&T/McCaw has the power to veto actions with which it disagrees (negative control), but lacks affirmative control, should not be subject to Section IV's requirements. For example, if AT&T/McCaw owned 50 percent of the voting interests in a cellular system and a second firm owned an identical interest in that system, that system should not be considered a ''McCaw Cellular System'' for purposes of the Proposed Final Judgment because McCaw would lack ''the power to direct or to cause the direction of the management and policies'' of the cellular system. In such a circumstance, McCaw could not unilaterally direct the partnership to take any actions, including to ensure compliance with the Proposed Final Judgment.

This issue is not one of theoretical interest. AT&T/McCaw is a partner of BellSouth's and owns negative control of cellular systems in Houston, Galveston, and Los Angeles, In each case, the system is governed by a partnership in which McCaw and BellSouth each own a 50 percent voting interest. BellSouth requests that the Court remove any lingering uncertainty over the proper construction of the Proposed Final Judgment by specifying that the term ''Control'' only describes affirmative control and that the term ''McCaw Cellular Systems,'' therefore, does not include cellular franchises in which McCaw possesses negative control.

Conclusion

The Court should decide the BOCs' motions for generic wireless relief before deciding whether the proposed consent decree is in the public interest. In that context, the Court should decide that the market for wireless services should not be burdened with equal access obligations and interexchange restrictions. If the Court nonetheless decides to the contrary, it should ensure that the terms of competition for the BOCs and AT&T/McCaw are equivalent. Finally, the Court should clarify that the term ''McCaw Cellular Systems'' does not include cellar systems in which McCaw does not possess affirmative control.

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Dated: October 25, 1994.

United States District Court for the District of Columbia

In the matter of: United States of America, Plaintiff, v. AT&T Corp. and McCaw Cellular Communications, Inc., Defendants. Civil Action No. 94–01555 (HHG).

To: The Department of Justice

Comments of SBC Communications Inc. on Proposed Final Judgment

Pursuant to 15 U.S.C. § 16(d), SBC Communications Inc. (''SBC'')[1] files these Comments in partial opposition to the proposed Final Judgment in this case. The proposed settlement addresses most of the competitive concerns raised by the merger of AT&T and McCaw Cellular Communications, Inc. (''McCaw''), and should be approved in substantial part. But the Final Judgment would not solve one aspect of a core problem the Department of Justice (''Department'') has identified: AT&T's ability to favor McCaw by misusing confidential information acquired in AT&T's capacity as a supplier of services to cellular carriers and their customers. The Department has insisted on considerable safeguards against disclosure of confidential information AT&T/McCaw acquires as a supplier or buyer of network equipment. Yet the Final Judgment would do nothing to prevent AT&T from advantaging McCaw, and disadvantaging competition, by disclosing confidential information AT&T acquires as a long-distance carrier.

Moreover, the proposed settlement cannot be reconciled with statements the Department of Justice has made about Bell company (or ''BOC'') provision of interLATA wireless services SBC disagrees with the Department's suggested conditions on wireless relief for the Bell companies. But if the Court finds the Department's reasoning persuasive in that context, the very same reasoning requires imposition of additional conditions on the AT&T/McCaw merger This Court should be unable to conclude that conditions like a ban on interexchange routing and sales force separation would promote competition if applied to BOC wireless systems, without finding that they would do the same if applied to AT&T/McCaw.

Introduction

While the McCaw acquisition marks a dramatic expansion of AT&T's wireless business, AT&T occupied a commanding position in wireless even before it decided to spend about $12 billion to become the nation's largest cellular carrier. Indeed, one cannot understand the competitive risk presented by AT&T's entry into local cellular services without appreciating AT&T's central place in all other aspects of wireless communications.

1. Wireless Long Distance

The Department freely acknowledges that AT&T remains the nation's dominant long-distance carrier. *See Proposed Final Judgment and Competitive Impact Statement; United States of America v. AT&T Corp. and McCaw Cellular Communications, Inc.*, 59 FR 44,158, 44,166 (1994) [hereinafter *Competitive Impact Statement*]. AT&T's entrenched position is particularly evident in wireless. Due to the Modification of Final Judgment (MFJ), customers of BOC-affiliated cellular systems are required to buy their cellular long-distance service separately

[1] SBC Communications Inc. was formerly knows as Southwestern Bell Corporation.

from local service.[2] AT&T is the long-distance carrier for more than 70 percent of these customers. 59 Fed. Reg. at 44,169. Moreover, while McCaw and other non-Bell company cellular carriers can and do resell interexchange services to their customers, they buy their wholesale service from AT&T in the vast majority of cases. *See id.*

For Bell company cellular providers, a customer's selection of AT&T means that AT&T will obtain some of the BOC affiliate's most competitively sensitive confidential information. The MFJ prohibits BOC affiliates—including SBC's affiliate, Southwestern Bell Mobile Systems (SBMS)—from providing long-distance services. Largely as a result of this barrier to competition up to 90 percent of all SBMS customers choose AT&T. Stupka Aff. ¶ 4. SBMS must provide AT&T with these customers' names, addresses, and telephone numbers. In addition, once AT&T begins to carry an SBMS customer's calls, it can collect usage information (including the location and telephone number of the party called, the duration of the call, and personal calling patterns) for that customer.

All of this non-public information has tremendous potential value in marketing cellular services. As explained in the attached affidavit of John T. Stupka, the information AT&T gains as a *long distance* carrier allows it to identify the particular customers who are the highest-volume users of SBMS *local cellular services.* These customers could be targeted for direct solicitation, and those solicitations could be tailored to the customer's historic calling patterns with SBMS. *See* Stupka Aff. ¶¶ 5–8. In other words, MFJ constraints guarantee AT&T a window into SBMS's most sensitive customer information, and a unique ability to access and potentially steal away SBMS' most valued customers.

2. Equipment and Software

Cellular customers depend upon AT&T products and services even when they place local calls. AT&T is the nation's largest manufacturer of switches, cell site radios, and related network equipment used by cellular telephone systems. *Competitive Impact Statement,* 59 Fed. Reg. at 44,166–67. More important than AT&T's naked market share, however, is the so-called ''lock-in'' effect. *See generally Eastman Kodak Co. v. Image Technical Servs.,* 112 S.Ct. 2072, 2087 (1992). As the Department has found, cellular providers that have purchased equipment from a particular manufacturer are locked into that manufacturer when they buy new equipment for the same service area. If they choose AT&T equipment for a particular system, cellular carriers either have to keep buying from AT&T or undertake a disruptive and expensive replacement of existing AT&T equipment with that of another manufacturer.[3] The same is true for the complex and expensive computer software needed to operate this equipment, and for ongoing software upgrades that enhance performance and allow new services.

Moreover, as an equipment supplier, AT&T has access to the most sensitive proprietary information of its customers. The Department has explained that cellular equipment manufacturers, in performing routine maintenance, software upgrades, and other services, have access to system usage patterns and similar day-to-day operating information. Likewise, AT&T and other equipment suppliers are aware of plans for system expansions and new services and features, since their cooperation is essential to effect them. 59 Fed. Reg. at 44,168.

3. The McCaw Acquisition

On September 19, 1994, AT&T committed to paying $12 billion for the nation's largest cellular provider. With its LIN Broadcasting subsidiary, McCaw serves roughly 3.4 million wireless callers. SBMS, by comparison, has about 2.6 million cellular customers. Stupka Aff. ¶ 1. NcCaw has ownership interests in over 114 markets nationwide, and competes directly against SBMS in Dallas, San Antonio, Corpus Christi, Oklahoma City, Wichita, and Kansas City. *Id.*

Before the McCaw acquisition, AT&T was unable to use the sensitive information it gains as a long-distance carrier to take customers from SBMS and other cellular providers. AT&T likewise had no incentive to favor one equipment customer over another. But that is no longer the case. AT&T now has the ''ability and incentive to use its position as equipment supplier to McCaw's wireless competitors to disadvantage those customers/competitors vis-a-vis McCaw.'' *Competitive Impact Statement,* 59 Fed. Reg. at 44,171. Similarly, AT&T now has the ability and incentive to use the information it obtains in providing long distance to BOC cellular customers to capture those customers for McCaw. These critical facts should inform consideration of the proposed Final Judgment.

I. The Proposed Decree Would Allow AT&T To Use Confidential Information It Gathers as the Dominant Interexchange Carrier To Obtain a Competitive Advantage in Cellular Services

The Department correctly concluded that the AT&T/McCaw merger, by bringing together the dominant long-distance carrier and a major supplier of interLATA wireless services, would ''[d]ecreas[e] actual and potential competition in the market for interexchange services to cellular subscribers.'' *Competitive Impact Statement* at 44,166. The Department therefore insisted on equal access obligations that, in its view, will cure this problem. *See id.* at 44 169–71.

The Department also properly found that preserving competition in the cellular services market requires restrictions on use of confidential and competitively sensitive information AT&T/McCaw acquires as a supplier of equipment and software to McCaw's rivals. Accordingly, the proposed Final Judgment would limit distribution of cellular carriers' confidential information within AT&T/McCaw, in an effort to ensure that this information is not used for the benefit of McCaw operations.

Specifically, the Final Judgment identifies particular categories of information—such as cellular customer names, system subscribership, and system usage—that ''if inappropriately disclosed or used [by AT&T/McCaw], could cause competitive harm.'' *Id.* at 44,172 & n.10. AT&T's equipment personnel are absolutely prohibited from disclosing this information to persons who play a role in providing, marketing, or developing AT&T or McCaw communications services. *Id.* at 44,172. The Department considers information like customer lists and usage information so competitively sensitive that AT&T equipment personnel could not disclose it even if the affected AT&T customer were to consent. *Id.*

The Department further concluded that new restrictions on AT&T/McCaw are necessary to protect against misuse of information McCaw obtains either in the course of interconnecting with long-distance carriers or as a buyer of cellular equipment manufactured by AT&T's competitors. The proposed Final Judgment thus contains provisions forbidding McCaw from transferring this

[2] *See United States v. AT&T,* 552 F. Supp. 131, 227 (D.D.C. 1982) (MFJ § II(D)(1)), *aff'd sub nom. Maryland v. United States,* 460 U.S. 1001 (1983).

[3] With cell sites costing $750,000, and switches approximately $7 million, changing manufacturers is extremely expensive. SBMS estimates that it would cost over $1.2 billion to replace all the AT&T equipment it currently uses. Stupka Aff. ¶¶ 16–18.

information to AT&T, so that AT&T cannot obtain an unfair competitive advantage as an equipment supplier or interexchange carrier. *Id.*

Finally, the Department concluded that allowing transfer of McCaw's presubscription and usage information to AT&T would deny other interexchange carriers ''a meaningful opportunity to market their services to customers of McCaw Cellular Systems.'' *Id.* at 44,170. The suggested settlement therefore prohibits McCaw from giving AT&T any such information, except that McCaw can provide AT&T information about its own long-distance customers if it gives other interexchange carriers the same information about their customers. *Id.*

The Department's insistence on substantial safeguards to address each of these problems makes it inexplicable that the proposed Final Judgment would do nothing to address misuse of customer lists and other confidential information AT&T acquires as the dominant interexchange carrier. In each of the 58 markets where McCaw (including LIN) competes against a Bell company cellular affiliate, MFJ restrictions and AT&T's market dominance guarantee AT&T extensive access to much of the same information (such as customer lists and usage information) that the Department would unconditionally protect when AT&T acts as an equipment supplier. And no matter how that information is obtained, AT&T now has the incentive to use it in just the same way: to gain an anticompetitive advantage in cellular services.

Consider the Dallas market, which is served by SBMS and McCaw. Seventy-nine percent of SBMS customers in Dallas select AT&T as their long-distance carrier. Stupka Aff. ¶ 6. SBMS therefore must give the parent of its local competitor the names, telephone numbers, and addresses of four out of every five SBMS customers, with the knowledge that AT&T can estimate their local cellular usage and track their calling patterns. Using the information it obtains as a long-distance provider, AT&T can market McCaw services directly to the most valued SBMS customers, without spending a penny on consumers who do not use cellular telephones in Dallas, or even SBMS customers who use their phone infrequently.

A recent SBMS study illustrates the value of the information AT&T/McCaw acquires about SBMS's Dallas customers. The study showed that roughly three-quarters of those SBMS customers who use at least 275 minutes of AT&T cellular long distance each month are above-average users of SBMS local service, whereas less than 20 percent of the lowest-volume AT&T users are above-average local cellular callers. *See id.* ¶ 6 & Attachment A at 1. Further, a marketing program that captured just 2,222 high-volume SBMS callers could win for AT&T/McCaw as much cellular revenue as a campaign that, lacking inside information, switched 40,000 low-volume SBMS customers. *Id.* ¶ 6 & Attachment A at 2. AT&T/McCaw's unique ability to identify the highest-volume cellular interexchange callers by name, address, and telephone number would thus convey a powerful advantage in local cellular marketing.

AT&T/McCaw also can use the SBMS customer lists and usage information it acquires as a supplier of long distance to estimate changes in the size and composition of SBMS's subscribership. It can determine, for example, if an SBMS system is attracting new subscribers relatively quickly, or loosing existing subscribers. By noting the addresses and/or calling habits of new subscribers, AT&T/McCaw may even be able to figure out which SBMS service or marketing initiatives attract customers AT&T/McCaw would particularly like to claim for itself. With this unique insight into SBMS's most closely guarded proprietary information, AT&T/McCaw could respond to changes in SBMS services and promotions literally on a day-to-day basis, and counter those SBMS efforts. *Id.* ¶ 7.

SBMS and other Bell company cellular providers, by contrast, are barred by the MFJ from providing long distance and do not receive customer information from BOC local exchange operations. *See 47* CFR § 22.901(d) (1994). BOC affiliates have ready means of identifying competitors' customers or discerning their calling patterns. They cannot instantly track their rivals' subscribership or target competitors' customers for solicitation. Similarly, cellular carriers that provide interexchange service only to their own customers have no ability to acquire such information. Even cellular carriers (such as Sprint/Centel) that are affiliated with an interexchange carrier will not be able to obtain meaningful access to McCaw's customer information, given that AT&T is certain to be the long-distance provider chosen by the overwhelming majority of McCaw cellular customers.[4]

The Department's failure to insist on safeguards against misuse of AT&T's unique information-gathering capability cannot be attributed to any confidence that competition will constrain AT&T from abusing its position in cellular long distance. The *Competitive Impact Statement* points out that AT&T is the ''dominant supplier of interexchange telecommunications service,'' 59 Fed. Reg. at 44,166, indicating the Department's acceptance that AT&T has market power. *See, e.g., MCI Telecommunications Corp.* v. *AT&T*, 114 S. Ct. 2223, 2226–27 (1994) (noting longstanding regulatory distinction ''between dominant carriers (those with market power) and nondominant carriers''). The Department further explains that the long-distance market is an oligopoly characterized by ''imperfect competition,'' 59 Fed. Reg. at 44,182–83, and notes AT&T's extraordinarily high market share in the wireless interexchange market, *id.* at 44,169.[5]

The Department's views about competition in local cellular services also fail to explain the absence of protections in the Final Judgment. The public interest demands appropriate safeguards against AT&T/McCaw's misuse of a competitor's confidential information no matter what the state of competition in the affected market. The *Competitive Impact Statement*, for example, contains no discussion of competition in cellular equipment and software markets. Yet the Department has determined that competition and the public interest would be served by a prohibition on sharing information McCaw obtains from its Swedish equipment supplier with employees of AT&T's equipment business. *Id.* at 44,172. If the public interest is served by preventing anticompetitive exploitation of confidential information AT&T/McCaw acquires as a supplier of cellular equipment, as a supplier of local cellular services, or as a buyer of

[4] Section IV.C of the proposed Final Judgment requires disclosure of McCaw customer lists to unaffiliated long-distance carriers, but those lists may be used only in marketing interexchange services. *See* 59 FR at 44,162.

[5] The FCC similarly has determined that AT&T ''may retain some ability to control its prices'' for the residential and small-business services used by most cellular customers who presubscribe to a long-distance carrier, and has identified evidence that regulation, not competition, holds down rates. *Price Cap Performance Review for AT&T*, 8 FCC Rcd 5165, 5167 (1993). In addition, SBC and others have demonstrated the absence of genuine competition to serve wireless long-distance customers. See Motion of the Bell Companies for a Modification of Section II of the Decree to Permit Them to Provide Cellular and Other Wireless Service Across LATA Boundaries and supporting affidavits, as well as Reply of the Bell Companies to Comments on Their Motion for a Modification of Section II of the Decree to Permit Them to Provide Cellular and Other Wireless Service Across LATA Boundaries and supporting affidavits, filed in the case of *United States* v. *Western Elec. Co.*, No. 82–0192 (D.D.C.) on June 20, 1994 and September 2, 1994, respectively.

cellular equipment, the public interest must also require protections against use of similar or even more sensitive information AT&T/McCaw acquires as a supplier of cellular long distance.

Prohibiting AT&T/McCaw from using customer information it obtains as a wireless long-distance carrier to market its own wireless services will not undermine any pro-competitive aspects of the merger. This leveraging of AT&T's dominant position in long distance would not enable McCaw to provide higher-quality or lower-cost service, or encourage investment in new technologies. Nor could it possibly assist in the development of wireless telephony by increasing overall cellular subscribership. Forbidding McCaw to piggy-back off AT&T's dominance in long distance would merely encourage McCaw to win new customers by offering higher-quality or lower-priced services, rather than barraging its competitors' best customers with personalized solicitations.

AT&T has elsewhere opposed a ban on using interexchange customer information to sell wireless services by arguing that the FCC has not flatly barred use of this information to market customer premises equipment (CPE) or enhanced services. *See* AT&T's and McCaw's Opposition to Petitions to Deny and Reply to Comments at 83–84, *AT&T Co. and McCaw Cellular Communications, Inc.,* File No. ENF–93–44 (FCC filed Dec. 2, 1993). But these analogies are misplaced. The Commission relied on customer-initiated restrictions in the CPE and enhanced services areas because it anticipated that valuable customer information would mostly relate to sophisticated businesses that can take care of themselves.[6] The same cannot be said about cellular customer lists and usage information. In Dallas, for instance, an SBMS customer who spends as little as $100 per month falls within the group of high-volume callers (25 percent of all callers) that accounts for the majority of cellular revenues. *See* Stupka Aff. Attachment A at 3.

The Commission also reasoned in the enhanced services context that use of confidential information would benefit all enhanced services providers by ''mak[ing] consumers more aware of the benefits of enhanced services.''[7] As already explained, this rationale has no application here because AT&T would be marketing its own wireless services to existing cellular customers.

AT&T has further claimed that it should not be restricted in using cellular interexchange customer information to market wireless services because ''[t]he information is AT&T's.'' AT&T's and McCaw's Opposition to Petitions to Deny and Reply to Comments at 83–84. Insofar as customer lists are at issue, that assertion is wrong in the most basic sense: AT&T obtains those lists only because the MFJ requires SBMS and other BOC affiliates to turn them over. The Department, in fact, has long recognized that BOC affiliates' customer lists are just that—the property of BOC affiliates. In 1987, it rejected AT&T's claim of an entitlement to full lists of BOC cellular customers, saying that whether or not to grant such access is a matter within the discretion of each BOC. Response of the United States Concerning its Enforcement of the Modification of Final Judgment at 13–16, *United States* v. *Western Elec. Co.,* No. 82–0192 (D.D.C. filed May 27, 1987).

With respect to information about long-distance and cellular usage that AT&T develops, AT&T's unrestricted ownership would extend no further than the long-distance ''half.'' The MFJ may guarantee AT&T, as the dominant interexchange provider, a unique chance to spy on BOC cellular systems, but that cannot mean that AT&T/McCaw, as wireless provider, has an unbridled right to exploit whatever cellular calling information AT&T can acquire.

If accepted, moreover AT&T's argument would suggest an entitlement to use all confidential customer information however it pleases. The Department has clearly and correctly rejected that position with respect to customer information McCaw and AT&T acquire as providers of local wireless services and network equipment, and also with respect to information McCaw obtains about its equipment suppliers and connecting long-distance carriers. The rules governing use of non-public information AT&T collects as a wireless interexchange provider should be no different.

This Court need not be concerned that conditioning approval of the Final Judgment on a modification prohibiting use of cellular carriers' customer lists and similar information to sell McCaw services will put the merger at risk. In connection with a suit by Bell Atlantic Corporation and NYNEX Corporation to undo the AT&T/McCaw merger, AT&T has already agreed to refrain temporarily from ''furnish[ing] to McCaw, or us[ing] in marketing McCaw's services, lists of, or usage information concerning, cellular customers of [Bell Atlantic and NYNEX] who have presubscribed to AT&T's long distance service for their cellular service.''[8] The condition here proposed by SBC would simply extend this commitment to all McCaw competitors, and extend its duration to match comparable provisions of the Final Judgment.

SBC does not suggest that the Court should intervene to correct every perceived shortcoming of the proposed settlement. But the Tunney Act requires more than a simple '' 'rubber stamp' '' of a proposed decree. *United States v. AT&T,* 552 F. Supp. 131, 151 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States,* 460 U.S. 1001 (1983). Where, as here, the proposed decree and the Government's Competitive Impact Statement reflect a failure to consider significant competitive concerns and ''inconsistent * * * interpretations of the public interest,'' the Court is obligated to step in. *United States v. Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981), *cert. denied,* 454 U.S. 1083 (1981); *cf. Office of Communication of the United Church of Christ v. FCC,* 707 F.2d 1413, 1424–26 (D.C. Cir. 1983) (rational decisionmaking requires reasoned analysis of departures from precedent and consideration of relevant factors and alternatives).

Accordingly, this Court should condition its approval of the proposed Final Judgment on the addition of a new Section IV.J, as follows:

J. AT&T shall not disclose to any person engaged in marketing any McCaw or AT&T Wireless Service names, addresses, or telephone numbers of, or usage information concerning, customers of a Wireless Carrier unaffiliated with AT&T or McCaw, if AT&T obtains that information in its capacity as a supplier of interexchange telecommunications services (as defined in the MFJ). Members of AT&T's management executive committee shall be permitted to receive such information in connection with their capacities as members of AT&T's management executive committee, but shall be bound by the nondisclosure obligation set forth in this Section IV.J.

[6] *Furnishing of Customer Premises Equip. and Enhanced Servs. by AT&T,* 102 F.C.C.2d 627 693 (1985); *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry),* 104 F.C.C.2d 958, 1089–90 & n.313 (1986), *reconsidered,* 2 FCC Rcd 3035, *further reconsidered,* 2 FCC Rcd 3072 (1987), *further reconsidered,* 3 FCC Rcd 1150 (1988), *further reconsidered,* 4 FCC Rcd 5927 (1989), *vacated in part on other grounds, California v. FCC,* 905 F.2d 1217 (9th CIr. 1990).

[7] *Third Computer Inquiry,* 3 FCC Rcd at 1163.

[8] *Bell Atlantic Co. v. AT&T Corp.,* No. CV 94–3682, Order at 2 (E.D.N.Y. Sept. 14, 1994). AT&T's agreement to this stipulation when under the eye of a court contrasts with AT&T's failure to sign a standard form contract governing access to SBMS systems, which requires interexchange carriers to keep customer lists provided by SBMS confidential. *See* Stupka Aff. ¶ 10.

II. If Imposed on BOC Wireless Providers, Certain Additional Conditions Should Be Imposed on AT&T/McCaw as Well

Whereas the above condition responds to AT&T/McCaw's unique position as the dominant interexchange carrier and leading cellular provider, two further conditions—tracking ones the Department of Justice seeks for Bell company provision of interLATA wireless services—may be necessary to promote fair competition between AT&T/McCaw and BOC providers of wireless services.

The conditions discussed below would, in SBC's view, be anticompetitive if imposed on the Bell companies or AT&T/McCaw. But the Department's logic requires that they be applied to AT&T/McCaw if they are imposed on the Bell companies. Indeed, the conditions would have to be incorporated in the Final Judgment for acceptance of the Department's position in pending MFJ proceeding to make sense.

A. The Sufficiency of the Recommended Conditions on the AT&T/McCaw Merger Cannot Be Determined Until the Rules Governing McCaw's Competitors Are Set

By urging equal access provisions that either reflect current MFJ requirements or ''basically track those the United States has recommended for the Bell Companies if they should be permitted to provide wireless interexchange service,'' 59 FR at 44,170, the Department has broadly accepted that parity between AT&T/McCaw wireless systems and their BOC competitors will serve the public interest.[9] Indeed, the Department attached its generic wireless filings to the *Competitive Impact Statement,* making clear its view that MFJ restrictions on the BOCs and the proposed conditions on AT&T/McCaw are intertwined. *See id.* at 44,176–91.

Yet, without any justification, the proposed settlement excuses AT&T/McCaw from requirements the Department seeks to impose on Bell company wireless operations. While this Court may not substitute its own judgment for the Department's, it nevertheless must assure itself that the Department has acted rationally in consenting to the proposed decree, *See United States* v. *Western Elec. Co.,* 993 F.2d 1572, 1577 (D.C. Cir. 1993). Just as an agency must explain departures from prior policies in adjudications or rulemakings, the Department may not simply ignore in this proceeding its inconsistent positions in the generic wireless matter. *See id.* (likening Tunney Act and APA review); *Atchison, T. & S.F.R.R.* v. *Wichita Bd. of Trade,* 412 U.S. 800 (1973) (agency must explain departure from position taken in prior cases). Moreover, the Department's reasons for changing course must be affirmatively stated, and cannot be inferred by the Court. *See Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). Because the *Competitive Impact Statement* fails to knowledge, must less explain, departures from the Department's position in the generic wireless matter, this Court must itself determine whether the public interest requires the imposition here of conditions like those the Department seeks to place on the Bell companies.

There is an obvious corollary to this point. Because rejecting the Department's proposed conditions in the generic wireless proceeding would eliminate any cause to consider their analogues here, the Tunney Act public interest determination would best be made *after or together with* this Court's decision on wireless relief for the BOCs—and issue that was fully briefed weeks ago.

We recognize that the Court recently found disposition of the generic wireless waiver request unnecessary to address AT&T's motion for a waiver of the MFJ to acquire McCaw. But that determination rested on the reasoning that ''the only systems implicated by the AT&T [waiver] request will remain subject to all of the restrictions which the Regional Companies would eliminate by way of their wireless motion.'' *United States* v. *Western Elec. Co.,* No. 82–0192, slip op. at 25 (Aug. 25, 1994). No similar finding can be made here. Just as the generic wireless proceeding will determine the rules under which all Bell company cellular affiliates will operate, this Tunney Act proceeding will set the rules for all but the few AT&T/McCaw systems that (due to partial ownership by BOC affiliates) are already subject to MFJ restrictions. It is appropriate to consider these parallel matters in tandem.

B. If the Court Agrees With the Department That BOC Affiliates Should Be Prohibited From Routing Calls Between MTSOs, the Final Judgment Should Include a Similar Condition

Sections II(D)(1) and IV(F) of the MFJ prohibit the Bell companies from directing long-distance calls to their destination. *See United States* v. *Western Elec. Co.,* 552 F. Supp. at 227, 228. If applied to the BOCs' cellular systems and not AT&T/McCaw's, this prohibition will have serious anticompetitive consequences.

A cellular system consists of dispersed radio transceivers connected to one or more switching facilities known as mobile telephone switching offices (MTSOs).[10] Adjacent systems with large traffic volumes between them are frequently joined by links from MTSO to MTSO, permitting the cellular carrier to hand-off calls from one system to the other as the caller crosses a service-area boundary. Such links also can allow efficient delivery of cellular-originated calls placed to a phone in a different area served by the same wireless provider. Once installed, the dedicated lines have large capacities and the marginal cost of carrying traffic over them is very low.

Under the proposed settlement, AT&T/McCaw could realize the efficiencies of inter-MTSO direct connections. McCaw would be free to provide the interexchange routing necessary to send cellular traffic over interLATA direct connections, as long as routing services are offered on a nondiscriminatory basis. 59 Fed. Reg. at 44,162 (Final Judgment § IV.D.1); *see id.* at 44,160 (Final Judgment § II.M, defining ''exchange access'' to include ''the origination, routing, or termination of interexchange calls''). Yet the Department opposes giving the Bell companies similar relief from MFJ restrictions. The Department seeks in the generic wireless proceeding to limit the Bell companies to reselling the switched long-distance services of other carriers. *See* 59 Fed. Reg. at 44,186. This restriction, if adopted by the Court, would prohibit Bell company wireless providers from constructing or even leasing dedicated lines between MTSOs, and self-providing the necessary routing. AT&T/McCaw, in other words, would be legally guaranteed a continuing edge over SBMS and its other Bell company competitors.

That competitive advantage would be substantial. SBMS, for example, estimates that it could carry all SBMS-originated calls between its Dallas and Oklahoma City service areas over a single leased interexchange line at a cost of $3200 per month, plus a one-time capital cost of $2000. At retail rates, AT&T would charge more than $30,000 per month to carry this same traffic between the two cities. *See* Stupka Aff. ¶¶ 19–20. Even considering volume discounts that SBMS might secure from AT&T, self-routing would still save

[9] Congress also has determined that consistent regulatory treatment of cellular carriers serves the public interest. *See* 47 U.S.C. § 332(c).

[10] The MTSO controls the transfer of calls between cell sites, between the cellular system and local telephone networks, and between the cellular system and interexchange carriers.

SBMS thousands of dollars each month, and those savings would be reflected in lower charges to SBMS customers.

The Department has offered no reasonable justification for imposing this extra expense of BOC affiliates and their customers. It defends the switched resale condition as necessary to protect against ''discrimination aimed at favoring the BOC's service.'' 59 Fed. Reg. at 44,186. If the Department means discriminatory use of BOC local exchange facilities, this cannot explain prohibiting inter-MTSO routing. Sending calls from one MTSO to another does not involve any use of the switched local exchange, but only MTSO functions and a dedicated connection that typically can be acquired from any of several providers.

If, on the other hand, the Department means discrimination with respect to MTSO routing functions, there is no possible reason to treat the BOCs differently from AT&T/McCaw. McCaw and BOC cellular systems are physically alike in all relevant respects. Moreover, BOC affiliates (like AT&T/McCaw) would be bound to perform interexchange routing on a nondiscriminatory basis, if they could route calls at all. *Compare* 59 Fed. Reg. at 44,162 (Final Judgment § IV.D.1, requiring McCaw to provide routing for unaffiliated interexchange carriers on nondiscriminatory terms) *with id.* at 44,185 (noting BOC commitment to do same).

Imposing an inter-MTSO routing ban on Bell company wireless providers therefore constitutes an irrational departure from the Department's overall policy of establishing similar rules for AT&T/McCaw and the BOCs, where they are similarly situated. The *Competitive Impact Statement* offers no justification for treating AT&T/McCaw more favorably than the Bell companies, and none can fairly be deduced. Moreover, there appears to be no plausible rationale for denying Bell company cellular customers the savings that would result from dedicated connections between MTSOs.

Rejecting the Department's proposed limitation in the generic wireless proceeding thus seems necessary. But if the Court were to discern some overriding rationale that would support the Department's position there, that same rationale would necessarily apply here. In that case, the public interest would require that approval of the Final Judgment be conditioned on addition of a new section, as follows:

Notwithstanding any other provision of this Final Judgment, McCaw Cellular Systems shall not provide interexchange traffic routing services in connection with the routing of traffic between MTSOs.

C. If the Court Agrees With the Department That the BOCs Should Be Required To Establish Redundant Sales Forces, the Final Judgment Should Include a Similar Condition

In the generic wireless proceeding, the Department also has urged the Court to require the Bell companies to maintain separate sales forces, with separate managers, for local services and wireless long-distance services. *See* 59 Fed. Reg. at 44,187; DOJ Proposed Generic Wireless Order §§ VIII(L)(3)(f), (g). If accepted, this proposal would burden BOC affiliates with the needless expense of redundant overhead, personnel, and administrative costs.

The Department suggests that this requirement is necessary to allow the BOCs' competitors ''to compete on equal terms.'' *Id.* Competitors of BOC cellular affiliates, however, are not required to carry unnecessary marketing costs. Sprint/Centel, for example, can market its communications services through a single sales force, even though its operations (which include local and long-distance wireline service, as well as wireless) are broader than any BOC's. GTE (a landline and cellular carrier that does not offer wireless interexchange carriers equal access) likewise sells local airtime and long distance through the same sales force.

Further, if generic wireless relief is granted subject to an equal access obligation, BOC wireless long-distance sales personnel will comply with extensive non-discrimination requirements whether or not they are part of a unified sales force. BOC long-distance salespersons would inform customers of their right to choose an interexchange carrier, would be denied special access to local customer information, and (if the Court accepts the Department's proposed waiver in toto) would offer local and long-distance wireless services separately. *See id.* at 44,187.

It is impossible to see a rational reason for imposing mandatory inefficiencies on BOC affiliates. But if there were one, it would have to apply to AT&T/McCaw as well. AT&T/McCaw assuredly could realize whatever ''unfair'' efficiencies or advantages would be available to the BOCs through the maintenance of a unified sales force. The combined AT&T/McCaw is the largest wireless carrier in the country, as well as the largest interexchange provider. According to the Department, AT&T/McCaw has market power in cellular services and is dominant in landline and wireless long distance as well. No other wireless carrier could employ joint marketing on a similar scale, and there is every reason to believe that this advantage would allow AT&T/McCaw to extend its current dominance even further.

Yet the proposed Final Judgment does not contain a sales force separation requirement like the one the Department recommends for the BOCs. Although A&T's and McCaw's operations must be separate, the Final Judgment seems to erect no barrier to the use of a single sales force within AT&T for local wireless, wireless long-distance, and land services. The Department may be confused on this point, for it stated in the generic wireless matter that AT&T/McCaw would be ''subject to the same separation . . . restrictions'' as the BOCs. *Id.* at 44,187. But in fact, the AT&T/McCaw settlement, on its face, would allow AT&T to perform all marketing of local and long-distance cellular services for McCaw, with the possible exception of administering some part of interexchange carrier presubscription. *See id.* at 44,162–63 (Final Judgment §§ IV.B.3, IV.F); *id.* at 44,170 (discussing § IV.F).

If imposing intentional inefficiencies on the BOCs somehow promotes competition, equivalent conditions on AT&T/McCaw would surely do the same. The Department evidently believes that this is so, given that the Final Judgment's joint marketing provisions were intended to ''basically track [conditions] the United States has recommended for the Bell Companies.'' *Id.* at 44,170. Therefore, should the Court find the Department's proposed condition on the Bell companies appropriate in the generic wireless proceeding, that finding should compel a conclusion that the public interest requires equivalent separation of AT&T/McCaw sales forces. SBC suggests the following new section IV.F.1(f), modeled on the Department's generic wireless proposal:

f. Retail store agents of McCaw and other salespersons who receive inquiries by prospective customers of McCaw Local Cellular Services shall be a distinct group of individuals, with separate managers, from any sales force that sells AT&T Interexchange Services and from any sales force that sells AT&T landline interexchange products or services.

Conclusion

The Court should approve the proposed decree, subject to the modification recommended in Section I, above. The conditions on interexchange routing and sales force separation suggested in Section II of these Comments should be additional

prerequisites of approval if, but only if, the Court deems comparable conditions necessary in the context of the Bell companies' motion for generic wireless relief.

Respectfully submitted,

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Counsel for SBC Communications Inc.

October 25, 1994.

United States District Court for the District of Columbia

In the Matter of United States of America, Plaintiffs v. AT&T Corporation & McCaw Cellular Communications, Inc., Defendants. Civil Act No. 94–01555 (HHG).

Affidavit of John T. Stupka

John T. Stupka, being duly sworn, deposes and says:

1. My name is John T. Stupka. I am President and Chief Executive Officer of Southwestern Bell Mobile Systems, Inc. (''SBMS''), which is headquartered in Dallas, Texas. SBMS provides cellular telephone service as either the licensee or the general partner of the licensee in a number of markets, including such major markets as Chicago, Boston, Dallas, Washington, Baltimore, Kansas City and St. Louis. SBMS provides cellular service to over 2.6 million customers. SBMS competes directly with McCaw or Lin Broadcasting in Dallas, San Antonio, Corpus Christi, Oklahoma City, Wichita and Kansas City.

2. I began my career with Southwestern Bell Telephone Company in 1974. In 1983, I was appointed Vice-President—Network for AT&T Advanced Mobile Phone Service (AMPS). At divestiture, the southwest region of AMPS became a wholly-owned subsidiary of Southwestern Bell Corporation known as Southwestern Bell Mobile Systems. In December 1984, I became Executive Vice President—Network where I was responsible for all of SBMS's network and engineering activities. In November 1985, I became President and Chief Executive Office of SBMS where I am responsible for the operation of twenty-eight metropolitan cellular markets in addition to markets in twenty-six rural service areas. In addition, since 1985, I have chaired the Technology Committee for the Cellular Telecommunications Industry Association (CTIA) which has been instrumental in fostering the development of intersystem standards. I am also the current Chairman of the Board of the CTIA. I have extensive knowledge and experience in operating cellular networks.

3. I am submitting this affidavit in support of the Comments of Southwestern Bell Corporation on the Proposed Final Judgment regarding the merger of AT&T and McCaw Cellular Communications, Inc. (''McCaw'').

I. AT&T as a Provider of Cellular Long Distance Service

4. In addition to being a provider of network equipment, AT&T is the dominant provider of cellular long distance service. The equal access obligations in the MFJ require SBMS customers to choose a long distance carrier unaffiliated with SBMS to provide them long distance service. There are as many as 35 separate carriers in some of SBMS' markets. Nevertheless, between 70 and 90 percent of all SBMS customers have chosen AT&T as their cellular long distance carrier. Through its role as a provider of cellular long distance service, AT&T has access to a wealth of confidential information about SBMS' customers.

5. SBMS customers receive both a bill from SBMS for local cellular service and a bill from AT&T for their long distance usage. As a result, AT&T has the name, address and telephone number of between 70–90 percent of SBMS' cellular customers, including customers in those markets where SBMS' direct competitor for cellular service is McCaw. In addition, AT&T has the usage information (the number of the calling party, the number of the called party, the duration of the call and the usage patterns of each individual customer) on all long distance calls placed by SBMS' cellular customers. AT&T could use this information to identify SBMS' customers who use a large amount of long distance service. Long distance usage is an excellent predictor of high cellular usage.

6. SBMS has recently performed a study of the long distance usage of its cellular customers in Dallas for April 1994. In this study, SBMS determined that 79 percent of its Dallas customers have chosen AT&T as their long distance carrier. SBMS then identified those SBMS customers who have chosen AT&T as their long distance carrier and who were the highest volume users of long distance service. Predictably, those same customers were extremely high users of local cellular service as well. In fact, as shown on Attachment A, the 2,222 highest users of AT&T long distance service generated as much local airtime revenue as 40,000 of the lowest long distance users.

7. With this information, McCaw could do a very targeted marketing program of those top 2,222 users and significantly diminish SBMS' revenue in Dallas. This marketing technique would be very strong. By targeting high users, the wireless subsidiary of AT&T would not have to offer special packages to the ubiquitous cellular customer. We estimate that such a campaign could result in a loss of $1,000,000 a month in local airtime revenue to SBMS. (See Attachment A). Any such targeted marketing scheme would not be the result of superior management, but only the result of AT&T's ownership of McCaw, coupled with its unique position as a long distance provider to SBMS customers. AT&T can also use this information to estimate changes in the size and composition of SBMS' Dallas subscribership. With this unique insight into SBMS' most closely guarded proprietary information, AT&T/McCaw could gauge the effectiveness of changes in SBMS' services and marketing literally on a day-to-day basis and counter those SBMS efforts.

8. A recent conversation illustrates the seriousness of this problem. At a recent analysts' conference, I was approached by a representative of a major investor in SBC stock. This representative immediately commented that he was concerned that, once AT&T bought McCaw, AT&T would be in a unique position to determine the identity of its high long distance users and share that competitive information with McCaw. He indicated that such a situation could result in significant long term harm to SBMS and, therefore, SBC's stock value.

9. Prior to its acquisition of McCaw, AT&T had no incentive to share competitively sensitive information concerning its customers with any particular wireless company. The AT&T enterprise could not benefit from McCaw or another carrier obtaining a competitive advantage over SBMS. After the acquisition, AT&T will likely find itself better off financially by favoring McCaw over SBMS and other service competitors.

10. The ability to negotiate commercial agreements to protect this information is not to be presumed. When the Federal Communications Commission (FCC) detariffed cellular interconnection with interexchange

carriers, SBMS drafted contracts incorporating much of the same language from the tariffs into the agreements. (See Attachment B). These agreements were sent to all interexchange carriers participating in SBMS markets. The agreements incorporate language to protect the confidentiality of SBMS' proprietary customer information. To date, AT&T has not executed this agreement.

II. Equipment

11. In addition to the problems posed by the anti-competitive use of proprietary customer information, the merger raises severe competitive problems because AT&T is SBMS' supplier of cellular network equipment, including switches, cell site equipment and related software, and is the country's leading supplier of such equipment to cellular carriers. AT&T can use its position as equipment supplier to McCaw's competitors to create artificial competitive advantages for McCaw.

12. This problem arises because once a decision is made to purchase a particular supplier's system, all upgrades and other equipment must be purchased from that supplier, both to assure quality and because, as will be discussed below, the carrier is essentially ''locked-in'' to that supplier's equipment in that particular market. Thus, the carrier must rely upon the vendor for equipment to expand its system, for prompt service, for updates to software and for new service features, as well as new operating and maintenance capabilities.

13. AT&T could use its position as an equipment supplier to reduce the competitiveness of McCaw's rivals in a number of ways. For example, AT&T could increase the costs of software upgrades, delay delivery times, or decrease technological and development support to McCaw's rivals. In this business, a delay of even one week could be disastrous. SBMS would have no effective recourse against AT&T if it takes any of these actions. Suing AT&T would take years and could make things worse since we need AT&T for prompt service and upgrades.

14. Since AT&T has not previously been a competitor of the BOC's cellular affiliates, it had no incentive to delay service or upgrades or to favor one purchaser over another. With the completion of the merger, however, AT&T is now in direct competition with the BOC's cellular affiliates and has the incentive to slow service and upgrades, to the detriment of SBMS, and to the benefit of McCaw.

15. Even if SBMS was willing to forego the advantages of AT&T equipment, it could not avoid these problems by switching to another manufacturer's cellular equipment because it is effectively locked into using AT&T equipment. There are three principal reasons for this. First, the cost of installing a cellular system in a market of any size is enormous. Second, even if a carrier decides to incur that cost, making the change is very difficult and can create serious operational problems. Third, it is not possible to mix equipment from different manufacturers because of the ''closed architecture'' of equipment manufactured for the U.S. market.

16. A brief discussion of the current cost of AT&T switches and cell sites will demonstrate the enormous cost of changing equipment. A large capacity AT&T switch costs approximately $7,000,000. We have more than one such switch in several of our major markets. Only about $185,000 of the equipment contained in a switch can be bought from a vendor other than AT&T, and our engineers believe that for some items we get better performance from AT&T than from other vendors' goods.

17. An average Series II cell site using AT&T equipment costs about $750,000. Only about $29,000 of that could be purchased from other vendors. The number of cell sites can be quite large; for example, there are over 200 cell sites in Dallas and 20–30 new sites are being added each year.

18. As these figures demonstrate, the costs of switching to anotherequipment supplier would be enormous. To take SBMS' Dallas network as an example, it would cost about $165,000,000 to change (assuming we could negotiate a contract similar to our AT&T contract with another vendor). Throughout all of our markets, it would cost approximately $1,200,000,000 over the next 2–3 years to change equipment to a vendor other than AT&T.

III. Network Efficiencies

19. SBMS conducted a sample of mobile originated calls between its Dallas and Oklahoma City service areas during the month of September 1993. We then calculated the number of minutes of use during the busiest hour and determined that the total number of minutes of use in that hour could be carried over a single DSI facility leased from an interexchange carrier. SBMS could obtain this circuit for a one time capital cost of $2,000 and a $3,200 per month flat rate lease payment. In fact, SBMS already has a leased facility in place to handle the messaging necessary for intersystem handoff and IS–41 call delivery. It might well be possible to carry all additional usage associated with this voice traffic over the already existing facility. The same would be true in many instances where the need for market-to-market connectivity already exists for intersystem operations.

20. SBMS also multiplied the total number of minutes of use in a month between these markets by AT&T's current retail rates. SBMS determined that the number of minutes of mobile originated long distance traffic between Dallas and Oklahoma City would, at AT&T retail rates, generate revenue of $30,440.40. This is but one example of where SBMS could significantly reduce the cost of long distance service to its customers if SBMS were permitted to take advantage of the efficiencies available to non-RBOC affiliated providers.

John T. Stupka,

Subscribed and sworn to before me on this 24th day of October, 1994.

Ms. S.R. Drifton,

Notary Public.

Notes

1. Southwestern Bell Mobile Systems (AT&T Long Distance Usage) Chart was unable to be published in the Federal Register.

2. Southwestern Bell Mobile Systems (Customers Required To Generate $1,000,000 of Revenue) Chart was unable to be published in the Federal Register.

3. Southwestern Bell Mobile Systems (cumulative Total Revenue and Customers Comparison) Chart was unable to be published in the Federal Register.

Southwestern Bell Mobile Systems

July 15, 1994.

Dear Carrier,

As you may know the Federal Communication Commission (FCC) has mandated that all Commercial Mobile Radio Service Providers cancel any tariffs on file with the FCC. In response to the FCC's mandate Southwestern Bell Mobile Systems, Inc. (SBMS) sought and received a waiver from Judge Harold Greene to provide exchange access on an untariffed basis ''provided that such exchange access shall be provided to all interexchange carriers on the same terms and conditions (including price)''. Thus, we will file to cancel Southwestern Bell Mobile Systems, Inc. Tariff F.C.C. No. 1 pursuant to which we provide cellular equal access service within our operating areas.

In order to fully comply with Judge Greene's ''same terms and conditions'' directive and to provide a smooth transition, SBMS has decided to offer exchange access service pursuant to contract based on the terms and conditions contained in our tariff. Thus, we have incorporated the applicable terms and conditions of the tariff into the attached ''Contract for Equal Access Service''. The terms and conditions of the ''Contract for

Equal Access Service are identical for all interexchange carriers (IXC).

Please execute both copies of the contract and return one copy at your earliest convenience. To insure that there is no disruption of service during any interim period prior to receiving an executed copy of the ''Contract for Equal Access Service'', SBMS will continue to provide access service on the terms and conditions contained in the tariff, as incorporated into the ''Contract for Equal Access Service'', provided you are not in violation of any such term or condition—in which case SBMS will pursue appropriate remedies and take appropriate action. If you are no longer interested in receiving SBMS' exchange access service on these terms and conditions please notify us and we will cancel your service and reballot any customers currently presubscribed to you.

PLEASE NOTE THAT WE ARE CONTINUING TO PROVIDE YOU SERVICE BASED ON THE TERMS OF THE TARIFF AS INCORPORATED IN THE ENCLOSED AGREEMENT INCLUDING, BUT NOT LIMITED TO, YOUR AGREEMENT TO KEEP INFORMATION CONFIDENTIAL AND TO USE IT ONLY IN THE PROVISION OF INTEREXCHANGE SERVICE AND NO OTHER PURPOSE (SEE SECTIONS 3.1.11 AND 10). FURTHER, THE CONFIDENTIALITY OBLIGATIONS UNDER THE TARIFF FOR INFORMATION PROVIDED THEREUNDER SURVIVES THE CANCELLATION OF THE TARIFF. IF YOU DO NOT AGREE WITH SUCH TERMS PLEASE NOTIFY US IMMEDIATELY ON 214–733–6100.

Lisa Guarnacci

Equal Access Agreement Between Southwestern Bell Mobile Systems, Inc. (''SBMS'') and _____ (''Carrier'')

WHEREAS, in the markets listed in Exhibit ''A'', SBMS is offering Equal Access capability so that each SBMS cellular customer in said markets may reach the presubscribed interexchange carrier (''Carrier'') of their choice on a direct dialed basis (1+dialing may be necessary in some markets) if the Carrier has chosen to provide service in such markets; and

WHEREAS, Carrier has sufficient capacity to adequately serve the cellular traffic of pre-subscribed cellular customers of SBMS by providing interLATA telecommunications services and Carrier is providing such services to customers of SBMS in the markets in Exhibit ''A''.

WHEREAS, Carrier desires to participate in SBMS' Equal Access offering; and

WHEREAS, SBMS is incurring substantial recurring costs to provide Equal Access to Carrier.

NOW THEREFORE, in consideration of the mutual benefits accruing to each party, the parties hereto agree as follows:

1. *DEFINITIONS.* For the purpose of this Agreement the following definitions are applicable:

A. Casual calling—A subscriber not presubscribed to the interexchange carrier providing the service, but using the interexchange carrier's services on an occasional basis.

B. Company—Southwestern Bell Mobile Systems, Inc.

C. Customer—Customers which acquire cellular services from Company, including those who acquire service at wholesale rates such as resellers of the Company's cellular service.

D. InterLATA—Communications which traverse LATA boundaries.

E. Interexchange Service—the provision of voice or data traffic across LATA boundaries.

* * * * *

Company, after thirty (30) days written notice may disconnect Carrier from Company's Equal Access facilities and contact Carrier's Customers to obtain a new designated interLATA telecommunications service provider and/or withhold the provision of further Unsolicited or Solicited Care, and/or take any other action provided at law or in equity. Carrier is responsible for all reasonable and necessary collection costs and fees incurred by Company, including reasonable attorney's fees if Company must initiate legal proceedings to collect any sums due hereunder and if a final order directing Carrier to pay amounts is received by Company.

3.1.10 Carrier will follow and abide by all equal access service provisions as outlined in Federal Communications Commission *Memorandum Opinion and Order* in CC Docket No. 83–1145, released June 12, 1985, and *Memorandum Opinion and Order* in CC Docket 83–1145, released November 14, 1985, and any present or future Orders, Rules or Regulations of the Federal Communications Commission.

3.1.11 Company and Carrier recognize that any customer lists which may be provided from one to the other in connection with, or subsequent to, the balloting and allocation process is proprietary information. Each of Company and Carrier agrees to use any such customer list solely for the purpose of providing interexchange communication services to such customers and shall be disclosed only within Company and Carrier to those individuals with a need to know in order to provide such service. Each of Company and Carrier agrees to keep such customer list confidential and agrees not to sell, transfer, assign, or otherwise disseminate the customer list to anyone except for the purpose of providing such interexchange services.

4 *INTERCONNECTION*

4.1. *GENERAL*

4.1.1 Carrier may interconnect with Company for the purposes of serving Company's customers interLATA telecommunications services requirements either by (1) local exchange carrier access tandem connection or (b) direct connection.

4.2 *LOCAL EXCHANGE CARRIER ACCESS TANDEM CONNECTION*

4.2.1 Subject to the terms of this Agreement, Company will provide to Carrier industry standard FGD signalling, protocol, transmission, and testing.

4.2.2 Subject to the terms of this Agreement, Company will make arrangements with the local exchange carrier to provide the necessary Type II trunks to the local exchange carrier access tandem to serve Carrier's requirements and provide for industry standard equal access grade of service.

* * * * *

number or mobile number and the date of the call. Further, IXC agrees not to solicit Customer account information for IXC Calls made before one (1) year prior to the date of the Solicited CARE request. IXC agrees to update its data base and populate its customer account field to identify the Customer by the Customer mobile number or account number to properly identify the Customer for that period of time. IXC shall update its data base upon receipt of the solicited CARE records so that subsequent requests for solicited CARE will, if possible, request Customer information using the correct account number or mobile number.

9.3 *CARRIER DATABASE*

9.3.1 IXC is solely responsible for updating its internal customer data bases with any an all information received from SBMS. SBMS assumes, and IXC acknowledges, that SBMS has no fiscal or financial responsibility or liability regarding any information contained on any Reconciliation Tape, or any form of Unsolicited and/or Solicited CARE response and IXC's ability to bill or collect for services reflected on the foregoing or for services rendered by IXC on its network.

9.4 *COSTS*

9.4.1 IXC shall pay SBMS $.05 per message/record for each response to a Solicited CARE request and $300.00 for each tape containing the Solicited CARE records, and in the case of paper transmittal, $.05 per message/record for the Solicited CARE record.

10. *CONFIDENTIALITY*

10.1.1 Any information and data of any nature, including, but not limited to Customer name, PIC information, account information from Casual Calling, Customer address, cellular account information, SBMS data processing/billing information, technical, or other Customer account information furnished by one part to the other in connection with this Agreement or which is identified or labeled as confidential or proprietary (''INFORMATION''), an all copies of such INFORMATION shall be treated in confidence and protected and shall be used and copies only for the exercise by the Receiving Party on performing its obligations hereunder. Each party agrees to use any INFORMATION received from the other party solely for the purpose of providing interexchange service to the Customers and such INFORMATION shall be disclosed within the Receiving Party only to those with a need to know in order to provide interexchange service.

10.1.2 These restrictions on the use or disclosure of INFORMATION shall not apply to any INFORMATION:

a. that is independently developed by the Receiving Party to lawfully received free of restriction from another source having the right to so furnish such INFORMATION;

b. after it has become generally available to the public without breach of any obligation of confidentiality by the Receiving Party;

c. that at the time of disclosure was known to the Receiving Party free of restriction as evidenced by documentation in such Receiving Party's possession; or

d. that the Disclosing Party agrees in writing is free of such restrictions.

10.1.3 Bith Parties shall retain copies of recorded information relating to its performance in the same manner, and for the same period, as it maintains such material for itself, subject to the rules, regulations and orders of applicable regulators or other lawful authority, and subject to such additional retention guidelines as the parties may mutually establish.

11. *ERRORS*

11.1 Each Party shall bear its own expense or any error, omission, mistake or failure to perform its respective duties hereunder.

12. *LIABILITY*

12.1 In no event will SBMS be liable or any matter relating to or arising out of this Agreement, whether based on an action or claim in contract, tort, or otherwise, for all events, acts or omissions which shall not exceed, in the aggregate, the actual costs and expenses to correct SBMS' data processing error, if any, or to provide additional solicited information. In no event will the measure of damages include, nor will SBMS be liable for any amounts for loss of income, profit or savings, or indirect, special, incidental, consequential, or punitive damages of any IXC, or any other party, including third parties.

13. *AUDIT*

A. Upon request, after adequate written notice, and during normal business hours, SBMS will allow IXC to audit the SBMS records which support the Market Share calculation for IXC and the cost figures used by SBMS in calculating its Recurring Costs, provided that IXC will not be entitled to see market share information or pro rata cost information pertinent to other Participating

* * * * *

Certificate of Service

I, Austin C. Schlick, hereby certify that copies of the foregoing Comments of SBC Communications Inc. on Proposed Final Judgment have been served by hand or *Federal Express* on this 25th day of October 1994 to the following:

Richard Liebeskind,

Assistant Chief, Communications and Finance Section, Room 8104, U.S. Department of Justice, Antitrust Division, 555 4th Street, N.W., Washington, DC 20001, Attorney for the United States

John D. Zeglis,

Mark C. Rosenblum,

AT&T Corp., 295 North Maple Avenue, Basking Ridge, NJ 07920, Attorneys for AT&T Corp.

Douglas I. Brandon,

McCaw Cellular Communications, Inc., 1150 Connecticut Avenue, N.W., Washington, DC 20036, Attorneys for McCaw Cellular Communications, Inc.

United States District Court for the District of Columbia

In the Matter of United States of America, plaintiff, v. AT&T Corp. and McCaw Cellular Communications, Inc., Defendants. Civ. Action No. 1:94–01555 (HHG).

Comments and Objections of the Ad Hoc IXCs to the Proposed Final Judgment Between the United States, AT&T Corp. and McCaw Cellular Communications, Inc.

The Ad Hoc IXCs, a group of non-dominant resale carriers, respectfully submits its comments on the Proposed Final Judgment (''Proposed Judgment'') drafted between the parties to this action, in which the United States correctly raised antitrust concerns in connection with the proposed merger between AT&T Corp. (''AT&T'') and McCaw Cellular Communications, Inc. (''McCaw'').

I. Introduction

Through settlement of this action, the Justice Department hopes and believes it has adequately protected the public from the foreseeable anticompetitive effects of an AT&T-McCaw merger. However, when viewed in light of AT&T's abysmal record of antitrust violations, it becomes clear that neither the Proposed Judgment, nor any other arrangement sanctioning the AT&T-McCaw merger, can possibly protect the public from either the foreseeable or unforeseeable competitive abuses available to AT&T as a result of this merger. Accordingly, this and any other proposed AT&T-McCaw merger agreement should be rejected under the Tunney Act as against the public interest.

II. The Proposed Judgment Is Not in the Public Interest

A consent decree settling an antitrust complaint must be drafted 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). Unless a colorable claim can be made that this standard is met in the present case, the Proposed Judgment must be rejected as not ''within the range of acceptability or . . . 'within the reaches of public interest.' '' *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.*, 406 F. Supp. 713, 716 (D. Mass. 1975).

The Proposed Judgment fails to adequately protect the public interest primarily because it is based on the presumption that the parties to the Judgment, and particularly AT&T, will comply with its terms in good faith. The Justice Department is powerless to protect competition unless AT&T voluntarily follows both the letter *and* the spirit of the Proposed Judgment.

Had the complaint been issued against a corporation with little or no history of antitrust abuses, the Justice Department's confidence in the protective provisions of the Proposed Judgment might be warranted. However, AT&T is no typical corporation. A brief review of AT&T's long history of anticompetitive practices, and an explanation of the more refined and clever tactics employed by the company today, demonstrate a deeply entrenched corporate hostility toward free competition. Unless and until AT&T reverses its unfairly competitive policies, the dominant carrier should not be entrusted with the power and potentially limitless opportunities for abuses that the AT&T-McCaw merger presents.

A. AT&T's Long History of Anticompetitive Practices

AT&T's history of antitrust problems dates back a century to 1878 when it litigated its first potential competitor out of business. The Congressional Committee considering telecommunications reform legislation during this past session (H.R. Report No. 103–559, Part 2, 103d Cong., 2d Sess. (1994)), points out that by as early as 1910, AT&T's monopolistic goals were openly touted in its annual report:

> This process of combination will continue until all telephone exchanges and lines will be merged either into one company owning and operating the whole system, or until a number of companies with territories determined by political, business, or geographical conditions, each performing all functions pertaining to local management and operation will be closely associated under the control of one central organization exercising all the functions of centralized general administration.

Id. at 33.

By 1913, the Justice Department had to file its first Sherman Act claim against AT&T. The Department then charged AT&T with unlawfully combining to monopolize telephone message transmission in the Pacific Northwest United States, *Id.* at 34–35. The litigation ended in 1914 with the Kingsbury Commitment, in which AT&T agreed to avoid various anticompetitive act. Nevertheless and despite the Commitment, by 1925 AT&T was an entrenched nationwide monopoly. *Id.* at 33.

In 1949, The Department of Justice filed its second Sherman Act complaint against AT&T. The complaint alleged that AT&T purchased all its equipment needs from its subsidiary Western Electric, regardless of price or quality. *Id.* at 38–40. To remedy AT&T's continued pattern of anticompetitive conduct, DOJ sought to divest AT&T from its subsidiary. However, AT&T's

influence and a change in administrations resulted in the Department's enforcement of the law to be compromised.

DOJ backed off from its divestiture goal in the 1956 Consent Decree, and instead meekly required AT&T and the Bell operating companies to limit themselves to the offering of basic common carrier communications services under tariff. As the House Judiciary Committee Report recently noted:

> [T]he 1956 consent decree had little relevance to the original premise of the 1949 case: that the exclusive purchasing arrangement between Western Electric and the rest of the Bell monopoly was inherently anticompetitive and inflationary. This disappointing and puzzling retreat of the Department from the original vigor of the case brought in 1949 did not go unnoticed by the House Judiciary Committee.

Id. at 40.[1]

AT&T's commitment to the preservation of its monopoly dominance resulted in the necessity for DOJ to file yet another antitrust complaint against AT&T in 1974. This time, DOJ charged AT&T with leveraging its monopoly position in local telephone exchange services to unlawfully impede competition in the markets for interexchange services, customer equipment and telecommunications equipment. *Id.* at 47. DOJ defined 30 specific acts which AT&T had committed in violation of the antitrust laws. *Id.* at 48, in.18.

The 1974 action by the Department of Justice established an unprecedented third attempt by the United States Government to stop AT&T from continuing its unabated policy of anticompetitive conduct it had commenced 100 years earlier:

> The Bell System's anticompetitive conduct and behavior was similar to actions attacked in the earlier Sherman Act suits. For example, the Bell System was alleged to have discriminated against its competitions in the quality of access it provided to its local telephone network, by giving competing interexchange carriers technically inferior connections and charging them greater access charges, or by denying equipment manufacturers essential information regarding the local exchange network. The Bell System was also engaging in predatory cross-subsidization by artificially depressing the prices it paid for Western Electric equipment and by allocating Western Electric's costs to the ratemaking base borne by telephone customers. The Department further asserted that the Bell System was engaging in monopolistic self-dealing—for example, by requiring affiliated local operating companies to acquire switching equipment from Western Electric rather than a lower-priced or higher-quality competitor.

Id. at 47–48.

The 1974 antitrust complaint ultimately led to the well-known 1982 Modification of Final Judgment (''MFJ''). The MFJ required AT&T, *inter alia*, to divest its 22 Bell operating companies, and was designed to put a final halt to AT&T's long history of anticompetitive acts. As the discussion, *infra*, demonstrates, the MFJ has not done so.

B. The Recent Increase in AT&T Anticompetitive Practices

AT&T's anticompetitive practices have only become more refined and sophisticated in recent years. Instead of openly repressing competition in the marketplace, AT&T now adopts the disingenuous policy of publicly supporting the notion of competition, but privately subverting its competitors through a variety of unlawful tactics. AT&T has shown that it will stop at nothing to suppress competition, including breaching contracts, interfering with third party contractual relations, and intentionally misrepresenting its intentions to customers and the Federal Communications Commission. Nowhere are these tactics more widely employed by AT&T than in its campaign to eliminate switchless resellers such as the Ad Hoc IXCs from the marketplace for long distance telecommunication services.

1. New Anticompetitive Tactics Employed Against Switchless Resellers

Each of the switchless resellers comprising the Ad Hoc IXCs started in the telecommunications business in late 1989 or early 1990. Each entered the industry after learning of the opportunity to resell AT&T's Software Defined Network (SDN) services. Each of the resellers invested substantial resources building customer bases. These customers were then committed to use AT&T's long distance network as part of the Ad Hoc IXCs' high dollar, high volume, long term contractual commitments required by AT&T's tariffs. As a result of the money and effort expended by the resellers, smaller end-users were able to earn larger discounts, and AT&T was able to garner substantial revenues that otherwise might have gone to competitor long distance carriers.

At first, AT&T recognized the value of resellers as a customer base. However, AT&T reversed itself, and rather than viewing resellers as a welcome source of revenue, decided that resellers undermined its ability to offer higher tariffed long distance rates to small end-users. As a result, AT&T embarked on a concerted campaign, through a variety of means and tactics, to drive the Ad Hoc IXCs and other companies like them out of business.

For example, AT&T exploited their role in the provisioning process to the detriment of the resellers. AT&T refused to accept, lost, and delayed large numbers of service orders placed with AT&T by the resellers, which were to be used to hook up the resellers' own customers. AT&T refused to timely and accurately bill large numbers of their reseller customers, and in some cases engaged in double billing of such customers.

AT&T also disparaged the competency of the Ad Hoc IXCs in the marketplace. AT&T did this by attacking the customer base of the Ad Hoc IXCs, through the use of its small competitors' proprietary information databases to cross market reseller customers.

AT&T manipulated the tariffing processes, and attempted to create, before the staff at the FCC, the image of the Ad Hoc IXCs and companies like them as ''deadbeats,'' *i.e.*, financially unsound entities, that are poorly managed. AT&T then attempted to use this inaccurate picture as justification for its use of its ''tariffed authority'' to terminate their resold networks.

AT&T also stonewalled requests by some of the Ad Hoc IXCs to resell AT&T's Tariff 12 services. AT&T's efforts to block the resale of Tariff 12 have been successful, as no Tariff 12 services were permitted to be resold by switchless resellers.[2]

Moreover, through these tactics, AT&T successfully divided the market for end-users such that resellers and the smaller switch-based carriers they resorted to for service, were excluded from the more lucrative market for larger direct access customers. Thus, AT&T ensured itself that it would dominate the large corporate customer market by forcing resellers off the AT&T network, and onto Spring, Wiltel, or other non-dominant carrier networks.

2. $13 Million Jury Verdict Against AT&T

This corporate policy toward resellers was recently put on trial in the United States District Court for the District Of

[1] A subsequent investigation into the consent decree ''uncovered an elaborate campaign to undermine the case, orchestrated and executed by AT&T, in which AT&T enlisted the aid of top officials in the FCC, the Defense Department, and the Justice Department itself.'' *Id.* at 40. The findings were published in a 1959 report. *Id.*

[2] AT&T's tactics go well beyond the brief summary of actions described herein. For example, AT&T has gone so far as to use third party telemarketing companies to attack the customer base of small reseller competitors.

Oregon in *Central Office Telephone, Inc.* v *American Telephone and Telegraph Company*. Central Office Telephone, Inc. (''COT'') a switchless reseller primarily active in the Pacific Northwest United States, alleged that AT&T intentionally interfered with COT's business by abusing its power as the dominant carrier in the telecommunications industry. The testimony and documents presented during this trial, some of which are summarized below and attached hereto, demonstrate extreme lengths to which AT&T will go in order to snuff out competition.

The plaintiff's first witness was the founder of COT, Gordon Rood.[3] Mr. Rood testified at length about the numerous ways in which AT&T intentionally set out to disrupt his company's business, and undermine its ability to compete. AT&T exploited its role in the provisioning, billing and servicing process to create the appearance that COT was incompetent. When AT&T refused to clear up the problems it created for COT's end users, the end users inevitably had no choice but to switch to long distance carriers.

Mr. Rood first testified how AT&T ensured that COT's customers would not enjoy a smooth transition onto the SDN account. Tactics employed by AT&T in the provisioning process included:

- Failing to send carrier changes orders to the local exchange company (exh. A at 265);
- Doubling the time in which AT&T promised to provision new orders from 30 to 60 days (*id.* at 233–34);
- Randomly reducing the number of orders that COT could offer from 6,000 down to 400 per month (*id.* at 225–26); and
- Stalling the provisioning of COT customers to such an extent that, by the third quarter of 1990, COT customers had to wait an average of 6 months from the time SDN was ordered to the time it was turned up; (*id.* at 273–74).[4]

If and when COT's customers were eventually provisioned on SND, their real problems began in the billing phase. AT&T created such extensive and tangled billing glitches (which to the end user appeared to be COT's fault) that COT was left with enraged customers who could not afford to spend valuable time sorting out billing errors. These billing tactics employed by AT&T included:

- Refusing to give COT multi-location billing as promised, such that COT could share a discount with a customer without costly and time-consuming adjustments after billing (*id.* at 374–75);
- Failing to provide call detail lists when billing COT's customers, or delaying call detail for months after bills were sent out (*id.* at 266–67);
- Incorrectly crediting or debiting the account of one end-user for amounts due from or to another end-user (*id.* at 298);
- Failing to bill customers for network usage until several months after the use, sometimes billing a customer for eight months of use in one bill (*id.* at 303);[5]
- Adjusting customer balances with unexplained credits and debits, causing major frustrations for customers (*id.* at 287–88);
- Double billing COT customers after COT assumed responsibility for billing its customers directly (*id.* at 298–99);
- Miscalculating the amount of volume discounts that a customer was owed (*id.* at 297);
- Refusing and/or failing to properly divide the SDN discount percentages between COT and the end-users, instead giving the entire discount to the end-user and thus cheating COT out of profits and cash flow (*id.* at 283–86);
- Refusing to correct erroneous bills brought to AT&T's attention (*id.* at 299, lines 11–13).

Finally, Mr. Rood testified to numerous ways in which AT&T undermined COT's competitive edge. These unfairly competitive tactics included:

- Breaking its promise to provide COT with calling cards containing the AT&T and COT logos, making it more difficult for COT's business end-users to get SDN rates for calls made from out of the office, and impossible to get SDN rates for calls made from out of the country (*id.* at 215–218, 559–561);
- Illegally ''slamming'' COT customers and converting them to the higher tariffed service of AT&T (*id.* at 557);
- Referring all resellers problems to one understaffed and untrained office in Piscataway, New Jersey, where the AT&T employees did not have the time, expertise, or customer familiarity to resolve the problems experienced by COT and its end-users (*id.* at 255–57, 299–300);[6]
- Making a post-contract demand for a deposit from COT before provisioning customer (*id.* at 261–62);
- Refusing to join COT in explaining the provisioning and billing problems to endusers (*id.* at 267–68).

The cumulative result of all these AT&T tactics was that COT lost a large part of his customer base. Indeed, by the Fall of 1991, COT was losing tens of thousands of dollars worth of customers every month. *Id.* at 304–05.

After Mr. Rood explained the difficulties COT experienced, testimony from a former AT&T employee, Spencer Perry, established that COT's problems were all intentionally orchestrated by AT&T.[7] Mr. Perry testified that resellers of SDN were first considered by AT&T to be a good source of revenue for the company,[8] but that later they were regarded with hostility and even referred to as ''cockroaches.''[9] This reversal in AT&T policy occurred after AT&T's Director of Distribution Strategy, Michael Keith, decided that SDN resellers might erode AT&T's PRO WATS customer base. *Id.* at 1009, line 18 through p. 1010, line 6.[10] To prevent this, Mr. Keith formed an ad hoc committee on resellers in order to, in Mr. Perry's words, ''work on ways . . . to change the SDN offer, so that the switchless resellers, or the cockroaches . . . would not . . . buy the product.'' Exh. B at 1038, at lines 20–23.[11]

At Mr. Keith's behest, Mr. Perry and another AT&T employee prepared a memorandum outlining ways in which AT&T could erect roadblocks to SDN

[3] Relevant portions of the transcript of Mr. Rood's testimony are attached hereto as Exhibit A.

[4] By comparison, Mr. Rood testified that COT could get an order provisioned by Spring within 10 days. Exh. At at 331, lines 12–16.

[5] In one case, Monarch Hotel received a $36 bill one month, and the next bill received was for $10,000. Exh. A at 303. As a result, Monarch Hotels refused to pay the bill, and cancelled its account with COT. *Id.*

[6] AT&T told COT that their account was being transferred to Piscataway, New Jersey because ''the SDN account was not for resellers,'' and even acknowledged that COT ''wouldn't be getting the same level of service that [it] had previously.'' Exh. A at 256, line 24 to 257, line

[7] Mr. Perry was an AT&T employee for 14 years, reaching the level of district manager for the account management district known originally as the Carrier Service Center and later as the Channel Development and Operations Center (''CDOC''). The relevant portions of the trial transcript containing Mr. Perry's testimony in *COT v. AT&T* are attached hereto as Exhibit B.

[8] Specifically, Mr. Perry testified that AT&T was at first ''overjoyed'' by resellers (exh. B at 993), because customers ''were walking in through the floor. It kind of reminded me of fish jumping out of the ocean into your boat. You don't even have to drop the line in.'' Exh. B at 994, lines 2–4.

[9] Exh. B at 1038.

[10] Mr. Perry explained the reasoning behind AT&T's sudden hostility toward resellers:

> [Y]ou would take a PRO WATS base of customers, and essentially take those customers, and move them to a product SDN that was lower priced. And that's referred to as base cannibalization. You are sort of eating your own customers.

Exh. B at 1071, lines 7–11.

[11] Mr. Perry also was instructed to find ways ''to kill the arbitrage'' which Mr. Perry explained meant to eliminate the price gap between the SDN and PROWATS tariff rates, the existence of which enabled resellers to make a profit by aggregating smaller end-user. *See* Exh. B at 1018, lines 9–19.

resale.[12] The ideas contained in the memorandum were then discussed at the first meeting of the ad hoc committee on resellers held on March 12, 1990. *Id.* at 1052–54. Seven AT&T officials attended the meeting, most of whom took notes. *Id.* at 1055, lines 14–15; 1056, line 20 through 1057, line 2. According to Mr. Perry, it was in this and other ad hoc committee meetings that AT&T formed its plans for destroying resale that were ultimately used against COT and the Ad Hoc IXCs:

> [O]ne of the things we were trying to do, was while making it less attractive to resellers, we wanted to keep the viability to commercial customers. And so, what we did, was we just listed ideas on the board, and then later went back, and then segmented those ideas, and tried to put some order to them, in terms of, you know, basically categorize the ideas.

Exh. B at 1052, lines 4–10. Mr. Perry testified that after this first ad hoc committee meeting ended, he was directed to gather the notes taken by the participants to the meeting and destroy them, which he did. Exh. B at 1056, line 3 through 1059, line 18.

By the Fall of 1990, AT&T's anti-resale policies devised by the ad hoc committee were working very well. Indeed, Mr. Keith indicated his confidence in AT&T's ability to thwart resale in a candid moment upon Mr. Perry's departure from AT&T. Mr. Perry testified about the encounter at the trial:

> Well [Mr. Keith] had mentioned that when . . . he asked what was I going to do . . . I sa[id] I wasn't sure. And he sa[id] well, I hope you are not going into SDN resale. And I said, oh, why is that? And he picked up a piece of paper, and he sa[id], with a one percent provisioning rate, they won't be around much longer.

Exh. B at 1084, lines 11–17.

Mr. Keith, in deposition testimony offered at the trial, essentially admitted that AT&T was working on ways of excluding resellers from the SDN markert.[13] Mr. Keith confirmed that, when asked by an AT&T official how resale could be limited, Mr. Keith answered in writing:

> I don't really know at the moment. We are meeting weekly with the SDN product team to find out. We want to make sure SDN serves the top end of the market. There will probably be modifications to the product that will insure this, but may not serve the resellers. But no one knows exactly what these steps will be . . .

Id. at 1201, lines 1–6.[14]

After a two week trial in which AT&T's anticompetitive tactics were explained at length, the jury concluded that AT&T had unfairly and intentionally excluded COT from reselling SDN as required by law and contract. The jury awarded COT $13 million in damages.

3. Other Actions Pending Against AT&T

AT&T's anticompetitive vendetta against SDN and Tariff 12 resale generated numerous lawsuits and continue to do so. Exhibit D to this Opposition lists the known lawsuits that have been filed to date and are pending against AT&T for its activities against SDN resellers like the Ad Hoc IXCs. Exhibit E list the pending complaints against AT&T that have been filed with the Federal Communications by two of the Ad Hoc IXCs, with respect to AT&T's stonewalling of the resale of its Tariff 12 services.[15]

4. AT&T's Unfair Business Practices Demonstrate the Hypocrisy of its Present Endorsement of Free and Unfettered Competition

As part of the Proposed Judgment negotiated with the Department of Justice, AT&T has once again endorsed the notion of free and unfettered competition. This is not the first time AT&T has endorsed competition in order to expand its dominance in the telecommunications market. Indeed, the first step in AT&T's campaign against resellers, described *supra*, was to win deregulation from the FCC. AT&T did so by expressly and repeatedly promising to the FCC and to the public, that AT&T would support competition, including long distance resale. Once it freed itself of regulatory constraints. AT&T reneged on these promises and initiated its efforts to put resellers out of business.[16]

AT&T's pattern of publicly subscribing to notions of free competition, but privately attempting to eradicate competitors through unfairly competitive practices, must be taken into account here. To justify its merger with McCaw, AT&T again has broadly supported free and unfettered competition, and even claimed that its control of additional communications facilities will increase access to the market. In light of AT&T's prior pattern of conduct toward resellers, these claims simply cannot be believed. AT&T is quick to embrace notions of free and unfettered competition in order to garner the very power that it needs to suppress small competitors, and expand its own dominance in the telecommunications industry. There is little reason to believe that AT&T's present promises to allow competition in the cellular market are any more genuine than any of AT&T's previous pro-competitive posturings.

C. Opportunities for Further Anticompetitive Practices Presented by an AT&T-McCaw Merger

The discussion, *supra*, of the relentless and creative ways in which AT&T pursued one segment of small long distance competitors, shows that it is impossible to predict how AT&T will pursue these same long distance competitors with its new found dominance of the existing cellular phone segment of the industry and the platform that dominance provides AT&T for future wireless telecommunications services of PCS (see *infra*). The anticompetitive opportunities this merger will create will be limited only by the collective

[12] The purpose of the memorandum was explained in its introduction:

> The recent unprecedented demand for AT&T [SDN] service, for the sole purpose of resale, has caused confusion in the marketplace, and has resulted in a clogged provisioning system, thus denying service to commercial customers. AT&T's interests may be well served in delivering this service to established, switch-based inter-exchange carriers. However, the current ability for switchless resellers to arbitrage the service has significant negative consequences to AT&T. This paper identifies tariffed elements and operational practices that attract arbitrageurs. Revisions to these elements and practices are listed in descending order of impact that would decrease the attractiveness of the service to switchless resellers.

Exh. B at 1050, lines 8–12, and 1051, lines 6–16.

This document is currently unavailable due to a pending AT&T remittitur motion. When available, this and other relevant documents from the COT trial will be submitted in a supplemental appendix.

[13] Relevant portions of Mr. Keith's testimony are attached hereto as Exhibit C.

[14] Mr. Keith also confirmed the disparate treatment that resellers received vis-a-vis larger corporate SDN customers. For example, AT&T refused to give their salespersons any commissions for sales to resellers. *Id.* at 1197. Moreover, unlike resellers, some corporate customers were given permission to use the AT&T logo, including for purposes of resale. *Id.* at 1199, 1202–03. Ironically, Mr. Keith testified that it was his organization within AT&T that was given responsibility for assisting resellers. *See* Exh. C at 1189, lines 9–18.

[15] These complaints are pending, and discovery in these proceedings to date have produced documents which demonstrate AT&T's motivation and intent to stop the resale of its services. Those documents are subject to various protective orders, but two of the companies comprising the Ad Hoc IXCs have requested a waiver of the protective order for purposes of this submission. If that waiver is granted, a supplemental appendix documenting AT&T's tactics will be submitted.

[16] This is particularly true with respect to its Tariff 12 services. For example, AT&T specifically represented to the FCC and to Congress that its ability to provide customized services would not violate the anti-discrimination provisions of the Communications Act (47 U.S.C. § 202(a)) and would not be anticompetitive, because its Tariff 12 services could be *resold*. However, at the time these representations were made, AT&T's corporate policy impact was totally contrary to these representations, as AT&T's policy was that no Tariff 12 services would be permitted to be resold if AT&T could stop such resale. The documents discovered in the pending FCC complaint proceedings demonstrate the contradictions between AT&T's public representations and its internal anti-resale policies and practices.

imagination of more AT&T ''ad hoc committees.'' There can be no doubt that the anticompetitive effects that will inevitably result from an AT&T-McCaw merger are clearly foreseeable and sharply defined against such entrenched anticompetitive behavior. The ''protective'' provisions of the Proposed Judgment will be powerless to prevent AT&T's unlawful restraints on competition.

1. Expansion of AT&T's Long Distance Domination

In filings with the Federal Communications Commission (''FCC''), AT&T has made no secret of the fact that it seeks to acquire the cellular facilities of McCaw for use as wireless local access in order to protect and expand its ''core'' long distance services business. The AT&T-McCaw merger will only provide AT&T with the tools necessary to protect its dominance and its ability to control and manipulate prices in the marketplace.

2. Creation of an AT&T End-to-End Network

Any Proposed Judgment in the public interest must be drafted with the recognition that AT&T's acquisition is designed to reintegrate its interexchange services with its control of local access, in order to create an end to end network in which AT&T will be able to bypass the local exchange carriers through the McCaw facilities. The creation of such a monolith was the very result that the MFJ was intended to prevent due to its anticompetitive nature.

The marketplace reality is that none of AT&T's larger competitors have the ability to compete with an AT&T that possesses the tools necessary to bypass present local exchange access networks. MCI may in six or more years have a wireless or wired presence in several major cities.[17] Competitive access providers exist only in small islands in a few cities and have recently suffered a major setback in their ability to expand on a more rapid and cost effective basis.[18]

In short, while the rest of the industry inches toward increasing their competitive parity, AT&T is seeking to further entrench its dominance by securing the assets necessary to put it so far ahead of all other competitors as to make any effective future competitive challenge impossible. If permitted to do so, the ''whale leading the pilot fish'' symbolism used by Professor Huber soon will be enshrined.[19]

3. Domination of the PCS Market

Most industry experts agree that over the next ten years, personal communications services (''PCS'') technology will transform the way in which the public communicates electronically. PCS will enable people to be reached anywhere in North America over wired and wireless networks with a single personal telephone number. PCS will also support two way data, radio location, and image transmission.

Dr. Jerry Lucas, a leading expert in the telecommunications industry, and publisher of *Telestrategies Insight,* predicts that, in the event that AT&T acquires McCaw, AT&T will be in a position to dominate the PCS market. In an article entitled ''The PCS Revolution and Why AT&T Will Dominate It,'' *Telestrategies Insight,* July 1994, Dr. Lucas analyzes the competitive prospects of leading companies in the PCS market. Dr. Lucas concludes that AT&T *is positioning itself to dominate* the PCS market through the AT&T-McCaw merger, and predicts that *AT&T ultimately will choose to control* 60% of the PCS market. *Id.* at 4.

To give a company such as AT&T, with its history of anticompetitive abuses, the opportunity to dominate such an important emerging technology, would be reckless. The FCC will be selling PCS spectrum at the end of 1994, and AT&T-McCaw would be in the unique position of having the financial and capital resources to ensure its total domination of the PCS market before other companies have had an adequate opportunity to evaluate their prospects for entering the field. It is only by blocking the proposed merger that robust competition in this emerging industry can be salvaged.

4. Inadequacy of the Proposed Final Judgment Protective Provisions

The Department of Justice undoubtedly believes the Proposed Judgment provisions adequately protect the public from the antitrust implications of an AT&T-McCaw merger. Unfortunately, the Proposed Judgment is entirely inadequate, as AT&T easily will be able to circumvent the anticompetitive spirit of the Judgment's protective provisions.

For example, the Proposed Judgment contains provisions regarding the ''Separation of McCaw and AT&T'' and ''Equal Access'' for other long distance carriers (including, presumably, resellers like the Ad Hoc IXCs). These provisions, which presumably were drafted with the good intention of preventing AT&T from monopolizing all the long distance needs of McCaw cellular telephone customers, will in no way prevent AT&T from continuing the anticompetitive practices discussed above.

Nor will these provisions fulfill the modest goals for which they were designed. The ''Separation'' provision, for example, presumably seeks to prevent AT&T from dictating how McCaw will operate its business. However, the Proposed Judgment does allow AT&T to funnel ''general corporate overhead and administrative services to McCaw and McCaw affiliates.'' This is exactly the type of control that AT&T will seek to exploit, through liberal interpretations of corporate overhead and creative offers of administrative services which will subtly enable it through ''carrot and stick'' approach to get the operational control over McCaw that the Proposed Judgment seeks to prevent.

Nor will the Equal Access provisions protect long distance carriers. The Ad Hoc IXC and COT currently operate in an equal access environment, but that hardly has guaranteed them the access to which they were legally entitled. Indeed, AT&T successfully thwarted the efforts of resellers to compete for large segments of the long distance market through the covert tactics described above. There is no reason to believe they will not repeat these actions once it has a foothold in the cellular industry, despite the Equal Access provisions contained in the Proposed Judgment.

III. Conclusion

AT&T's historic practices have proven, if anything, that they have not earned the privilege of being entrusted with the means with which to further its anticompetitive attempts to dominate and restrain competition in the

[17] Exhibit F—MCI press announcement, Washington, D.C., February 28, 1994.

[18] *Bell Atlantic Telephone Companies* v. *Federal Communications Commission,* Case No. 92–1619 Slip Op. (D.C. Cir. June 10, 1994), *vacated in part and remanded, Expanded Interconnection with Local Telephone Company Facilities* (FCC Docket No. 91–141), *Report and Order and Notice of Proposed Rulemaking* 7F.C.C.R. 7369 (1992); *Memorandum Opinion and Order,* 8F.C.C.R. 127 (1993).

Although the local exchange carriers one day likely will, under the proper combination of government regulation and technological advances, enter the interexchange market, as AT&T itself has consistently and vociferously argued, that day is far from being here. Hence, there is no need to accommodate AT&T's own attempts to get a head start on such entry by acquiring the local access facilities that will provide it with the capability to reestablish its monolithic end-to-end network reach. Clearly none of AT&T's competitors have a similar capability at this time, and will not have such a capability for the foreseeable future.

[19] See Huber, Kellogg and Thorne. *The Geodesic Network II. 1993 Report on Competition in the Telephone Industry* (1992) at 3.52.

telecommunication industry. AT&T must be required to first earn the public's trust as the dominant carrier before being permitted to expand its power and influence in the industry. As such, the AT&T-McCaw merger should be rejected.

Indeed, the actions thusfar taken endorsing the merger, if followed here, will be evidence of the Department's commitment to effectively enforcing the laws of this country. Approving the AT&T-McCaw merger will cheat the small businesses which have diligently fought to bring more effective competition to the telecommunications industry, and the small businesses and other small users who can only be properly served by the smaller carrier community of that industry. The Proposed Judgment cannot guarantee that these significant interests will be preserved. To the contrary, history has demonstrated, and history is repeating itself today, that AT&T will not allow the antitrust laws or government decree to sidetrack its continued and unabated efforts to remain dominant and controlling in its core line of business—long distance telecommunications.

For the foregoing reasons, the Proposed Final Judgment must be rejected as against the public interest.

Respectfully Submitted, The Ad Hoc IXCs

Charles H. Helein,

Their Counsel

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Exhibit A—Excerpts of Trial Testimony of Gordon Rood, Central Office Telephone, Inc. v. AT&T, Civil Action No. 91–1236–JE, United States District Court, for the District of Oregon, June, 1994

A. Exhibit 5 is a photocopy of the information about the SDN calling card, and how it would be laid out with our logo. And in the lower left corner is an actual copy of the calling card that LaDonna brought out as a sample. She put it down there, and she said here is—and we made the copy together.

She said here are the instructions on how—what information we had to provide them to get our logo printed. And she said this will have the AT&T logo here, and we will have the Central Office Telephone logo up here, and they will print the cart out.

MR. HALL: Excuse me, your Honor. May I instruct the witness not to show the jury the exhibit until——

THE COURT: Okay.

BY MR. HALL:

Q. I didn't tell you. That is my fault, Mr. Rood. But don't show the jury things you are looking at until the court has to admit it into evidence.

We will offer that exhibit, your Honor.

THE COURT: What is the number?

MR. HALL: Exhibit 5.

MR. PETRANOVICH: No objection.

THE COURT: 5 is received.

(Exhibit 5 received.)

BY MR. HALL:

Q. I would like to ask if the blowup or the transparency can be put up. That may be a little easier for the jury to see than what you were showing them prematurely there.

Can you see that over there readily?

A. Yes, I think I can. It might be easier to look at this.

Q. Why don't you just describe for the jury quickly again what you said about where the calling card information was located?

A. Okay. The lower left, the white portion on there, it was the actual duplicate of the calling card sample that LaDonna brought out to us. The instructions above are—tell you the different options for—one says hot stamping. One was offset printing. One says exclusive customer design.

Q. Now, when you were negotiating with LaDonna Kisor about entering the AT&T agreement on SDN, what was the discussion with regard to calling cards?

A. Calling card was one of the most important things we saw. The SDN calling card was very similar to a standard AT&T calling card. You accessed it through a normal telephone, with what we call zero plus. You didn't have to dial an 800 number. One of the major benefits of it, it gave a 45 percent savings off of the AT&T card.

Actually, there was a little bit more than that. But we—the initial charge was 30 cents compared to about 75 cents. And the cost per minute was considerably less. And it was also billed in six second increments as opposed to full minute increments, so there was at least a 45 percent savings off an average call using the SDN card compared to a standard AT&T credit card.

Q. What did you consider the value of that calling card in relation to prospective customers?

A. Oh, boy. It was really important. A lot of the customers we dealt with had actually spent more money on calling cards, because they would have a lot of salespeople traveling. And the savings, because it was 45 percent, if a customer, for example, had a $1,000 phone bill, and 500 of it was in calling cards, they could save 45 percent of the 500, where we might only safe them 22 percent on the other 500 of their bill. So, it had a significant impact on customers in reduction of their telephone expense.

Q. Okay. It's a little blurred there. There is the AT&T logo in the upper, left-hand corner. Was your logo going to be on there?

A. Yes, she showed us where the logo—I wrote—those are my actual numbers. I wrote—that's our logo with a globe, and Central Office Telephone, and that is where we anticipated we would put our logo.

Q. Okay. Was the—was having the AT&T logo along with your logo on your card of value to you?

A. Absolutely. It gave us what I considered almost instant credibility with our customers.

Q. Okay. Now, did you ever get the AT&T calling card?

A. No. We never got their AT&T calling card. We submitted the artwork to them. I took it—I hand-carried it down to one of the people in their office that was on the account team. I think LaDonna was out of town.

They called me up and said we need your artwork. I took it down to the AT&T office here, and we never heard anything more. And a couple months later, of course, our account—this was probably in December of 1989. And somewhere around January or February, since our account was not yet turned up until April, we couldn't issue it, because it wouldn't work.

And I asked LaDonna about the calling cards. And she says, well, she said, you can't have them. AT&T credit card manager, I think she said, had said the resellers weren't going to have use of the AT&T calling, the SDN calling card.

Q. Okay. Would you distinguish between the resellers with the term commercials?

A. Yes. A commercial account would be someone who purchased an SDN account or account for their own use or

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Q. Did you actually contemplate telemarketing at the time you were considering going into this SDN program?

A. Yes, we contemplated all different services. Telemarketing is one that we looked at. Actually, in 1990, in February of 1990, I met with a telemarketer, with Jerry Oren, who was our customer service manager. We talked about implementing—he was doing telemarketing already on SDN for another company, and said that he could bring four telemarketers over. But we were—we entered initial discussions about doing some telemarketing.

Q. Okay. Might as well jump ahead here. Why did you not follow through on that?

A. The reason we didn't follow through, was AT&T changed the number of orders that we could offer. When we first signed up in October, they told us that the—we could have up to 6,000 locations on a multiple location, or multiple location billing account. If we ever exceeded that, we could add another 6,000 by partitioning it, which was simply adding a one-time fee of $10,000. We could actually have a second partition to do that.

In looking at 75 accounts a month, we didn't think that 6,000 was something that we would be reaching in the immediate future. But, there was no limit put on to us up to that 6,000, as far as the number of accounts that we could put up. But, in February, I believe, of 1990, they came out, and they said we are going to restrict you to a maximum of 400 accounts, orders per month. They—so, we abandoned our calls, at that point, to do telemarketing, because telemarketers generally target a lesser amount. We wanted to talk to customers doing $100 a month and more.

Telemarketers would generally be talking to smaller businesses. I didn't want to fill up my account with 400 orders for $40, when we had these salespeople, and these plans to expand, and we would much rather put on 400 orders of customers averaging five or $600 a month.

Q. Okay. We were on—we were talking in terms of the EVP split here. Again, and that was a term related to MLB. Let me go back there and try to discuss this more completely in terms of MLB versus LABO through another chart. Can you look at Exhibit 250?

THE COURT. Excuse me. Before you go on, what does BSD stand for on the chart up here?

THE WITNESS. BSD?

THE COURT: Up in the upper right.

THE WITNESS: Business service——

MR. HALL: Your Honor, I can ask some questions there.

Q. Would you please explain to the jury what business services division customers means?

A. Business service division customers would be those

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Mr. Petranovich. No objection.

The Court. 39 is received.

(Exhibit 39 received)

By Mr. Hall.

Q. Anyway, looking at Exhibit 68, will you tell us how it came about that having started out to do this SDN part two program you just told the jury about on October 30, 1989, you ended up in this March 8, 1990, agreement on something called MLCP?

A. Yes. In February of 1990, LaDonna Kisor came and told us that they were having some difficulty in implementing some of the orders, our initial contract, because it wasn't due to go in, had not been—our initial contract has not been installed.

As I told you, that she told us originally, that it would take, for subsequent orders, when we added customers to our network, it would take about 30 days, but she said——

Q. Excuse me. When you say originally, are you referring back to October 30?

A. I am referring to the original October '89. We were told that we would have subsequent locations added in 30 days. She came out and told us, in February, that they were having—they had a lot of orders from other sources, other resellers. They were having some difficulty in implementing the orders, and that actually, the implementation date, phase would change from 45 to 60 days, which is a fairly long time. When you go out and sell a customer service, and he said, yeah, gee, that sounds good. I want it. And you say, I can't get you up for two months or whatever.

Actually, in some cases, with this, she also told us that we would now submit orders by a certain date each month. And she called them windows. She gave us a schedule, and said that if you give us all your orders by March 23, for example, then those orders will—would now be implemented on the second following month from about the 11th to the 15th of the month. So, it was anywhere from 45 to 60 days. But, it also meant that if we—if the window date was March 23, and we signed up a new customer on March 25, two days later, we couldn't submit that customer until the next month. And the next month the window might be April 21, or April 19.

So, we would have to hold that customer's order for almost a month, and then an additional time. It would take another 45 to 60 days. So, in some cases, it could be almost 75 to 90 days before that customer service was installed.

Q. How does that relate to MLCP?

A. Well, then that is why she came out, and she proposed

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was interested in continuing to work on a full-time basis.

Q. Okay. Following your April 9, 1990, agreement, for the MLB EVP six program there, what, what was your relationship to the business services division in the Portland branch?

A. All right. LaDonna Kisor, at that point, continued and was still our account team manager. She was the sales rep. And we had the account team that we had, which consisted of Jan Bramlett and Lynn Rosen. They had a technical person assigned, Ken Merlot. So, they had a whole account team right here in Portland that we dealt with, that smoothed out any technical difficulties that came out.

At that point, in earlier 1990, we were meeting on a weekly basis. We actually, I think, every Wednesday afternoon at 2:00 o'clock, LaDonna would come out, and we would give her orders. We would talk about anything, so we had a very close relationship with our account team at that point.

Q. Okay. Did that change?

A. Yes, it changed in May of 1990.

Q. Okay. And will you just tell the jury what happened?

A. AT&T decide that they were going to transfer all of the resellers to Piscataway, New Jersey, for processing orders. And the account representation, instead of being in Portland, would be in Pleasanton, California, the western sales group there.

Q. How did you come to learn this?

A. LaDonna told us that this was going to happen, and she asked the new sales executive, Trish North and her supervisor, who was Bob Alpert, to come to Portland and do a transition. To have them explain to us the new structure, the new method for in how our account was going to be handled at AT&T. That was the 25th of May.

Q. Would you describe that meeting, who attended it, and what occurred there?

A. Jerry Oren and I attended for our company. Trish North and Bob Alpert, LaDonna Kisor was there, and they came into,—and they had an agenda set for the meeting, a printed agenda, telling the things that they were going to talk about in the meeting. And they discussed the transition of our account to their new representation.

Q. Okay. What, what were you told, with regard to how AT&T would be handling you from that point on? What were you told as to the support?

A. We were told we would process our orders through the office in New Jersey. We were told that we would not be getting the same level of service that we had been getting in the past. Bob Alpert told us that the SDN account was not meant for resellers, and that we wouldn't be getting the same level of service that we had previously.

Q. Okay. Was there, were there—were any names of any people mentioned at that time at CDOC for you to contact?

A. Yes, they gave us the telephone numbers of several people. I don't recall. I think Tony Parisi's name was

on that as a person that we would contact regarding processing the orders. And there was also someone in the—Cynthia Alexander's group, I believe. And you will have to—Jerry Oren, probably, since he was dealing with those people, on a daily basis, he probably has those names down. I don't recall them.

But we were given, actually given the telephone numbers of the people that we would be talking to in Piscataway and in Pleasanton.

Q. You mentioned CDOC, and talking about Piscataway, and what did you then know about what CDOC is or was?

A. I didn't know a heck of a lot. It was a channel development operations group. And all I understood was that instead of being in the business services division, we would be dealing with the people back there. And that we would not have the account team that we had had at that point. That it was going to be basically our responsibility to process all of the paperwork, as opposed to some of the functions that had been performed by the Portland account team.

* * * * *

A. This is a letter on July the 3rd of 1990 from Trish North as a followup to their meeting, saying that AT&T had completed a credit review, and based on that, they asked us for a $375,000 deposit.

Q. You'd indicated you'd worked with MCI earlier on before you got into this SDN program in October. Had you had any troubles with credit with them?

A. No, we had not.

Q. Okay. And you had worked, at the time this letter came to you, with AT&T already under two different contracts?

A. Right. We'd already had—we already had three accounts. We had the original SDN option 2, we had the multiple location calling plan, which they came out and sold to us, and we'd already signed up and had working the SDN option 6.

Q. I didn't ask you this before, but when you did the option 6 back in April 9, 1990, was there any specific discussions with LaDonna Kisor about whether there would be a deposit?

A. Yes. I had a credit background. We had been asked for a deposit with MCI. I was—and I brought it up. I said, ''You know, LaDonna, I've got to ask you this. I'm a little bit surprised that you haven't asked us for a deposit.'' Her reply was that, well, she had written up a good story about our company based on our history, and we had an account with MCI. And with our vast experience in telecommunications industry, she said a deposit wouldn't be required.

Q. But, in any event, you did get this letter in July, and did you ultimately come down to a particular deposit figure for Trish North?

A. Yes. I had a telephone conversation. I was pretty upset at the 385,000 deposit, but I had a telephone conversation with an Alex Aja, A–J–A, I believe. And I said—in fact, Trish North told me if there was any questions regarding this, I should talk—gave me the telephone number.

And I said, ''You know, I'm surprised that you are asking for a deposit.'' I had given them a bank record showing our bank balances. I gave them MCI as a reference. I actually had made out a—had a completed financial statement. At the time they gave me the credit applications, I said, ''Well, you know, let me give you a current financial statement.'' And that was at the—our accountant's at that point. So I wanted to give them current information. So I asked—I asked him, I said, ''Well, what did you find out when you talked to our banker or MCI?'' He says, ''We didn't talk to anyone.''

Q. In any event, did you come down to a number?

A. Yes. They agreed to talk to MCI, which they did. I

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the problems is some of our customers may have 15 lines, and they would have five lines up on the SDN and the other 10 aren't working. Some of them would not have anything.

So our salespeople had to go back out to the customers, tell them that we were having some problems, and we'd have to go to the terminal block and actually physically make calls from each line to do the verification to find out which numbers were actually up on SDN, if any of them. It was very time consuming. The customers were peeved, if not outright mad, because they had signed up for a service maybe four or five months before and still weren't on it. They may be getting some billing from us and some billing from someone else.

And it was—the orders weren't working. We found out that the orders that we submitted in May that were supposed to be turned up in July—and I forget. There was something like 40 of them or whatever—that not one of those orders were turned up, not a one. And we called Trish North and said, ''What happened? None of our July window went out or what was the orders that we had submitted in May.''

She came back with a reply, someone forgot to send the orders to the LEC, which is L–E–C. It stands for local exchange company. It's an industry termination. So if we talk about LEC, we're talking about local exchange company, L–E–C.

Q. Would that be like U.S. West?

A. U.S. West, GTE, Continental Telephone, whoever happens to be the local serving telephone for that particular customer. So we were—we were really concerned. We were concerned that our account was not billing. Here we had given them enough orders to where we were expecting, by the May or June time frame, that our account would be billing $50,000 a month. And here on the July bill we only billed $13,000.

We don't know what is happening. We know the orders aren't getting up. So we were terribly sensitive about it. And we said, well, you know, let's make sure we don't have any problems in August. This is really getting terrible.

Q. Can I stop you here for a second? Before you go on to the next month, did you ask AT&T to join with you or itself make some explanation to your customers of why these problems were occurring?

A. Not in July, no.

Q. Okay. When was that?

A. Actually, in September we made an original request that we—and the other thing that was happening, the accounts that were getting billed weren't getting call detail, and they were getting a bill for $200 or $1000 or $500, and there was no record of where they made their calls. Well——

Q. Excuse me. Can you explain to the jury, especially in the business setting now, because these customers are all business customers, right?

A. Right.

Q. Can you explain in that setting what the value of the call detail was to a business customer?

A. A business customer who doesn't know who in their organization makes calls—you get a bill for $1,000 for telephone calls, you sort of want to know where those calls went to and if the billing is correct. They're dealing with a reseller, and this may be the first bill. So all of a sudden they're getting a bill.

The call detail we knew—we had ordered the call detail, and actually we didn't know and it wasn't explained to us, that the call detail actually came under separate cover. And if it came within a week or even——

Q. Excuse me.

A. —two weeks, that was probably timely. But by August and September, we were told that the call detail wasn't going to be coming out for several months yet for July and for August.

And we asked AT&T to—well, you know our customers aren't going to

believe us on this. So we asked—asked them if they would write a letter with us explaining, you know, and they said no. So we wrote a letter in September explaining that AT&T had—was going through a new billing system on this and that the July and August call detail wouldn't be out for several months yet and asked—now, we did have a bill detail which came—was available to our office, but it showed most of the same information, but it did not show the destination city. It would say one—a call was made from this telephone number to 1–206. It wouldn't tell you if it was Vancouver or Chehallis or Seattle.

And we would get copies of that and send that out, and that satisfied some of our customers. But we did the best—we were in constant daily communication with the billing office in Seattle getting copies of this, trying to satisfy our customers, because the customers simply won't pay their bill unless they know—most of them wouldn't. Some of them were very good and paid it and relied on us, and in a couple months the call detail came out maybe two weeks late, and that was acceptable to the customer. But we were getting a lot of complaints about the bill detail or call detail not coming with the account. When it was two and three months, it was outrageous.

Q. Would you look at Exhibit 115, 115?

A. All right.

* * * * *

this point unless you're prepared to make a firm representation that this will be connected up specifically with AT&T and somebody who can explain it in more detail. I don't know whether you want this witness to explain certain things that were going on that might relate to this or just that you want the document in. But if you just want the document in now, it's not sufficient. There's not a sufficient foundation.

MR. HALL: All right, your Honor, we'll hold that back for a while, then.

DIRECT EXAMINATION (continued)

BY MR. HALL:

Q. What was the provisioning rate for your company during the fall of 19—well, let's start—let's say what was the provisioning rate, to your recollection, for your company in the second quarter of 1990?

A. I—I don't have any statistics. What I can tell you is that our entire July window didn't go up, our entire August window didn't go up. We continued to have problems. Our analysis told us that during this period that—we did an analysis of the dates that the orders went in. And during 1990, the second and third quarter, or this period, that the average installation on all of our accounts was over—was about six months from the time that we submitted the order to the time it was turned up.

Q. So, in other words, it would be 180 days from the time the customer would order to when the customer actually got on line?

A. Yes. It's about 180 days. I would—we have some supporting someplace.

Q. And what was the promise that was made at the time that you entered the contract of April 9, 1990?

A. We had been told at that time that from the time we gave AT&T the order, it would be 45 to 60 days.

Q. Okay. Can you look at Exhibit 139?

A. 139. All right.

Q. Okay. Is—can you identify this?

A. Yes. This is a document that we received from AT&T in the discovery process.

Q. Okay. Can you—is that—can you identify that?

A. It says, at the top, the—

Q. Well, no. I'm not wanting you to read things. Do you know what it is?

A. Yes. It's an alternate channel support group report on resellers and implementation of orders.

Q. Okay. And is your company included in this listing?

A. Yes, we are.

Q. Okay. Can you—

A. On page 21.

Q. All right. And can you just summarize your understanding of what this chart's about or this tabulation?

A. All right.

MR. PETRANOVICH: Your Honor——

MR. HALL: Just summarize——

THE WITNESS: Yes.

MR. PETRANOVICH: Your Honor, objection. We don't have this exhibit entered into evidence yet. And we've got a question asking the witness, as I understand it, to read from it.

THE COURT: Well, without reading from it, what does it purport to be?

THE WITNESS: It—it's a document showing, in this case, Central Office Telephone orders received by month and implementation.

BY MR. HALL:

Q. Okay. In connection with—does that include Central Office Telephone Company's own orders, as well as other—

A. Yes. Page 21 specifically refers to Central Office Telephone.

MR. HALL: We'll offer that, Your Honor.

MR. PETRANOVICH: Your Honor, a few questions in aid of objection?

THE COURT: You may.

* * * * *

And she came back with an answer. I don't know if it one day or two hours or two days. She said, ''The SAGE test failed.'' Quote. And this is evidently—I don't know. It's a test that they say they have to perform to make sure that your data's entered correctly. And if it—I'm not an expert on the SAGE test, but that was the reason given to us for our August window not turning up.

Q. Okay. Now, going on here, did you have any discussions during this time fram—we're in the fall of 1990 now—with Trish North with regard to the—the allocation of the discount under MLB that you'd asked for?

A. Yes. Starting in August when the first billing went out, actually under the 15 million minute commitment, we noticed that there was no discounts allocated to headquarters except for a very small amount, which would have represented only those calls that our company made on our own account.

Q. When you say, ''headquarters,'' are you referring in this instance to Central Office Telephone?

A. To Central Office Telephone's own physical operation in Milwaukee, yes.

Q. All right. Okay. And so, having notice that there was no discount allocations at headquarters, what did you do?

A. We called Trish. And she came back, and we determined that all of the discounts were being given out to our end user customers, and the 50 percent that our headquarters was supposed to get was not on the bill.

Q. All right. Did she indicate she would make any steps—take any steps with regard to this?

A. Well, she sent us—one of the things—we had several discussions about the discounts—and there had been an error made where, we—we were told that 50 percent of the expanded volume plan could be allocated. Trish North informed us at this point that if we allocate 50 percent of the URP, the usage reduction plan. That was a 5 percent discount.

Well, we explained before, we had very carefully calculated those percentages that we could afford to allocate to our customers and still be profitable. So it turned out that the 50–50 allocation would not have been a correct allocation, simply because we were giving them not only half of the 12 percent, but we were giving them half of our 5 percent, too, or 14 and a half percent. At the level we were at in volume discounts, it wouldn't allow us to be profitable.

So we had a discussion about reallocating those discounts. And Trish told us that we—you know, any change in that allocation had to go in 10 days before the billing period. And we had our first discussion, I think on August

29th. So we had first talked about changing that. And we asked her, ''Can you make an allocation other than a full percentage allocation?'' And we used an example. We're talking about a 47 and a half and 52 and a half percent discount. And it took about a week, five or six days, before Trish got back and said, ''No, if you're going to make any allocation, it has to be in full percentage amounts. If you want something, you're either going to have to go 47 or 53.''

Well, we had done some computing by this time. We had promised our customers a 12 percent volume discount. And during—one of the incentives of going to the option 6 was that during the first year, regardless of where we were in the contract, we would get, for the first year, a 24 percent expanded volume plan discount. So we promised our customers 12 percent. We'll give you half of our expanded volume plan, which is 24.

So we tried to comeup—in addition to that we had a 5 percent discount, so our total discounts were 29 percent. We had promised our customers 12 percent. So we came up, and on about the 8th of September, which was still in the period to get it on the next billing, we asked to allocate 42 percent to our customers and 58 percent to headquarters. And 42 percent of 29 percent total comes out to 12.19 percent. So we actually had to give them a slightly higher percentage than we had promised, but that's the closest we could come to 12 percent and meet our commitment to our customers the give them the 12 percent discount.

So we ordered a change in the discount allocation, from what was in the computer of 50 percent, to 42 and 58.

Q. Okay. Now, did that change in allocation that you ordered at that time—as I understand it, prior to this time, there had been no allocation made whatsoever, is that correct?

A. All of the discounts were going to the end user customer, yes.

Q. Right. And what happened after this discussion?

A. Trish told us—reported that she had turned in the order to change it and that it—the change would appear on the October 11th bill for September usage.

Q. And did it?

A. No, it did not.

Q. Did it ever?

A. No, it never did.

Q. Okay. Did it ever appear to the day you left in September 30, 1992?

A. Well, we changed—because of all the billing problems, we had to change our billing option. So——

Q. Excuse me.

A. They reported to us that in March of 1991, which was two months after we changed to a different billing option as a matter of survival—they told us, ''The compute took your changes,'' but they were no longer doing our billing, so it didn't make any difference.

Q. Let's go——

A. I don't know that for a fact. they just told us that.

Q. Let's go briefly forward to that point. You say that you changed finally to another form of billing. When was that?

A. We actually ordered, initially, the change at the end of October when we again had a failure in getting the allocations out. Our customers started leaving us. We'd had a—we'd had problems with the implementation, we had problems with credit cards, we had problems with the substitute on the credit card.

Now the billings were going out. And when AT&T had given all the billings out, they were now sending adjustments on the bill without any explanation to the customer. Because they had given the customer all of our discounts, now they decided they had to make an adjustment on the bill debiting the customer for an amount of money, which would get our discounts back, and the adjustments they sent out were worng.

So our customers were just getting tired of it, and they started cancelling their accounts. Our salespeople were getting irate. They were losing their customers. They were spending all their time resolving problems and not going out and selling new accounts. And so we just said we've—the billing is just impossible. We can't do it. And we said, ''We've got to go to network billing,'' which was a sort of a traumatic thing, because it cost a lot of money to get it set up, and it was going to take several months to get it done.

Q. I'd like to ask you if you'd tell the jury what the difference is—just so they know. They're trying to follow this along here. We've got this MLB and how it's supposed to operate and then MLCP as a temporary parking place. Now we're up to—back to MLB efforts again with Trish North. And I'm trying to get the distinction between the network billing, which you're now going to talk about, and the prior billing?

A. Okay. Network billing, AT&T would continue to carry the service, but they would send us a magnetic tape. We signed up with a billing company, computer company who was in the business of doing telephone billing, and we signed up with them to transfer over other billings and have them do our billings for us. But what it did is it increased

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a major problem. All of our discounts had been allocated back to the end user customer.

AT&T decided that they had to go back and do a debit on their accounts. We'd asked them to just simply credit our account for what should have been on there, but they said, ''No, we've got to bill the customer.'' So they would issue a debit. They may issue a debit in October for two previous months. There would be two debits to a customer's account without explanation. These debits were computed wrong.

In other words, let me give you an example. If our customer, say, got—had $1,000, a bill, and they got, say, $290 in volume discounts, actually the customer should have only had 120. Well, so AT&T would say, okay. We have to issue a debit to that account for the difference between the 290 we gave them and the 120. That, obviously, should be $170. Well, they would issue a debit maybe for $138. It has no rhyme or reason to be a correct amount to get our money back.

And almost none, that I know of, of the debits that they made were computed correctly. Simply—they gave them all—they should have simply multiplied 58 percent times the amount of the volume discount the customer got. It was a pretty simple mathematical calculation. They never—they never got it correct. So they kept doing that.

Some of our customers didn't understand them. They didn't call us. They wouldn't pay them. Some of them said, no, you gave me a discount. I'm not going to get it. They didn't understand it. And these bills were just fouled with incorrect balances every month. It was taking—customers quit. They'd say, ''You know, I like your service. I simply can't spend four hours every month reconciling my AT&T phone bill or my Central Office Telephone phone bill.''

So the balances were incorrect. Then we have some evidence that Customer A would pay his bill, and it would be credited incorrectly to Customer C's account. It was just a tangled web of incorrect billings that went out. Those bills were fouled.

Well, when we went to network billing, we made one very good decision. We decided not to try and bring forward the balance the AT&T showed on these accounts, because there was no way—AT&T couldn't explain it to us. There's no way we could explain it to our customers. So when we started billing in February, we started and out as if the customer owed no previous balance. We started out with zero. So we didn't know where they really stood. There's no way of our

telling without some—and we're still dealing with the Seattle office.

And so there was an ongoing problem now, that we're—our customers are still getting billed. We didn't want any more incorrect bills to go out, so we tried to resolve the issue with AT&T to get them to correct the bills so they would be to our customer—customer deserves a correct billing. So we didn't bring back the fouled balances, so now we have all those bills out there with balances on them as a result of all of the incorrect billings from AT&T. So we just started out clean with our network billing and started collecting that.

But now we have a problem that went on for months and months and months of trying to get AT&T to correct these bills. They absolutely refused to correct the bills. We had conversations. We started withholding our payments to them. We said, ''We are not going to pay any money until you get those bills corrected, because, you know, it's jeopardizing our business and our customers.''

So we withheld—we withheld funds, and we had—we had conference calls a month down the line in 1991. They—our billing—billing responsibilities that I told you about that was handled in Seattle, that got moved back to another department in New Jersey. These people had no idea—the people that we dealt with in Seattle, Myrna Pharr and Becky Zeller, were completely familiar with our account, all the problems. Myrna Pharr was a supervisor. And she told us, she said, ''I won't let them transfer this account til we get this cleared up.'' Well, that didn't happen. They transferred the accounts.

There was another problem that——

MR. PETRANOVICH: Your Honor, if I could just ask for maybe for Mr. Hall to interpose a question every now and then. We're just getting a narrative here that's sort of hard to follow. And if we could do this on a question and answer basis, I think that would help everybody.

MR. HALL: I agree with that, Your Honor.

BY MR. HALL:

Q. Did you get to the point where you hired an outside person to help you unscramble this?

A. Yes. AT&T wouldn't do it. We told them that we would do it. We hired a person by the name of Griff Griffith, who had some computer knowledge and expertise. We installed a special—we asked him what we should install. We told him what the problem was, that we had all of these bills that are incorrect. We want to get them and resolve the balances. So we hired Griff Griffith to come up with a way of identifying all of these bills.

Q. Okay. And did you get any satisfaction out of that arrangement in terms of your AT&T negotiations?

A. No, we didn't. It took several months. We had to go back to every single bill that had been sent to every

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the SDN program?

A. Well, as I indicated, we had continued to have the problems of getting the billings corrected. AT&T was refusing to do it. And we went to network billing, but there was a new billing problem cropping up that was destroying us. And that's called unbilled toll, or—we'd get a report.

And what happened, our customers would be on the SDN network, but for some reason their calls wouldn't be billed. And even though we were doing a network billing, we were not getting identification of the calls from our customers. Some customers were billing nothing, even though they said they weren't getting a bill from anyone else. And so, all of a sudden, a customer would get a bill, and it would be for eight months of long distance service.

In September, particularly, Sam Allen, at the Monarch Hotel, called me, and he got a bill for that month for the Monarch Hotel of nine- or $10,000. The previous bill was $36. It had calls on it for eight months. And he ordered all of his service canceled. Sam Allen owns the Monarch Motor Hotel, the Sunnyside Inn, Days Inn, and the—he owns half of the Best Western at the Meadows. He canceled all those services, and said he would never do business with us again, and he wouldn't pay the $12,000 or $10,000 that we showed owing on the bill even though some of it was a current portion.

Mr. PETRANOVICH: Objection. Hearsay as to what Mr. Allen told Mr. Rood.

The COURT: I didn't hear the very last part. The objection's overruled as to the first part. He can testify he wouldn't do business with you again, but I don't want you to go on beyond that as to what he said.

THE WITNESS: All right.

BY MR. HALL:

Q. Mr. Rood, I think you, just at the end there during the objection, were talking about the amount of the unbilled—the outstanding billing with your—what you had. You can testify as to what that was. What was the outstanding billing that Monarch had with you?

A. The outstanding bill on the——

Q. Yes.

A. On that one account?

Q. What they would have owed you, yes.

A. About $10,000.

Q. Okay. That was never paid to you?

A. There were a number of other accounts at the same time. World One and Mark Gould in Florida. We also couldn't pay his account and canceled. We had pretty close to 25- to $30,000 a month in cancellations in the September time frame, because at this point we'd had so many customers drop off, that our AT&T account was down in the area of $100,000.

The way the discounts were set up, we were only—we weren't getting enough money for it to be profitable. And with the cancellations, now, we were getting on that, there was no way that we could salvage it and make it profitably. And our salespeople, who were on commission, who waited months and months and months after they made a sale to get a commission, wouldn't sell AT&T. They absolutely—unless a customer begged to go on AT&T, they wouldn't turn in an order for AT&T. They absolutely—because their lives depended on it, and some of these people were making only half of what they should have made as far as their sales.

So they—at that time we had another account with U.S. Sprint, and so they would sign them up on Sprint, but they wouldn't put anyone on AT&T. So there's no way to sustain our AT&T program. And I just decided that if I left AT&T build long enough, that eventually they would drive away every customer that I had on it. So we made a decision to cancel the account.

Q. After you canceled the account did AT&T demand of you close to a million dollars?

A. Well, not—not right away. We had—we received a

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AT&T people, for the termination notice that you just read to us, would you describe the internal effect upon your company of the position that you were in at this time?

A. Yes. This, we had—we were in total frustration with the entire AT&T SDN problem. We had ongoing problems that weren't solved, and no attempt was being made to solve them.

In spite of what they say, we did not see any real improvement in the provisioning process. Part of that may have been due to the fact that our salespeople would no longer sell it, because they couldn't get their commissions. They could sell on our Sprint account and get the account up and working in 10 days and start getting commissions. And they would put them

on SDN, and they would have to wait six months before they started making any money, and that wasn't fair to them.

We had the substantial billing problem with the multiple location billing, which was never solved, and couldn't be resolved. We, we had gone through this expensive thing of providing them with our database, providing them with a complete analysis. We went down and broke every single bill down, and showed them what our figures were, as far as why we thought their bills were wrong, and they never would correct them. They wouldn't look at it.

* * * * *

Q. Now, I think your testimony was, just after lunch, that there came a time that you were told, in March of 1992, you were told by AT&T, that they had got your system working, so that the allocations, percentage allocations could be made as you directed, correct?

A. No, I didn't say that. I said that on April 9 of 1990, they told us that our first customer had been installed on the network.

Q. Go back——

A. No one said to me, at that time, that your percentages are going to be allocated correctly. That wasn't part of any discussion we had on April——

Q. Is it your testimony today, that AT&T was never able to offer you multi-location billing, such that you could share a discount with your customer, 50/50, 48/50, 58/42, any way; is that your testimony today?

A. It's my testimony today, that AT&T could have done it. That it was in their option. It is my testimony that AT&T did not do it.

Q. Right.

A. Ever.

Q. But it's your testimony today, that as of the date of this letter, AT&T could have delivered multi-location billing?

A. We were told they could.

Q. All right. And you believe that they could?

A. I certainly did.

Q. All right.

A. I probably would not have signed the contract, had we known that they couldn't or wouldn't.

Q. Okay. Fair enough. Fair enough. That is one. You wouldn't have signed the contract, if you had known that they could not deliver it?

A. Oh, absolutely.

Q. All right. Now, let's talk about some things that you were not told that you think you should have been. How about the discount? Excuse me. Not the discount, the deposit. You were eventually required to place a deposit with AT&T, correct?

A. Yes, in July 3rd of 1990.

Q. All right. And is it your case here today, that you weren't told that in October of '89?

A. We definitely were not told that in October of 1989.

Q. Now, are you telling me you weren't told, or it just wasn't mentioned?

A. It wasn't—we weren't——

Q. No one mentioned it?

A. In October of '89, it wasn't mentioned.

Q. All right. No one mentioned it in October of 1989?

A. No, they did not.

Q. Okay. Let's spend some time on this deposit. Let's stop right here. MCI required you to place a deposit?

A. Yes, they did.

Q. You, yourself, COT, required its customers, in appropriate cases, to place a deposit?

A. In very few, but, yes, there were times that we had customers place a deposit with us.

Q. You knew, from your years with AT&T, that occasionally AT&T required its customers to place a deposit?

A. If you want to include Pacific Northwest Bell being AT&T at the time, yes, that's fine, yes.

Q. Yes, Pacific Northwest Bell.

A. I knew occasionally Pacific Northwest Bell or AT&T required deposits, yes.

Q. And it wouldn't have surprised you, on October 30, 1989, to be told that you would have to place a deposit, correct?

A. No, it wouldn't have surprised me a bit.

Q. And if you had been told, you would have signed that contract anyway, correct?

A. Providing I could have met the deposit requirements, yes.

Q. Okay. Well, we will get into the deposit requirements—well, let's get to that right now.

* * * * *

asked about three separate increases that occurred?

A. Yes.

Q. Okay. I would like you to look at paragraph 22. Earlier, in your cross-examination testimony, you mentioned the term slamming. Do you see that in there?

A. Yes, that's the bottom sentence there.

Q. Okay. Was that one of your problems?

A. It was a problem. While it wasn't as significant as the other, it did create a problem with our customers. Slamming is a process of illegally converting a customer from one service to another. G.I. Joe's, which was a large customer at the time, multiple location, significant billing, and they were contacted by a telemarketer, employed by AT&T, and without authority, slammed all locations.

All the time it took us to get them up on SDN, and whamo, overnight, they were switched back to 1–288, and we lost the billing. It was a nightmare. It took about four months. We lost the revenues. We ended up losing the customers. The customer, of course, blames us for a lot of things that happened, even though we are not involved.

But it took some time, two or three months, I think, to get the customer converted back, and up on our service again. And so anytime something changes, and a problem occurs, they have a tendency to relate it to us. I—but this is one of the, one of the incidents. There is at least half a dozen more, and there is slamming done by other carriers, too, other than AT&T.

Q. Okay. Now, did this contribute, this slamming to your statement, on cross-examination, about a total lack of trust?

A. That is another factor, yes. That is definitely a factor.

Q. And talking about that slamming, is this part of the types of problems that you attempted to have AT&T write to your customers about?

A. I don't, I don't specifically recall. We, we had asked them—most of these slamming incidents were coming in, say, 1991 or 1992, or most—you know, that is when they became a problem. And we—it was in 1990 that they were denying to write letters. We didn't go back to them. We knew what the answer would be.

Q. Okay. Let me ask you to look at paragraph 17. Okay. There's talk in there, is there not, in paragraph 17, about the calling card again, an NRA I?

A. Yes.

Q. Okay. Now, you have already testified that you had never got that AT&T calling card. Tell us, if you will, about what—about the NRA I. We have never gotten fully into that.

A. Well, I have got to relate the NRA I to the SDN calling card.

Q. Okay.

A. The whole thing is—the SDN calling card, I told you how attractive it was. And you can make calls in the normal way that you could with any AT&T calling card, and you would save at least an average of about 45 percent per call. Had our logo.

And once we were told we had it, we went out and told our customers, that we were signing up, it was going to be, you know, five months before we were

on the network, but we told them about this calling card. And they are going to have the SDN calling card and save this money. And it was good for making international calls. It was also good from any U.S. direct country. If you were in Germany, and that was a U.S.—you could actually access that calling card from—I think there were 32 different foreign countries that were on the USA direct list.

That was important to our customers. They had people out there that traveled internationally and made calls to international locations. And they came back, and they said that we were going to be denied use of that calling card. Well, that was—the bad part about that, is the fact that it caused us to have made a misrepresentation to our customer, unintentional, but it was a misrepresentation. Because we told them, in good faith, based on what we had, that we were going to have this card.

So, Donna suggested that we get an alternate card, under the tariff called NRA I, Network Remote Access I. In this case, we would print the cards up. It was not going to be good from any U.S. direct country, because the only way you could access this card was an 800 number. So, our—made it more difficult for our customers to use, because, number one, they had to dial an 800 number, and then they had to put in their identification, and they had to put in the number they were dialing, and things like that.

But, they—we were also told that it would be good for making international calls. So, it's a more difficult card to use. It's not good from the foreign countries, and that probably didn't affect more than five percent of our credit card users. But they—we had considerably more than that that made international calls. And, it was, again, reaffirmed, in the April 9 billing, that NRA I would be good for making international calls.

So, we had these cards printed up. I think we printed up an initial 5,000 of them. Our logo on, numbers, signed them out to our customers, and they weren't good until the network turned up. But when the network was turned up, we gave them to our customers. And they went out, and they immediately got calls. And the international calls were blocked. The customers that we had issued the cards to, they never could make calls, international calls.

And most of them—you just don't do that, because people don't want—if they are going to have a service, they don't want to have to carry two calling cards. So, we virtually were denied—those people that wanted to make international calls, we were denied any income or revenue from those people.

And, of course, if a company had 20 people and 10 of them made international calls, they don't want to issue AT&T cards or MCI cards to half their people, and give half to another. So, it virtually destroyed our credit card program.

Q. Mr. Rood, I would like to ask you to take a quick squint at this one chart that you were shown. I think there was one over here. Yes. You were examined a little bit about this particular chart. And can you see it?

A. I can see it, yes.

Q. I will stay out of your way here. On that particular chart, a comparison is being made here between network billing and multi-location billing. Is that a correct comparison, in your view, to have the comparison between

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Exhibit B—Excerpts of Trial Testimony of Spencer Perry, Central Office Telephone, Inc. v. AT&T, Civil Action No. 91–1236–JE, United States District Court, for the District of Oregon, June, 1994

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were people that were going literally through the door requesting SDN service, he was pretty happy, and so was I. We had made some significant revenue commitments to AT&T marketing, meaning that we—we said that we were going to bring in quite a bit more revenue then we had the previous year, and, so—

Q. Just so the jury knows and we know, the previous year is 1988; is that correct?

A. That's correct.

Q. Or are we talking—previously, we were talking about 1989?

A. That's correct. From 1985 up until 1989, the revenue for that organization had been steadily decreasing. I believe in '85, it was somewhere a little over a billion dollars, and by 1988, it had gone down to less than half of that amount. So, it was a significant revenue decrease that was happening over time, and it was about that time that AT&T's corporate marketing department was looking for new revenues from all of its sales folks and so forth, and, so, Walt, like I said, performed the study over a period of time and essentially convinced his management that we ought to go after the resell market, an when switchless resellers came and wanted to buy the service, we were overjoyed that there were people that wanted to buy the service and we didn't have to go out and beat the bushes, so to speak, looking for customers.

They were walking in through the door. It kind of reminded me of fish jumping out of the ocean into your boat. You don't even have to drop the line in.

Q. Well, were you given a revenue goal that you were to accomplish based on this advent of the stichless resellers?

A. Yes, sir.

Q. What was that?

A. I believe the total revenue goal, and this is increased revenue, not the total revenue, but increased revenue, I think we had to provide somewhere in the neighborhood of 115-million dollars of new revenue to the company, and I think about 90-some of it was targeted towards the software defined network product.

Q. At that point, did you view the switchless resellers as customers?

A. Absolutely.

Q. Now, you indicated that the switchless resellers were jumping into the boat like fish a minute ago.

Tell me a time when your ability to handle this group of people coming in was taxed.

A. Yes.

Q. Explain that.

A. Well, our organization—Wait Murphy's organization

* * * * *

was the operations center of this entire group. John Greco came out of the staff group that was doing the channel development work. Channel development was simply a term that was used by marketing to look at alternate distribution channels to sell AT&T services.

Traditionally, AT&T sold its services via its own sales forces. It peppered the television, media with ads. It was kind of hard to turn on the television and not see an ad for AT&T with a telephone number. What they were looking at was things like sales agents and non-traditional ways of selling those services.

Anyway, those two groups merged. John Greco came from that Channel Development Group, and when Michael came on board, where before I reported as a third level directly to Walt Murphy who was a fifth level, and we did not have a fourth level manager in that group. When Keith came in, he was, of course, the fifth level, and John Greco then stepped—sort of stepped in, and I wound up reporting to John so that I no longer reported directly to the fifth level manager.

Q. Now, I am getting myself into another one here. You better explain to the jury what these levels are.

A. All right. AT&T has—has a hierarchy of management that I think ranges from, say, the first level, which

is the lowest level of management which might be considered like I guess in the Army you might call it second lieutenant or something like that, I suppose, all the way up to the chairman of the company who I guess would be a ninth level or maybe tenth level. I don't know.

Q. Just to get it down to where you were, you were at what level at this point?

A. I was at the third level.

Q. Mr. Greco at fourth?

A. Yes.

Q. And Mr. Keith was fifth?

A. Right, the level right below officer level.

Q. When you did this study—by the way, do you have that study that you just talked about that you and Mr. Gengenback made?

A. No. I recreated it, but I don't have the actual study that we did.

Q. How did you come about to recreate it?

A. I recreated it later on when I was executive director for the Interchange Reseller Association. That chart—if you just, you know, look at that chart, you can very quickly understand or you can explain if you were explaining where the price difference between, say, SDN and WATS, and you can look at that price gap, and you can very quickly understand where the market opportunity for resellers existed.

* * * * *

Q. Did you show this chart to Mr. Keith?

A. Yes, I did.

Q. What was his reaction to the chart?

A. Well, when he looked at the—at the percentage difference, he said that the AT&T's WATS base could be—could be eroded in no time.

Q. And did he give you any instructions when he made that remark as to any further assignments for you?

A. Yes. Yes, he did. Later on, and I don't know if it was the same day or perhaps a day later, but he essentially asked me to get with Glenn Starr's people. Glenn was the product management—product manager for SDN. He was the person in marketing responsible for the service—you know, the service and its features and its profitability and all of that. He was the top dog of SDN.

Q. Could you please look at Exhibit 243? I better give you—pardon me. I'm sorry. I made a mistake, your Honor.

It's 248 A. I'm sorry.

A. Okay.

Q. Can you take a look at that for me and give me an idea as to what that represents?

A. This is a organization chart, first quarter, 1990, of AT&T Communications—of the AT&T Communications organization or a partial organization chart.

Q. Does this describe the various groups that you have been talking about today, such as product management, Mr. Starr's organization?

A. Pretty much so. It is a little bit off, but for the most part, it does.

Q.Does it describe Mr. Keith's organization?

A. Yes, it does.

Q. Now, you mentioned that AT&T traditionally does direct selling.

Is the direct selling organization in there correctly—

A. Well, it shows up here, but it shows up at a level—the head of the group shows up a level where—lower than what it really should be.

Q. Do you have a pen with you?

A. Yes.

Q. Okay. Could you angle the direct sales organization and start it at a box higher or however you want to to do it so that it is corrected.

A. (Complying).

Q. Okay. Why don't you initial that with ''S.P.'', your initials?

A. (Complying). Done.

Q. Okay. Now, Michael Keith: Is he the Director of Distribution Strategies or was he at that time?

A. Yes, he was.

Q. That was Director of Distribution; correct?

A. Yes.

Q. Would you kindly write in ''strategy'' there?

A. (Complying). Okay. Initial that as well?

Q. Yeah. Thank you.

A. (Complying).

Q. Do you recognize all of the names on that document and the positions in which they are indicated to occupy?

A. Yes, I do.

Q. All right. There is also a box in there about the so-called ad hoc committee on resellers.

Can you tell me what the ad hoc committee on resellers.

Can you tell me what the ad hoc committee on resellers is or was, just briefly?

A. Yes. You asked me what Michael Keith's reaction to that chart that I showed him was, and indicated that—well, I guess I didn't indicate, but he asked later on—

MR. PETRANOVICH: Objection, your Honor. We have a question, and maybe we can get an answer to the question and then go on.

The COURT. Okay. Could you restate question?

Mr. HALL: Yes. I asked him to identify or just give me a brief description on what this ad hoc committee on resellers was.

The WITNESS: It was an ad hoc group of people that was comprised of people within Michael Keith's organization and Frank Ianna's organization that got together on a couple of occasions to change the SDN offer.

MR. HALL. All right. Your Honor, we will offer 243 A—248 A, I'm sorry.

MR. PETRANOVICH: Few questions in aid of an objection, your Honor?

The COURT. You may.

MR. PETRANOVICH: On this chart that is 248 A, let's just look at Michael Keith. You told us that his real title was Director of Distribution Strategies; right?

The WITNESS: That's right.

MR. PETRANOVICH: Those people aren't on this chart?

THE WITNESS: That's correct. It says it is a partial organization chart.

MR. PETRANOVICH: It's a partial organizational chart?

THE WITNESS: Correct.

MR. PETRANOVICH: Similarly, there are folks who reports to Mr. Frank Ianna who are not on this chart?

THE WITNESS: That's right.

MR. PETRANOVICH: And I suppose there are others who report to Mr. Blanchard; is that correct?

THE WITNESS: That's true.

MR. PETRANOVICH: This chart is as of what?

THE WITNESS: It says first quarter, 1990.

MR. PETRANOVICH: And that would be the end of March of 1990?

THE WITNESS: I suppose it would be as of the end of March.

MR. PETRANOVICH: Okay. Now, you have got or—I guess I don't want to burden you with this, but this committee you just talked about, the ad hoc committee on resellers—do you see that?

THE WITNESS: Um-hum (affirmative).

MR. PETRANOVICH: That ad hoc committee is your term; isn't it?

THE WITNESS: That's correct.

MR. PETRANOVICH: I have no other questions, your Honor, and with notations that this doesn't describe the chart, I have no objections.

THE COURT: 248 is received, but I'm not clear: Is ad hoc—are you the only one that uses that term or was that a term—let me ask it this way: Was that a term that was used within AT&T at the time? Mr. Petranovich asked you if that was your term.

THE WITNESS: I heard Mr. Petranovich use it this morning. So, he has used it before.

THE COURT: We have heard it used here. When people say ''ad hoc committee'', are we all going to be talking about the same thing?

THE WITNESS: I suppose. It never had a formal name because it wasn't a

formal organization. It was a group of people that met, to my knowledge, twice—only twice. So, that for that reason, I refer to it as an ad hoc committee.

THE COURT: Okay.

THE WITNESS: We can call it anything that you like.

THE CLERK: Your Honor, just for clarification, they offered 248 A. You said 248 is received.

THE COURT: 248 A is received.

THE CLERK: They already offered and received 248 D.

THE WITNESS: Your Honors, could I have some more water?

MR. HALL: Your Honor, we have a problem here because he has now made some changes on that. If I can show it—I would like to project it, but he has made a couple of changes on there, and the lady operating the transparencies—if he would put it on for her some way.

THE WITNESS: If you have a grease pencil—

MR. URRUTIA: There should be a grease pencil there, your Honor. Perhaps, Mr. Perry could make the same changes on the transparency.

THE COURT: That would be fine. Go ahead and put it on, and he can come down.

Q. (by Mr. Hall) Go ahead and make the changes right on that transparency.

THE WITNESS: (Approaching the projector). (Complying).

Q. (by Mr. Hall) I think the first one was Mr. Keith's title. That is the easiest one.

A. (Complying).

Q. And then you said that that direct sales organization—we had that one wrong.

Can you put a box to show it independently or whatever you want to do?

A. First, his title wasn't director.

Q. Then strike that, if you don't mind.

A. (Complying).

Q. So, you are showing organization as being at a higher level, then, than Michael Keith's; correct?

A. That's correct, and it was the business sales division is I believe what it was called, the BSD.

Q. Then, that line between Mr. Nacchio and Gus Blanchard shouldn't be there?

A. That's correct.

Q. Now, you mentioned product management.

Would you just tell the jury where those two organizations, CDOC and product management, sit in this chart?

A. This is product management here.

Q. Mr. Starr's organization?

A. Well, actually, Frank Ianna had product management, and Glenn Starr was fourth level who was the product manager for the SDN product.

Q. Okay. Then, what about CDOC?

A. CDOC was right here under Michael Keith, and as the counsel said, there should be another box here that has some other staff organization. Remember that I showed you there was the channel development piece of this?

Q. Show yours there, please. You mentioned several names.

A. I am Spencer Perry.

A. Yeah. May I—well, I will just wait.

Q. Now, on this ad hoc committee, let's—why don't you resume the stand there. Thank you.

A. Go back up here? Turn this off?

Q. No. Just resume the stand. We will take care of that part.

A. (Returning to the witness stand).

Q. You were starting to testify, I believe, that Mr. Keith had asked you to take some further steps after you gave him this report indicating what I think was price point comparisons for PRO WATS and SDN and so forth.

What were the assignments that you were given?

A. Well, he asked me to get with Glenn Starr's people to change the SDN offer to kill the arbitrage.

Q. Want to tell the jury what the arbitrage is?

A. ''Arbitrage'' is basically an economic term that explains a situation where you can go into one market, let's say, and buy a product or service or commodity at one price and, then, go into another market and buy the same or similar commodity or service at a lower—typically, a lower price and, then, go back up into the first market and sell the commodity with a price spread and make some money doing it, and, you know, there is—and that's classical arbitrage, as I understand it.

Mr. HALL: Your Honor, may I pick up an exhibit over here?

THE COURT: Yes.

Q. (by Mr. Hall) I'm showing you Exhibit 243 which has already been in evidence. I will put it over here. I don't know if you can see it at this angle or not.

* * * * *

A. Correct.

Q. Okay.

A. And that would roll up to me.

Q. Okay. What is the next one?

A. Develop plans for SDN targeting and strategy to traditional resellers and deflect cockroaches.

Q. Okay. Explain what that means?

A. Like I said earlier, we had a significant commitment to raise our revenues selling SDN to traditional or switch based resellers. What we were doing here—well, what, what this represents is really like a parallel track of, of work that had to be done.

One was go out and sell SDN, and measure it with your folks, and create a sales organization to go out to the traditional people. And, at the same time, cockroaches was a term that a lot of people within AT&T, basically smaller, lower level people, used to referred to switchless resellers.

Q. Who specifically can you recall besides yourself there?

A. I used it. People in my organization. I think Ed may have used it. John Greco used it. Several people. Marty Gitter used it. A lot of people.

Q. Is Ed, Ed Gegenbach to whom you earlier referred?

A. Yes.

Q. I can't—what is the last line there? Actually, it's—

A. It's cut off. It may be on the—

Q. Okay. Account plans?

A. Account plans, yeah. It says account plans by segment. And hold on just a second. Account plans by segment.

Q. Okay. Thank you very much. Can you resume the stand? Thanks.

A. Sure.

Q. Now, when you were talking to Mr. Greco, after you talked to Mr. Keith, did you then make plans to call this meeting of this ad hoc committee?

A. Well, shortly, shortly after the meeting with, with Keith, I got more specific instructions. And I think it was shortly, like a day or two later. I got specific instructions to, to organize a group to get with, with Glenn Starr's people. Glenn again being the SDN product manager. To, to get some of our people together, and his people together in a meeting. And, and work on ways to, to change the SDN offer, so that the switchless resellers, or the cockroaches, or whatever, would not, would not buy the product.

Q. All right. Now, how did you go about meeting with Glenn Starr's group?

* * * * *

you look down at—in this document—let's just read. If you please, do for us the first line, and I will ask some questions.

A. The first line of the document?

Q. Yes, please.

A. Not the title, but the line of text?

Q. Yeah.

A. Okay. The recent unprecedented demand for AT&T software defined network service, for the sole purpose of resale, has caused confusion in the marketplace, and has resulted in a clogged provisioning system, thus denying service to commercial customers.

Q. Okay. Now, you said that you and Mr. Gitter wrote this memo. Where did you get your information about denying service to commercial customers?

A. There was, there was a lot of talk, if you will, a lot of discussion among the various managers involved in this. And you know, we—I got both—well, I am going to speak for myself.

I got a general sense of what was going on, you know, the global picture of what was going on, and—from various people. I hadn't attended any meetings, or actually had seen any, any data, but there was just a lot of what I would call scuttlebutt going on about, about a lot of problems that were happening out across the country.

Q. Now, the commercial customers were under the—Mr. Blanchard's group, were they not?

A. That's correct.

Q. Okay. Would you read on then the rest of that paragraph?

A. AT&T's interests may be well served in delivering this service to established, switch-based inter-exchange carriers. However, the current ability for switchless resellers to arbitrage the service has significant negative consequences to AT&T.

This paper identifies tariffed elements and operational practices that attract arbitrageurs. Revisions to these elements and practices are listed in descending order of impact that would decrease the attractiveness of the service to switchless resellers.

Q. Did you actually look at the SDN tariff to see areas where this could be accomplished?

A. That wasn't the process that we used. I—as you described it.

Q. Okay.

A. I mean, if you like, I can describe the process Marty and I used that culminated in this paper.

Q. All right.

A. What, what we did, was I believe it was in my office, where Marty and I—we hashed out, in my office, and put—made notes on a—on the white board there, of different, different things that could be done to make the service less attractive to resellers.

And one of the things that we were trying to do, was while making it less attractive to resellers, we wanted to keep the viability to commercial customers. And so, what we did, was we just listed ideas on the board, and then later went back, and then segmented those ideas, and tried to put some order to them, in terms of, you know, basically categorize the ideas.

And then further, we then listed, listed those, those ideas, in what we thought were, was a, sort of rank order of effectiveness.

Q. Okay.

A. And then—just let me finish. And then I went back, and took those things, and wrote, and created the paper.

Q. Okay. Did you take this paper with you to the meeting that you—the policy group meeting?

A. I don't recall that I did or didn't. I, I believe I, I—we handed it to John and perhaps Michael, but I don't recall taking it to the meeting.

Q. All right. When you were at the meeting, did you do what you said you just did with Marty Gitter, which is have a blackboard to put down ideas?

A. Yes, sir. Well, it was a white board.

Q. Excuse me. Looking at the next page, there's this talk up in there about the AT&T logo. So perhaps if you would read the first item under billing. Not the first item, excuse me, the first paragraph.

A. Okay, yeah. When AT&T provides billing to the SDN end user, switchless reselling is encouraged. The reseller is given additional credibility when the AT&T logo appears on the end users bill. Potential corrections include, and then there is a list of corrections.

Q. Okay. The very bottom bullet there, what does that say?

A. AT&T logo on end user bill for resellers.

Q. Are you acquainted with multiple location billing?

A. Yes, I am.

Q. Okay. Did multiple location billing, as an option under SDN, result in these end users getting this very logo?

A. Yes, it did.

Q. Okay. Was that discussed?

A. At, at the meeting?

Q. Or at any time.

A. Obviously, Marty and I discussed it.

Q. Okay.

A. That was—the whole billing, the whole billing issue, I think, was more—was, Marty was more expert on that than I was. So, I mean, I think that, that these—most of the billing ideas here were Marty's.

Q. Okay. You can put the last one on to show signatures. I am not going to ask any questions. That was signed by yourself and Marty?

A. It wasn't signed. It was just our names. We put our names down there. It was a draft.

Q. All right. Would you turn to Exhibit 70, please.

A. Okay.

Q. That's what? Will you describe that document, please?

A. This is a summary of the items that, that this, the group, what I call the ad hoc group, came up with, as a result of that meeting.

Q. Okay.

A. Of action items.

Q. Okay. When did you do this summary?

A. At the meeting.

Q. All right. Is this all in your own handwriting?

A. Yes, it is.

Mr. HALL: Okay. We will offer Exhibit 70, your Honor.

Mr. PETRANOVICH: No objection, your Honor.

The COURT: 70 is received.

(Exhibit 70 received)

By Mr. HALL:

Q. Can you put up the transparency on that one? Can you move it over slightly there? Oh, that's a good idea. Thank you.

All right. If you will look at that document, up at the top, it's got a whole bunch of names. Are these people that attended the meeting?

A. Yes, sir.

Q. All right. And at the right, you have got product management, and it's bracketing Ianna, Starr and Brittele. Are these the gentleman from that organization?

A. Correct.

Q. And the CDOC ones, I think you have got Keith, Greco, Gitter, and yourself. So, seven of you at this meeting?

A. That's correct.

Q. And then on the left-hand side, you have got some descriptions, tariff, policy, tariff. Can you explain the differences, why they are there?

A. Yeah. All that does is just explain what kind of modification it is, whether it's a tariff, a change—a change to the tariff, or a change in AT&T operational policy. Some of the things, many of the things that associate—are associated with delivering of product aren't in the tariff. They are just policy. And so—

Q. Can you give us examples of those?

A. Sure. In most instances, billing, and how billing is accomplished and so forth is not specified in the tariff.

Q. Is that — does that include MLB?

A. Well, yes. That's correct. There is only one mention, that I recall, of billing in the tariff with regard to SDN, and MLB wasn't one of them. Wasn't it.

Q. All right. Then, when the meeting was completed, were you given any instructions as to the notes? Let me ask you, first of all, were any notes taken by others than yourself at the meeting?

A. Yes, sir, there were.

Q. Okay. and what instructions, if any, were given with regard to those notes?

Mr. PETRANOVICH: Objection, your Honor. I would like a side bar.

THE COURT: Okay. You may step up.

THE CLERK: Jury need a stretch?

(Unreported discussion held at side bar)

By Mr. HALL:

Q. Mr. Perry, were there, at this meeting on March 12, 1990, were—with

the people that you have noted up there, were there notes taken by various people?

A. Yes, sir.

Q. Do you have any recollection of who was taking notes and who wasn't?

A. Not exactly. I mean, I think probably most people were.

Q. All right. And when the meeting ended, were you asked to gather the notes and to destroy them?

A. Correct, yes, sir.

Q. Okay. And who asked you?

A. I, I really don't recall. I mean, there was a meeting. A lot of people were talking. A suggestion was made. I was sort of the de facto secretary of the meeting, and I did.

Q. All right. Now, who was, who was—who presided at the meeting?

A. I can't say that anyone really presided over it. I think Michael probably was, if—Michael Keith was the guy that was probably really directing the meeting, so to speak. But, after the meeting got going, it was just sort of kind of free form of ideas and so forth.

Q. All right. Now, did you immediately, meaning at the very minute, destroy those documents?

A. No, sir.

Q. Okay. Now long was that meeting?

A. Oh, it, it—I think it went well into the late afternoon and early evening.

Q. Okay. How do you know that?

A. I was starving by the time it was—(Laughter)

The Witness. It was past my dinner time. I normally eat dinner around 6:00 o'clock.

By Mr. Hall:

Q. Did you have any discussion with any people after the meeting?

A. Yeah, yes, I did. Marty and I, at the end of this meeting, talked about it, about the meeting in the parking lot. And, and we were, we were sort of—again, both working in Michael Keith's organization, him being a new guy on the block, we were—we had sort of talked about what we were doing, and, and how this guy probably, of all the managers that we had ever come in contact with, was probably the most gung-ho kind of guy to actually make things happen, to make them happen very quickly.

Q. Okay. And at that time, did you—when did you destroy these documents? I don't think you told us.

A. The next day.

Q. The next day. Did either you or Mr. Gitter express any concerns about the consequences of what you were doing?

A. Well, yes. We both had come out of the AT&T external affairs organization, that was before that, the state regulatory organization. And we both had——

Mr. Petranovich. Objection, your Honor. If we could go one by one. Mr. Gitter and Mr. Keith, or Mr. Perry, instead of both. I don't know who is saying what.

The Witness. I am sorry. Mr. Gitter and I had both come from the external affairs organization.

The Court. Okay.

The Witness. And, and during our tenure there, when the carrier service center, later the CDOC, was part of that organization, we, we both understood that the reason why that group wasn't part of marketing, was because there were some, some potential—if this group ever became part of marketing, that, that some things could happen that weren't too kosher, that sort of went against the Federal Communications Act.

And we discussed, and I think it was in his car or my car, that this is some pretty serious business that we are doing, that we are involved in. We had never, neither one of us had ever been involved in this kind of activity in our careers.

By Mr. Hall:

Q. Let me go back to that meeting. One of the names you have got up there—let's see. Where is that? Did you have any dealings with a Mr. Joe Brittele from product management during the course of these discussions?

A. Yes, Joe was, was a participant in the meetings.

Q. But he wasn't—he's now shown. Oh, yes. There he is. Okay. What did Mr. Brittele have to say, with regard to these problems? Are there any particular areas that he focused on?

A. Well, during the discussion, I think Joe was probably the most animated of the people from product management at the meeting. And the one thing that, that stood out, in my mind, was Joe is a character. Let me say this. So that's how come I can kind of recall this.

But, when we were talking about deposits, you know, Joe made the comment that, hey, these guys don't even have any skin in the game, so that they should be made to put some money up front in the form of deposits. And, you know, I recall Marty and Joe basically had most of the discussion about the, the issue of instituting deposit requirements.

Q. Okay. Now that you mentioned that last comment, were assignments given to the various people that were at that meeting, to, to go out and accomplish?

A. Yes, sir. What we did, was after we had come up with a list of things, we then went back, as you asked, you know, you said, well, what are the designations there, tariff and policy and so forth. And for the most part, they were all product management issues to go off and chase, so to speak.

Q. Okay. At this time, had there been some—were there * * *

* * * * *

A. Yes, I, I know what that meant.

Q. What did it mean?

A. Base cannibalization is the term you are referring to?

Q. Yes.

A. That was my understanding of what the main issue always was with the switchless resale. And that was that you would take a PRO WATS base of customers, and essentially take those customers, and move them to a product SDN that was lower priced. And that's referred to as base cannabilization. You are sort of eating your own customers.

Q. If you look at the second page there—excuse me—the name of Central Office Telephone appears thereupon. Did you know—did you even know Central Office Telephone at that time?

A. No, sir.

Q. Would you look at Exhibit 11, please.

A. Okay.

Q. Can you identify that document for us?

A. This appears to be a package that was put together by Susan Early, that was a comprehensive communications package to the BSD sales force.

Q. That is the direct sales force?

A. Correct.

Q. And was it——

* * * * *

A. I had just talked to my supervisor, Mary Upchurch, and she said I better go tell Michael. And we went down the hall. And there were some folks in his office. They left. I had a seat outside. The folks in the office left. I went in, and, apparently, she had told him that I was leaving. And we had a conversation. And he asked, he asked why I was leaving, and I told him that I wasn't happy there. And we chatted about that.

Q. Did you have any discussions as to the status of SDN resellers?

A. Well, he, he had mentioned that when, when he asked what was I going to do, and I says I wasn't sure. And he says, well, I hope you are not going into SDN resale. And I said, oh, why is that? And he picked up a piece of paper, and he says, with an one percent provisioning rate, they won't be around much longer.

Q. Could you identify that piece of paper?

A. No, sir.

Q. Then after that, I think you have already testified, you took this job as the executive director of the inter-exchange Reseller's Association?

A. Yes, sir, that day.

Mr. HALL: Okay. That's all I have, your Honor.

The COURT: It's time for lunch. Since we lost a little time getting started this morning, I would like to

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Exhibit C—Excerpts of Trial Testimony of Michael Keith, Central Office Telephone, Inc., v. AT&T, Civil Action No. 91–1236–JE, United States District Court, for the District of Oregon, June, 1994

Mr. URRUTIA: Your honor, we would offer 87 at this time.

Mr. PETRANOVICH: No objection, your Honor.

The COURT: 87 is received.

(Exhibit 87 received)

By MR. URRUTIA:

Q. Do you help your customers by giving their competitors hints on how to stick it to them in the marketplace?

A. No, I don't see that as helping them. But I had a role to service and help the resellers.

Q. That was your responsibility?

A. Yes.

Q. Other people in the company had other roles, perhaps, which might include competing against them?

A. That's correct.

Q. But you, Michael Keith, or Mike Keith, and your organization were supposed to help them?

A. That was one of my responsibilities, yes.

Q. And one of the men that worked for you is a guy named Jim Murphy, right?

A. Yes.

Q. And Mr. Murphy wrote an article in this paper, that you reviewed before it was published, called, quote, selling against a reseller, unquote?

A. That's correct.

* * * * *

that has the interview with Mr. Barillari? I will spell it, B-A-R-I-L-L-A-R-I?

A. No, I have not seen the tape.

Q. Are you aware of the fact that a videotape was done? You do know who Mr. Barillari is, right?

A. Yes.

Q. He is one of your in-house lawyers?

A. That's correct.

Q. At least the one with authority on SDN reseller issues, right?

A. He would be one of the lawyers. I am not sure if that's his only responsibility, yes.

Q. As far as those sales people were going, what you were telling them, in this magazine that was especially for them, is that their compensation was going to be affected by resellers, right?

A. What do you mean by that? I don't understand.

Q. Weren't you telling the folks in the field that if they sold to resellers, that they were not going to get any commissions?

A. Oh, yes. That's correct.

Q. Mr. Perry testified yesterday, that part of his job was to go out there in the branches and make the branches turn over resale accounts to CDOC; is that right?

A. I asked John Greco to identify SDN resellers, because the decision is that we will meet the needs of those customers through the CDOC organization. So, working with the branches, both terms would get together, and identify those people that are resellers, and that should be serviced out of the CDOC branch.

Q. So, you would have given that responsibility to Mr. Greco?

A. Yes.

Q. And would you assume, in the ordinary course of business, he would use those people who worked for him?

A. Yes.

Q. Like Spencer Perry and Marty Gitter to do that job?

A. That's correct.

Q. You formulated the corporate agenda for SDN resellers and had it published in this, in this magazine, so the sales force would know about it, right?

A. That's correct.

Q. Did you give an interview that was published in the June 11, 1990, edition of Network World?

A. Yes.

Q. And that document has been marked for identification as Plaintiff's Trial Exhibit 93. Many say that AT&T was generally surprised—excuse me—quote, many say that AT&T was generally surprise—genuinely surprised at the quick expansion of aggregation—aggregation. Has AT&T decided to take action against aggregation, unquote?

Would you read your answer, please, Mr. Keith?

A. Quote, I don't feel there's been a radical change in our attitude. However, we are starting to evaluate how we can realign our strategies to make our products better suited for the marketplace. Our principal theme is that we believe our sales force is the way we want to reach our customers, not through service aggregators, end quote.

Mr. URRUTIA: Mr. Petranovich, we are going to skip to page 107, Line 12.

Mr. McDERMOTT: We have got some on 98, don't we?

Mr. URRUTIA: Did I miss some on 98?

Mr. McDERMOTT: Lines four to 14.

By Mr. URRUTIA:

Q. Okay, Thank you. We are going to go back to 98, and then we will move forward.

Did you ever allow the commercial users of SDN to use the AT&T globe?

A. There may be examples of that, yes.

Q. I mean, you have seen it right there on their newsletter, haven't you?

A. I wouldn't doubt that I have seen it on customer newsletters, yes.

Q. And if we see that globe on a newsletter, then we know that that is an authentic document, as far as AT&T is concerned, right?

A. Yes.

Q. We will start on page 107, line 12.

Plaintiff's Exhibit 77, have you turned to it, Mr. Keith?

A. Yes.

Q. Now, this is a letter that you wrote to Gail McGovern, right?

A. That's correct.

Mr. URRUTIA: Your Honor, four our record, Plaintiff's Exhibit 77 has been received into evidence by Mr. Perry. It was the April 3, 1990, memo.

Q. And it has all of the—or various recommendations, right, six recommendations?

A. That's correct.

Q. Plaintiff's Trial Exhibit 93——

A. This is the second time he's asking?

Q. The second time Mr. Briere asked you.

A. Yes.

Q. On page five of the article.

A. Right, yes.

Q. Question, quote, what means can AT&T use to limit SDN reselling, unquote?

A. Answer, quote, I don't really know at the moment. We are meeting weekly with the SDN product team to find out. We want to make sure SDN serves the top end of the market. There will probably be modifications to the product that will insure this, but may not serve the resellers. But no one knows exactly what these steps will be, end quote.

Q. Skip to page 128. Line 10.

Q. Do you recall the day that Spencer Perry left the employment of AT&T?

A. It was in the fall of 1990.

Q. Did he come to see you?

A. Yes, he did.

Q. Mr. Keith, tell us what your bottom line assessment of provisioning was, at the time you began working in CDOC?

A. It was a disaster. That is, the provisioning problem is the fundamental problem that caused all the action in the case here. And at this time, and it wasn't directed towards any class of customers. Anyone asking for provisioning of switched access had a terrible time, during this period, of

getting it in. And it took us a long period of time.

It was getting better by the time I was leaving in 1991. By better, I mean with a set of predictability you could say that this order you gave me will be completed in 45 days plus or minus 10 days. And that was a better condition at the end of my tenure. At the beginning of my tenure, I didn't even understand how bad it could be.

Q. Plaintiff's Exhibit 91 is in front of you. It's easier to read out of the book.

A. That's fine.

Q. I think you said that this was a letter that you had written to Gail McGovern?

A. That is correct.

Mr. URRUTIA: And your Honor, this is already in our record as 91. It's been received, and it's the April 21 letter—excuse me. May 21, 1990, letter.

Q. Who is Gail McGovern?

A. Gail McGovern was my counterpart in the business unit that owned the product SDN. So, her product chose the one that makes changes to it.

Q. All right. And what does this letter consist of?

A. It consists of a series of recommendations and modifications to the process of provisioning and the underlying service itself.

Q. Now, are you aware of whether commercial users of SDN were using the AT&T globe to sell long distance services to third parties?

A. To third parties?

Q. Right.

A. They could. But if they were using it inside their own company, they would use their own logo.

Mr. URRUTIA: And that concludes the designated depositions for Mr. Keith.

Mr. URRUTIA: Do you have Mr. Greco's?

Mr. PETRANOVICH: Yes.

The COURT: Would you sell Greco for us, please?

Mr. URRUTIA: Sure. Spelled G–R–E–C–O. The deposition of Mr. John A. Greco, Junior, was taken on February 26 of 1993. It was taken in the offices of AT&T at 295 North Maple Avenue in Baking Ridge, New Jersey, starting at 1:00 p.m. Mr. Hall was present for the Central Office Telephone and took the deposition for Central Office Telephone, and I believe Mr. Petranovich was present for AT&T.

Direct Examination

BY MR. URRUTIA:

Q. And it starts on page five. I want to go back to when you first came into the SDN program and get the time frames established for your involvement. When did you first become involved with SDN?

A. I guess when you are saying involved with SDN, it's parts of the AT&T's offer, so my involvement, specifically, my job responsibility, it's——

Exhibit D—Pending Federal Court Litigation Instituted by Resale Carriers Against AT&T

1. AT&T v. NOS Communications, Inc. (counterclaim), Civil Action 92–4172 (MTB) D.C.D.NJ
2. Target Telecom, Inc. v. AT&T, Civil Action No. 93–1851 (MTB) D.C.D.NJ
3. Group Long Distance, U.S.A. v. AT&T, Civil Action No. 93–1851 (MTB) D.C.D.NJ
4. Communications Services of America v. AT&T, Civil Action No. 93–1851 (MTB) D.C.D.NJ
5. Telecomp Technologies Network, Inc. v. AT&T, Civil Action No. 93–1851 (MTB) D.C.D.NJ
6. Business Choice Network v. AT&T, Civil Action No. 93–1851 (MTB) D.C.D.NJ
7. Telcom United North v. AT&T, Civil Action No. 93–2625 (HAA) D.C.D.NJ
8. National Communications Association v. AT&T, Case No. 92 Civ. 1735 (LAP) D.C.S.D.NY
9. Envoy Communications, Inc. v. AT&T, Case No. 91–1333 (JE) D.C.D.OR
10. Central Office Telephone, Inc. v. AT&T, Case No. 91–1236 (JE) D.C.D.OR
11. Affinity Network, Inc. v. AT&T, Case No. 92–2836 (JSL) D.C.C.D.CA
12. AT&T v. The People's Network, Inc. (counterclaim), Case No. 92–3100 (AJL) D.C.D.NJ
13. Teledesign v. AT&T, Susan Robinson & Toby Ragsdale, Case No. H–92–1414 D.C.S.D.TX Houston Div.
14. US Wats, Inc. v. AT&T, Case No. 93–CV–1038 D.C.E.D.PA—Philadelphia Div.
15. Telexpress, Inc. v. AT&T, Case No. 93–0256 (AWT) D.C.C.D.CA
16. Paragon v. AT&T, Case No. 91–5057 (JSL) D.C.C.D.CA
17. SCG Financial Corporation, Inc. v. AT&T, Case No. CV–91–5057 (JSL) D.C.C.D.CA
18. Association of Long Distance Users, Ltd. v. AT&T, Case No. 4–93–283 (D.C.D. Minn.—4th Division) (Stayed by Federal Court pending outcome of FCC action.)
19. Cunningham Enterprises, Inc. v. AT&T (counterclaim), Case No. 90–4111 (TJM) (D.C.C.D.CA)
20. AT&T v. Equal Access Corp., Case No. CV–92 (WDK) (D.C.C.D.CA)
21. MJM Communications, Inc. v. AT&T, Case No. CV–92–1951 (JSL) (D.C.C.D.CA)
22. National Communications Ass'n, Inc. v. AT&T, 93 CIV 3707 (D.C.S.D.NY)
23. Retco Enterprises, Inc. v. AT&T, Case No. H–91–2221 (D.C.S.D. Tex.—Houston Div.) (Case settled July 1993)
24. Triad Communications Group v. AT&T, Case No. SACV–93–529 AHS (D.C.C.D.CA)
25. Uni-Tel of Farmington, Inc. v. AT&T, Case No. 92–0963SC/AY (D.C.D.NM) (Not active at this time)
26. Telegroup, Inc. v. AT&T, Case No. 94 CIV 4123 (D.C.S.D.NY)
27. ProGroup, Inc. v. AT&T, Case No. 94 CIV 4123 (D.C.S.D.NY)

Exhibit E—List of Pending Complaints Against AT&T That Have Been Filed With the Federal Communications Commission by Two of the Ad Hoc IXCS With Respect to AT&T's Stonewalling of the Resale of Its Tariff 12 Services

List of pending complaints against AT&T that have been filed with the Federal Communications Commission by two of the Ad Hoc IXCs with respect to AT&T's stonewalling of the resale of its Tariff 12 services.

1. Affinity Network, Inc. v. AT&T, Case No. E–92–96 (FCC, June 26, 1992)
2. NOS Communications, Inc. v. AT&T, Case No. E–92–101 (FCC, July 27, 1992)

Exhibit F—MCI Press Announcement, Washington, DC February 28, 1994

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SUSAN SUSS
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MCI Will Invest $1.3 billion in Nextel to Offer Nationally Branded Wireless Services

Network MCI Strategic Alliance With Nextel and Comcast Will Provide First Digital Personal Communications Services

WASHINGTON, D.C., February 28, 1994—A strategic alliance formed today by MCI, Nextel Communications, Comcast Corporation and Motorola will begin offering MCI wireless personal communications services this year. A $1.3 billion MCI investment in Nextel will accelerate this first nationwide offering of advanced wireless voice and data communications, featuring digital clarity and reliability, a single telephone number that will work anywhere, and availability throughout the country.

The companies said that their alliance will bring these enhanced flexible services to consumers, business and government customers far sooner than generally had been expected. The services will be marketed jointly by MCI, Nextel and Comcast under the MCI brand name.

Nextel's license coverage and planned interoperability agreements give the alliance the potential to reach 95 percent of the U.S. population. Its first

digital network is already serving customers in the Los Angeles area and will stretch across California within the next few months. With the investment by MCI, plans are underway to accelerate construction in most major cities.

''Wireless communication is becoming an integral part of our daily lives, and demand is growing rapidly,'' said Bert C. Roberts, Jr., MCI chairman and CEO, at a press conference in Washington, D.C. ''Customers have been asking us to provide a totally portable communications service that meets their needs any time, anywhere. This alliance means that Nextel is the platform on which we will build an integrated wireless strategy, and that we will be able to reach virtually every American who wants wireless service.''

The strategic agreement will capitalize on the strengths of four dynamic companies, each a leader in its field. MCI brings world-class marketing assets—name recognition, customer base and distribution channels—as well as the company's intelligent network. Nextel adds licenses with extensive geographical coverage, planned interoperability agreements and proven wireless products and services. Comcast contributes its experience and know-how in operating cable and cellular systems and will support the build-out and operation of Nextel systems. And Motorola will provide its Integrated Radio Service (MIRS) technology platform, as well as subscriber equipment. These combined strengths will enable the companies to provide a wide array of advanced wireless servicers to consumers, business and government customers over a larger area than any other wireless service competitor.

''This alliance means that everyone else will be playing catch up,'' said Morgan E. O'Brien, Nextel chairman. ''MCI's enormously successful marketing and branding, and large customer base give us the ability to extend beyond our core of business customers to serve virtually anyone who could benefit from wireless communications. We are delivering the first of these advanced wireless services on our all-digital network in L.A., including wireless telephone, two-way paging and dispatch radio.''

Under terms of the agreement, MCI will purchase approximately 17 percent of Nextel's stock, which will match Comcast's ownership. The initial purchase, expected to occur in a few months, will consist of 22 million shares of Nextel stock at $36 per share. MCI has also committed to purchase an additional 15 million shares at an average cost of $38 per share over the next three years, for a total investment of more than $1.3 billion.

The announcement adds one more key component to networkMCI, the company's strategic vision announced in January. When networkMCI was unveiled, MCI highlighted its intent to form alliances with communications and information industry leaders to provide innovative new communications services. It identified wireless personal communications services as an integral part of the networkMCI vision.

Roberts pointed out that the demand for wireless voice communications is expected to grow from 15 million users today to 80–90 million users in the next 10 years. Data, paging and messaging applications will further expand the total wireless market.

The companies said they will provide consumers, business and government customers with MCI-branded services such as mobile calling services, alphanumeric messaging, dispatching and data transmission, all integrated in a single digital phone. The same telephone number will work from anywhere in the United States.

Comcast has been increasing its presence in the telephony business in recent years through its ownership and operation of cellular properties in the Northeastern U.S. and cable/telephone operations in the United Kingdom. As part of the alliance, MCI and Comcast have entered into a shareholders' agreement with equal representation, and together they will own approximately 35 percent of Nextel.

Comcast is proud to have been a catalyst for bringing this alliance together,'' Brian L. Roberts, president of Comcast, said. ''We are delighted that MCI will be joining us as both an operating partner and an investor in Nextel. From the time of our original investment in Nextel just 18 months ago, management's efforts have resulted in a near tripling of the reach of its operations. In addition to marketing under the MCI name, Comcast may market Nextel's under our own brand as well.''

Handsets and infrastructure for the new system, both produced by Motorola, provide improved functionality over earlier mobile services, including digital voice, message and data services. Messages can be displayed on phone screens. The phones also can be used as mobile data receivers. Because it will be fully digital, the wireless services will provide crisper voice and dataquality than current analog systems.

The new system will use Motorola's powerful new digital communications technology, Motorola Integrated Radio System (MIRS). Motorola Chief Executive Officer Gary L. Tooker said, ''The versatility and spectrum efficiency of MIRS will open the door to a whole new world of digital, personal communications services. As it will on other MIRS systems around the world, this technology adds the power of messaging, dispatch and data, to the same handset.''

The agreement is subject to appropriate regulatory review.

Certificate of Service

I, Charles H. Helein, attorney at Helein & Waysdorf, P.C. hereby certify that I have this 25th day of October, 1994 caused the foregoing document to be served by hand delivery upon:

Richard Liebeskind, Assistant Chief, Communications and Finance Section, Room 8104, U.S. Department of Justice, Antitrust Division, 555 4th Street, N.W., Washington, D.C. 20001;

and by overnight mail upon the following:

John D. Zeglis, AT&T Corp., 295 North Maple Avenue, Basking Ridge, New Jersey 07920

Douglas I. Brandon, McCaw Cellular Communications, Inc., 1150 Connecticut Avenue, N.W. Washington, D.C. 20036

Charles H. Helein

Certificate of Service

I, Kathy L. Cuff, hereby certify under penalty of perjury that I am not a party to this action, that I am not less than 18 years of age, and that I have on this day caused the Response to Public Comments to the Proposed Final Judgment to be served by mailing a copy, postage prepaid, to:

John D. Zeglis, Mark C. Rosenblum, AT&T Corp., 295 North Maple Avenue, Basking Ridge, NJ 07920

Douglas I. Brandon, McCaw Cellular Communications, Inc., 1150 Connecticut Avenue, N.W., Washington, D.C. 20036

Kathy L. Cuff

July 25, 1995

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