DEPARTMENT OF JUSTICE

Antitrust Division

[Civil No. 95–1304]

Public Comments and Response on Proposed Final Judgment, United States v. Sprint Corporation and Joint Venture Company

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States of America hereby publishes below the comments received on the proposed Final Judgment in *United States* v. *Sprint Corporation, et. al.*, Civil Action No. 95–1304, filed in the United States District Court for the District of Columbia, together with the United States' response to the comments.

Copies of the comments and response are available for inspection in Room 215 of the U.S. Department of Justice, Antitrust Division, 325 7th Street, NW., Washington, DC 20530, telephone: (202) 514–2481, and 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. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Constance K. Robinson,

Director of Operations, Antitrust Division.

Comments Relating to Proposed Final Judgment and Response of the United States to Comments

United States of America, Plaintiff, v. *Sprint Corporation and Joint Venture Company,* Defendants.

[Civil Action No. 95–1304 (TPJ)]

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16(b)–(h)) (''APPA''), the United States of American hereby files the public comments it has received relating to the proposed Final Judgment in this civil antitrust proceeding, and herein responds to the public comments. The United States has carefully reviewed the public comments on the proposed Final Judgment. While the United States remains convinced that entry of the proposed Final Judgment is in the public interest, in this Response the United States clarifies the meaning of several provisions of the proposed Final Judgment in response to issues raised by the public comments to ensure that there is no uncertainty as to how the proposed Final Judgment will operate. The United States also explains why other provisions of the proposed Final Judgment that were questioned or criticized in the public comments need not be changed in light of the factual circumstances, including developments in France and Germany and actions taken by the European Commission and the Federal Communications Commission.

At this time, it would be premature for the Court to render a decision on entry of the proposed Final Judgment. The Joint Venture must first be made a party to the Stipulation consenting to entry of judgment, and the United States must have this Response and the public comments published in the Federal Register, certify that all of the requirements of the Tunney Act have been met, and move for entry of judgment. It is anticipated that these steps will be completed in a period between two weeks to a month from this filing. The filing of this Response has been delayed as a result of the shutdown of government functions in December and early January due to lack of funding. Before the United States moves to enter the Final Judgment, the United States and defendants expect to arrange with the Court for the scheduling of a status conference, in order to determine what further procedures the Court may wish to follow to complete the proceedings under the Tunney Act.

I

Background

A. The Proceedings in This Case

This action was commenced on July 13, 1995, when the United States filed a civil antitrust complaint under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, alleging that the proposed acquisition of 20% of the stock of Sprint Corporation (''Sprint'') by France Telecom (''FT'') and Deutsche Telekom AG (''DT''), and the proposed formation by Sprint, FT and DT of a joint venture to provide international telecommunications services, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleges that because of the market power held by FT and DT in telecommunications services in France and Germany, the acquisition and the joint venture may substantially lessen competition in two markets: (1) provision of international telecommunications services between the United States and France, and between the United States and Germany, and (2) provision of seamless international telecommunications services.

Also on July 13, 1995, the United States submitted a proposed Final Judgment and a Stipulation, and this Court subsequently approved the Stipulation for filing. In the Stipulation, defendant Sprint and the United States have consented to entry of the proposed Final Judgment by the Court after completion of the procedures required by the APPA, and agreed to certain other preconditions for consummation of the transactions between Sprint, France Telecom and Deutsche Telekom.[1] After the Joint Venture has been formed, and before the Court is requested to enter the proposed Final Judgment, the United States and all defendants expect to file an amended version of the Stipulation including consent to entry of judgment by the Joint Venture.[2]

On August 14, 1995, the United States filed a Competitive Impact Statement explaining the basis for the Complaint and the provisions of the proposed Final Judgment, including their anticipated effect on competition in relevant markets. The terms and conditions imposed by the Final Judgment are intended to safeguard against discriminatory and other anticompetitive practices that would favor the defendants over competing United States providers of international telecommunications services and harm competition. The Competitive Impact Statement addresses the reasons why entry of the proposed Final Judgment would be in the public interest.

The proposed Final Judgment would subject Sprint and the Joint Venture to various restrictions affecting their relationship with FT and DT. These restrictions operate in two distinct phases, lessening over time as

[1] The United States has been advised by FT and DT that one of those preconditions, the divestiture of the Initial Tranche of FT's and DT's shares of Infonet Services Corporation, has now been completed.

[2] Paragraph 6 of the July 13, 1995 Stipulation signed by the United States and Sprint provides that ''Joint Venture Co. is necessary as a defendant in this action, together with Sprint, for the relief specified in the proposed Final Judgment to be effective.'' It further sets out required conditions pertaining to Joint Venture Co. including ''that Joint Venture Co. (i) has been created as a legal entity, (ii) is subject to suit and is within the reach of the jurisdiction of the United States courts, and (iii) will have full authority and power to carry out all of the obligations imposed upon it by the proposed Final Judgment as those obligations take effect, and Joint Venture Co. has consented to and executed this Stipulation on the same terms as Sprint, without reservation or qualification, * * *'' The stipulation further provides that until these conditions pertaining to Joint Venture Co. are satisfied, the United States ''shall be under no obligation to move for entry of the Final Judgment and may withdraw its consent to entry of the Final Judgment, and defendants shall not move for entry of the Final Judgment.'' The original stipulation signed by both Sprint and the United States essentially makes the formation of the joint venture and its execution of the Stipulation consenting to entry of the proposed Final Judgment preconditions for entry of the Final Judgment.

competition develops in France and Germany. During Phase I, while DT and FT still have monopoly rights in Germany and France and competitors have not been licensed, Sprint and the Joint Venture may not acquire ownership or control of certain types of facilities from FT and DT, may not provide services in which FT or DT have special rights except in limited, non-exclusive circumstances, and may not benefit from discriminatory treatment, disproportionate allocation of international traffic, or cross-subsidization by FT and DT. In addition, access to the French and German public switched networks and public data networks cannot be limited in such a way as to exclude competitors of Sprint and the Joint Venture.

During both Phase I and Phase II, after FT and DT face licensed competitors in all areas of services and facilities in France and Germany, Sprint and the Joint Venture must make certain information on their relationships with FT and DT available to competitors, will be precluded from receiving competitively sensitive information that FT and DT obtain from the competitors of Sprint and the Joint Venture, and may not offer particular services between the United States and France and Germany unless other United States providers also have or can readily obtain licenses from the French and German governments to offer the same services. These provisions of the decree will remain in effect for five years beyond the end of the first phase.

B. Other Significant Developments Affecting These Transactions

In the Competitive Impact Statement, the United States noted that both the competition authorities of the Commission of the European Union, and the Federal Communications Commission in the United States, had pending investigations of these transactions. See *Competitive Impact Statement,* 60 Fed. Reg. 44049, at 44065 (Aug. 24, 1995). The issues in these separate investigations overlapped to a certain extent with those considered by the United States under the Clayton Act, but also differed significantly in some respects, both for jurisdictional and substantive reasons. The European Commission and the FCC now have both resolved their separate investigations of these transactions. Both of these authorities have determined that the transactions should be allowed to proceed, subject to various modifications, limitations and safeguards addressing the concerns within their areas of responsibility. Other relevant developments have also taken place in the European Union and in France and Germany indicating further progress toward removal of legal barriers to competition and the establishment of effective regulatory regimes to protect competition.

1. The European Commission Decision

The competition authorities of the European Commission considered not only the transactions between Sprint, France Telecom and Deutsche Telekom leading to the formation of the ''Phoenix'' alliance referred to in the proposed Final Judgment as Joint Venture Co., but also the formation of the strategic alliance between France Telecom and Deutsche Telekom in Europe known as ''Atlas,'' which was outside the scope of U.S. antitrust review. Their decision, first reached and announced in October 1995 shortly before the end of the public comment period on the proposed Final Judgment, was officially published on December 15, 1995.[3] It is subject to an ongoing public comment period before it is finalized, which will likely occur sometime in the first half of 1996.

The European Commission recognizes in its decision that other competitors of the Atlas and Phoenix ventures will be dependent in France and Germany on the monopoly services of FT and DT, including the public switched telephone network (PSTN) and other reserved services such as leased lines. Moreover, FT and DT already have very high market shares in various types of services in their home countries that the parties had planned to provide through Atlas and Phoenix, including standardized low-level packet-switched data communications services. The European Commission gives DT's share of data communications services in Germany as 79%, and FT's share of data communications services in France as 77%. In order for the Atlas and Phoenix transactions to be exempted from the prohibitions of European competition law and enabled to proceed, FT and DT accepted various conditions and modifications to the transactions, while the French and German governments also committed to make important changes in their national laws.

First, the French and German governments have made a written commitment to the European Commission to permit competition in the provision of telecommunications infrastructure for services other than public switched voice by July 1, 1996, and to permit full competition for voice telephone services and all types of telecommunications infrastructure by January 1, 1998. This early liberalization for infrastructure used for services other than public switched voice will authorize competitors in France and Germany to begin developing and operating alternative telecommunications networks a year and a half before the date of full liberalization in France and Germany, and also considerably before the earliest time that a shift from Phase I to Phase II could occur under the proposed Final Judgment. For Phase II to begin in either France or Germany, there must have been, among other things, complete removal of all legal prohibitions on competition, which would not occur before January 1, 1998 at the earliest based on current schedules for liberalization in France and Germany.

Second, FT is precluded from integrating its Transpac public switched X.25 data network in France into Atlas, and DT similarly is precluded from integrating its Datex-P public switched X.25 data network in Germany into Atlas, until January 1, 1998, the planned date of full liberalization. Atlas may not acquire any form of legal ownership or control over the Transpac network in France or the Datex-P network in Germany before that date, although certain international operations of Transpac outside of France can be contributed to Atlas. In essence, the European competition authorities have extended to Atlas the prohibition on integrating the Public Data Networks into Phoenix during Phase I that is contained in Section III.B of the proposed Final Judgment.[4] The Transpac and Datex-P networks in France and Germany are to be wholly owned subsidiaries of FT and DT during the period before they can be integrated into Atlas, while Atlas will have subsidiaries of its own in France and

[3] Case No. IV/33,337—Atlas, *Notice pursuant to Article 19(3) of Council Regulation No. 17 and Article 3 of Protocol 21 of the European Economic Area Agreement concerning a request for negative clearance or an exemption pursuant to Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement,* 1995 O.J. No. C 337/2 (Dec. 15, 1995), and Case No. IV/35,617—Phoenix, *Notice pursuant to Article 19(3) of Council Regulation No. 17 and Article 3 of Protocol 21 of the European Economic Area Agreement concerning a request for negative clearance or an exemption pursuant to Article 85(3) of the EC Treaty and Article 53(3) of the EEA Agreement,* 1995 O.J. No. C 337/13 (Dec. 15, 1995). For convenience these decisions have been attached to this Response as Exhibit H.

[4] There are minor differences between these integration prohibitions. The European authorities have opted for a fixed date on which the prohibition terminates, whereas the termination of Phase I is flexible and depends on the satisfaction of certain conditions, and also can differ for France and for Germany. Also, the definition of the Public Data Networks in Section V.S. of the proposed Final Judgment, with respect to Germany, is broader than the Datex-P network and also includes some other data services.

Germany to provide its other services. FT and DT will have the ability to cooperate with respect to Transpac and Datex-P, using Atlas as a manager, only in certain specified areas involving the development of common products and technical network elements, including network planning and information systems.

Third, FT has committed to divest its Info AG data network in Germany, instead of integrating it into Atlas. This responds to concerns on the part of the EU competition authorities about loss of horizontal competition between Info AG and DT in Germany in data services, similar to the concern of the United States about the loss of competition between Sprint and Infonet Services Corporation in the U.S., which was addressed by FT's and DT's agreement to divest their interest in Infonet.

Fourth, Atlas and Phoenix will not act as agents for the international half-circuits of DT and FT, a change to the original agreements of the parties. These international half-circuits will continue to be sold by DT and FT directly.

Fifth, the non-compete agreements of the parties to the Phoenix joint venture will not apply to long distance services, except for competition with entities providing long distance services that are controlled by Phoenix.

Sixth, Atlas, Phoenix, DT, FT and Sprint and their affiliates are precluded from making a telecommunications operator's ability to use the Phoenix international carrier services (*i.e.*, sales of switched transit capacity to other telecommunications carriers), or the commercial terms on which such services are offered, conditional upon use or distribution by that telecommunications operator of services of Atlas, Phoenix, DT, FT or Sprint.

Seventh, DT and FT have committed directly for Atlas, and DT, FT and Sprint have committed for Phoenix, to certain undertakings regarding forms of behavior that could have anticompetitive effects. These undertakings, enforceable by the European competition authorities, are similar in many respects to the obligations that would be made binding on Sprint and the Joint Venture directly, and indirectly affect FT's and DT's conduct, under the terms of the proposed Final Judgment. They do not conflict with the proposed Final Judgment in any way.

Several of these undertakings are directed at preventing discrimination in public switched telephone network (PSTN) and reserved services, such as leased lines. FT and DT will be required to give similar terms and conditions of service (including availability, price, quality of service, usage conditions, delays for installation and repair and maintenance) to Atlas and Phoenix and other providers of similar services, with respect to FT's and DT's PSTN services and other reserved services. Atlas and Phoenix are not to be granted terms and conditions or to be exempted from usage restrictions regarding the PSTN and other reserved services that would enable them to offer services that competing providers are prevented from offering. DT and FT are prohibited from discriminating between Atlas and Phoenix and any competing service provider in connection with substantial modifications to interfaces for reserved services or the disclosure of technical information relating to the operation of the PSTN. DT and FT also are prohibited from discriminating between Atlas and Phoenix and other competitors regarding the disclosure of commercial information, including customer information derived from operating the PSTN or providing reserved services, that would confer a substantial competitive advantage and is not readily available elsewhere. While these restrictions presumably would cease to apply to particular services as they lose their reserved status, they would continue to apply to the PSTN with no specific time limit.

Other undertakings are intended to ensure that access to the DT and FT national public switched data networks remains available to competitors. These services, though not considered to be PSTN or reserved services, nonetheless are ones for which DT and FT remain the dominant providers in their home countries. DT and FT will be required, as of January 1, 1996, to establish and maintain third-party access to their public switched data networks in Germany and France on a non-discriminatory, open, and transparent basis, for all other providers of X.25 packet-switched data communications services. In order to ensure such non-discriminatory access to their national public switched data networks, DT and FT will be required to establish and maintain interfaces based on the X.75 standard (a form of protocol for interconnection between data networks that is commonly used as an international standard and is suitable for the provision of end-to-end X.25 services) or any other generally used standard interconnection protocol that may modify, replace or co-exist with the X.75 standard. Access based on such protocols is to be offered on publicly available standard non-discriminatory terms including price, availability of volume or other discounts, and quality of interconnection, and FT and DT are required to make available to the European competition authorities the terms of any agreements concerning access. Atlas, Datex-P and Transpac will not be prohibited, however, from developing additional proprietary interfaces between their networks, provided that access granted to Atlas through such interfaces is economically equivalent to the access that third parties are able to obtain. Apart from a prohibition on the sharing of customers' confidential interconnection information between Transpac, Datex-P and Atlas, which would be lifted once these networks can be combined into Atlas, the obligations regarding access to the public data networks do not expire at any predetermined time.

Further undertakings are directed at preventing cross-subsidization by FT and DT of the Atlas and Phoenix ventures as well as Datex-P and Transpac. These obligations last until the telecommunications infrastructure and service markets in France and Germany are fully liberalized, as is expected to occur by January 1, 1998. All entities formed pursuant to the Atlas and Phoenix ventures must be distinct and separate from DT and FT. Atlas, Phoenix, Datex-P and Transpac must obtain their own debt financing, with certain exceptions similar to those in the proposed Final Judgment. They are also prohibited from allocating directly or indirectly any part of their operating expenses, costs, depreciation, or other business expenses to any parts of FT's or DT's business units, again with provisos similar to the proposed Final Judgment. They are required to keep separate accounting records identifying payments and transfers to and from FT and DT, and are prohibited from receiving any material subsidy or any investment or payment from FT or DT that is not recorded in their books as an investment in debt or equity.

Atlas, Transpac and Datex-P will be subject to regular auditing obligations to ensure that any transactions between them and FT or DT are on an arm's length basis. FT, DT, Phoenix and Atlas will also be subject to recording and reporting obligations, in order to enable FT's and DT's undertakings not to discriminate or cross-subsidize to be effectively monitored by the European Commission competition authorities. These conditions will last until full telecommunications liberalization takes place in France and Germany.

2. The FCC Decision

On December 15, 1995, the Federal Communications Commission announced its decision on the proposed

acquisition by FT and DT of 20% of the equity of Sprint, and the formation of the ''Phoenix'' joint venture between these three companies, under the ''public interest'' standard of the Communications Act of 1934 and relevant provisions of that statute, including 47 U.S.C. §§ 214 and 310(b).[5] The FCC, similarly to the United States, has recognized in its decision that the 20% investment in Sprint and formation of the Joint Venture will give FT and DT incentives that they would not otherwise have to engage in various types of anticompetitive behavior favoring Sprint and the Joint Venture over other U.S. competitors, potentially raising prices and reducing service quality and innovation.[6] Based on the recent policy shift by the French and German governments toward competitive telecommunications markets and the potential benefits of the transactions for consumers, the FCC has determined that allowing these transactions to be consummated would be in the public interest notwithstanding the present lack of ''effective competitive opportunities'' for U.S. providers in France and Germany. However, it has also imposed several significant conditions on the transactions.

First, the FCC has restricted Sprint's ability to operate new international circuit capacity to France and Germany for either its own use or that of the Joint Venture, beyond the existing and idle capacity it already has to those countries on several submarine cables, until (1) infrastructure liberalization for facilities used to provide services other than public switched voice has actually occurred in France and Germany (as the European Commission's settlement requires to take place by July 1, 1996), and (2) opportunities exist in France and Germany for basic public switched voice resale services to be provided on a competitive basis, including international traffic between France and Germany and the U.S.[7]

Second, Sprint will be subject to regulation as a ''dominant carrier'' with respect to traffic between the U.S. and France and Germany, due to its relationship with FT and DT, which are considered to be dominant carriers in their home markets, until Sprint demonstrates that there is no longer a substantial risk of anticompetitive effects in the U.S. arising from its relationship with FT and DT. This would mean that Sprint would be required to notify the FCC and obtain approval whenever it seeks to add new circuits to those countries, either for itself or the Joint Venture, whereas nondominant carriers only need obtain approval when first commencing service to a particular country and can thereafter add capacity freely. It would also mean that Sprint's tariffs filed with the FCC for basic telecommunications services, such as switched voice, to France and Germany would be subject to longer waiting periods before taking effect, and that Sprint would have to file quarterly traffic and revenuer reports.[8]

Third, Sprint will be obligated not to accept any ''special concessions'' directly or indirectly from any foreign carrier or administration, including FT or DT, with respect to traffic or revenue flows between the United States and any foreign country, including France or Germany. Other U.S. carriers that are considered to be affiliated with a foreign telecommunications carrier under 47 C.F.R. § 63.14 have a similar obligation. This requirement will remain in place indefinitely, unless removed by the FCC. ''Special concessions'' are defined by the FCC to include any arrangements that affect traffic or revenue flows to or from the United States that are offered to a particular U.S. carrier but not to other similarly situated U.S. carriers that are authorized to serve a particular route. 47 C.F.R. § 63/01(r)(3)(1). The FCC's decision illustrates the effect of this prohibition with detailed examples. Sprint would be precluded from accepting disproportionate amounts of return traffic, preferential changes in methods of allocating traffic, or discriminatory accounting rates from FT or DT.

Furthermore, if FT or DT were to grant an operating agreement or marketing arrangement to Sprint for a particular type of basic service but to withhold such agreements from other similarly situated U.S. carriers, or only offer agreements on discriminatory terms, Sprint would be in violation of the ''no special concessions'' requirement were it to offer service under the special operating agreement or marketing arrangement. Sprint will also be precluded from accepting any discriminatory interconnection or distribution arrangements from FT or DT, or arrangements for the joint handling of basic traffic involving third countries that are not available to other U.S. carriers. Sprint could not receive directly or through the Joint Venture (i) information about FT's or DT's basic network services that had not been publicly disclosed and that would affect U.S. carriers' provision of service, (ii) proprietary or confidential information that FT or DT have obtained from other competing U.S. carriers, or (iii) FT's or DT's telephone customer information that is not also available to U.S. competitors. In furtherance of this obligation not to accept special concessions, Sprint will also have to obtain a written commitment from FT and DT not to offer or provide any special concessions to Sprint or the joint venture relating to the provision of basic telecommunications services or facilities. Sprint also will be obligated to maintain records on its provisioning and maintenance of network facilities and services with FT and DT (including services or facilities procured on behalf of Joint Venture customers), to file various types of reports with the FCC on its numbers of circuits, revenues, numbers of messages and minutes for originating and terminating traffic between the U.S. and France and Germany, and to make available its contracts and agreements with FT and DT relating to routing of traffic and settlement of accounts on the U.S.-France and U.S.-Germany routes.[9] These conditions are similar to the obligations the FCC imposed on MCI in connection with its sale of 20% of its equity to British Telecommunications plc and formation of a joint venture in 1994.[10]

Fourth, Sprint will have to obtain a written commitment from France Telecom to lower its accounting rates for U.S.-France traffic within two years to the levels of the lower accounting rates between U.S. carriers and British carriers for U.S.-U.K. traffic, and between U.S. carriers and DT for U.S.-Germany traffic. The FFC has found that the U.S.-France rates are 28% above the level of the others and that this difference is unjustified.[11]

Fifth, Sprint will have to file annual reports, beginning in 1996, concerning the status of telecommunications markets and regulatory regimes in France and Germany.[12] These reports are intended to enable the FCC to evaluate how far France and Germany have progressed toward meeting the

[5] *In the matter of Sprint Corporation Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended,* File No. ISP–95–002, FCC 95–498 (released January 11, 1996) (hereinafter ''FCC Sprint Order''). Because this document is lengthy and is publicly available in the U.S., it has not been attached as an exhibit to this Response.

[6] *Id.,* ¶¶ 56–57.

[7] *Id.,* ¶¶ 109–115.

[8] *Id.,* ¶¶ 103–108.

[9] *Id.,* ¶¶ 116–127.

[10] *MCI Communications Corporation/British Telecommunications plc, Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended,* 9 FCC Rcd 3960, 3973 (released July 25, 1994).

[11] FCC Sprint Order, ¶¶ 90–92, 131.

[12] *Id.,* ¶¶ 128–29.

''effective competitive opportunities'' criteria that the FCC has announced it will apply generally to foreign telecommunications carrier acquisitions of over 25% of the equity in U.S. telecommunications carriers leading to affiliation, or other investments likely to have competitive significance.[13] The reports will continue until the FCC finds that ''effective competitive opportunities'' exist in France and Germany, and the FCC has said that it will reconsider whether the public interest continues to be served by Sprint's authority to provide facilities to France and Germany if effective competitive opportunities are not available by 1998.[14]

3. Other Significant Actions by European Union Authorities

The Competitive Impact Statement addresses the European Union's overall plans for the introduction of full telecommunications competition by January 1, 1998, and infrastructure competition for services other than public switched voice in 1996. 60 Fed. Reg. at 44062. Over the past few months, the Commission of the European Union has proposed several other major directives, all of which are necessary steps on the road to full competition and an effective regulatory framework, and together indicate the substantial progress that is now being made toward telecommunications competition.

On July 19, 1995, the European Commission issued a proposed draft directive governing interconnection in telecommunications, which has now been submitted to the Parliament and the Council of Ministers who are responsible for adopting it.[15] This directive comprehensively addresses the manner in which Member States of the European Union, including France and Germany, would be required to ensure that telecommunications operators such as France Telecom and Deutsche Telekom provide interconnection to their networks for other telecommunications network and service providers. Under the terms of this directive, FT and DT, as entities with significant market power, would have to establish transparent, unbundled, cost-oriented interconnection charges, and would not be able to discriminate among providers in interconnection. They would have to publish tariffs for their standardized interconnection services, and not simply establish interconnection terms through commercial negotiation as is more typical today. Moreover, where any interconnection arrangements are negotiated, regulatory authorities would have to ensure that agreements are reached within specified times and provide for review with published decisions. This directive is scheduled for final adoption by the end of 1996, and member States, including France and Germany, would have to take the measures necessary to bring themselves into compliance before the end of 1997, so as to have an interconnection regulatory regime in place prior to the start of full competition.

On November 14, 1995, the European Commission also adopted a proposed draft directive, to be acted upon by the Parliament and Council of Ministers, to ensure a common framework in the European Union for the grant of general authorizations and individual licenses to provide telecommunications services by the Member States, including France and Germany.[16] This directive would apply to all types of telecommunications services as they become open to competition. Under this proposed directive, Member States would not be permitted to impose limits on the number of licenses granted to provide particular services or facilities, except as necessary in the case of radio-based services because of limits on the availability of spectrum. Licensing procedures would have to be open, transparent and nondiscriminatory, and any denials of licenses would have to be justified and subject to appeal. This directive is scheduled for final adoption by the fall of 1996, and Member States would have to take measures to bring themselves into compliance by July 1, 1997, six months before the start of full competition, so as to enable competitors to be licensed in a timely manner.

Other existing European Union directives governing telecommunications services are also being updated to account for the plans for full introduction of competition by 1998. Under proposed changes to the existing directive governing the framework for open network provision, announced on November 14, 1995 by the European Commission, Member States that retain a significant degree of ownership or control of a telecommunications provider, as France and Germany both still do, would have to take additional measures to ensure the effective separation of regulatory activities from activities of the government related to ownership or control of the telecommunications provider.[17] The regulatory authorities would have to be both legally distinct from and functionally independent of all organizations providing telecommunications networks or services, effective structural separation from any activities associated with ownership or control of such organizations would have to exist, and rights of appeal from the regulator to an independent body would have to be provided. These changes to the framework directive are also scheduled for final adoption by the fall of 1996, and Member States would have to take the measures needed to bring themselves into compliance by the end of 1997.

[13] The ''effective competitive opportunities'' criteria are explained fully in the FCC's decision in *Market Entry and Regulation of Foreign-affiliated Entities,* IB Docket No. 95–22, Report and Order (released Nov. 30, 1995). In summary, they are: (1) whether U.S. carriers can, as a matter of law, offer in the foreign country international facilities-based services, including the ability to obtain a controlling interest in a facilities-based provider and to offer basic International Message Telephone Service traffic; (2) the availability of reasonable and nondiscriminatory published charges, terms and conditions for interconnection to foreign domestic carriers' facilities for termination and origination of international services; (3) whether competitive safeguards exist in the foreign country to protect against anticompetitive conduct, including cost-allocation rules to prevent cross-subsidization, timely and nondiscriminatory disclosure of technical information needed to use or interconnect with carriers' facilities, and protection of carrier and customer proprietary information; and (4) whether there is an effective regulatory framework in the foreign country to develop, implement and enforce legal requirements, interconnection arrangements and other competitive safeguards, including separation between the regulator and the foreign operator of international facilities-based services, and the existence of fair and transparent regulatory procedures. A favorable competitive opportunities finding can be made if effective competitive opportunities currently exist or it is reasonably certain that they will be available in the near future. The FCC places greatest emphasis on the legal ability to provide international facilities-based service, but if any of the factors of the test are completely absent, the FCC will deny authority to provide facilities-based service on an international route where the foreign carrier is dominant at its end, unless other public interest factors lead to a different result. *Id.* at ¶¶ 42–55.

[14] FCC Sprint Order, ¶ 132.

[15] Commission of the European Communities, *Proposal for a European Parliament and Council Directive on Interconnection in Telecommunications,* COM (95) 379 final, O.J. No. C 313/7, November 24, 1995. Although only recently published, this directive was submitted by the Commission on August 31, 1995, shortly after the Competitive Impact Statement was filed in this case.

[16] Commission of the European Communities, *Proposal for a European Parliament and Council Directive on a Common Framework for General Authorizations and Individual Licenses in the Field of Telecommunications Services,* COM (95) 545, Nov. 14, 1995.

[17] Commission of the European Communities, *Proposal for a European Parliament and Council Directive amending Council Directives 90/387/EEC and 92/44/EEC for the purpose of adaption to a competitive environment in telecommunications,* COM (95) 543 final, Nov. 11, 1995.

4. Progress Toward Competition in Germany and France

Notwithstanding these important developments at the level of the European Union, it is also necessary to consider actions taken by the German and French governments to move towards a competitive telecommunications environment. European Union measures must be transposed into law at the national level, and national regulatory authorities have the primary responsibility for implementing and enforcing them. Even though the European Union telecommunications directives do not discriminate among European and U.S.-owned providers in the rights that would be accorded to firms doing business in Europe, the Member States retain the authority to establish the terms on which international services to countries outside the European Union will be provided, as discussed in the Competitive Impact Statement, 60 Fed. Reg. at 44063. They may elect to liberalize these services partly or entirely on their own now, or to await the results of ongoing multilateral trade negotiations on telecommunications services.

a. *Germany*. The German government set out its proposals for liberalization in March 1995,[18] and these proposals are generally in line with the approach being taken by the European Union. Draft legislation for a new Telecommunications Act was to be prepared by fall 1995, and the United States understands that this process is on schedule. Draft legislation was in fact released by the German Post and Telecommunications Minister in June 1995 and now is under consideration at the highest levels of the German government. The legislation originally was scheduled to be adopted by both houses of the German federal legislature by summer 1996, and now is expected to be passed even earlier, in the late spring of 1996. By the spring of 1997, even more rapidly than the European Union would require, the German telecommunications regulator expects to have awarded licenses to applicants, and it will not restrict the numbers of licenses made available, except where necessary due to scarcity of resources such as frequencies, nor will it impose restrictions on foreign investment in licensees. The new telecommunications law will take effect by January 1, 1998. As part of the new legislation, the German government also is considering various alternatives to create a more independent telecommunications regulator.

Having agreed to authorize competition for infrastructure used to provide services other than public switched voice, the German government is also preparing legislation for this partial early liberalization, which is planned to be adopted by the German federal legislature by the spring of 1996, apparently as part of the larger telecommunications reform law. The German government informed the FCC by letter on October 17, 1995 that it is committed to allowing alternative facilities providers to commence operations as of July 1, 1996.[19] Also, in October 1995, the German telecommunications regulator adopted a licensing regulation, which is to be used to consider applications to operate competing telecommunications systems pending the enactment of the new law.[20]

The German government has confirmed, in a letter from the Bundesministerium für Post und Telekommunikation (BMPT), the German telecommunications regulator, to the Department of Justice,[21] that international telecommunications infrastructure, including submarine cable ownership interests, will be included within the partial liberalization of infrastructure planned to occur by July 1, 1996. At that time, providers other than Deutsche Telekom will acquire the right to set up and operate transmission lines for all services other than public voice telephony. The BMPT has stated that Germany does not require special licenses for submarine cable landing rights, and there will be ''non-discriminatory, open and transparent access regulation in Germany for submarine cables,'' without regard to the nationality of the operator or owner of the cable. Thus, U.S. firms should lawfully be able to acquire interests in the German end of submarine cables by mid-1996 and use such facilities for services other than public switched voice. The BMPT also has informed the Department that it intends to issue a draft regulation governing interconnection with public telecommunications networks immediately following the entry into force of the proposed new Telecommunications Act in 1996, although the draft of this regulation is not yet prepared and the exact date of its submission has not yet been scheduled.

In Germany, there are several large firms that are already providing some types of telecommunications services now open to competition, and have announced plans to become telecommunications carriers once they are able to obtain licenses, including Mannesmann/CNI, Thyssen, Vebacom, RWE and VIAG. Mannesmann is the major competing cellular radio provider and Thyssen also has a mobile radio license, while the other firms all have some amount of wireline and fiber-optic infrastructure that is used for their own internal or separate business purposes today and might be offered for telecommunications networks were they permitted to compete in this area. The German national railway, Deutsche Bahn, also has internal telecommunications capabilities and rights of way that it plans to make available to others for telecommunications networks. Vebacom and VIAG have already formed international alliances with the principal British telecommunications carriers, British Telecom and Cable & Wireless. In some major German cities, such as Frankfurt and Cologne, authorization has already been granted for firms other than Deutsche Telekom, including U.S. providers such as MFS, to establish local telecommunications networks serving business users.[22] These developments do not mean that Deutsche Telekom is in imminent danger of losing its dominant position in German telecommunications markets. For the reasons indicated in the Complaint and Competitive Impact Statement in this case, it is reasonable to expect that DT will continue to exercise market power for some time. But these developments do indicate that actual and potential competitors exist that may be willing to take advantage of early infrastructure liberalization in Germany and begin to develop alternative networks in advance of full liberalization.

b. *France.* Progress toward liberalization in France has not been as

[18] Federal Ministry for Post and Telecommunications, *Corner Stones of a Future Regulation Framework in the Telecommunications Sector,* March 27, 1995.

[19] FCC Sprint Order, ¶ 67, citing Letter from Dr. Wolfgang Boetsch, Federal Minister for Posts and Telecommunications, to Reed E. Hundt, Chairman, Federal Communications Commission (Oct. 17, 1995).

[20] Regulation on the Opening of Markets for Services as well as on the Content, Scope and Procedure of Licensing in the Telecommunications Sector, October 31, 1995.

[21] Letter from Dr. Witte, BMPT, to Carl Willner, Department of Justice (December 13, 1995). This letter is attached to this Response as Exhibit I.

[22] These networks are being established under an exception to the general DT monopoly still in effect on telecommunications infrastructure that permits separate facilities to be established to provide non-monopoly services, but only with a 25 kilometer limit. At present they must use DT leased lines for interconnections outside the 25 kilometer area.

rapid as in Germany. Privatization of FT, if it occurs at all, will only be partial, with the French government retaining a controlling interest. Unlike Germany, no privatization legislation has been introduced let alone enacted. Nor has the process of adopting legislation governing the transition to full competition progressed as rapidly as in Germany.

An important step, however, has been taken with the publication by the French Ministry of Information Technologies and Postal Services and the French telecommunications regulator, Direction Generale des Postes et Telecommunications (DGPT), in October 1995, of a consultative document outlining the steps to be taken and the timetable planned for introduction of competition.[23] This document indicates that the French government plans in March 1996 to introduce telecommunications reform legislation for the full introduction of competition by January 1, 1998, with passage of the legislation by Parliament expected during the spring of 1996. By the end of 1996, regulations reflecting the new law are to be established, along with the principles for interconnection and licensing of competitors. Licenses are to be issued to competing telecommunications operators in the spring of 1997. The consultative document outlines the types of services for which individual licenses, as opposed to general authorizations, will be required. According to the DGPT, the number of licenses for services or facilities should not be limited, unless this is justified by scarcity of resources such as frequencies. Some telecommunications operators, including France Telecom, will be required to publish their interconnection terms in advance, rather than relying merely on commercial negotiation, and the structure and pricing of their interconnection terms will be subject to regulatory approval based on auditable cost accounts. France Telecom will be expected to issue its interconnection tariffs by July 1997, according to the consultative document. This document also addresses the need for changes to give the telecommunications regulator greater independence as part of the opening of the French telecommunications markets to full competition and considers options to do so, suggesting that this could be done as early as January 1, 1997.

In one important respect, partial liberalization of infrastructure for services other than public switched voice, France is able to move more rapidly than Germany, since the regulator already has some statutory authority to permit greater competition without the need to pass new legislation as in Germany. The regulator has already granted experimental licenses for some competitive pilot projects, and one U.S. firm, MFS, has been authorized to establish competing local fiber-optic infrastructure for closed groups of business users in Paris. The French government has informed the FCC, by letter of October 20, 1995, that legislation to provide for alternative infrastructure liberalization for services other than public switched voice will be introduced in the French Parliament in the spring of 1996 and will take effect by July 1, 1996.[24]

To date, not as many large potential providers of competing telecommunications networks have emerged in France as in Germany. The French telecommunications regulator anticipates that France Telcom's dominant position will continue for some time.[25] One major firm that plans full-scale entry into liberalized telecommunications services and infrastructure, however, is Compaignie Generale des Eaux (CGE). This firm is already a provider of cable television infrastructure as well as the largest shareholder of France's principal competing mobile telephone services provider, SFR, and provides various types of business telecommunications services that are already open to competition in France. AT&T and the Unisource partners (the principal telecommunications providers in Sweden, the Netherlands, Spain and Switzerland) have reached an agreement to form a strategic alliance with CGE's telecommunications subsidiary IRIS, much as British Telecom has done with VIAG and Cable & Wireless with Vebacom in Germany. There are other cable television companies in France such as Lyonnaise Communications that are considering entering the telephone business using their networks, and the French national railroad, SNCF, also has an internal telecommunications network including fiber-optic cable that it plans to make available to telecommunications network providers.

In France, unlike Germany, it appears that international telecommunications facilities to the United States may not be liberalized automatically with the rest of the opening to partial infrastructure competition due to take place on July 1, 1996 under the agreement with the European Union. Although the French government has stated in a letter from DGPT to the Department of Justice[26] that it ''fully supports opening up all telecommunications services in all markets,'' whether this liberalization actually occurs in the case of international half-circuits and submarine cable landing rights for competing providers on the France—U.S. route will depend on the outcome of ongoing multilateral trade negotiations or separate bilateral agreements. However, draft legislation in France that will permit the granting of various experimental telecommunications service licenses in 1996, including public voice telephony services in geographically limited areas, does not contain any foreign ownership restrictions for wireline networks.

II

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). In this case, the sixty-day comment period commenced on August 24, 1995, and terminated on October 23, 1995. During this period, the United States received comments by seven competitors of Sprint and the proposed joint Venture or other interested persons, including AT&T Corporation, MCI Communications Corporation, BT North America Inc., Cable & Wireless Europe, ACC Corp., Esprit Telecom United Kingdom Limited, and Prof. Charles M. Haar of the Harvard University Law School.[27] The United States responds herein to these comments. Upon publication in the Federal Register of these comments and the following response of the United States to these comments, pursuant to 15 U.S.C. § 16(d) of the APPA, the procedures required by the APPA prior to entry of the proposed Final Judgment will be completed. The United States expects to move for entry of the proposed Final Judgment after the public comments and this response of

[23] Ministry of Information Technology and Postal Services, *New Ground Rules for Telecommunications in France*, October 1995.

[24] FCC Spring Order, ¶65, citing Letter from Bruno Lasserre, Director General, DGPT, to Reed E. Hundt, Chairman, Federal Communications Commission, at 2 (Oct. 20, 1995).

[25] The October 1995 consultative document states that France Telecom will continue to have ''strong dominant market positions'' after 1998 in several important telecommunications market sectors and indicates that there may even be *de facto* monopolies in certain services or market segments. Ministry of Information Technology and Postal Services, *New Ground Rules for Telecommunications in France*, at 24.

[26] Letter from M. Bruno Lasserre, Director General of DGPT, to Carl Willner, December 8, 1995. This letter is attached to this Response as Exhibit J.

[27] These comments are attached as Exhibits A–G.

the United States have been published in the Federal Register and the Joint Venture has been formed and has executed the Stipulation, binding it as a party to the proposed Final Judgment under the terms specified in the Stipulation.[28]

III

Response to Public Comments

In consenting to the entry of the proposed Final Judgment in this case, the United States took into account various considerations bearing on the risks of competitive harm affecting U.S. consumers and the desirability of further litigation. These included the size of the planned 20% investment by Deutsche Telekom and France Telecom in Sprint, the potential for new services to be offered and other efficiencies realized by the Joint Venture, the increasing progress toward removal of legal and practical barriers to telecommunications competition in France and Germany, and the involvement of foreign telecommunications providers subject to distinct regulatory regimes in their home countries. Competitive Impact Statement, 60 Fed. Reg. at 44075.

The public comments express various types of concerns about the interpretation or the adequacy of the proposed Final Judgment, and several contend that the Final Judgment should not be entered unless substantial changes are made. It appears that many of these concerns are based on misunderstandings or uncertainties on the part of the commenters about the meaning of provisions of the proposed Final Judgment or their application to the agreements between Sprint, FT and DT, and conduct in which they might engage. The United States accordingly provides further clarification of the meaning and application of several provisions of the proposed Final Judgment below.

Some other concerns expressed in the public comments are simply not germane to the problems associated with these transactions that are identified in the Complaint and Competitive Impact Statement in this case. It is not the role of the Court, in a proceeding under the Tunney Act to approve an antitrust consent decree, to each beyond the terms of the complaint and consider whether other cases might have been brought and other violations alleged. *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1459–60 (D.C. Cir. 1995).

A number of the comments question whether there is sufficient relief in the proposed Final Judgment to remedy the problems alleged by the United States, contending that further modifications should be made. These commenters overlook, however, the context in which these transactions take place. Two other government agencies in addition to the United States Department of Justice have reviewed these transactions, and have imposed additional relief that complements and reinforces in important respects the terms of the proposed Final Judgment. Moreover, an ongoing process of telecommunications reform and opening to competition is taking place in the European Union, France and Germany. In ruling whether this proposed Final Judgment is sufficient to satisfy the ''public interest'' standard of the Tunney Act, the Court should not limit its consideration to whether all of the potential competitive problems arising from the monopoly rights and market power of Deutsche Telekom and France Telecom in their home countries are fully corrected within the four corners of the proposed Final Judgment alone. Rather, it should ask whether the proposed Final Judgment satisfies the ''public interest'' bearing in mind that it will operate together with all of the other relief imposed by the European Union competition authorities and the FCC, and with the liberalization measures now planned in Germany and France. When the issue is properly understood in these terms, it is apparent that the proposed Final Judgment does indeed promote the ''public interest.''

Because the same types of issues are raised by many of the commenters, this Response is structured in terms of the issues raised rather than separately addressing each of the comments filed.

A. Transition from Phase I to Phase II of the Proposed Final Judgment

Several commenters, including AT&T, MCI, BT North America, Esprit Telecom and Cable & Wireless, raise the issue of whether the proposed Final Judgment will be effective in light of the possibility that the transition from Phase I to Phase II could occur while DT and FT, though deprived of their legal monopolies, still have *de facto* market power in Germany and France. They point out that effective competition could take substantial time to develop after removal of the monopoly rights and licensing of competitors. Some, including BT, Cable & Wireless and Esprit Telecom, are also concerned that the decree would not ensure that effective regulatory regimes are in effect in France and Germany at the time the transition to Phase II takes place to ensure rights such as interconnection with the networks of the dominant carriers. AT&T and MCI favor modifying the decree to keep the Phase I restrictions in effect until ''actual'' or ''effective'' competitive alternatives are found to exist in France and Germany, while BT proposes keeping the various Phase I restrictions in effect for the entire duration of the decree, essentially eliminating the distinction between Phase I and Phase II.[29] Esprit and Cable & Wireless also take the position that alternative infrastructure must be in place in France and Germany before these transactions are implemented, or at least before the Joint Venture is formed.

The United States has no fundamental disagreement with the commenters on the importance of effective competitive alternatives, or the crucial significance of the ability of competitors to interconnect their networks and facilities with those of DT and FT on reasonable, transparent and non-discriminatory terms. Nor does it disagree with the desirability of having effective regulatory regimes to complement the protections provided by competition, and afford a recourse to competitors who experience anticompetitive practices by DT and FT. But the United States parts company with the commenters at their evident assumption that all of these protections must be contained within the four corners of the proposed Final Judgment itself for it to be deemed in the ''public interest.''

The proposed Final Judgment operates in conjunction with the relief imposed by the European Commission and the FCC, and the various liberalization measures in the process of being enacted by the EU and the French and German governments. Early liberalization for provision of competing infrastructure for non-monopoly services, to take effect on July 1, 1996 in France and Germany, will give potential competitors the opportunity to begin establishing alternative networks a year and a half before the earliest time that Phase I is likely to expire, making possible the ''actual'' or ''effective'' competition that AT&T and MCI desire.

Because the EU and the German and French governments have all announced that they will be adopting open

[28] Until these events have taken place, and the United States has certified that the requirements of the Tunney Act have been met, the Court should not rule on entry of the proposed Final Judgment.

[29] Because many of BT's observations on the various provisions of the proposed Final Judgment are in fact reiterations of this same argument, not all of BT's comments about particular provisions of the decree are separately discussed in this Response.

licensing policies and will not restrict the numbers of licenses (except where necessary due to limits on radio frequencies, which would not affect landline fiber-optic networks), potential providers of alternative networks should not be deterred from entering the market now by the fear of being denied full use of their network for voice services for want of a license when full liberalization occurs. Moreover, both the German and French telecommunications regulators plan to license competitors during 1997, enabling them to prepare to provide services in advance of full liberalization.

BT is mistaken in believing that Phase I could terminate if only one competitor is allowed to provide competing facilities-based switched voice services in France and Germany. In fact, the definition of Phase II of the proposed Final Judgment is not intended to condone any form of legal duopoly (such as still exists in the U.K. for international facilities-based services but has otherwise been ended there). Section V.Q specifies that among the conditions necessary for Phase II to be reached, France and Germany must have ''removed all of the legal prohibitions'' on competing provision of public switched domestic and international voice services, and construction, ownership or control of both domestic and international telecommunications facilities and the use of such facilities to provide any services. The existence of artificial restrictions on the numbers of domestic or international licenses available for either telecommunications services or facilities in France or Germany would mean that the conditions for moving from Phase I to Phase II in that country would not be satisfied.[30] Moreover, should either France or Germany decline to remove all of the legal prohibitions on competition in international services and facilities to and from the U.S., even if liberalization within the EU has taken place as required by the planned directives, the transition to Phase II still would not take place for that country. Since both France and Germany have announced that they will grant licenses in 1997 under their planned open policies, and have not shown themselves to date unwilling to license large foreign firms to provide the types of services already open to competition (as evidenced by BT's ability to provide data services in both France and Germany today), BT's suggestion that the French and German governments might in practice license only a small number of ineffectual competitors seems conjectural.

The concerns expressed by commenters about the lack of an effective system of transparent and reasonable interconnection with FT and DT are addressed during Phase I by the nondiscrimination requirements of Section III.D as well as the provisions ensuring standardized access protocols in Sections III.H and III.I. The EU's planned interconnection directive will require Member States, including France and Germany, to have interconnection regimes in place that comply with the directive before January 1, 1998, the earliest that Phase I is likely to expire. Both the French and German telecommunications regulators are planning to have new interconnection regimes based on the EU principles in effect in their countries before that time.

The EU and the French and German governments all have recognized the need for more independent regulatory authorities where state ownership of telecommunications carriers continues, as will be the case for several years in Germany and indefinitely in France. Both France and Germany are contemplating changes to their regulatory systems before 1998 to address this problem. In the interim, the full protections of this decree and the EU settlement dealing with the various risks identified by the commenters, including discrimination and cross-subsidization, will be in effect as independent safeguards against anticompetitive conduct. Some of the EU's safeguards, in particular those involving nondiscrimination in access to and use of the FT and DT PSTNs and availability of standardized interfaces for Transpac and Datx-P, would continue beyond the date of full liberalization in France and Germany as they have no predetermined time limits. The FCC's general prohibition on ''special concessions,'' also will be available to reinforce nondiscriminatory interconnection rights, and the FCC's ability to act under its policy is not time-limited.

It is not practical or necessary for the United States antitrust authorities to maintain indefinitely the degree of oversight of the relationship between DT, FT and the Joint Venture contemplated by Phase I of the proposed Final Judgment, taking into account the clear policies of moving toward full liberalization and more effective regulation within a definite time that have been announced by the EU authorities and the governments of France and Germany, and the existence of other regulatory authorities, including the FCC, BMPT in Germany and DGPT in France, that have ongoing responsibility for regulatory oversight of the telecommunications industry. Fundamentally, what is at stake here is the reasonableness of the United States' judgment under the ''public interest'' standard that the transition to more effective competition and better regulatory safeguards is likely to continue to move forward in a reasonable time in France and Germany, so that it is not necessary to stop these transactions altogether or substantially alter the terms of the proposed settlement in order to safeguard against DT and FT using their continuing market power in anticompetitive ways to favor Sprint and the Joint Venture. This judgment continues to be reasonable, given that the policies and timetables that the EU and the French and German governments have announced for the transition to full competition include not only removal of legal barriers to competition and licensing of competitors, but also the other key measures such as an interconnection regime that are needed for real competition to develop. Moreover, AT&T, BT and Cable & Wireless all have been forming strategic alliances with the large firms that have entered telecommunications service markets in Germany or France and are planning networks in anticipation of full liberalization and licensing of competing providers. These alliances make available to the German and French partners resources, expertise and international access to customers that can help to make them more effective rivals to DT and FT.

The judgment that these transactions should not be stopped, given the progress of the liberalization process, is shared by the FCC and the European Commission. These authorities have also shared the concern of the United States about the ongoing ability of FT and DT to exercise market power to the detriment of competition, and have imposed their own remedies and safeguards to help ensure both that liberalization advances and that no harm occurs to international telecommunications competition during the transition period. In light of the circumstances of this transaction and the actions taken by other authorities, the United States does not believe that extending Phase I safeguards for several more years, imposing some form of ''effective competition'' test in the proposed Final Judgment, or precluding the transactions until significant

[30] This would not preclude France or Germany from having a limited number of licenses available for radio-based services justified for objective reasons of spectrum scarcity.

alternative infrastructure competition is ongoing are necessary steps to protect the ''public interest.'' The United States will retain the ability under this Final Judgment, pursuant to Section VIII, to seek modifications should new events, such as any major breakdown of the transition to competition underway in France and Germany, indicate the need for additional measures within the context of the Final Judgment to prevent substantial harm to competition and U.S. consumers.

B. Opening to Voice Resale Competition in France and Germany

ACC contends that entry and the effective date of the Final Judgment in this case should be conditioned on DT and FT agreeing to open their public switched voice services to resale competition. These services currently are provided on a monopoly basis in France and Germany, though DT and FT apparently could voluntarily open these services to some resale competition. The United States agrees with ACC that resale competition at the German and French ends of international routes with the U.S. would likely benefit United States consumers of international services to France and Germany, and indeed the FCC has made this one of the conditions for the removal of the freeze imposed on Sprint's ability to add circuits to France and Germany, in order to limit Sprint's advantage over other U.S. providers from being the only carrier with allies that can provide end-to-end service between the U.S. and France and Germany. But the question for purposes of this Tunney Act proceeding is whether, in light of the other restrictions in the proposed Final Judgment as well as the FCC's action and the announced intention of the European Union, Germany and France to remove all restrictions on voice competition by 1998, it is necessary to impose such a condition as part of this decree to prevent some *lessening* of competition that would otherwise occur. The United States does not view this as necessary for the decree to accomplish its purposes. The transition from Phase I to Phase II cannot occur for either Germany or France under this decree while any form of prohibition on voice competition, resale or facilities-based, remains in effect in that country. During Phase I, ACC and other prospective U.S. international providers of resale services will be able to avail themselves of all the protections against discrimination in Section III.D, if Germany or France permits resale competition (as the FCC's decision indicates is already legally permissible to some extent, based on representations by the German and French governments [31]) but DT or FT acts to favor its own affiliates over competitors in PSTN interconnection, leased lines, or other FT or DT Products and Services that would be used by switched voice resellers.[32] Moreover, during Phase I and Phase II, Section II.C of the proposed Final Judgment will ensure that neither Sprint nor the Joint Venture provide voice resale services, or any other type of services, or make facilities available to FT or DT to do so (other than under existing bilateral correspondent agreements that have also been made available to other U.S. competitors), if competitors cannot obtain licenses in France and Germany.

C. Non-Exclusive Licensing Requirement

BT proposes a number of changes to Section II.C, as does Esprit Telecom. This provision ensures that neither Sprint nor the Joint Venture receive exclusive licensing advantages directly from French or German authorities or indirectly by affiliation with FT or DT, and that neither Sprint nor the Joint Venture provide facilities to FT or DT enabling them to offer to the United States any services for which they have exclusive licenses in France or Germany, other than existing correspondent services that other U.S. providers can also offer under operating agreements with FT and DT. Some of the changes recommended by BT are already addressed implicitly within the language of the existing provision, while the United States believes that the remaining modifications are not necessary for this provision to accomplish its purposes.

A principal concern for BT is the language in Section II.C.3(i) requiring that, before Sprint, the Joint Venture, DT or FT are able to provide an international telecommunications service pursuant to an individual license granted by the French or German governments, ''one or more'' other U.S. international telecommunications service providers also have received a license. BT would prefer that at least three other licenses be granted before the Joint Venture be allowed to offer a service. However, BT's fear that under this provision the French or German governments might be able to mandate a duopoly, or arbitrarily delay granting licenses to all competitors but one, is not consistent with other language of Section II.C.3 or with the licensing policies announced by the French and German governments. Section II.C.3 also mandates, for any services that require individual licenses in France or Germany, that ''established licensing procedures are in effect as of the time of the offering of the service by which other United States international telecommunications providers are also able to secure a license.'' This means, as the United States and defendants have agreed, that there must be licensing procedures in place that are reasonable and neutral, that do not discriminate among providers or restrict the entry of U.S. providers, and that do not arbitrarily limit the number of licenses available. Clearly a duopoly licensing scheme for international services would not meet the terms of this provision, for once the one other license were awarded to a French or German firm, United States providers would not be able to secure a license. In any event, the EU authorities plan to mandate, and both the French and German governments have indicated that they will adopt, open licensing schemes that would meet the above criteria, and the French and German telecommunications regulators will make their decisions on licensing before 1998. Moreover, under Section II.C.3(ii), which ensures that where Sprint, the Joint Venture, FT or DT applies for a license first other competitors applying later can receive their licenses within no less time than was needed for the first license to be granted, the ''reasonable time'' provision can mean in particular cases that the time to grant additional licenses should be even less than for the first licensee, whose application presumably raised the most difficult regulatory issues about the service, if any.

BT expresses apprehension that the French or German governments may deny or fail to act on license applications of competitors who seek a license for a particular service before the Joint Venture does, so as to delay their entry until the Joint Venture is ready to enter the market. It does not, however, suggest a practical means of addressing this concern, since United States authorities are not in a position to direct the French or German governments to grant a license to any particular provider, but only to ensure that the parties to the transactions are not given

[31] FCC Sprint Order, ¶ 112.

[32] Contrary to the assertion of Cable & Wireless, the proposed Final Judgment's protections are not limited only to ''reserved'' monopoly services such as public switched voice. Most of the safeguards are defined in terms of FT and DT Products and Services, and Section V.L. expressly states that the services defined as being within this category will remain so regardless of whether the services are considered to be reserved exclusively to FT or DT under French or German law. Other safeguards, including Sections III.B. and III.I, apply to Public Data Networks, which are legally open to competition in France and Germany and are not even listed as FT and DT Products and Services.

an advantage over others in the timing of their licenses. The United States also believes that Esprit's proposal to require that German and French regulators commit to some expedited schedule for licensing, with suspension of Joint Venture services while any competitor applications have been pending for over 60 days, is impractical and should not be adopted, as it could perpetually postpone the entry of the Joint Venture into the market as each new applicant comes forward. In fact, under the proposals put forward by the EU authorities and the French and German governments, most types of telecommunications services will be subject to class licenses that will not require any individual approval. BT also recommends that the full range of regulatory reforms in France and Germany be in place before activities of the Joint Venture are permitted to commence under this provision. The United States continues to believe, however, that the service-specific approach is preferable. For example, if reasonable, nondiscriminatory open licensing procedures are in effect by which competitors can obtain licenses to operate a data service, it does not appear necessary or desirable to forbid the Joint Venture from offering that service to consumers under II.C. because rules are not yet in place governing a voice service.

D. Facilities Ownership Provisions

BT seeks clarification of the meaning of several aspects of Sections III.A and III.B, which preclude during Phase I any ownership or control by Sprint or the Joint Venture of (i) facilities in France or Germany legally reserved to FT or DT, (ii) international half-circuits terminating in France or Germany used for U.S.-France or U.S.-Germany telecommunications services, or (iii) the Public Data Networks, as defined in Section V.S.

The United States agrees with BT that the concept of ownership and control in this provision includes Indefeasible Rights of Use (IRUs), so that Sprint or the Joint Venture could not acquire IRUs in German or French half-circuits while other providers legally could not do so. The exclusion for ''publicly available leases or other publicly available uses'' in Section III.A was simply meant to ensure that the definition of ''control'' was not interpreted here to preclude Sprint or the Joint Venture from such normal forms of generally available usage as leasing a private line under tariff. Moreover, as a general matter, the preclusion on Sprint or the Joint Venture acquiring ownership or control over any facilities legally reserved to FT or DT would mean that Sprint and the Joint Venture could not acquire such interests in a type of facility (*e.g.*, submarine cable) or a form of ownership or control that remained reserved, even if some other type of facility that might compete with it in some respects (*e.g.*, a privately owned satellite) or some other form of ownership or control of the same facility is not reserved. The restriction on ownership of international half circuits, with the ''aggregate quantity'' exception, under Section III.A(ii) is in addition to the prohibition on ownership or control of reserved facilities, not an alternative to it. The United States does not agree with BT, however, on the interpretation of the ''aggregate quantity'' exception as limited to the quantity of half-circuits held by any other *single* provider. The FCC's freeze on operation of new capacity by Sprint on the U.S.-France and U.S.-Germany routes will help to counter BT's expressed fear that Sprint or the Joint Venture would be able to use a quantity of circuits far greater than those of any other single provider. Nor does the United States agree with BT that modification of the restriction on international half-circuits ''where plaintiff and defendants agree that meaningful competition exists'' can only be done after public comment and hearing procedures, but there is nothing to preclude the United States from seeking information from other interested persons before agreeing to a modification.

E. Antidiscrimination Provisions

1. ''Steering'' of Customers to Phoenix and Sprint

AT&T, MCI and Cable & Wireless all object to a provision of the Joint Venture Agreement between Sprint, FT and DT, Section 10.6(b). They are concerned that this provision would require DT and FT, when customers approach them for international facilities or services over which they have monopolies in their home countries, such as half-circuits, to take measures to ''steer'' the customers to Sprint or Phoenix to provide the U.S. end of these international facilities or services, *i.e.*, induce them to obtain the service from the Joint Venture and disclose their identities to the Joint Venture, even if they would prefer to use another U.S. carrier. AT&T requests that the anti-discrimination provisions of the proposed Final Judgment in Section III.D be clarified to preclude such activity.

AT&T has correctly understood the intent of Section III.D of the Proposed Final Judgment. Sprint and the Joint Venture are precluded by Section III.D from receiving more favorable terms from FT or DT than other similarly situated United States international telecommunications providers with respect to any FT or DT Products and Services, and are also precluded from benefitting from any more favorable term that FT or DT offer to any customer of FT or DT Products and Services, conditioned on Sprint or the Joint Venture being selected as the United States provider of a telecommunications or enhanced telecommunications service. FT or DT Products and Services, under Section V.L, are defined as correspondent services, transit services, leased lines or international half circuits, and interconnection to the PSTNs provided by FT or DT in France or Germany, or between the United States or France and Germany, regardless of whether the service is exclusively reserved to FT or DT as a matter of law. Accordingly, if FT or DT were to ''steer'' customers of FT or DT Products and Services to Phoenix or Sprint in the manner originally contemplated by Section 10.6(b), Sprint and the Joint Venture would be placed in violation of Section III.D of the Final Judgment. In order to eliminate any confusion on this point, Sprint, FT and DT have agreed to amend Section 10.6(b) of the Joint Venture Agreement, deleting any requirement that customers of FT or DT Products and Services be ''steered'' to the Joint Venture.[33] The FCC also has stated that its ''no special concessions'' requirement would preclude such ''steering'' with respect to basic services such as private lines.[34]

2. Effect of Exclusion of DT and FT as Parties

BT objects to the exclusion of DT and FT as parties to the proposed Final Judgment, even though BT similarly is excluded as a party under the separate decree governing its joint venture with MCI. BT's particular concern is that if the antidiscrimination provisions of Section III.D are read to include some form of ''knowledge'' or scienter requirement, it could prove difficult or impossible to enforce them without the ability to get information directly from FT and DT.

BT's concern is based on a misunderstanding of the antidiscrimination provisions of the proposed Final Judgment. There is no requirement that Sprint or the Joint Venture have known of any

[33] Letter from Kevin R. Sullivan to Carl Willner, Nov. 21, 1995, and attached amendment to Phoenix JVA Section 10.6(b). This letter and the modifying language are attached to this Response as Exhibit K.

[34] FCC Sprint Order, ¶ 125.

discrimination, for a violation of Section III.D.1 or III.D.2 to be found. Rather, it is merely necessary that the discrimination have occurred, as defined in Section III.D, for the United States to take action to enforce the decree. Indeed, in the negotiations leading to the proposed Final Judgment, the concept of requiring some knowledge of discrimination on the part of Sprint or the Joint Venture was explicitly rejected.[35] Ordinarily, whether discrimination has occurred would be evaluated by comparing the terms made available by DT or FT to a complaining competitor (with which it would be familiar) with the terms made available to Sprint or the Joint Venture (which could be ascertained using the visitorial and compliance powers of Section VI), and the disclosure requirements of Section II.A would facilitate detection and reporting of such discrimination by competitors. Thus, the United States reasonably concluded that the antidiscrimination provisions of the proposed Final Judgment were adequate without making DT and FT parties to the decree.

3. Other Issues Concerning the Antidiscrimination Provisions

BT recommends that Section III.D.1 be clarified to ensure that the protection against discrimination applies to all similarly situated providers. The United States agrees that the language prohibiting Sprint and the Joint Venture from obtaining FT and DT Products and Services on terms ''more favorable * * * than are made available to other similarly situated United States international telecommunications providers'' means that no similarly situated provider can be disfavored in any of the ways proscribed by this provision, even if some other similarly situated providers are being treated in the same way as Sprint and the Joint Venture.

BT also proposes that Section III.D.2's prohibition on Sprint or the Joint Venture receiving any ''benefit'' from more favorable terms offered by FT or DT to customers of FT or DT Products and Services, conditioned on Sprint or the Joint Venture being selected as a service provider, be clarified to apply to situations where FT or DT is acting as the distributor for the Joint Venture, and to cover both implicit and express conditioning. The United States agrees that Section III.D.2 reaches all such conditioning of terms for FT or DT Products and Services, express or implicit, and was intended to apply to situations where FT and DT are distributing Joint Venture products and services.

Esprit Telecom urges that DT and FT should be prohibited from providing leased lines for Joint Venture services unless such lines are provided in a nondiscriminatory manner, including equal treatment on all terms such as price and provisioning intervals, to all competitors. This is already accomplished by Section III.D, since leased lines are expressly treated as FT and DT Products and Services by Section V.L(iii). Esprit also contends that DT and FT should be required to provide leased lines at wholesale, cost-based rates to competing carriers on a priority basis. The proposed Final Judgment does not mandate that leased lines be provided at any particular price level, nor would it be practical to do so for FT's and DT's leased lines, which are located outside the U.S., are under the regulatory supervision of foreign authorities and are also subject to EU directives on open network provision and the terms of provisioning of leased lines. While the United States is cognizant of the evidence that FT's and DT's leased lines are priced far above U.S. levels and are generally provided much more slowly than in the U.S., the concern of the United States in this case is to ensure that neither those nor other potential abuses of FT's and DT's monopoly positions lead to advantages for Sprint or the Joint Venture that could harm competition. This Clayton Act case is not a vehicle for addressing all difficulties that competitors may face in doing business in France or Germany or all harms that U.S. consumers may experience as a result of having to use the services of the DT and FT monopolies. Whatever the prices at which leased lines may be provided in France or Germany, or the time needed to provide them, Sprint and the Joint Venture will not fare better than other competing providers under the terms of this proposed Final Judgment. Moreover, as competition develops in France and Germany due to alternative infrastructure liberalization in 1996 and full liberalization in 1998, leased line prices can be expected to decline substantially and provisioning times improve, as has occurred in the United States and the United Kingdom.

Cable & Wireless has brought to the attention of the United States new evidence that Colisee International, a subsidiary of FT engaged in reselling FT capacity, has behaved in an anticompetitive manner and that complaints about Colisee have been confirmed by findings of the French telecommunications regulator. These complaints and the regulator's findings of FT's noncompliance with French law, according to Cable & Wireless, relate to (i) sales by FT of leased lines and PSTN interconnection at rates below the official tariffs from which other competitors must buy capacity, and (ii) FT's grant of more favorable access arrangements to its International Transit Center for Colisee than for other competitors.[36] The United States has examined substantial information on this allegation, including the regulator's findings of noncompliance and FT's plans to make substantial changes to the Colisee service in response. In addition to being subject to challenge under French law, it appears that the types of discrimination alleged here are of the sort that would be covered by the antidiscrimination provisions of the proposed Final Judgment, if Sprint or the Joint Venture were to receive such favorable treatment through FT or any of its subsidiaries. No modification to the proposed Final Judgment is necessary to deal with this matter, but the Colisee International evidence indicates that the antidiscrimination provisions of the proposed Final Judgment are indeed focused on substantial competitive concerns.

F. Protections Against Cross-Subsidization

BT's principal arguments on this provision, favoring extending it through the life of the decree or until comprehensive protections against cross-subsidization are determined to be part of the French and German telecommunications regulatory systems, do not differ substantially from its general arguments for extending the duration of all of Section III, which the United States has already addressed and declined to accept. Cross-subsidy risks were perceived here, by both the United States and the European Commission competition authorities, to be particularly substantial while DT and FT still have three-quarters of their business legally protected from competition. During this time, DT and FT enjoy a very large base of revenues into which costs could be shifted, or from which subsidies could be obtained, without risk of increasing entry by competitors into the services which provide the subsidies and which would be priced at higher levels to generate them. The evidence of past cross-subsidies of the Datex-P data network by DT on a large scale, and the risk of use of cross-subsidization to put

[35] Issues of knowledge would thus only come into question to the extent that they are relevant under established legal principles to particular forms of culpability or sanctions, *i.e.*, criminal contempt, but would not affect civil enforcement.

[36] Comments of Cable & Wireless Europe, at 6.

competitors in a ''price squeeze,'' Competitive Impact Statement, 60 Fed. Reg. at 44064, 44072, support having these restrictions in the decree during Phase I. However, neither the United States nor the European Commission's competition authorities extended the structural separation of the Public Data Networks, or the specific cross-subsidy safeguards, into the period following full liberalization in France and Germany, when DT and FT will legally be subject to competition in all their areas of business and will face actual licensed competitors. At that point, while cross-subsidization potentially could still occur, the risks of it substantially harming competition over a sustained period will have been reduced owing to the possibility for competitive entry into the markets providing the subsidies, and policing cross-subsidization can with greater confidence be left to the national regulators, who by then should have greater independence as well.

BT also seeks to give competitors and other interested parties access to all of Sprint's and the Joint Venture's records to determine if cross-subsidization has occurred. The United States does not consider a modification of this sort to be necessary or desirable. The disclosure provisions of Section II.A of the proposed Final Judgment strike a careful balance between providing information competitors would need to detect discrimination, and protecting Sprint's and the Joint Venture's confidential business information from disclosure to competitors. BT's disclosure proposal would expose far more of Sprint's and the Joint Venture's business information to their competitors, in a way that if abused could harm rather than help competition. The United States notes, however, that nothing precludes it from using independent auditors under contract to assist in reviewing Sprint's and Joint Venture's documents for cross-subsidization, and that the EU competition authorities have imposed an auditing requirement on Atlas, Transpac and Datex-P during the pre-liberalization period.

Cable & Wireless argues that there should be structural separation between the Atlas and Joint Venture entities and their parents. In fact, the proposed Final Judgment already mandates such separation between FT and DT on the one hand, and the Joint Venture and Sprint on the other, through a combination of the facilities ownership provisions of Sections III.A and III.B, the non-exclusive agency provisions of Section III.C, the prohibitions on cross-subsidization in Section III.F, and the prohibitions on sharing of confidential information in Section II.B. The EU competition authorities have further reinforced this separation through their treatment of Atlas, Transpac and Datex-P.

Esprit Telecom urges that DT and FT be precluded from predatory pricing of end-user services. The cross-subsidization prohibitions of the proposed Final Judgment will help to achieve that objective, as will the EU's complementary safeguards, while predatory pricing remains independently actionable under the antitrust laws as well.

G. Treatment of Operating Agreements

AT&T and BT both have raised issues regarding the operation of Section III.G.1. This provision precludes Sprint from providing any correspondent telecommunications or enhanced telecommunications service between the United States and France or Germany pursuant to any operating agreement with FT or DT, unless at least one other U.S. international telecommunications provider has also obtained an operating agreement with FT and DT for the provision of that service.

AT&T has requested that the interplay of Section III.G and Section III.D.1(v), which prohibits discrimination between Sprint and other similarly situated providers in the ''terms of operating agreements for correspondent services and connection of international half-circuits,'' be clarified to preclude discrimination in the granting of operating agreements by FT and DT. BT is concerned about the risk of allowing Sprint to provide service if FT or DT has granted an operating agreement to only one competitor, particularly if that one competitor is an inadequate alternative.

The United States agrees that operating agreements already granted, or granted in the future, could not thereafter be modified or withdrawn on a discriminatory basis favoring Sprint or the Joint Venture, for to do so would amount to a discrimination in the ''terms of operating agreements'' prohibited under Section III.D.1(v). Existing operating agreements, particularly those covering International Message Telephone Service (IMTS) switched voice traffic and private lines, account for what will likely continue to be the bulk of telecommunications international traffic for the next several years at least. Moreover, the terms of all operating agreements granted must be nondiscriminatory, whatever the number of carriers that receive them. AT&T is thus correct insofar as it says that Section III.G.1 does not abrogate the requirement of nondiscrimination in the terms of operating agreements under Section III.D.1(v), or any of the other requirements of Section III.D.

Section III.G.1 affords an additional measure of protection with respect to any correspondent services where agreements have not yet been negotiated, or the service itself has not yet been developed, ensuring that Sprint will not be able to obtain the only operating agreement or to go first while entry of competitors is delayed, as a result of its special relationship with FT and DT. It was not written to require that all other carriers receive operating agreements for such new services, since U.S. carriers may vary considerably in traffic volumes and foreign carriers may be reluctant to incur the expense of providing a facilities-based interconnection with a low-volume provider. The counterpart Section III.G.2 provides a mechanism for such smaller carriers to have their traffic delivered at reasonable, nondiscriminatory rates accounting for the value of proportionate return traffic from France and Germany.

It is implicit in the concept of Section III.G.1 that the other U.S. international telecommunications provider that receives an operating agreement not be a sham or subterfuge to circumvent the Final Judgment, but a real provider capable of offering its own alternative service. Should FT or DT grant operating agreements for new correspondent services to Sprint and another alternative provider, but withhold them from other similarly situated U.S. international carriers, those carriers would still be able to complain to the FCC that Sprint was receiving improper ''special concessions.'' The FCC's policy is thus broader in one respect than that in the proposed Final Judgment, but does not explicitly mandate, as does Section III.G.1, that one other carrier already have an operating agreement before Sprint can provide a service. These policies operate together to ensure effective international competition by multiple U.S. carriers notwithstanding the affiliation of FT and DT with Sprint.

The United States understands that there are relatively few issues concerning the grant of operating agreements now outstanding between U.S. international carriers and DT and FT. For the major longstanding services such as IMTS, as well as for relatively new services such as International Virtual Private Networks (IVPNs), FT and DT have now granted operating agreements to multiple U.S. international telecommunications carriers in addition to Sprint. Accordingly, in light of the additional protections afforded by Section

III.D.1(v) and the FCC's ''special concessions'' prohibition, and available evidence on the current practice of FT and DT, the United States does not consider it necessary to modify Section III.G.1.

H. Standardized Interface Requirements

BT takes issue with the provisions ensuring the maintenance of standardized PSTN and data network interfaces by FT and DT, Sections III.H and III.I, which were closely followed by the EU competition authorities in their own settlement. Apart from its general arguments for extending these provisions through the duration of the decree, BT also objects to the opportunity that these provisions give to Sprint and the Joint Venture to develop proprietary interfaces with FT and DT. BT is concerned that this could allow the parties to these transactions to develop certain types of advanced services and interconnection protocols that would not be available to competitors.

To the extent that competitors are similarly situated, of course, the antidiscrimination provisions of Section III.D would remain available to address any handling of interconnection to the FT and DT PSTNs that disfavors competitors of Sprint and the Joint Venture. Sections III.H and III.I go beyond the antidiscrimination provisions in mandating availability of standard interfaces and protocols for FT and DT Products and Services, and for the Public Data Networks, without any proof of discrimination against similarly situated competitors. Neither the United States nor the European Union competition authorities, however, found it desirable to prohibit FT and DT from also developing any proprietary or nonstandardized protocols, in the way BT advocates. The various strategic alliances that have formed or are now forming to provide seamless international telecommunications services, including the BT–MCI partnership, AT&T's alliance with the Unisource partners in Europe, and the FT–DT-Sprint combination, all will be seeking to develop advanced telecommunications services which may require nonstandardized or proprietary protocols not currently available. Some competitive risks inhere in the ability of telecommunications providers with monopoly rights, such as DT and FT, or market power, such as BT in the UK, to develop nonstandardized protocols and interfaces that are not universally available and might be used to favor particular providers. In the case of these international strategic alliances, however, there are also substantial competitive benefits to consumers from the development of advanced seamless telecommunications services, and all of the alliances will be competing with each other to produce the most attractive advanced services and differentiate them from those of the other competitors. These benefits could be reduced if FT and DT were precluded from developing with their Joint Venture and Sprint any proprietary or nonstandardized interfaces and protocols for new services, as BT would have the United States do. Furthermore, the prospect of full liberalization in France and Germany two years from now and liberalization for alternative infrastructure used to provide services other than public switched voice within six months means that BT and other competitors should not remain indefinitely dependent on a single provider in France and in Germany to supply all telecommunications lines and network interconnections. Rather, they will be able to have their local allies in France and Germany adopt whatever proprietary and nonstandardized protocols they may develop that are inconsistent with those used by DT and FT.

I. Access to FT's ''Orange List'' Customer Information

Charles M. Haar, a professor at Harvard University Law School who is working as an expert for a company named Filetech, which is involved in litigation with France Telecom in the United States District Court for the Southern District of New York,[37] has filed comments requesting that entry of judgment in this case be conditioned on France Telecom making available to competitors certain information about customers, known as the ''Orange List,'' that it acquires in the course of its responsibilities for maintaining the French telephone directory.

The United States expresses no view on the merits of Filetech's litigation with France Telecom, but its allegations did not form any specific part of the complaint in this case. While the complaint is based on France Telecom's ability to use its monopoly rights and dominant position in France to favor Sprint and the Joint Venture over competitors in various ways, it does not appear that France Telecom would be able lawfully to use preferential access to the Orange List to favor Sprint or the Joint Venture, since France Telecom has represented in its litigation with Filetech that this information is confidential and under French law cannot be disclosed to others, except for the limited purpose of publishing telephone directories.[38] Moreover, the FCC has indicated that preferential disclosure of telephone customer information by DT and FT to Sprint would be an impermissible ''special concession.''[39] Thus, the United States does not believe that any modifications to the proposed Final Judgment are needed to address this issue.

IV

Standard of Review

Pursuant to 15 U.S.C. § 16(e), the proposed Final Judgment cannot be entered unless the Court determines that it is in the public interest. The focus of this determination is whether the relief provided by the proposed Final Judgment is adequate to remedy the antitrust violations alleged in the Complaint. *United States* v. *Bechtel Corp.*, 648 F.2d 660, 665–66 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981), *quoted with approval in United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1457–58, *see also* 56 F.3d at 1459–60 (D.C. Cir. 1995). In the recent *Microsoft* decision by the United States Court of Appeals for the District of Columbia Circuit, which reversed the district court's refusal to enter an antitrust consent decree proposed by the United States, the court of appeals held that the provision in Section 16(e)(1) of the Tunney Act allowing the district court to consider ''any other considerations bearing upon the adequacy of such judgment,'' does not authorize extensive inquiry into the conduct of the case. 56 F.3d at 1458–60. The court of appeals concluded that ''Congress did not mean for a district judge to construct his own hypothetical case and then evaluate the decree against that case.'' *Id.* To the contrary, ''[t]he court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' and so the district court ''is only authorized to review the decree itself,'' not other matters that the government might have but did not pursue. *Id.*

Under the public interest standard, the Court's role is limited to determining whether the proposed decree is within the ''zone of settlements'' consistent with the public interest, not whether the settlement diverges from the Court's view of what

[37] *Filetech S.A.R.L.* v. *France Telecom*, Civil Action No. 95–1848 (CSH) (S.D.N.Y.).

[38] *Filetech S.A.R.L.* v. *France Telecom*, Civil Action No. 95–1848 (CSH), Memorandum of Law of France Telecom and France Telecom Incorporated in Support of their Motion to Dismiss the Complaint at 10–15, and Declaration of Jacques Henrot (S.D.N.Y., filed June 2, 1995).

[39] FCC Sprint Order, ¶ 123.

would best serve the public interest. *United States* v. *Western Electric Co.*, 993 F.2d 1572, 1576 (quoting *United States* v. *Western Electric Co.*, 900 F.2d 283, 307 (D.C. Cir. 1990)); *United States* v. *Microsoft Corp.*, 56 F.3d at 1460. Moreover, the Court should give a request for entry of a proposed decree even more deference than a request by a party to an existing decree for approval of a modification, for in dealing with an initial settlement the Court is unlikely to have substantial familiarity with the market involved. *United States* v. *Microsoft Corp.*, 56 F.3d at 1460–61.

Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should * * * carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. *Mid-America Dairymen, Inc.*, 1977–1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977). The Court may reject the agreement of the parties as to how the public interest is best served only if it has ''exceptional confidence that adverse antitrust consequences will result. * * *'' *United States* v. *Western Electric Co.* 993 F.2d at 1577 (D.C. Cir.), *cert. denied*, 114 S. Ct. 487 (1993), *quoted with approval in United States* v. *Microsoft Corp.*, 56 F.3d at 1460.

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 the United States' discretion 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, after the Joint Venture has been made a party to the stipulation for entry of judgment and the United States has completed the procedures mandated by the Tunney Act and moved for entry of judgment.

Dated: January 16, 1996.

Respectfully submitted,

Carl Wilner,

Joyce B. Hundley,

Attorneys, U.S. Department of Justice, Antitrust Division.

Certificate of Service

I hereby certify that on this date I have caused to be served by first class mail, postage prepaid, or by hand, if so indicated, a copy of the foregoing Response to Public Comment upon the following person, counsel for defendants in the matter of *United States of America* v. *Sprint Corporation:* Kevin R. Sullivan, Esquire, King & Spalding, 1730 Pennsylvania Avenue, N.W., Washington, D.C. 20006, Counsel for Defendants, Sprint Corporation and Joint Venture Company.

Dated: January 16, 1996.

By Hand:

Carl Willner,

Attorney, Telecommunications Task Force, Antitrust Division, U.S. Department of Justice.

United States of America Plaintiff, v. *Sprint Corporation and Joint Venture Co.,* Defendants

[Civil Action No. 95 CV 1304 (TPJ)]

Comments of AT&T Corp.

AT&T Corp. (''AT&T), pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the ''Tunney Act''), hereby submits these comments on the proposed Final Judgment in the above-entitled action concerning the planned acquisition by France Telecom (''FT'') and Deutsche Telekom A.G. (''DT'') of 20 percent of the voting shares of Sprint Corporation (''Sprint''), and the proposed formation of a joint venture among Sprint, FT and DT to provide international telecommunications services (the ''Joint Venture'').

AT&T will be adversely affected by the proposed acquisition and joint venture. AT&T provides international telecommunications services to customers in the United States in competition with Sprint. Moreover, to provide these services, AT&T is required by law to sue the bottleneck monopoly services of FT and DT to terminate its telecommunications traffic to France and Germany respectively. AT&T and its customers will suffer competitive injury if the proposed transactions are allowed to proceed without the Department of Justice (the ''Department'') clarifying certain provisions and procedures in the proposed Final Judgment. Specifically, the Department should condition its continuing consent to the proposed Final Judgment on the adoption of clarifying changes making explicit that: (1) Sprint cannot offer a new correspondent service unless other U.S. carriers can provide such service with FT and/or DT on a non-discriminatory basis; (2) Sprint and the Joint Venture cannot provide services to customers who have been ''steered'' to Sprint or the Joint Venture by FT and/or DT; and (3) the Phase I conditions will not expire until practical alternatives, *i.e.*, competitive networks, exist in France and Germany for the termination of international telecommunications traffic, including basic switched voice services.

Introduction and Summary

The Department has accurately concluded that the proposed acquisition and Joint venture threaten U.S. competition and consumers. As described in the Department's Competitive Impact Statement, the acquisition and the joint Venture would provide FT and DT ''increased incentives and the ability using their monopolies and dominant positions in France and Germany respectively, to favor Sprint and Joint Venture Co. and to disfavor that United States competitors in international telecommunications services. * * *'' [1] As the Department has elsewhere stated:

> The continued existence of telecommunications monopolies in foreign countries results in higher prices, lower output, inefficient quality of service and slower innovation for U.S. consumers of international telecommunications services. *Facilities-based competition in foreign countries is the best solution to these problems, and neither resale nor regulation is an equally effective substitute.*[2]

AT&T believes that the threat to United States competition and consumers would justify Department action to block the proposed acquisition. In the exercise of prosecutorial discretion, however, the Department has entered into a proposed Final Judgment with Sprint and the Joint Venture containing nondiscrimination and other protections designed to mitigate the competitive harms associated with the Sprint, FT and DT transaction.

Under the Tunney Act, however, the Court must find that the proposed Final Judgment ''is in the public interest'' in order to enter it. Thus, the Court must determine whether the proposed decree

[1] Competitive Impact Statement (''CIS''), Fed. Register, Vol. 60, No. 164, 44049, 44063 (Aug. 24, 1995).

[2] *Market Entry and Regulation of Foreign-Affiliated Entities,* 10 FCC Rcd. 4844 (1995) (''*Market Entry NPRM*''), Reply Comments of the Department of Justice (filed May 12, 1995) at ii (emphasis added).

''would serve the public interest in free and unfettered competition.'' [3] This inquiry appropriately involves an analysis of the clarity and adequacy of the decree's essential nondiscrimination provisions and compliance mechanisms, as well as an analysis of the injury that third parties might suffer as a result of the decree.[4]

In determining whether the decree meets the public interest standard, the Court will consider the explanations for the consent decree contained in the Department's Competitive Impact Statement [5] and whether the decree will protect third parties.[6] In this proceeding, the Department has accurately described in its Complaint and the Competitive Impact Statement the monopolistic leveraging in which FT and DT could engage absent the nondiscrimination provisions set forth in Section III of the decree. This leveraging would severely harm the third parties the decree is designed to protect. The clarity and efficacy of the Section III nondiscrimination provisions thus are central to the Court's public interest determination.[7]

AT&T's objections to the proposed Final Judgment all fall within the areas appropriate for review by a court in its determination of whether a proposed consent decree is in the public interest. Accordingly, AT&T believes that the Department should condition its continued support of the proposed Final Judgment on acceptance of the proposed clarifications and change in implementation procedures for the essential nondiscrimination provisions as set forth below.

First, the Department should clarify that the provisions of Section 111.G.1 of the decree do not abrogate the nondiscrimination requirements of Section III.D of the proposed Final Judgment. Section III.D prohibits Sprint and Joint Venture from accepting any FT or DT Products and Services on a discriminatory basis. Section III.G.1 seeks to protect competition further by restricting Sprint from providing a correspondent service with FT or DT unless at least ''one'' other carrier has reached an agreement with FT or DT to provide such a service as well. The proposed Final Judgment should be clarified to ensure that Section III.G.1 is not interpreted as absolving the parties of their nondiscrimination obligations once one other carrier offers a correspondent service with FT or DT.

The second area requiring clarification involves the Joint Venture Agreement's attempt to require that FT and DT steer business to the Joint Venture. Such a marketing strategy by the parties violates the clear intent of Section III.D because, as noted in the Competitive Impact Statement, the discrimination prohibited by that provision ''includ[es] activities involving the sale [sic] marketing, and distribution of Sprint and Joint Venture Co. services by FT and DT.'' [8] The consent decree should be clarified to prohibit expressly the steering of customers by FT and DT to the Joint Venture because such activity constitutes banned favoritism.

AT&T's final concern rests with the mechanism chosen to trigger the expiration of the nondiscrimination protections in Section III of the decree (the ''Phase I Conditions''). The Phase I Conditions for each country expire once France or Germany authorizes domestic and international facilities-based competition in basic telecommunications services and issues one license to a competitor to FT or DT. The Department's rationale for the lifting of the Phase I Conditions upon the authorization of competition and licensing of a competitor in France and Germany is that U.S. carriers will have means other than FT's and DT's bottleneck facilities to terminate their traffic to France or Germany.[9] Yet, the Department's own explanation for why the Phase I Conditions are necessary, coupled with the Department's acknowledgment that mere legal authorization to compete and issuance of one license to do so may not result in a competitive alternative to FT or DT, mandate that the Department ensure continuance of the Phase I protections until FT and DT face actual competition.[10]

The Department Must Clarify the Scope of Certain Conditions and Change Implementation Procedures of the Proposed Final Judgment

As the Department recognizes in its Competitive Impact Statement, FT and DT—the world's largest government-owned monopoly telecommunications carriers—have absolute control over telecommunications services in France and Germany, respectively. FT is the fourth largest provider of telecommunications services in the world, while DT is the second or third largest.[11] FT and DT are each the state authorized monopoly provider of public switched voice service, as well as all transmission facilities for domestic and international telecommunications in their respective home countries.[12] As a result, ''[a]ccess to FT's and DT's public switched network and transmission infrastructure is necessary for international telecommunications and enhanced telecommunications services that originate or terminate in France and Germany,'' and ''virtually all international telecommunications traffic between the U.S. and France and between the U.S. and Germany originates or terminates over FT's or DT's public switched networks, their transmission infrastructure, or both.'' [13]

Under the proposed joint venture, FT and DT are required to refrain from competing with Sprint in the United States in the Joint Venture's services and in other services.[14] FT and DT thus ''generally will only be able to participate directly in United States telecommunications markets through their ownership interests in Spring.'' [15] Moreover, the United States is ''by far'' the most important location of those customers who desire global seamless telecommunications services, *i.e.*, multinational corporations who seek one stop shopping for their communications needs irrespective of national borders.[16] Because FT and DT can participate in the U.S. market only through the Joint Venture, they will have increased incentives and the ability, using their monopolies and dominant positions in France and Germany, respectively, to favor Sprint and the proposed Joint Venture and to disfavor their United States international telecommunications services competitors and their customers.[17]

The Competitive Impact Statement sets forth in detail the myriad ways that FT and DT could use their control over essential facilities in France and Germany to favor Sprint and to harm Sprint's U.S. competitors and their

[3] CIS at 44077 (citing *United States* v. *Waste Management, Inc.*, 1985–2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C., 1985).

[4] United States v. *Microsoft Corp.*, 56 F.3d 1448, 1461–62 (D.C. Cir. 1995).

[5] *United States* v. *Mid-America Dairymen*, Inc., 1977–1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977) (Court carefully considers explanations of the government in the Competitive Impact Statement when determining if decree is in the public interest).

[6] *Microsoft Corp., supra*, at 1462.

[7] *Id.*

[8] CIS at 44071.

[9] See pp. 16–17, *infra.*

[10] CIS at 44074.

[11] CIS at 44060.

[12] *Id.*

[13] *Id.* at 44061.

[14] *Id.* at 44059. Similarly, Sprint must refrain from competing with the Joint Venture anywhere in the world and must refrain from competing with FT and DT in France and Germany. *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 44063

customers.[18] Although this threat to U.S. competition and consumers would justify the Department's blocking of the proposed acquisition, the Department has exercised its prosecutorial discretion and entered into the proposed Final Judgment, which seeks to prevent such anticompetitive conduct through conditions. However, unless the clarifications and change to implementation procedures set forth herein are made, FT and DT will be able to leverage their monopoly power contrary to the Department's intent, and to the public interest test in the Tunney Act.

A. The Department Should Make Clear That Sprint and the Joint Venture Cannot Offer a New Correspondent Service Unless Other U.S. Carriers Can Provide Such Service With FT and/or DT on a Non-Discriminatory Basis

Because FT and DT each has the ability to leverage its monopoly power over telecommunications in France and Germany, respectively, in favor of Sprint or the Joint Venture and against other U.S. carriers, the proposed Final Judgment prohibits any discrimination in favor of Sprint. Section III.D thus explicitly prohibits Sprint and the Joint Venture from accepting any FT or DT Products and Services on a discriminatory basis for the provision of any telecommunications or enhanced telecommunications service in the United States or between the United States and France or the United States and Germany.

As a result of FT's and DT's monopolies over the provision of basic telecommunications services in their countries, U.S. carriers can provide U.S.-to-France service and U.S.-to-Germany service only through agreement with FT and DT for the termination of such calls. Such services are referred to as correspondent services. The provision of correspondent services is included within the nondiscrimination protections of Section III.D. Sprint and the Joint Venture cannot accept ''FT or DT Products and Services'' that are provided on a discriminatory basis, and ''FT or DT Products and Services'' are defined to include correspondent services.[19] Further, Sprint and the Joint Venture are specifically prohibited from receiving discriminatory ''terms and conditions of operating agreements for correspondent services and international half-circuits.'' [20] The Final Judgment thus would prohibit Sprint or the Joint Venture from offering correspondent services between the U.S. and France or the U.S. and Germany where FT or DT has not made such correspondent services available to other U.S. carriers on a nondiscriminatory basis.

In order further to protect U.S. competition and consumers from monopoly leveraging, Section III.G.1 of the proposed decree provides that Sprint may not provide a correspondent service with FT or DT unless at least one other carrier has reached agreement with FT or DT, as the case may be, to provide such a correspondent service:

> Sprint may not offer, supply, distribute or otherwise provide any correspondent telecommunications or correspondent enhanced telecommunications service between the United States and France or Germany pursuant to any operating agreement with FT or DT, unless with respect to such service, at least one other United States international telecommunications provider has also obtained an operating agreement with FT and DT for the provision of such service between the United States and France and Germany. This provision will operate separately for France and Germany.

This provision is designed to ensure that Sprint does not have an exclusive or preferential arrangement with FT or DT, which would limit competition in the provision of U.S.-to-France or U.S.-to-Germany services in the U.S. In addition, it balances that interest with the public interest of permitting new services to be offered to U.S. customers on an expedited basis by allowing Sprint to introduce a correspondent service as soon as another U.S. carrier also has reached agreement with FT and DT to do so. Sprint need not wait to offer the service until FT and DT have reached nondiscriminatory operating agreements covering such service with all U.S. carriers.

Section III.G.1 must be interpreted, however, consistent with the antidiscrimination protections of Section III.D. Otherwise, Section III.G.1 could permit FT and DT to introduce a new correspondent service with Sprint once that service is offered by *any* other U.S. carrier selected by FT or DT—without regard to the practical ability of that other carrier to compete effectively with Sprint. Moreover, such an interpretation could be used to limit FT's and DT's obligation to provide the same correspondent service to other U.S. Carriers that today serve the route or that seek to do so in the future. Limiting FT's and DT's nondiscriminatory treatment merely to one other carrier would be inconsistent with Section III.D and clearly was not intended.

The Department thus should clarify that Section III.G.1 does not abrogate any of the nondiscrimination requirements of Section III.D. Specifically, the Department should make clear that the Final Judgment requires FT and DT to offer correspondent services to all U.S. carriers on a nondiscriminatory basis, and prohibits Sprint from offering a correspondent service where FT or DT has discriminated in offering to provide such correspondent services with other U.S. carriers.[21] Further, this obligation should be viewed as a continuing obligation. Were FT or DT has a service arrangement with other U.S. carriers that is later offered with Sprint, FT or DT should be required by Section III.D.1 to extend any different terms and conditions it has offered to Sprint to the other U.S. carriers.

B. The Department Should Make Clear That Sprint and Joint Venture Co. Cannot Provide Services to Customers Who Have Been ''Steered'' to Sprint or the Joint Venture by FT and/or DT

Section 10.6(b) of the Joint Venture Agreement between Sprint, FT and DT specifically requires FT and DT to steer customers toward Joint Venture services even where the customer has affirmatively requested that another U.S. carrier provide the U.S. half of the service:

> If a Party or any of its Affiliates receives an unsolicited request from a customer of a Party or any of its Affiliates or of the Joint Venture to enter into a Contract to provide to such customer in conjunction with other persons a service that is currently offered by the Joint Venture, such Party or its Affiliates will use commercially reasonable efforts to persuade such customer to purchase such service from the Joint Venture. If despite such Party's efforts, the Customer prefers not to purchase such service from the Joint Venture, such party will refer such matter to the Global Venture Office which, within ten (10) Business Days, will present its observations regarding such matter. * * *

For example, if a customer comes to DT (which the customer must do in Germany) and requests that DT arrange for private line service between Germany and the U.S. and requests that

[18] *Id.* at 44063–64.

[19] Final Judgment, § V.L.(i).

[20] *Id.* § III.D.1(v).

[21] Section II.C of the proposed Final Judgment confirms this reading. That section prohibits Sprint and the Joint Venture from participating in the provision of a service that requires a license in France or Germany unless other carriers can obtain the necessary authorization on the same terms and conditions, including the same time frame as FT or DT. It would be inconsistent to permit Sprint or the Joint Venture to benefit from FT or DT discrimination in providing authorization (via an operating agreement) that is solely under their control, when Sprint and the Joint Venture are not permitted to benefit from discrimination by France or Germany in granting governmental authorization.

MCI provide the U.S. half-circuit, DT must use ''commercially reasonable efforts'' to persuade MCI's customer instead to use the Joint Venture for such service.[22] Further, DT must refer the customer's request to the Joint Venture (including Sprint's representatives) if it fails to convince the customer to purchase Joint Venture services.[23]

Such discriminatory marketing activity by a company controlling essential facilities in favor of its affiliate is precisely the type of monopoly leveraging that the Final Judgment seeks to prohibit.[24] The Department should clarify that the receipt of such favored treatment by Sprint or the Joint Venture would violate the prohibition against discrimination contained in Section III.D.1 of the proposed Final Judgment.

C. The Department Should Make Clear That the Phase I Conditions Will Not Expire Until Practical Alternatives Exist in France and Germany for the Termination of International Telecommunications Traffic, Including Basic Switched Voice Services

The Final Judgment would impose two sets of conditions on Sprint and the Joint Venture, one set that continues for the term of the decree and one set that expires upon the happening of certain events. The Phase I protections against discrimination will terminate (separately for each country) once France or Germany authorizes domestic and international competition and issues a license to one competitor of FT or DT. The restrictions contained in Section II will continue through the entire term of the consent decree.

As the Department explains, stricter prohibitions during Phase I are necessary ''because there is considerably greater potential for competitive abuses to occur in the period while competitors have no legal alternative to using FT's and DT's facilities and services and before the French and German governments finish implementing their program of regulatory reform.'' [25] Further, in order for Phase II to begin, ''the licensed competitors must have authority to construct or own a sufficiently large amount of international capacity that other providers would have a realistic alternative to the use of the international facilities of FT or DT. * * *'' [26] In short, the Department's rationale for the lifting of the Phase I Conditions is that, once Phase II begins, U.S. carriers will have means other than FT's or DT's bottleneck facilities to terminate their traffic to France or Germany. Moreover, if ''the entry of licensed competitors in France or Germany has been significantly delayed after the granting of licenses, or has otherwise not proven sufficient to provide a competitive alternative [to FT or DT],'' the Department would request reinstatement of the Phase I Conditions.[27]

Despite the stated rationale for the Phase I conditions, the Final Judgment appears to provide for their termination upon the mere removal of legal restrictions and the issuance of a license to a potential competitor in France and Germany. There is no demonstration required by the parties that effective competition exists in France and Germany for the termination of international traffic. Thus, the Phase I Conditions, which include the prohibitions against discrimination, would terminate once France and Germany each legally authorizes competition in international and domestic services and issues *one* license to do so, regardless of whether the recipient of that license is capable of providing U.S. carriers any practical alternative to FT or DT for terminating calls to France or Germany. This result would conflict with the Department's own underlying rationale for the proposed two-phased decree. To remedy this problem, the Department should modify the implementation provisions of the decree to require Sprint to demonstrate to the Department that an actual competitive alternative to FT and DT exists in France and Germany, respectively, for the termination of telecommunications traffic, including basic switched voice services, in order for the Phase I Conditions to be lifted.

Conclusion

As set forth above, the application of key provisions of the proposed Final Judgment must be clarified in order for the decree to be applied in the manner intended by the Department and in order to prevent anticompetitive abuse. Unless the Department adopts the clarifications and implementation modification set forth herein, the Final Judgment will not satisfy the Tunney Act's requirement that the decree be in the public interest. The Department therefore should clarify that (1) Sprint cannot offer a new correspondent service unless other U.S. carriers can provide such service with FT and/or DT on a non-discriminatory basis, and (2) Sprint and the Joint Venture cannot provide services to customers who have been ''steered'' to Sprint or the Joint Venture by FT and/or DT. The Department also should modify the implementation provisions of the decree so that the Phase I Conditions will remain in effect until Sprint demonstrates to the Department that practical alternatives exist in France and Germany for the termination of international telecommunications traffic, including basic switched voice services.

Dated: October 23, 1995.

Respectfully submitted,

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Comments of MCI Communications Corporation on Proposed Consent Judgment

United States of America, Plaintiff, v. *Sprint Corporation and Joint Venture Co.,* Defendants.

[No. 95–CV–1304 (TPJ)]

Dated: October 23, 1995.

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To: The Department of Justice

Comments of MCI Communications Corporation on Proposed Consent Judgment

United States of America, Plaintiff, v. *Sprint Corporation and Joint Venture Co.,* Defendants.

[No. 95–CV–1304 (TPJ)]

Pursuant to § 2 (b), (d), and (f)(4) of the Antitrust Procedures and Penalties Act (the ''Tunney Act''), 15 U.S.C. § 16 (b), (d), and (f)(4), MCI Communications Corporation (''MCI'') submits these comments regarding the consent

[22] It is unclear what would constitute ''commercially reasonable efforts'' if one is a monopolist to whom all customers must come for service.

[23] Sprint's representative to the Joint Venture thus would be informed of every unsuccessful attempt in Europe to steer global customers to the Joint Venture (*i.e.*, every time a customer wanted to use a U.S. carrier other than Sprint or the Joint Venture). Such market leads obtained solely because of FT's and DT's monopoly status would permit Sprint to target the U.S. offices of these customers for follow-up persuasion.

[24] Sprint does not dispute AT&T's interpretation of FT's and DT's obligation under the Joint Venture Agreement, and does not deny its intent to engage in such steering of customers. Indeed, Sprint argues that the steering of customers by a monopolist to its U.S. affiliate merely reflects ''economic self-interest'' and is not improper. *Market Entry NPRM,* Sprint Supplemental Reply (filed Sept. 15, 1995) at iv.

[25] CIS at 44066.

[26] *Id.* at 44065.

[27] *Id.* at 44074.

judgment proposed by the United States Department of Justice (''DOJ'') in this proceeding.

I. Introduction and Summary

If the proposed transactions among Sprint Corporation (''Sprint''), France Telecom (''FT''), and Deutsche Telekom A.G. (''DT'') are consummated, FT's and DT's monopoly power in France and Germany would pose a serious and long-term threat to U.S. consumers and competition. The heart of DOJ's complaint is that the transactions threaten substantially lessened competition because of the danger that FT and DT will ''use their market power over the public switched networks, transmission infrastructure and public data networks in France and Germany to discriminate in favor of Sprint and [Phoenix] vis-a-vis other United States international carriers'' and to engage in other anticompetitive conduct.[1] In addition to financial incentives, the proposed transactions would create contractual and corporate duties on the part of FT and DT to discriminate in favor of Sprint and Phoenix.[2]

However, the proposed consent decree falls conspicuously short of alleviating these dangers. Most significantly, it allows the shift from a *de jure* to a *de facto* monopoly in France and Germany to trigger the lifting of its crucial substantive protections against anticompetitive behavior. The critical question is whether FT's and DT's monopoly power persists, not whether their monopolies are *de jure* or *de facto*. Under DOJ's proposed consent decree, however, the substantive protections against abuse of FT's and DT's monopoly power immediately and automatically expire as soon as competition is legally authorized and just one competitor has been licensed in France or Germany. By removing Phase I protections before the development of genuine, effective facilities-based competition in France and Germany, the decree substantially undermines its own force.

The competitive problems posed by these transactions stem mainly from three facts. First, FT and DT have market power in France and Germany, and international telecommunications carriers are completely dependent on them in connection with services to France and Germany. Second, even after effective facilities-based competition is legally permitted in France and Germany, it will take, at a minimum, several years to develop, and effective regulation of FT and DT will be essential during the transition period. And third, as government-owned and government-controlled monopolies, FT and DT lack any independent regulator in their home countries.

The proper benchmark for when such anticompetitive behavior ceases to be a threat is not the *legal possibility* of competition, but rather the *actual development of facilities-based competition.* As DOJ itself recently stated in a related proceeding, ''facilities-based competition is by far the best solution to the problems * * * that arise today from [foreign] monopoly provision of key network facilities and services.'' [3] DOJ recommends the imposition of these restrictions because of FT's and DT's monopoly power, so they should remain in effect as long as that monopoly power persists.

FT's and DT's monopoly power—and hence the anticompetitive threat—will persist for years after the triggering events for termination of the Phase I competitive safeguards (formal authorization of competition and licensure of one competitor). First, new entrants will need time to construct networks and develop a customer base. Second, numerous regulatory implementation issues will have to be resolved by French and German authorities after the formal licensing of competitors. And third, regulation is especially unlikely to be effective when, as in the case of FT and DT, ''foreign authorities are regulating government-owned monopoly carriers.'' [4] There is no basis for equating the elimination of legal entry barriers and the licensing of one competitor with the immediate reduction, much less elimination, of FT's and DT's market power.

DOJ attempts to justify the premature expiration of Phase I's competitive safeguards by relying on the ''assumption'' [5] that the French and German governments eventually will provide equivalent protection, even though the governments will continue to own FT and DT. As DOJ itself has observed, however, ''[f]oreign regulation normally should not be considered a sufficient alternative to protect U.S. consumers in the absence of any meaningful facilities-based competition, however effective that regulation may be represented to be.'' [6] Such foreign regulation may not be adopted for years in France and Germany and is unlikely effectively to rein in FT's and DT's monopoly power—particularly given that the regulators would also be the owners of the regulated entities. In any event, DOJ's independent responsibility to enforce the U.S. antitrust laws and to protect U.S. consumers is not shared by French and German regulators.

By permitting anticompetitive conduct to occur under the *de facto* monopolies of FT and DT after *de jure* protections have been eliminated, the proposed consent decree fails to prevent serious harms to competition and consumers during a crucial period of years. Therefore, the proposed decree is not in the public interest unless it is modified to provide that the restrictions remain in effect until actual, effective facilities-based competition is found to exist in France and in Germany.

II. Background

A. Legal Standards Under the Tunney Act

The Tunney Act provides that proposed consent judgments in antitrust cases brought by the United States are subject to a 60-day period during which written comments may be filed.[7] The United States is required to ''receive and consider'' any such comments.[8]

In requiring consideration of public comments, the Act contemplates a critical reexamination of the decree by DOJ in light of the points made in any submitted comments. DOJ has the authority to withdraw its consent to the decree at any time before it is entered.[9] Therefore, if the public comments persuade DOJ that the decree should be modified, it is free to condition its continued consent on these modifications.

If DOJ decides that no modifications are appropriate in light of the public comments, the Court must determine whether entry of the proposed consent judgment ''is in the public interest.'' [10] In making that determination, the Court may consider:

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

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations

[1] Competitive Impact Statement, 60 Fed. Reg. 44,058, 44,063 (filed Aug. 14, 1995) (''CIS'').

[2] *See infra* at 11–12 and n. 29.

[3] Reply Comments of DOJ, at 17, *Market Entry and Regulation of Foreign-affiliated Entities*, IB Docket No. 95–22, RM–8355, RM–8392 (FCC) filed May 12, 1995).

[4] *Id.* at 27.

[5] CIS, 60 Fed. Reg. at 44,066.

[6] Reply Comments of DOJ, at 27.

[7] 15 U.S.C. § 16 (b) and (d).

[8] *Id.* § 16(d).

[9] *See* Stipulation ¶ 2, 60 Fed. Reg. 44,049 (''Plaintiff may withdraw its consent to entry of the Final Judgment at any time before it is entered, by serving notice on the defendants and by filing that notice with the Court.'').

[10] 15 U.S.C. § 16(e).

set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.[11]

The Court is specifically authorized in making its public interest determination to review any comments of interested parties and DOJ's response to such comments.[12]

Although an antitrust consent decree proposed by DOJ is entitled to deference, the Tunney Act was ''intended to prevent 'judicial rubber stamping' '' of such decrees,[13] and to require ''an independent determination as to whether or not entry of a proposed consent decree [was] in the public interest.'' [14] Thus, while the D.C. Circuit made clear in its recent *Microsoft* decision that ''Congress did not mean for a district judge to construct his own hypothetical case and then evaluate the decree against that case,'' [15] it also reaffirmed the district court's duty to inquire into ''the purpose, meaning, and efficacy of the decree,'' [16] and to determine whether the remedies proposed are ''inconsonant with the allegations.'' [17]

DOJ accurately describes the character of the ''public interest'' determination in the context of this case:

> The courts have recognized that the term ''public interest'' ''take[s] meaning from the purposes of the regulatory legislation.'' *NAACP* v. *Federal Power Comm'n,* 425 U.S. 662, 669 (1976); *United States* v. *American Cyanamid Co.,* 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied,* 465 U.S. 1101 (1984). Since the purpose of the antitrust laws is to ''preserv[e] free and unfettered competition as the rule of trade,'' *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 4 (1958), the focus of the ''public interest'' inquiry under the Tunney Act is whether the proposed final judgment would serve the public interest in free and unfettered competition. *United States* v. *Waste Management, Inc.,* 1985–2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C. 1985).[18]

A proposed consent decree that fails to cure the antitrust violation is not in the public interest.[19]

B. The Proposed Transactions

Two related transactions are the subject of DOJ's antitrust complaint and consent decree. First, Sprint, FT, and DT have entered into an agreement providing for the formation of an international joint venture, now known as ''Phoenix,'' to provide a variety of voice, video, and data services. Under the agreement, each party would contribute most of its existing operations outside its home country to the Phoenix joint venture. FT and DT would hold and manage their interests in Phoenix together through their own proposed two-party joint venture, known as ''Atlas.'' Phoenix would have a board on which FT, DT, and Sprint would be equally represented. Sprint would have the exclusive right to provide Phoenix services in the United States, and FT and DT would not compete with Sprint in the United States with respect to such services. Sprint similarly would not compete with FT and DT in their home countries. None of the three owners would compete against Phoenix.[20]

Second, Sprint, FT, and DT have entered into an agreement entitling FT and DT each to acquire a 10-percent equity interest in Sprint, and thus to become Sprint's largest shareholders. FT and DT would acquire special shareholder rights, including the right to appoint three members of Sprint's 15-member Board of Directors.[21]

C. The Proposed Consent Decree

On July 13, 1995, DOJ filed a civil antitrust complaint alleging that the proposed Sprint-FT-DT transactions would violate § 7 of the Clayton Act [22] by lessening competition in the markets for telecommunications services between the United States and France and between the United States and Germany. On the same date, Sprint and DOJ stipulated to the entry of a proposed consent decree, which purports to remedy the fundamental problem created by an alliance between Sprint and two foreign, government-owned monopoly carriers that are among the largest telecommunications providers in the world. The danger addressed by DOJ's complaint and consent decree is that FT and DT will ''use their market power over the public switched networks, transmission infrastructure and public data networks in France and Germany to discriminate in favor of Sprint and [Phoenix] vis-a-vis other United States international carriers'' and to engage in other anticompetitive conduct.[23]

The proposed consent decree imposes restrictions and obligations in two separate phases. Phase I terminates, for France and Germany independently, when legal prohibitions on competition against FT and DT have been removed and one or more competitors have been licensed to provide facilities and services in each country.[24] Phase II continues for five years after the end of Phase I.[25]

The provisions of the decree that apply during both Phase I and Phase II include:

- requirements of disclosure of the terms and conditions of dealings among Sprint, FT, DT, and Phoenix (II.A)
- restrictions on the sharing of information (II.B)
- limitations on the ability of Sprint and Phoenix to offer international services involving France or Germany, or to provide facilities to FT or DT for such services, if other United States international telecommunications providers are not permitted to provide the same services (II.C)[26]

The provisions that are applicable only during Phase I include:

- restriction against the acquisition by Sprint or Phoenix of ownership interests in or control over facilities legally reserved to FT or DT, and limitations on their ability to acquire international half-circuits terminating in France or Germany (III.A)
- prohibition of the acquisition by Sprint or Phoenix of ownership interests in or control over FT or DT public data networks (III.B)
- prohibition against Sprint or Phoenix providing FT or DT products and services on an exclusive basis (III.C)
- prohibition against Sprint or Phoenix obtaining FT or DT products and services on a discriminatory basis (III.D)
- prohibition of Sprint's acceptance of correspondent telecommunications traffic on a disproportionate basis (III.E)
- restrictions designed to guard against cross-subsidization of Sprint or Phoenix by FT or DT (III.F)

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[11] *Id.*

[12] *Id.* § 16(f)(4).

[13] *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1458 (D.C. Cir. 1995) (quoting H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974)).

[14] *Id.* (quoting S. Rep. No. 298, 93d Cong., 1st Sess. 5 (1973)).

[15] *Id.* at 1459.

[16] *Id.* at 1462.

[17] *Id.* at 1461.

[18] CIS, 60 Fed. Reg. at 44,076–44,077; *see also United States* v. *Western Elec. Co.,* 900 F.2d 283, 308 (D.C. Cir.) (''To remain consistent with antitrust policy, the court should revise the decree that is shown to lessen competition substantially in present circumstances.'') (quoting 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 330, at 141–42 (1978)), *cert. denied,* 498 U.S. 911 (1990).

[19] *See United States* v. *AT&T,* 552 F. Supp. 131, 150 (D.D.C.1982), *aff'd mem. sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983).

[20] *See* CIS, 60 Fed. Reg. at 44,058–44,059.

[21] *Id.*

[22] 15 U.S.C. § 18.

[23] CIS, 60 Fed. Reg. at 44,063.

[24] *Id.* at 44,065; Final Judgment V.Q, 60 Fed. Reg. 44,051, 44,056.

[25] CIS, 60 Fed. Reg. at 44,074; Final Judgment X.B, 60 Fed. Reg. at 44,058.

[26] CIS, 60 Fed. Reg. at 44,067–44,070; Final Judgment, 60 Fed. Reg. at 44,051–44,053.

- prohibition of any exclusive operating agreements between Sprint and FT or DT (III.G)
- requirements that Sprint and Phoenix not provide telecommunications or enhanced telecommunications services using FT or DT products and services or public data networks, if FT or DT has established proprietary or nonstandardized protocols or interfaces and has failed to continue to provide other competitors with access to those services and networks on a standardized basis (III.H–I)[27]

III. The Proposed Decree Should be Modified so That its Safeguards Against Abuse of FT's and DT's Monopoly Power Continue as Long as Their Monopoly Power Continues

The proposed transactions pose a well-established threat to U.S. consumers and competition. DOJ recognizes that the transactions threaten substantially lessened competition because they give FT and DT ''increased incentives and the ability, using their monopolies and dominant positions in France and Germany respectively, to favor Sprint and [Phoenix] and to disfavor their United States competitors in international telecommunications services in various ways,'' including discrimination, cross-subsidization, and sharing of confidential information.[28] The proposed transactions also would create contractual and corporate duties on the part of FT and DT to discriminate in favor of Phoenix and Sprint. For example, the Joint Venture Agreement would require FT and DT to ''use commercially reasonable efforts to persuade'' customers to use Phoenix services when they have requested the services of another U.S. carrier.[29] DOJ does not point to any procompetitive benefits created by the transactions that would mitigate their anticompetitive effects.

The proposed consent decree fails in a basic respect to prevent the injury that DOJ alleges arising from FT's and DT's monopoly power. In particular, it allows the shift from a *de jure* to a *de facto* monopoly in France and Germany to trigger the lifting of its substantive protections against anticompetitive behavior. By providing for the removal of Phase I restrictions before the development of genuine, effective facilities-based competition in France and Germany, the decree fundamentally fails to solve the anticompetitive problems that would result from the transactions.

A. The Proposed Consent Decree Would Permit Anticompetitive Activity to Occur Under De Facto Monopolies in France and Germany

The Phase I restrictions are necessary because of FT's and DT's monopoly power. Under the consent decree as currently proposed, Phase II would begin as soon as France or Germany (1) has legally authorized competition, and (2) has issued *one* license for the construction or ownership of facilities and the provision of services. At that time, Phase I's substantive restrictions intended to prevent misuse of FT's and DT's monopoly power would immediately and automatically end—even if FT's and DT's monopoly power was unabated as a practical matter.[30]

DOJ cannot justify this premature trigger for the lifting of the crucial Phase I restrictions before the advent of effective competition in France and Germany. DOJ states:

> These [Phase I] restrictions * * * are expected to become less necessary once competition has been introduced in France and Germany, which should occur concurrently with the regulatory reform program being undertaken by the EU authorities. At that point, competitors will be less vulnerable to abuses of market power by FT and DT because of the alternatives available for transmission infrastructure, and should be better protected by European regulatory requirements to the extent that they continue to depend on the services and facilities of FT and DT.[31]

But competition is ''introduced,'' and there are ''alternatives available for transmission infrastructure,'' only when competition actually has *developed* in France or Germany—not when it is simply made legally permissible. When France (or Germany) eliminates its *de jure* monopoly and licenses one initial competitor, FT (or DT) will still continue to operate as a *de facto* monopoly for a significant period of time—*i.e.*, until a competitor actually develops its own network sufficient to constitute a realistic alternative to the facilities of FT (or DT). And during this period of time—which is likely to last a number of years—Sprint and Phoenix will be able to benefit from the same discriminatory and other anticompetitive monopolistic conduct that DOJ agrees the judgment should prohibit. Whether FT and DT use *de jure* or *de facto* monopoly power to harm U.S. competition and consumers is irrelevant. The same need for the Phase I restrictions exists regardless of the source of the monopoly power.

DOJ itself has emphasized the essential need for actual (versus potential) facilities-based competition in foreign telecommunications markets. In comments filed with the FCC, the Department states that ''facilities-based competition is by far the best solution to the problems'' for U.S. consumers created by foreign *de jure* and *de facto* monopolies.[32] DOJ cites the existence of real competition in the U.K. as permitting the particular relief provided in the MCI–BT decree, and as resulting in significantly lower prices.[33] Even parts of its Competitive Impact Statement reveal DOJ's fundamental agreement with the proposition that actual competition—rather than the mere legality of competition—is the *sine qua non* of preventing the harms of monopoly and market power.[34]

In another proceeding in this Court, DOJ also recognized the substantial danger that an incumbent telecommunications monopolist will abuse its monopoly power in favor of an affiliated entity unless and until actual facilities-based competition develops. DOJ has moved to permit one of the Regional Bell Operating Companies (''RBOCs'' or ''Baby Bells'') to provide on a trial basis through a separate affiliate domestic and international long

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[27] CIS, 60 Fed. Reg. at 44,070–44,073; Final Judgment, 60 Fed. Reg. at 44,053–44,055.

[28] CIS, 60 Fed. Reg. at 44,064–44,064.

[29] Section 10.6(b) of the Joint Venture Agreement (p. 81) provides:

> If a Party or any of its Affiliates receives an unsolicited request from a customer of a Party or any of its Affiliates or of the Joint Venture to enter into a Contract to provide to such customer in conjunction with other Persons a service that is currently offered by the Joint Venture, such Party or its Affiliates will use commercially reasonable efforts to persuade such customer to purchase such service from the Joint Venture. If despite such Party's efforts, the customer prefers not to purchase such service from the Joint Venture, such Party will refer such matter to the Global Venture Office which, within ten (10) Business Days, will present its observations regarding such matter. * * *

[30] DOJ contemplates that the end of Phase I would be contemporaneous with the EU liberalization reforms currently scheduled for 1998. CIS, 60 Fed. Reg. at 44,066, 44,074.

[31] *Id.* at 44,070.

[32] Reply Comments of DOJ, at 17, *Market Entry and Regulation of Foreign-affiliated Entities*, IB Docket No. 95–22, RM–8355, RM–8392 (FCC) (filed May 12, 1995); *see also id.* at ii (''Facilities-based competition in foreign countries is the best solution to these problems, and neither resale nor regulation is an equally effective substitute.''); *id.* at 27 (''the existence of facilities-based competition is the best means of ensuring that U.S. consumers of international services are adequately protected'').

[33] *Id.* at 14, 19–21.

[34] *See, e.g.*, 60 Fed. Reg. at 44,071 (''The limitation on ownership or control of international half-circuits can be lifted, if the United States and defendants agree that *meaningful competition exists* to the half-circuits provided by FT or DT.'') (emphasis added); *id.* at 44,072 (''Once FT and DT *face competition* in the areas of their business now protected by monopoly rights, and the EU authorities have improved safeguards against cross-subsidy as part of their liberalization program, there is reason to believe that the risks of such conduct should diminish. * * *'') (emphasis added).

distance service, but only *after* ''actual competition (including facilities-based competition)'' has developed.[35] FT's and DT's monopoly power in France and Germany over local (and domestic long distance) services is as great as the RBOCs' monopoly power in the U.S. over local services, and FT and DT control the ability of international carriers to reach French and German customers to at least as great an extent as the RBOCs control their ability to reach U.S. customers. Accordingly, decree restrictions involving FT and DT should continue as long as decree restrictions on the RBOCs—until actual facilities-based competition has developed.

For three reasons, it will take time for actual competition to develop after formal legal barriers to entry are eliminated and a competitor is licensed. *First*, after they obtain a license, new entrants will need time to construct alternative networks and develop a customer base. DOJ acknowledges this fact:

> Although some competition to the FT and DT public switched voice services and network would likely emerge were all legal restrictions on competition lifted, replication of the entire public switched network would be prohibitively expensive for any new entrant.[36]

The slow development of competing data services in France and Germany is illustrative: although legal entry barriers were removed a few years ago and competitors have been licensed, FT and DT continue to have considerable market power.[37] DOJ also recognized this problem in discussing economic barriers to competition in local telecommunications markets in the United States—barriers that are comparable to the barriers in France and Germany. In the proceeding in this Court concerning the RBOC waiver, DOJ stated that ''even as legal and regulatory barriers come down, a substantial barrier remains if entrants must replicate the entire network of the [local exchange carrier] in order to provide local exchange service.'' [38]

This Court well understands that the elimination of legal barriers to competition should not be confused with actual competition in telecommunications markets. As the Court explained in rejecting DOJ's attempt to equate elimination of legal entry barriers with effective competition in U.S. telecommunications markets:

> To be sure, as long as states and localities prohibit outsiders from competing with the local Operating Companies, the monopolies will continue to exist. But the reverse is not true. Even if all state and local regulation prohibiting competitive entry into the local exchange market were to be repealed tomorrow, and anyone were free, as a matter of law, to sell local telephone service, the exchange monopolies would still exist substantially in the same form and to the same extent as they do now.[39]

This observation is as true for French and German telecommunications markets as it is for U.S. markets.

Second, a number of regulatory issues critical to the development of effective competition will have to be resolved after French and German regulators formally license potential competitors of FT and DT. The threat of cross-subsidy provides one example. DOJ acknowledges that existing French and German regulations ''are very limited and have not prevented instances of massive cross-subsidy.'' [40] Unless effective regulations to prevent cross-subsidy are both adopted and implemented, would-be competitors of FT and DT will be at an insuperable competitive disadvantage, with FT and DT continuing to have a unique ability to fund competitive services with inflated revenues coerced from captive monopoly customers. If such cross-subsidization is allowed to continue after the removal of legal entry barriers and the licensing of one competitor, it will be impossible for competition to develop. Similarly, French and German regulators will have to resolve issues about the price that FT and DT charge for essential inputs. DOJ acknowledges that even licensed competitors will continue to be dependent on FT and DT for certain inputs for a significant period of time,[41] and if those inputs are overpriced, other firms will not be able to compete effectively.

Regulatory implementation issues following formal liberalization will be a major obstacle to the development of effective competition. DOJ itself recognized the critical importance of these implementation issues in the pending proceeding in this Court concerning the RBOC waiver:

> [T]he transition to competition in local exchange services will be complex. No set of conditions for promoting such competition could hope to address in advance the dozens of complicated implementation issues that will have to be resolved before meaningful competition is a practical reality, rather than merely a theoretical possibility.[42]

DOJ's observations apply with equal force to the introduction of competition in foreign countries. Yet DOJ would allow the Phase I restrictions to be lifted while meaningful competition is only a ''theoretical possibility,'' not a ''practical reality.''

Third, resolution of these regulatory implementation issues on terms that permit effective competition to emerge will be especially difficult because the French and German governments are both the owners and regulators of FT and DT.[43] So long as those entities are controlled by the French and German government, there will be strong incentives for the governments to favor them, as well as Sprint and Phoenix, in adopting and implementing regulatory reforms. The inherent conflict of interest when the same entity owns and regulates a carrier is certain to retard the development of meaningful competition. Indeed, full privatization

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[35] Memorandum of the United States in Support of Motion for a Modification of the Decree to Permit a Limited Trial of Interexchange Service by Ameritech, at 28–29, *United States* v. *Western Elec. Co.*, No. 82–0192 (D.D.C.) (filed May 1, 1995) (''DOJ Mem. re Competition'').

[36] CIS, 60 Fed. Reg. at 44,061–44,062.

[37] *Id.* at 44,060, 44,062.

[38] DOJ Mem. re Competition, at 3.

[39] *United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 544 (D.D.C. 1987) (footnote omitted), *aff'd in relevant part*, 900 F.2d 283 (D.C. Cir.), *cert. denied*, 498 U.S. 911 (1990).

[40] CIS, 60 Fed. Reg. at 44,072. Although section III.F of the decree prohibits FT and DT from cross-subsidizing the international services of Sprint and Phoenix, the proposed decree does not address cross-subsidization of domestic services provided by FT and DT over their domestic networks. The latter is the kind of cross-subsidization that would prevent competition to FT and DT from developing in France and Germany.

[41] *Id.* at 44,061–44,062 (because of the prohibitive cost of constructing a complete competitive network, ''any provider of telecommunications or enhanced telecommunications services, or seamless international telecommunications services, whether in the U.S., France, Germany or elsewhere, is and will continue to be dependent to some extent for the foreseeable future on FT for origination and termination of telecommunications between France and anywhere else, and on DT for origination and termination of telecommunications between Germany and anywhere else'').

[42] DOJ Mem. re Competition, at 3. The development of domestic long distance competition provides an instructive example. By the early 1970s, the FCC had determined that long distance competition was in the public interest and authorized MCI to compete against the Bell System, which at that time controlled local and long distance telephone service in the United States in much the same way that FT and DT control local and long distance telephone service in France and Germany. It still took MCI years to become a significant competitor because MCI was forced repeatedly to seek relief from the FCC and the courts from the determined efforts of the incumbent monopolist to obstruct MCI's ability to compete. *MCI Communications Corp.* v. *AT&T*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *see also United States* v. *AT&T*, 524 F. Supp. 1336, 1353–57 (D.D.C. 1981); *United States* v. *AT&T*, 552 F. Supp. at 160–63. The implementation issues in France and Germany will be at least as difficult as those in the United States.

[43] FT is a 100-percent Government-owned and -operated entity and is expected to remain Government-controlled. Although DT became a private corporation this year, the German Government is its sole shareholder and is expected to retain majority control at least through 1999. *See* CIS, 60 Fed. Reg. at 44,060.

of FT and DT—when private investors, and not the French and German governments, own FT and DT—is likely to be practical prerequisite to effective competition.

For these three reasons, and despite DOJ's apparent recognition that the serious threats to U.S. consumers and competition alleged in the complaint will continue until effective competition in France and Germany develops, the proposed consent decree fails to guard against those threats by terminating the Phase I safeguards when competition is theoretically possible but long before it becomes actually effective. It is plain, therefore, that there is a major gap in the protections afforded by the consent decree. This gap is particularly significant because it will occur during years of crucial development and innovation in telecommunications.[44] As a result, the harms to competition—and ultimately to consumers—will have long-term and extensive consequences.

Accordingly, the transition from Phase I to Phase II under the decree should take place *not* with the elimination of the legal monopolies and licensing of a competitor in France and Germany, but rather upon a *finding that there is actual, effective facilities-based competition* in France and Germany. Such a finding by DOJ—as it has proposed in other contexts[45]—should be included in the consent decree as a prerequisite to the lifting of the Phase I restrictions. Any DOJ decision concerning the state of competition in France and Germany should be preceded by a mandatory public-comment period during which intervenors are given an opportunity to present evidence to DOJ. Following consideration of public comments, the Court should adopt or reject DOJ's finding of actual, effective competition. Only if the Phase I restrictions continue until FT's and DT's monopoly power has ended can the proposed decree be effective.[46]

Extending the Phase I protections as proposed here would neither unduly burden Sprint and Phoenix nor eliminate any possible benefits of the alliance. The defendants have no legitimate interest in being the beneficiaries of discrimination or other anticompetitive behavior, and the Phase I restrictions (such as those prohibiting cross-subsidization and nonstandard interfaces) will not impair Sprint's or Phoenix's ability to compete. If French and Germany regulatory authorities eventually adopt measures parallel to the Phase I restrictions, Sprint and Phoenix would not be prejudiced merely because the same conduct would be prohibited by the consent decree, particularly because DOJ contemplates that the victim of any violation would pursue regulatory remedies in France and Germany before complaining to the Department.[47] In sum, the demonstrable harms resulting from premature expiration of the Phase I safeguards are into outweighed by any offsetting benefits.

B. Conditions Protecting U.S. Competition and Consumers Should Not Be Ended Prematurely on the Assumption That Foreign Regulators Will Provide Equivalent Protection

DOJ states that its acquiescence in the termination of the Phase I restrictions under the terms of the proposed judgment rests in part on the assumption that European regulatory authorities will protect competition from U.S. carriers trying to compete with FT's and DT's affiliates Sprint and Phoenix:

> Generally speaking, during Phase II the proposed Final Judgment relies to a greater extent on enforcement by national regulatory authorities in Europe, the EU itself, and the FCC in the United States to protect competition, while during Phase I the proposed Final Judgment provides for additional types of injunctive relief to ensure that Sprint and [Phoenix] do not benefit from anticompetitive conduct by FT and DT. * * * Although the proposed Final Judgment does not specifically reference all of the directives and measures envisioned by the European authorities, an underlying assumption is that these authorities will carry out their publicly announced intention of having all the key regulatory measures needed for development of effective competition in place by the time full liberalization is to take effect in 1998.[48]

Reliance on such assumptions is misplaced. As DOJ itself has stated, ''Foreign regulation normally should not be considered a sufficient alternative to protect U.S. consumers in the absence of any meaningful facilities-based competition, however effective that regulation may be represented to be.'' [49]

First, for the reasons explained above, even assuming implausibly for purposes of argument that the French and German governments will act affirmatively and aggressively to foster competition against the incumbent monopolists that they own, it will take time for competition to develop, and the threat to U.S. competition and consumers arising out of these monopolies, and the corresponding need for the Phase I protections, will continue until effective competition has taken root.

Second, as also explained above, because they own FT and DT, the French and German governments that also regulate FT and DT and their would-be competitors have an incentive to protect and preserve FT's and DT's monopolies and to maximize their value if their shares are ever sold to private investors. Moreover, the French and German governments have considerable flexibility not to implement procompetitive reforms. DOJ explains why:

> The EU authorities have exercised a very significant role in bringing about telecommunications liberalization in Europe, but there are important limits on the scope of their authority. The decision whether to privatize the government-owned telecommunications carriers, and the pace at which this occurs, [are] wholly at the discretion of the member states. Moreover, the EU's powers to compel liberalization and protect competition relate to activities affecting commerce within or between the member states. The decision of whether and how to regulate the dealings of FT and DT with foreign telecommunications carriers outside the EU, including the terms on which operating agreements and leased lines are made available, has been left to the French and German authorities. It is not yet clear whether the EU's liberalization measures will confer any rights on providers from the United States and other countries outside the EU, or only on firms operating within the EU. The national governments at present are free to limit entry by such non-EU competitors, subject to the results of ongoing multilateral telecommunications trade negotiations.[50]

Even if EU measures are effective in theory in preventing the risks associated with the Sprint–FT–DT transactions, France and Germany can delay adoption of those measures well beyond an EU implementation deadline. Potential regulatory changes in France and Germany are simply too uncertain to serve as the basis for expiration of the fundamental substantive protections of the decree.

Third, DOJ has an independent responsibility to enforce the U.S. antitrust laws to protect U.S. trade and U.S. consumers, and French and German regulators do not share this

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[44] *see, e.g.,* Reploy Comments of DOJ, at 10.

[45] *See* DOJ Mem. re Competition, at 28. Such a finding would require ''more than a single competitor serving niche markets.'' *ID.* at 33. Indeed, DOJ recognizes in its consent decree that such minimal competition is insufficient to prevent anticompetitive behavior. *See* Final Judgment III.B, III.I, 60 Fed. Reg. at 44,053, 44,054–44,055; CIS, 60 Fed. Reg. at 44,071, 44,073 (applying Phase I restrictions to public data networks despite existence of limited competition).

[46] It is reasonable to expect that such a finding would be possible when, at a minimum, three years have elapsed since full liberalization and privatization in France and Germany.

[47] CIS, 60 FR at 44,074.

[48] *Id.* at 44,066.

[49] Reply Comments of DOJ, at 27.

[50] CIS, 60 Fed. Reg. at 44,063.

duty or this commitment. Deferring to the French and German governments while FT's and DT's monopolies persist is inconsistent with the very premise of the proposed judgment: if such deference were appropriate, no decree at all would be necessary or appropriate. DOJ has stated: ''Regulation generally is an imperfect substitute for competition, and that is particularly true when foreign authorities are regulating government-owned monopoly carriers.'' [51] If reliance on French and German regulators to protect U.S. trade and consumers is inappropriate today, it will continue to be inappropriate until effective facilities-based competition has emerged in France and Germany.

Contrary to DOJ's suggestion, its authority to seek modification of the judgment does not solve the problem. DOJ notes that it could seek modification pursuant to section VIII.A ''if, after the termination of Phase I, discrimination * * * or other types of conduct occur that would have been prohibited under the Phase I restrictions, resulting in a substantial harm to competition.'' [52] Before seeking modification, DOJ ''would ordinarily inquire at the outset whether injured competitors had availed themselves of existing regulatory remedies, if any, in France or Germany as well as the United States, and what relief had been provided or action taken, if any. * * *'' [53] In other words, DOJ recognizes a substantial possibility that the French and German governments will not take the actions necessary to permit effective competition to develop against FT and DT, and if its current hopes thereby turn out to be unfounded, DOJ in effect commits itself to seeking modification of the judgment.

This approach does not protect the public interest. The purpose of the Phase I protections is to prevent competitive harm from occurring, not merely to provide an after-the-fact remedy. Reimposing Phase I protections after protracted modification proceedings would be too little too late, and the judgment would provide no substantive protection for competition by U.S. carriers from the end of Phase I until DOJ prevailed on its modification motion. Moreover, the kind of modification proceeding that DOJ contemplates would put it and the Court in the position of evaluating the efficacy and reasonableness of specific French and German regulations. Such a review would not promote the interests in international comity espoused by DOJ.[54] For these reasons, reliance on possible future modification of the judgment to solve the problem of future anticompetitive conduct would undermine the purposes of the judgment.

The simpler, more direct, and more effective approach is to continue the Phase I protections until effective competition develops. Reliance on a hope that the French and German governments will provide equivalent protection of U.S. trade and consumers once they license one competitor would embroil DOJ and the Court in difficult enforcement and modification issues in the likely (if not inevitable) event that this hope turns out to be unrealistic.

C. Making Termination of Phase I Restrictions Dependent on the Development of Effective Competition Is Consistent With the Decree Entered in Connection With the MCI–BT Alliance

As DOJ acknowledges, there are ''crucial differences between this transaction and the BT–MCI alliance.'' [55] These differences make it clear that modifying the proposed decree to retain the Phase I restrictions until effective competition develops in fact and not merely in theory is entirely consistent with, if not compelled by, the decree entered in connection with the MCI–BT transaction.

At the time of the MCI–BT transaction, BT's position in the United Kingdom's telecommunications market was dramatically different from the current positions of FT and DT in their home markets:

> Although BT continued to have some market power in basic telecommunications services and facilities and control over local bottlenecks in the United Kingdom at the time it formed its alliance with MCI, *all of its lines of business were already open to competition and BT actually faced facilities-based competition to some extent at all levels,* from independent carriers and cable television companies. Moreover, since 1993 BT has ceased to be government-owned, so that it is independent from its government regulator in the United Kingdom.[56]

In stark contrast, FT and DT have legal monopolies over all basic voice services—and over three-quarters of *all* telecommunications business—in their markets; they do not face facilities-based competition in the small segments in which it is legally permitted; and they are government-owned entities with no independent regulators.[57]

The size of the proposed Sprint-FT-DT alliance magnifies its anticompetitive risks. The combined revenues of Sprint, FT, and DT were approximately $85 billion in 1994, more than twice the total revenues of MCI and BT.[58] France and Germany represent two of the three largest telecommunications markets in the European Union; together they are more than twice the size of the U.K. market. The proposed alliance would have a significant portion of the overall European market as a protected base from which to operate.

DOJ purports to provide for these differences between the Sprint-FT-DT alliance and the MCI–BT alliance by imposing the Phase I safeguards until competition is legally permitted in France and Germany and then by imposing Phase II requirements that generally parallel the injunctive provisions in the MCI-Concert decree.[59] However, as explained above, the most significant problem with the proposed decree is that the Phase I restrictions are lifted before the actual development of facilities-based competition in France and Germany. To be consistent with the MCI-Concert decree, the Phase I restrictions on Sprint and Phoenix should continue until there is as much competition in France or Germany as there was in the United Kingdom at the time the MCI-Concert decree was entered. At that time, it would be appropriate to implement the Phase II restrictions comparable to the restrictions in the MCI-Concert judgment.

IV. Conclusion

For the foregoing reasons, the consent decree as currently proposed fails to remedy the antitrust violation alleged in the complaint and therefore is not in the public interest. The decree should be modified to provide that the restrictions imposed in Phase I remain in effect until actual, effective facilities-based competition is found to exist in France and in Germany.

Respectfully submitted,

MCI Communications Corporation.

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[51] Reply Comments of DOJ, at 27.

[52] CIS, 60 Fed. Reg. at 44,074.

[53] *Id.*

[54] *Id.* at 44,076.

[55] *Id.* at 44,065.

[56] *Id.* (emphasis added).

[57] *Id.*

[58] *Id.* at 44,059.

[59] *Id.* at 44,065.

Dated: October 23, 1995.

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Comments of BT North America Inc. to the U.S. Department of Justice Regarding the Proposed Final Judgment

United States of America, Plaintiff, v. *Sprint Corporation and Joint Venture Co.,* Defendants.

[Civil Action No. 95–1304 (TPJ)]

Dated: October 23, 1995.

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Exhibit C

Comments of BT North America Inc. to the U.S. Department of Justice Regarding the Proposed Final Judgment

[Civil Action No. 95–1304 (TPJ)]

United States of America, Plaintiff, v. *Sprint Corporation and Joint Venture Co.,* Defendants.

I. Introduction

A. Background

In response to the public notice [1] issued under the Antitrust Procedures and Penalties Act (or Tunney Act),[2] BT North America Inc. (''BTNA'') submits these comments on the proposed Final Judgment or Decree. The Complaint and Decree relate to the proposed twenty percent investment by France Télécom (''FT'') and Deutsche Telekom AG (''DT'') in Sprint Corporation (''Sprint'') and the three companies' proposed formation of a Global Partnership. The Complaint defines their Joint Venture Company (''JVCo'') as ''all entities to be formed as a joint venture between Sprint, DT, and FT under the terms of the Joint Venture Agreement when that agreement is consummated, including the governing bodies of such venture.''[3] The overall set of transactions is sometimes referred to as the Phoenix Alliance, to distinguish it from another proposed alliance between FT and DT called Atlas.

BTNA, a wholly owned subsidiary of British Telecommunications plc (''BT''), is authorized by the Federal Communications Commission to operate as a United States international resale carrier. BT is a domestic and international telecommunications provider in the United Kingdom (''UK'') and, through subsidiaries and affiliates, elsewhere in the world. BT has a twenty percent investment in US carrier MCI Communications Corporation (''MCI'') and has formed an international joint venture with MCI known as Concert Communications Company (''Concert'').[4] MCI and Sprint are facilities-based competitors in the provision of US international telecommunications service, including to France and Germany. As distributors of Concert services, BT (including BTNA as a US reseller) and MCI will be direct competitors of Sprint, FT, and DT as distributors of JVCo services, if the Phoenix Alliance is consummated. Where permitted by law, BT has been endeavoring, directly or through joint ventures, to compete against FT and DT on the European Continent. BTNA qualifies under Section V.F. of the proposed Final Judgment as a US international telecommunications service provider that ''directly or through a subsidiary or affiliate'' holds or has applied for a US, French, or General license, or actually provides service that does not require a license, involving the US-France or US-Germany route.[5]

B. Overview of the Problems With the Proposed Decree

As explained in considerable detail in Part II of these Comments, the proposed Final Judgment requires clarifications and modifications in many important respects. With respect to the needed modifications, four inter-related themes are paramount.

First, the Final Judgment should be rewritten so that the transactions may not be consummated unless and until certain minimum French and German laws and rules are in place. For example, if France and Germany are actually preparing legislation and regulations allowing alternative infrastructure (such as utility owned private networks owned by railroads and electric utilities) to be used for public telecommunications services other than switched voice, [6] and if (as the parties maintain [7]) those governments are not far behind in preparing laws and regulations allowing facilities-based competition in public switched voice, why not condition consummation of the transactions on the prior completion of those efforts?

Second, excluding FT and DT as parties to the Final Judgment is very problematic. In many cases, defendants Sprint and JVCo will be able to turn a blind eye to discrimination or other impermissible activity by FT and DT toward others that benefits Sprint and JVCo. This is because it is too easy under the Decree for Sprint and JVCo to claim they lacked sufficient information to actually know that something was amiss in FT's or DT's conduct toward others. After all, there is nothing in the proposed Decree binding *FT and DT* to disclose to Sprint, JVCo, or anyone else critical information that would unmask FT's and DT's wrongdoing. Additionally, because FT and DT are not defendants, the Decree focuses upon forbidding Sprint and JVCo to undertake certain activity until FT and DT conduct themselves in a specified way *vis-à-vis* rivals. This backhanded approach, made necessary because FT and DT are not defendants, will tend to postpone desirable technological progress and innovation until Sprint and JVCo have caught up with, and are prepared to compete against, their more pioneering competitors. A direct approach, binding FT and DT as parties to the Decree, would avoid allowing Sprint and JVCo to control the pace of industry progress.

Third, and very important, in several places the proposed Decree improperly assumes that the mere issuance of ''one'' license (or the execution of ''one'' operating agreement) evidences so profound a change in competitive circumstances as to justify automatic lifting of key Decree safeguards. (The phrase ''one or more'' licenses, as used in the proposed Decree, does not disguise the fact that ''one'' is legally sufficient.) Indeed, there is no Decree requirement that the ''one'' licensee be

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[1] 60 Federal Register (FR) 44049 (August 24, 1995).

[2] 15 U.S.C. 16(b)–(h).

[3] Complaint ¶ 24; see also the definition of ''Joint Venture Co.'' as multiple ''entities'' in Section V.O. of the proposed Decree. The Stipulation (¶ 6 thereof) filed on July 13, 1995, contemplates that JVCo will be created as ''a legal entity'' and will execute the Stipulation. 60 FR at 44050.

[4] BT's investment in MCI and their formation of Concert were investigated by the Antitrust Division of the Department of Justice (''DOJ'') and were allowed to go forward subject to a consent decree. *See United States* v. *MCI Communications Corp. & BT Forty-Eight Co.,* 1994–2 Trade Cas. (CCH) ¶ 70,730 (D.D.C., final judgment entered September 28, 1994) (''*BT–MCI* Final Judgement'').

[5] BTNA is licensed by the FCC, inter alia, to resell switched services and non-interconnected private lines between the US and France and Germany. *See BT North America, Inc.,* FCC File No. I–T–C–93–126, DA 94–1257 (Chief, Int'l Bur., released November 14, 1994).

[6] *See* ''Germany, France Agree to Liberalize Phone Markets as Part of Sprint Venture,'' *Wall Street Journal,* October 13, 1995, at A10.

[7] *See Sprint Corp.,* FCC File No. ISP–95–002, Reply Comments of France Télécom (September 15, 1995) at 17–19; Reply Comments of Deutsche Telekom (September 15, 1995) at 2–3, 25–26.

a major competitor and not a weak neophyte or even a shill. Thus, under Section II.C., the issuance of an individual license to ''one or more'' other US provider(s) could unleash Sprint and JVCo to offer their US-French/German services even though all other significant US competitors are still knocking on the French and German authorities' doors for essential licenses.[8] And, Section III's crucial provisions restricting unequal access to facilities ownership, prohibiting discrimination and cross-subsidization, mandating proportionate returns, and ensuring equal technical access to public network interconnection, all expire when Phase I of the Decree terminates—which is when, among other things, ''one or more'' entities is/are licensed to provide facilities-based public switched voice services (Section V.Q.(2)).

Fourth, as noted, Section III's protections automatically expire at the end of Phase I when FT's and DT's public infrastructure and switched voice monopolies formally terminate and ''one'' competing license issues. Yet, nothing in the definition of Phase II assures that the French and German governments will have in place from that point forward adequate regulations, properly enforced, to prevent discrimination, cross-subsidization, disproportionate returns, etc. DOJ admits the ''proposed Final Judgment'' rests on the ''underlying assumption * * * [that] all the key regulatory measures needed for development of effective competition [will be] in place by the time full liberalization is to take effect in 1998.'' [9] There is absolutely no warrant for DOJ's giant leap of faith that market-opening measures inevitably will be accompanied by EC and national regulation fully adequate to prevent FT and DT from abusing their enormous market power. Nor, given the persisting government equity interests in FT and DT (and indirectly in Sprint and JVCo), is there any basis to presume that the national regulators will have the full independence or proper inclination to provide sufficiently vigorous and impartial regulation as to adequately replace Section III of the Decree.

C. DOJ's Discretion to Withdraw and Renegotiate the Decree

The proposed Decreed was developed without benefit of the insights of any affected industry members other than Sprint (and presumably FT and DT). Now that it has received this and other Tunney Act comments, DOJ should take a fresh look at the document. Whatever limits the case law may place on a court's ability to reject a proffered antitrust consent decree,[10] those limits do not apply to the Department of Justice. Paragraph 2 of the July 13, 1995 Stipulation says unmistakably: ''Plaintiff may withdraw its consent to entry of the Final Judgment at any time before it is entered, by serving notice on the defendants and by filing notice with the Court.''

While a reviewing court may have discretion to reject a proposed decree on public interest grounds only if the decree is not ''within the reaches of [the] public interest,''[11] DOJ has the discretion and the duty, particularly after receiving extensive public comment from expert (albeit interested) industry participants, to determine anew whether the proposed Decree is satisfactory or whether the antitrust laws require additional or changed language. There is ample precedent for DOJ modifying a proposed decree and seeking the defendants' consent to essential changes.[12] If defendants are absolutely unwilling to accept needed changes, that alone may reveal something about defendants' hidden motivations or agenda and reinforce DOJ's conviction that the changes are absolutely vital to protect competition and the public interest. In any case, no harm will come from DOJ proposing further discussions among the Decree parties regarding such possible modifications.

Moreover, the parties to the proposed Decree must recognize that the district court's authority is not zero. ''A decree, even entered as a pretrial settlement, is a judicial act, and therefore the district judge is not obliged to accept one that, on its face and even after government explanation, appears to make a mockery of judicial power.'' [13] This Decree will be reviewed by the court to see whether the remedies proposed are ''inconsonant with the allegations.'' [14] Moreover, in determining whether to approve a proposal, the court is supposed ''to pay close attention to the compliance mechanisms in [the] consent decree.'' [15] The court also ''should pay special attention to the decree's clarity'' or lack thereof.[16] The judge ''is certainly entitled to insist on that degree of precision concerning the resolution of known issues as to make his task, in resolving subsequent disputes, reasonably manageable.'' [17]

As Part II of these Comments brings out, there are a number of instances in which the remedies proposed fall so far short of correcting or preventing the anticompetitive problems described in the Complaint, that the decree, unless significantly modified, will not be within the broad ''reaches'' of the public interest. Further, there are major loopholes, gaps in logic, and facial inconsistencies and ambiguities that must be addressed and resolved before the court would be right to approve the proposal.

II. The Proposed Final Judgment Must be Withdrawn and Substantially Modified and Clarified to Come ''Within the Reaches of the Public Interest''

A. The Phase I and II Equal Licensing Opportunity Provision (Section II.C.) Requires Modification and Clarification

Section II.C. of the proposed Final Judgment is intended to ensure, throughout Phases I and II, that US international telecommunications service providers receive equal opportunity with Sprint, JVCo, and their affiliates, in access to essential French and German licenses and other forms of governmental authorization. Before discussing several fundamental deficiencies in Section II.C.—which must be corrected, it should be useful to review how central this matter of licensing is to remedying the competitive problems described in the Complaint.

The Complaint asserts that the transactions at issue will substantially lessen competition by giving FT and DT increased incentives and ability to use their government-granted monopolies and market power to discriminate against competitors of Sprint and JVCo.[18] This discrimination, which can take many forms, will raise competitors' costs and diminish the quality and quantity of their services—all to the detriment of consumers.[19] FT and DT have government-granted monopolies encompassing essentially all

[8] *See* pages 18–19, *infra.*

[9] *Id.* at 4406.

[10] *See US* v. *Sprint,* Competitive Impact Statement (''CIS''), 60 F.R. at 44076–78.

[11] *See id.* at 44077, *quoting, 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).

[12] *See, e.g., United States* v. *United Technologies Corp.*, No. 78 CV 580 (S.D. N.Y.), DOJ Responses to Comments, 46 F.R. 8787, 8789, 8798 n.3 (January 27, 1981) (modifying proposed antitrust consent decree in response to public comments); *United States* v. *National Broadcasting Co.*, Civil Action No. 74–3601–RJK (C.D. Cal.), Stipulation of May 4, 1977 (modifying proposed antitrust consent decree after public comment), 42 F.R. 24996, 24997–98 (May 16, 1977).

[13] *United States* v. *Microsoft Corp.*, 56 F. 3d 1448, 1462 (D.C. Cir. 1995).

[14] *Id.* at 1461.

[15] *Id.* at 1462.

[16] *Id.* at 1461.

[17] *Id.* at 1462.

[18] *Id.* ¶ 40.

[19] *Id.*

international and domestic public telecommunications infrastructure (excluding certain mobile telephone and satellite radio facilities) and the provision of public switched voice services.[20] Although their legal monopolies over international and domestic public data transmission have recently expired, FT's and DT's well-established and ubiquitous public data networks retain nearly 100 percent monopoly market shares.[21]

For the immediate future, then, any competitor wishing to provide public telecommunications voice, data, or other value-added services between the US and France or Germany is dependent upon FT and DT for their cooperation and much more.[22] In the case of bilateral correspondent services where each corresponding carrier is responsible only for its end, US providers need FT and DT to provide the requisite French or German connecting international half-circuits and also domestic circuits terminating communications in those countries or transiting them to third country.[23] For services that do not qualify as traditional bilateral correspondent services, such as seamless end-to-end services, US providers need to obtain from FT and DT leased international half-circuits and domestic French and German private lines, as well as interconnection to each country's public switched telephone network (PSTN) for voice services and public switched data networks for many data services.[24]

The Complaint recognizes that the European Union (EU) may eventually require France and Germany to allow entry by additional providers of public telecommunications infrastructure and switched voice services.[25] The Complaint also notes, however, that the same French and German governments that own FT and DT will have to develop licensing and interconnection regulatory regimes and actually issue licenses and other authorizations before ''real competition'' truly exists.[26]

Section II.C. purports to address the risk that French and German licensing requirements and processes will be used in ways that discriminate against US competitors of Sprint and JVCo.[27] This is a very substantial risk for two reasons. First, the French and German governments are the sole owners, and are pledged to remain the controlling owners, of FT and DT respectively.[28] These ownership interests give the two governments strong financial incentives to favor FT and DT and the entities those governments will indirectly own in part, i.e., Atlas, JVCo, and Sprint. Second, even if those governments were to drastically revise their laws so as to fully insulate the licensing bodies from such conflicts of interest, FT and DT will have strong incentives to use (or misuse) the licensing requirements and processes to discourage, delay, and defeat the licensing of rivals. Section II.C. falls so far short of the mark in preventing anticompetitive licensing discrimination that it must be modified in several crucial respects and clarified in certain other respects.

Specifically, the situation Section II.C. must more adequately address is when a competitor of Spring or JVCo needs to secure a French or German individual license in order lawfully to offer a particular telecommunications service between the US and France or Germany. For example, suppose MCI seeks to offer an end-to-end Concert-branded service between the US and France that would require MCI or Concert (or BT on behalf of MCI or Concert) to obtain an individual license covering all or part of the French end.[29] It is essential that Section II.C. be modified so that: (1) an individual license will be issued promptly even if Sprint and JVCo are not sufficiently technologically advanced to offer a directly competing service; (2) the individual license is not burdened with discriminatory terms and conditions; (3) unfair delay in issuing the individual license cannot be justified on the ground that French and German authorities have already licensed ''one'' other unaffiliated US provider, however weak and insignificant that provider may be; and (4) the license-issuing process cannot be skewed to give Sprint and JVCo an unfair headstart.

1. Failure to Precondition Consummation of the Transactions Upon Actual Accomplishment of Regulatory Reforms in France and Germany

A key flaw in Section II.C. is its failure affirmatively to require that, as *a prior condition* of the parties' consummating the FT/DT investments in Sprint and the formation of JVCo, nondiscriminatory requirements and procedures for prompt French and German licensing of US international providers must be established and in place for all services (except, regrettably, still-monopolized public switched voice services). Instead, Section II.C. comes at the problem indirectly and, unfortunately, much less effectively.

Section II.C. bars Sprint and JVCo from offering (or providing facilities enabling FT or DT to offer) ''any particular * * * service'' between the US and France or Germany unless (1) US competitors seeking to offer ''such a service'' do not need a license (or other authorization) for any French or German aspect of the service, or (2) the requisite French or German class license is in effect for US providers, or (3) French or German individual licensing procedures are established ''as of the time'' Sprint and JVCo begin offering ''such a service.'' Given Section II.C.'s oblique approach to the problem, France and Germany (motivated perhaps by their direct ownership interests in FT and DT and indirect interests in Sprint and JVCo) can delay determining whether a license is required, can delay placing a class license in effect, and can delay adopting individual licensing procedures, until FT, DT, Sprint, JVCo, and their affiliates, are ready to offer the ''particular * * * service'' themselves. Thus, US consumers of US-French/German telecommunications services can be denied the benefits of early innovation and competition from pioneering entities outside the Sprint alliance while French and German authorities postpone essential decisionmaking needed by those entities. In effect, Section II.C. lets FT, DT, and Sprint control the pace of innovation and progress on the US-French/German routes to suit their own parochial economic interests and schedule.[30]

[20] *Id.* ¶¶ 25–26, 31–32, 34–35.

[21] *Id.* ¶¶ 33,36.

[22] *Id.* ¶¶ 31–36

[23] *Id.* ¶¶ 31, 34.

[24] *Id.* ¶¶ 31–36.

[25] *Id.* ¶ 37.

[26] *Id.*

[27] *United States* v. *Sprint Corp.*, Competitive Impact Statement (CIS), 60 F.R. at 44049, 44058, 44069–70.

[28] Complaint ¶¶ 2, 25, 26; CIS, 60 F.R. at 44065; Statement by French Minister Fillon, August 30, 1994 (''a majority of [FT's] capital will remain held by the public sector''), attached to Sprint Corp. *ex parte* letter, *Sprint Corp.*, FCC File No. ISP–95–002 (filed September 28, 1995); Speech and Responses to Questions by German Minister Bötsch, National Press Club, Washington, D.C., April 3, 1995 (German government intends to retain majority control of DT), recorded on Dow Jones Investor Network videotape.

[29] Under the current monopoly regime, the French license might be for the right to offer ''bearer services,'' e.g., packet switched data services over international half-circuits and domestic private lines leased from FT. *See* Complaint ¶ 33. After FT's legal monopoly over public voice and infrastructure is abolished, the French license might be to offer public switched voice services over international and domestic circuits owned by the licensee or leased by the licensee from FT or its new infrastructure competitors.

[30] The problem is exacerbated by Section II.C.'s reliance on the term ''particular * * * service.'' The Section seems to presume that the only competitive alternative to a ''particular * * * service'' is ''*such* a service'' (emphasis added), i.e., *an identical type* of service provided by a rival. This creates a serious

To be sure, US authorities probably lack the authority to impose requirements directly upon foreign states' licensing authorities. But where foreign states own controlling interests in commercial entities that seek to invest in and form a joint venture with a US international carrier (here Sprint), US authorities have the jurisdiction and the statutory obligation to *prevent that investment and joint venture from occurring* unless and until the foreign sovereign authorities have taken adequate legal actions in their own jurisdictions to ensure fair competition.[31] The proposed decree should be modified to accomplish that objective.

2. Failure to Specify That Individual Licensing Must be Nondiscriminatory

A second serious flaw is the failure of subparagraph 3 of Section II.C. to require explicitly that individual licensing procedures be nondiscriminatory, substantively and temporally. The provision says that the Sprint/JVCo ''particular * * * service'' offering may not proceed unless:

> 3. If an individual license is required in France or in Germany to offer such a service, *established licensing procedures* are in effect as of the time of the offering of the service by which other United States international telecommunications providers are also able to secure such a license * * *. [Emphasis added.]

The provision may intend that the ''Licensing procedures'' be evenhanded and nondiscriminatory, but it does not unequivocally say so—which it should. The provision needs to be modified to read ''established licensing procedures (either the same as, or no more demanding of the prospective licensee than, those procedures applicable to the particular service offering of Sprint, Joint Venture Co., FT, or DT) * * *''.

To ensure no temporal discrimination, the phrase ''as of the time of the offering of the service'' should be modified so that the Sprint group does not receive an unfair headstart. The phrase should read: ''as of the time that Sprint, Joint Venture Co., FT, DT, or their affiliate applied for the requisite license * * *.'' Otherwise the Sprint group could complete the licensing process and be poised to offer the service before rival U.S. providers would even be able to submit their license applications.[32]

Finally, to ensure that rival U.S. providers are not subject to unfair discriminatory conditions, the phrase ''such a license'' should be rewritten to say: ''such a license (with requirements and conditions no more onerous than those imposed on Sprint, Joint Venture Co., FT, DT, or their affiliate).'' Without this amendment, the whole provision could be severely undercut, for example, by France or Germany imposing unfairly discriminatory license or interconnection fees, geographic requirements or limitations, service eligibility restrictions (such as satellite-only when terrestrial is needed), universal service obligations or contributions, and the like, upon the other U.S. providers.

3. Failure to Require That More Than One U.S. Provider Besides Sprint and JVCo be Licensed

One of the most troubling loopholes in Section II.C. relates to the second part of subsection 3 which, as now written, can be satisfied in either of two ways: (i) simultaneous or earlier licensing of other U.S. providers(s), or (ii) later licensing. The pertinent language is:

> * * * and (i) *one or more* United States international telecommunications providers other than FT, DT, Sprint or Joint Venture Co. and unaffiliated with FT, DT, Sprint or Joint Venture Co. have secured such a license in France and in Germany, *or* (ii) if Sprint or Joint Venture Co. or FT or DT is the first provider to seek a license to offer such a service, other United States international telecommunications providers are also able to secure such a license *within a reasonable time and in no event longer than the time it took Sprint, Joint Venture Co., FT, or DT* to obtain such a license, after having applied for such a license, *unless* the additional time required is attributable to *delay caused by the applicant*. [Emphasis added.]

Alternative (i) is met if ''one or more'' US providers other than Sprint, JVCo, *et al.*, actually ''have secured a license.'' Clearly the word ''or'' in the phrase ''one or more'' is used here in the disjunctive sense; consequently, the words ''or more'' add nothing mandatory to Section II.C.3.(i)'s requirement. Doubtless Sprint and JVCo will claim that Section II.C.3(i) is fully satisfied if a license is issued to only ''one'' unaffiliated US provider, no matter how weak or inconsequential that provider is.[33] Thus, AT&T, BTNA, Concert, MCI, IDB, Worldcom, MFS, ACC, and other significant competitors could find their license applications held up indefinitely, so long as a single heretofore unknown, unaggressive, resource-limited US provider has the one other license besides the Sprint group.

Subsection (i) absolutely must be rewritten to increase significantly the minimal number of required licenses. As the Complaint itself says: ''Mere lifting of the legal prohibitions on competition would not alone bring about real competition, since actual *competitors* [sic] must also be licensed to operate.'' [34] To ensure that the minimal number of licensees includes significant competitors, certainly the major US carriers AT&T and MCI (or their affiliates, such as Concert or BT for MCI) should have to have been proffered licenses before Sprint and JVCo could proceed with their offering.[35] The minimal number should

problem illustrated by the following example. Assume Sprint and its allies are content to offer a certain level of enhanced voice service on a correspondent basis with FT and DT subject to a certain accounting rate that keeps settlement rates and retail prices up. If another US carrier wanted to undercut the Sprint correspondent service by offering an end-to-end enhanced voice service on a non-correspondence or self-correspondence basis, Section II.C. (absent modification or clarification) would seem of no help. This is because the new service probably would not be considered ''such a service'' as the ''particular * * * service'' offered by Sprint.

[31] The situation here is totally distinguishable from that in *United States* v. *MCI Communications Corp. and BT Forty-Eight Company*, Civil Action No. 94–1317 (D. D.C., filed June 15, 1994). At the time of the consent decree settling that matter, the United Kingdom no longer owned a significant interest, much less a controlling interest, in BT. See *U.S.* v. *Sprint Corp.*, CIS, 60 F.R. at 44065. Consequently, the British government and its licensing and regulatory authorities (DTI and OFTEL) had no economic or financial interest in BT, MCI, or their joint venture.

[32] The modification proposed in the text presumes that Sprint, JVCo, FT, or DT, as the case may be, must secure ''an individual license'' before any Phoenix Alliance entity (including Atlas) may offer the particular U.S.-France/Germany service. DOJ should confirm that, if ''an individual license'' must be obtained by other U.S. providers (or their affiliates), then the Decree also requires one of the Phoenix entities to apply for and obtain a comparable ''individual license.'' DOJ needs to clarify that the Phoenix entities may not simply operate their service over FT's and DT's pre-existing telecommunications operators' licenses thereby evading the equal opportunity intent of Section II.C.

On the other hand, if the Decree contained a loophole allowing the Phoenix entities to bypass applying for any new French and German licenses and permitting them to rely solely upon FT's and DT's pre-existing operators' licenses, then some modification or clarification of Section II.C. would be essential. First, DOJ would need to clarify that Section III.C.3. applies even when the relevant ''individual license[s]'' for the Phoenix group are FT's and DT's pre-existing operators' licenses. Second, Section III.C. would need to be revised to impose on the Phoenix group a reasonable moratorium preventing Sprint and JVCo from offering the U.S.-France/Germany service (or providing facilities enabling FT or DT to offer that service) until the requisite ''individual licens[ing]'' procedures that other U.S. providers must go through had been ''established'' long enough that any providers applying promptly after those procedures took effect would also be licensed.

[33] Alternative (ii) in Section II.C.3. cannot be relied upon to close any loophole left available under alternative (i). Separated by the disjunctive ''or,'' subsections 3(i) and 3(ii) clearly are alternatives; both need not be satisfied, only one.

[34] Complaint ¶ 37 (emphasis added).

[35] Section II.E. of the Final Judgment in the BT–MCI matter required that the UK grant UK–US

Continued

be *three*.[36] Moreover, Section II.C.3. should be rewritten so that the revised first part of subsection 3 becomes the first requirement, the revised subsection (i) becomes the second requirement, and a revised subsection (ii) (discussed *infra*) becomes the third requirement.[37]

If subsection 3(ii)'s timely future licensing concept were retained as a complete alternative to the concept of simultaneous (or previous) licensing of competitors, it would open a potentially very significant loophole. Subsection 3(ii) requires licensing of Sprint's and JVCo's rivals ''within a reasonable time.'' If it turns out later (after Sprint and JVCo begin offering service) that US rivals remain unlicensed even though a reasonable time has expired,[38] the horse will be long gone from the barn and hardly susceptible to quick capture and return. The prospect that the court would actually order Sprint and JVCo to stop service to customers (and indeed terminate their contracts) seems quite remote—although that would be the correct result under the proposed decree. Thus, there is a substantial practical risk that subsection 3(ii) violations would not be remedied soon enough, if ever. To avoid that problem, it is important that *both* subsections 3(i) *and* 3(ii) be made separate mandatory obligations that stand on their own. In that way, there will be licensed competitors (three under our alternative approach, perhaps only one under the proposed Final Judgment) even if subsequent licensing of others is delayed.

4. Need To Require That All Subsequent License Applications be Processed at Least as Promptly as Sprint's and JVCo's

As explained *supra*, both subsections 3(i) and 3(ii) should be mandatory provisions, not optional alternatives to compliance with each other. Subsection 3(i), after being rewritten in the mandatory language we suggest, would require that at least three US international providers (or their affiliates) be licensed *before* Sprint and JVCo may offer their service. Subsection 3(ii), in turn, would require prompt processing of any *later-filed* applications by additional US providers beyond those licensed in accordance with subsection 3(i).

When rewritten, subsection 3(ii) should also be clarified in one important respect. As now written, the provision requires the license to issue ''within a reasonable time * * * unless the additional time is attributable to delay caused by the applicant.'' The provision should say ''*solely* attributable'' to take care of the situation where the French or German government imposes unfairly discriminatory conditions or information requirements and the applicant refuses to acquiesce in the discrimination, thus resulting in delay.[39]

* * * * *

To summarize the foregoing points, here is how Section II.C.3. should read in full:

3. If an individual license is required in France or in Germany to offer such a service (or one competitive with it),

(i) established licensing procedures (either the same as, or no more demanding of the prospective licensee than, those procedures applicable to the particular service offering of Sprint, Joint Venture Co., FT, or DT) are in effect as of the time that Sprint, Joint Venture Co., FT, DT, or their affiliate applied for the requisite license for the offering of the service, by which procedures other United States international telecommunications providers are also able to secure such a license (with requirements and conditions no more onerous than those imposed on Sprint, Joint Venture Co., FT, DT, or their affiliate); and

(ii) at least three major United States international telecommunications providers (including minimally AT&T and MCI or their affiliates) other than FT, DT, Sprint or Joint Venture Co. and unaffiliated with FT, DT, Sprint or Joint Venture Co. have secured such a license (with requirements and conditions no more onerous than those imposed on Sprint, Joint Venture Co., FT, DT, or their affiliate) in France and in Germany; and

(iii) other United States international telecommunications providers are also able to secure such a license within a reasonable time and in no event longer than it took Sprint, Joint Venture Co., FT or DT to obtain such a license, after having applied for such a license, unless the additional time is solely attributable to delay caused by the applicant.

B. Phase I's Facilities Ownership Prohibitions (Sections III.A.–B.) Must Be Modified and Clarified in Key Respects

Sections III.A.–B. are intended to ensure that, throughout Phase I of the Final Judgment, Sprint and JVCo gain no unfair advantage from FT's and DT's continuing government-protected infrastructure monopolies. Thus, Section III.A.(i) prevents Sprint and JVCo from ''acquiring an ownership interest in, or control over,'' facilities ''in'' France or Germany that are ''legally reserved to FT or DT.'' Section III.A.(ii) forbids Sprint and JVCo from ''acquiring an ownership interest in, or control over,'' international half-circuits ''terminating in France or Germany'' that are used for US traffic unless: (1) those half-circuits are ''no greater than the aggregate quantity'' that ''other providers unaffiliated with FT, DT, Sprint, or [JVCo] actually own and control,'' or (2) DOJ agrees that ''meaningful competition exists to such international half-circuits provided by FT or DT.'' Section III.B. prohibits Sprint and JVCo from investing in or controlling FT's and DT's Public Data Networks.

Phase I (as well as each of the foregoing Section III.A.–B. restrictions) expires on a country-specific basis when the relevant French or German government (1) removes all of the legal prohibitions on public infrastructure and switched voice competition and (2) licenses ''one or more'' entities unaffiliated with FT, DT, Sprint, and JVCo to (i) construct, own, and control domestic and international infrastructure, and (ii) provide switched domestic long distance voice services ''without any limitation on geographic scope or types of services offered'' and ''international voice service[s]'' between the US and that country. *See* Sections V.P.–Q. for definitions of Phases I and II.

To avoid the very sorts of anticompetitive problems described in the Complaint (discussed *supra*), these provisions must be modified and clarified in certain key respects.

1. ''Ownership Interest'' and ''Control'' Need Clarification

Section III.A. uses the terms ''own,'' ''ownership interest,'' and ''control.'' ''Control'' is defined to exclude ''publicly available leases or other publicly available uses of such facilities.'' ''[O]wn'' and ''ownership interest'' are not defined.

DOJ should clarify what constitutes an ''ownership interest'' or ''control,'' as

international simple resale (ISR) licenses to ''all qualified United States international telecommunications providers'' before MCI or Concert could provide BT facilities or services for a UK–US ISR offering. At the time, *seven* such US providers were identified. See *US* v. *MCI*, CIS, 59 F.R. 33009, 33021 n.12.

[36] If at least three US competitors or their affiliates do not seek licenses or are ''gaming'' the process to slow their own applications, presumably DOJ, the other parties, and the Court can agree to waive the requirement-of-three. See Section VIII.A.

[37] To be consistent with the anti-discrimination change that should be made in the first part of subsection 3, the revised second requirement (currently subsection 3(i)) should say: ''secured such a license (with requirement and conditions no more onerous than those imposed on Sprint, Joint Venture Co., FT, DT, or their affiliate).''

[38] The delay may be unexplained or may be attributable to various anticompetitive explanations, including the attempted imposition of discriminatory conditions on the rivals of Sprint and JVCo.

[39] DOJ should make clear that, in some situations, a ''reasonable time'' may actually be shorter than the time taken for processing the application of Sprint, JVCo, FT, or DT. Presumably action on that application will have resolve most or all general regulatory issues, permitting much faster processing of subsequent applications filed by others.

distinguished from ''publicly available leases [and] * * * uses.'' In the case of undersea cables, certainly an entity that holds title to the cable, or owns an equity interest in the corporation, partnership, or venture that holds title to the cable, has an ''ownership interest'' for purposes of Section III.A. Cable investments in the form of indefeasible rights of use (IRU) are long-term non-management rights generally obtained through private negotiation with the cable owner(s). IRUs provide ''control'' over half-circuits and should not be excluded from Section III.A. as ''publicly available leases or * * * uses.'' With respect to satellites used for international telecommunications, generally the owner is an international organization of sovereign states. Each member state commonly designates a single signatory carrier to obtain long-term transponder allotments. Surely the entity that either owns the satellite (or transponder) or signs a commitment for the transponder allotment ''owns'' or ''controls'' the uplink and downlink half-circuits in its country within the meaning of Section III.A.

Clarification along the foregoing lines is needed so that Sprint and JVCo are not able to find a loophole in Section III.A. that permits them to gain an anticompetitive cost advantage over competitors that lack their close affiliation with FT and DT. FT and DT are the only undersea cable owners (or IRU holders) ad international satellite signatories in France and Germany as of now.[40] Competition would be severely distorted if FT or DT could favor Sprint or JVCo with special cable IRUs and/or satellite circuit allotments priced at book value or some other level far under the long-term lease rates ''publicly available'' to their competitors.

2. The ''Aggregate Quantity'' Exception Requires Clarification

The first exception to Section III.A.(ii) says: ''except to the extent that, and in no greater than the aggregate quantity that, other providers unaffiliated with FT, DT, Sprint or Joint Venture Co. actually own and control such international half-circuits.'' The most reasonable reading of this exception is that Sprint and JVCo may own or control only the ''aggregate[d] quantity'' of half-circuits that any *single* ''other provider[]'' owns or controls. If, however, the provision enables Sprint and JVCo to own or control as many half-circuits as *all* ''other providers'' in the ''aggregate'' own or control, then the provision must be modified for the following reason. If half-circuit ownership is split among many ''other providers,'' Sprint and JVCo with far greater capacity than any other competitive provider will easily be able to divide and conquer. Facilities ownership/control gives a carrier lower costs and greater certainty about its costs than a carrier compelled to rely, in whole or in part, on leasing half-circuits. To be sufficiently attractive from price, technical, or other perspectives to elicit customer orders, a particular service offering may require a substantial number of half-circuits. If that number exceeds the maximum available half-circuits that any individual competitor other than Sprint/JVCo can readily acquire from FT and DT, obviously Sprint/JVCo's advantage deriving from the affiliation with FT and DT would unfairly distort competition. Section III.A.(ii) should be clarified to ensure that this cannot happen.

The first exception in Section III.A(ii) requires further modification or clarification to make clear that the term ''such international half-circuits'' means that the competitor's half-circuits are comparable and not inferior to Sprint/JVCo's half-circuits. The competitor's half-circuits should have the same technical features (bandwidth transponder power, etc.), belong to the same distribution mode (e.g., submarine cable compared to submarine cable), connect to the same or a commercially equivalent terminus (in the case of cable), and serve the same geographic area (in the case of satellite) as the Sprint/JVCo owned or controlled half-circuits. Otherwise, for example, Sprint/JVCo might be allowed to own/control undersea fiber optic cable half-circuits up to the aggregate number of the competitor's satellite half-circuits even though the former transmission mode is far preferable for trans-Atlantic voice communications. Similarly, Sprint/JVCo might benefit unfairly be being allowed to own/control undersea cable half-circuits that terminate in the most desirable locations whereas the competitor would be relegated to less desirable locations further removed from higher quality gateway switches and larger population centers.

3. The ''Meaningful Competition'' Exception Requires Clarification

Section III.A. provides a second exception *viz.*: if ''plaintiff and defendants agree that meaningful competition exists.'' DOJ needs to clarify that it will not ''agree'' unless such a conclusion is fully supported by a factual record developed after reasonable notice and opportunity for public comment.

4. The ''One or More Licenses'' Concept That Would Terminate the Facilities Ownership Prohibitions of Sections III.A. and B. Needs Revision

Sections III.A. and B. (like Sections III.C.–I.) automatically expire when Phase I, as defined, ends.[41] Under Sections V.P. and V.Q. of the proposed Final Judgment, Phase I terminates on a country-specific basis when (1) all legal prohibitions against entities other than FT and DT providing domestic and international infrastructure and public switched voice are removed, and (2) ''one or more licenses or other necessary authorizations'' are issued to entities unaffiliated with FT, DT, Sprint, and JVCo. The phrase ''one or more'' raises the same problem here as it does in Section II.C.3(i) *supra.* In the Section III.A.B. context, the interests of promoting competition would be seriously disserved if Sprint and JVCo could start owning and controlling French and German domestic and international infrastructure even when only a *single* competitor (and quite possibly a weak one or one antagonistic to AT&T, MCI, and US carriers) had been licensed. Section V.Q.(2) should be modified to say, in pertinent part, ''issued licenses or other necessary authorizations to at least three entities other than FT, DT, Sprint or Joint Venture Co. and unaffiliated with FT, DT, Sprint or Joint Venture Co. * * *.'' The provision should go on to say that the three should ''minimally include AT&T and MCI or their direct or indirect affiliates,'' (e.g., a BT joint venture with a German company, an AT&T/Unisource entity, etc.). This modification will provide assurance that the licensees providing alternatives to FT and DT will be vigorous and financially strong competitors and also that Sprint and JVCo will not obtain an anticompetitive advantage over their principal US competitors when Phase I expires.

C. The Principal Provision Prohibiting Discrimination During Phase I (Section III.D.) Requires Modification and Clarification

Although several other provisions are also intended to prevent FT and DT from unfairly favoring Sprint and JVCo,[42] the principal anti-discrimination provision is Section III.D., which has two parts. Section III.D.1. says Sprint and JVCo ''shall not purchase, acquire or accept from FT or DT any FT or DT Products and Services on any discriminatory basis for use in

[40] *See* Complaint ¶¶ 32, 35; CIS, 60 F.R. at 44071.

[41] *See* Section X.B. second sentence.

[42] *See e.g.,* Section III.C., III.E., III.I.; *cf.* Sections II.A.–7.

the offer, supply, distribution or other provision by Sprint or [JVCo]'' of any US-France/Germany telecommunications service. ''[D]iscriminatory basis'' means ''terms more favorable to Sprint or [JVCo] than are made available to other similarly situated'' US providers, i.e., providers ''that are generally comparable to Sprint and [JVCo] with respect to volume or type of FT or DT Products and Services purchased, acquired or accepted from FT and DT * * *.'' Section III.D.2. supplements Section III.D.1. by coming at the anti-favoritism issue from a different angle. Section III.D.2. says ''Sprint and [JVCo] may not benefit from any discount or more favorable term offered by FT or DT to any customer for FT or DT Products or Services, that is conditioned on Sprint or [JVCo] being selected'' as the US provider. These provisions require modification and clarification to eliminate possible loopholes in interpretation and enforcement.

1. The Failure To Bind FT and DT Directly as Parties to the Decree Is a Significant Flaw That Should Be Corrected

The stated purpose of Section III.D.1 is ''to prevent *FT or DT* from using their monopolies and market power in France and Germany to favor Sprint and [JVCo] in the provision of products and services that other providers must also have to compete effectively.'' [43] A crucial deficiency of Section III.D.1. is that it is framed only in terms of what *Sprint and JVCo* may not ''purchase, acquire or accept'' from FT and DT but not also in terms of what *FT and DT* may not provide to them. FT and DT are not made defendants and, therefore, are not bound to comply with the prohibition against discrimination.[44] Although on its face Section III.D.1. is not limited to knowing or intentional receipt of discriminatory preferences, there is a substantial risk (absent clarification) that Sprint and JVCo will view their obligations as extending only to situations where they *know* they are beneficiaries of preferential treatment by FT and DT. Moreover, there is no provision expressly requiring Sprint and JVCo affirmatively to inquire of FT and DT in advance to make certain there will be no discrimination if they purchase, acquire or accept a particular FT or DT Product or Service. Instead, Sections II.A.1.–5. only require Sprint or JVCo, as the case may be, to determine and disclose what *it* is receiving from FT and DT in terms of interconnection, other services, accounting and settlement rates, and circuit and service provisioning and restoration (and also, under subsections A.2. and A.4., to disclose what FT and DT are providing to customers ''in conjunction with'' FT's and DT's distribution of JVCo services). Sprint and JVCo, therefore, will not necessarily know whether they have acquired FT or DT Products and Services on a discriminatory basis because they may not know what prices, terms, and conditions FT and DT have agreed to provide others.

A similar problem exists with respect to Section III.D.2. This provision fails to prohibit FT and DT (because they are not defendants bound by the decree) from offering discounts or other favorable terms to customers conditioned upon the customers using Sprint or JVCo as US provider. Section III.D.2. certainly does not say Sprint or JVCo must *know* of the ''discount or more favorable term'' and of the ''condition[ing]'' for the prohibition to come into play. Nonetheless, there is a substantial risk Sprint and JVCo will consider the Section III.D.2. obligation to apply only if they have such knowledge. Nothing in the Section or elsewhere imposes upon Sprint and JVCo an express affirmative obligation to obtain from FT and DT all the information necessary to determine that such conditional discounting (or other favoritism) has not occurred and will not occur. Section II.A.7. requires Sprint and JVCo to make disclosures only when they are in ''receipt of any information from FT or DT, or otherwise learn[ ] of any discount or more favorable term'' offered to customers by FT or DT on condition that Sprint or JVCo is selected as US provider. Under Section II.A.7., clearly there is no obligation imposed on FT and DT to provide the requisite information to Sprint and JVCo and apparently there is no obligation on Sprint or JVCo to insist that FT and DT provide such information to them.

To be effective, the decree should be revised to include FT and DT as parties and to make the anti-discrimination language apply directly to FT's and DT's actions in creating any discrimination as well as to Sprint's and JVCo's actions in accepting the benefits of discrimination.[45] In the event that cannot be accomplished, at a minimum the decree must be clarified to make certain that Sprint and JVCo understand their obligations apply *strictly* regardless of what facts Sprint and JVCo may or may not actually know or even have reason to know after due inquiry.

2. The Anti-Discrimination Requirements Should Stay in Effect for the Life of the Decree

According to Section X.B. (second sentence), Section III.D. automatically expires when Phase I of the Decree terminates. Under Sections V.P.–Q., Phase I ends when FT's and DT's monopolies lose their formal legal protection and ''one or more'' competing licenses are issued. Nothing in the Decree requires that France and Germany have in place at that time adequate laws and regulations preventing and remedying discrimination—as Section III.D. is supposed to do during Phase I. The Competitive Impact Statement recognizes that ''the [nondiscrimination] provisions of the Final Judgment are considerably more specific and comprehensive than any existing regulatory obligations applicable to Sprint, FT, or DT.'' [46] Moreover, DOJ is rightly concerned that ''regulatory regimes in France and Germany are not fully developed'' and that, in any case, ''Joint Venture Co. may not be subject to direct or complete oversight by any United States, French or German telecommunications regulator.'' [47] DOJ effectively acknowledges that the fact

[43] CIS, 60 F.R. at 44071 (emphasis added).

[44] Sprint and JVCo are defined so as not to include FT, DT, Atlas, or each other. *See* Sections V.O. and V.T.

[45] This situation is entirely distinguishable from *US* v. *MCI, supra,* where there was no need to make BT a party to the consent decree. The decree there had no substantive anti-discrimination obligation because BT already faced facilities-based and reseller competition, the UK government did not own any significant interest in BT (nor would it have an indirect ownership interest in MCI or the NewCo (Concert) joint venture) and thus had no conflict between its interest as owner and its interest as regulator; and there was an established UK regulatory regime that prevented undue discrimination. *See US* v. *MCI,* CIS, 59 F.R. at 33015, 33016, 33022–23.

DOJ said there: ''Persons affected by an undue preference or undue discrimination on the part of BT in violation of Condition 17 of BT's license, or other violation of BT's license, in favor of MCI or NewCo, may complain to the United Kingdom Office of Telecommunications for such relief as OFTEL is authorized to provide under the United Kingdom Telecommunications Act and BT's license. * * * Because * * * the telecommunications regulatory regime in the United Kingdom now embodies or is developing important competitive policies and safeguards, the United States concluded that it is possible to protect competition in these circumstances without placing specific antidiscrimination prohibitions in the proposed Final Judgment * * *.'' *i.d.* at 33022–23. By contrast, ''[h]ere, the competitive concern [particularly about discrimination and cross-subsidization] is * * * that [French and German] regulation is at present insufficiently developed to safeguard competition adequately by itself, in the absence of alternative telecommunications infrastructure that can be used by all competitors in France and Germany.'' *US* v. *Sprint,* CIS, 60 F.R. at 44076.

[46] CIS, 60 F.R. at 44071.

[47] *Id.*

''FT and DT continue both to be government-owned'' is a reason not to rely totally on the French and German governments to prevent discrimination by FT and DT.[48]

DOJ also has no basis at present to presume that European Union (''EU'') directives addressed to Member States[49] will somehow ensure by the end of Phase I that France and Germany have adequate anti-discrimination regimes and will deploy sufficient resources to enforce them. First, the proposed market-opening measures that the European Commission (''EC'') is considering are draft proposals[50] that may not be adopted in a form which ensures adequate anti-discrimination measures. Second, Member States, including France and Germany, have been tardy in implementing EC directives and have sometimes refused to implement them in full.[51] Third, as the CIS itself cautions, ''[i]t is not yet clear whether the EU's liberalization measures will confer any rights on providers from the United States.''[52]

In short, there is no basis for trusting to a leap of faith that, when Phase I ends, there will be fully functioning and adequate anti-discrimination regimes in force in France and Germany protecting US and other competitors of FT, DT, Sprint, and JVCo. Section III.D. must be revised so that it runs for the life of the Decree. If France and Germany ultimately put into place sufficient substitutes for Section III.D., the parties could propose, subject to public notice and comment, a waiver or modification under Section VIII.

3. Section III.D.1.'s Definitions of ''Discriminatory Basis'' and ''Similarly Situated'' Require Clarification

Section III.D.1. says '' 'discriminatory basis' shall mean terms more favorable to Sprint or [JVCo] than are made available to other similarly situated United States international telecommunications providers * * *.'' DOJ should clarify that the word ''all'' implicitly modifies the phrase ''other similarly situated [US] * * * providers'' so that *all* such providers are protected against discrimination. In other words, if the favorable terms received by Sprint or JVCo are received by only one ''similarly situated'' US provider (or fewer than all ''similarly situated'' US providers), the receipt of such terms by Sprint or JVCo would still be on a ''discriminatory basis'' because other ''similarly situated'' US providers were unable to obtain comparable terms. If that were not a correct reading, FT and DT could circumvent the purpose of this provision by granting one (or a few) weak and ineffective US provider(s) the same favorable terms as received by Sprint and JVCo and denying such terms to the US providers that are Sprint and JVCo's principal competitors .

Section III.D.1. defines ''similarly situated'' to mean providers that are ''generally comparable to Sprint and [JVCo] with respect to the volume or type of FT or DT Products and Services purchased * * *, provided that volume and type are relevant distinctions in establishing service conditions.''[53] The provision adds: ''Defendants shall make available to plaintiff all information that was available to them, whether possessed by them or obtained from FT or DT, in considering the relevance of such distinctions.'' It is critical that ''plaintiff'' (DOJ) be able to disclose that information to affected US providers so that they may comment upon whether an impermissible ''discriminatory basis'' exists. To remove any ambiguity, the beginning of the sentence should be revised to read: ''Defendants shall disclose to the United States all information. * * *'' By using the defined term ''[d]isclose'' (see Section V.F.), the sentence would make clear that the information will be disclosed through DOJ to interested US providers. If the sentence is not rewritten in this way, DOJ at least should clarify that the provision as written impliedly permits it to disclose the information to US providers.[54]

4. Section III.D.2. Needs Clarification

Section III.D.2. ''is designed to prevent Sprint and [JVCo] from receiving benefits of discrimination indirectly, through special deals or arrangements that FT and DT offer to customers in order to induce them to obtain services from Sprint or [JVCo], rather than through more favorable terms offered directly to Sprint [or JVCo] addressed by [Section] III.D.1.''[55] Because FT and DT (or Atlas), rather than JVCo, will interface directly with the customer in the sale of JVCo services, this provision is of paramount importance in guaranteeing that FT and DT do not misuse their dominant home country positions to impair competition in the provision of US-France/Germany telecommunications services. Consequently, it would be helpful for DOJ to clarify that Section III.D.2. governs, inter alia, situations ''where FT or DT is acting as the distributor for Joint Venture Co.'' and FT or DT Products or Services are ''provided [to the customer] by FT in France or DT in Germany in conjunction with'' the distributed ''Joint Venture Co. services.''[56] To guard against enforcement loopholes, DOJ should clarify that Section III.D.2's phase ''conditioned on'' covers not only express conditioning but also situations where the circumstances reasonably imply that the discount in FT or DT Products or Services is available only if the customer selects Sprint or JVCo products or services. DOJ should also make clear that, if the overall circumstances reasonably indicate the availability of the discount or more favorable term increased the customer's willingness to take the Sprint or JVCo product or service, that is enough to establish the proscribed ''condition[ing].'' DOJ should add that just because the FT or DT item offered to the customer at discount (or with some other preferential term) is formally covered by a different invoice or contract than the Sprint or JVCo product or service, hardly proves there has been no illicit ''condition[ing].''

D. The Restrictions Against Cross-Subsidy (Section III.F.) Should Be Extended to the End of Phase II and Strengthened

The stated purpose of Section III.F. is ''to ensure that the activities of Joint Venture Co. and Sprint are not subsidized by FT and DT.'' Yet, these vitally important restrictions

[48] *Id.*

[49] *Id.* at 44062–63.

[50] *See* Proposal for a European Parliament and Council Directive on Interconnection in Telecommunications Ensuring Universal Service and Interoperability through Application of the Principles of Open Network Provision (ONP), COM (95) 379 (July 19, 1995) (''*Draft Interconnection Directive*''); Draft Commission Directive of _____, 1996, amending Commission Directive 90/388/EEC, regarding the implementation of full competition in telecommunications markets (96/_____/EC) (July 19, 1995) (unofficial draft) (''*Draft Voice and Infrastructure Directive*'').

[51] *See* EC, DG, IV, *Communication by the Commission to the European Parliament and the Council on the Status and Implementation of Directive 90/388/EEC on Competition in the Markets for Telecommunications Services,* COM (95) 113 final (April 4, 1995) (''*1990 Services Directive Implementation Report*'') at 11, 20, 22, 34.

[52] CIS, 60 F.R. at 44063.

[53] DOJ should clarify that if ''volume and type of FT or DT Products and Services'' are *not* ''relevant distinctions in establishing service conditions,'' then a US provider is ''similarly situated'' to Sprint or JVCo if the provider and Sprint or JVCo are acquiring the same or ''generally comparable'' FT or DT Products or Services.

[54] The revision or clarification will also make clear that US providers will have access, through DOJ, to any ''justification of costs'' which Sprint or JVCo offer ''to rebut a claim of discrimination.'' *See* penultimate sentence of Section III.D.1.

[55] CIS, 60 F.R. at 44071.

[56] The quoted language, containing the ''in conjunction with'' concept, appears in Sections II.A.2. and II.A.4.

automatically expire at the end of Phase I. The Competitive Impact Statement (CIS) acknowledges that ''[e]xisting regulatory safeguards against cross-subsidization in France and German are very limited and have not prevented instances of massive cross-subsidy.'' [57] Under the decree, Phase I ends when French and German authorities eliminate FT's and DT's legal monopolies over domestic and international infrastructure and public switched voice and issue licenses to ''one or more'' competitors.[58] There is no requirement that French and German authorities also have in place regulations and enforcement resources adequate to prevent more ''instances of massive cross-subsidy.''

The formal termination of the legal monopolies and the issuance of one (or more) competitor licenses will not eradicate FT's and DT's incentive and ability to cross-subsidize. FT and DT have retained high market shares and considerable market power in data transmission even though competition has been allowed for a few years.[59] There is no reason to assume that the market power FT and DT have in the currently monopolized segments (such as public switched voice) will dissipate so fast after the arrival of Phase II that a strategy of predatory cross-subsidization will necessarily fail and therefore will not be attempted. The risk of cross-subsidization is not restricted to situations of 100% legal monopoly, but can also materialize where a company has substantial market power in one segment of its operations and the ability to absorb costs properly attributable to a more competitive segment. The type of rate regulatory scheme applicable to the segment where market power is present may actually exacerbate the company's incentive to cross-subsidize,[60] in addition to being ineffective in detecting and preventing cost-shifting by the company.

The CIS assumes that with the arrival of Phase II ''the EU authorities [will] have improved safeguards against cross-subsidy.'' [61] But, as the CIS also recognizes, EU directives are merely an ''overlay'' of requirements that mean very little unless and until Member States transpose them into national laws and then effectively enforce those laws.[62] Furthermore, ''[i]t is not yet clear'' whether EU measures (and, therefore, the requisite follow-on national laws) would ''confer any rights on providers from the United States.'' [63] Consequently, there is a significant risk that US providers may lack standing or adequate procedural rights to challenge suspected cross-subsidization. Moreover, FT and DT will remain at least majority-owned by their respective governments beyond the end of Phase I,[64] privatization being ''wholly at the discretion of the [M]ember [S]tates'' and not something the EU has sought to dictate.[65] As a consequence, there is a substantial risk that the French and German governments' ownership interests in FT and DT will deter those governments (as has happened up to now) from imposing and/or effectively enforcing regulations intended to detect, prevent, and remedy cross-subsidization.

To correct this major flaw, Section III.F. should be modified so that it remains effective for the entire life of the decree. Alternatively, the Section should be revised so that it expires only after the market-opening standards for starting Phase II are satisfied [66] *and* France and Germany have put into effect comprehensive measures for preventing, detection, and remedying cross-subsidization and have granted affected US and other providers adequate rights to complain about and receive prompt and complete injunctive and monetary relief for any cross-subsidization that does occur.

Section III.F.3. says that the required separate ''accounting systems and records of Joint Venture Co. will be made available pursuant to the visitorial provisions of Section VI.'' Section CI bars disclosure to the public, including certainly JVCo's competitors, of any information or documents obtained thereunder by DOJ. By its very nature, cross-subsidization is not something that a competitor can readily infer simply from knowledge of its own costs and what targeted customers may say they are being offered or charged by someone else. Consequently, DOJ cannot assume that JVCo's books will need to be examined only when DOJ receives a credible complaint from a JVCo competitor. Yet, given its limited resources and other priorities, DOJ is hardly in a position regularly to audit JVCo's financial records to discover any cross-subsidization. The decree needs to be revised so that interested parties, pursuant to a confidentiality commitment, many examine the JVCo records and bring any evidence of cross-subsidization to DOJ's attention. A possible (although less effective) alternative would be for the decree to provide that DOJ shall hire an independent auditor for regular audits at JVCo's expense.

E. The Restrictions Regarding Proportionate Returns and Correspondent Operating Agreements (Sections III.E. & G.) Should Be Extended to the End of Phase II and Strengthened

1. Proportionate Returns

Section III.E. is designed to prevent FT and DT from favoring their partially owned affiliate Sprint over other U.S. international carriers in returns of voice correspondent traffic. Because FT and DT are not Decree defendants, the obligation is imposed upon Sprint for the duration of Phase I not to ''accept'' returns from either FT or DT or ''accept or benefit from'' any methodology changes inconsistent with FCC proportionate return policies or which ''substantially favor[ ]'' Sprint over other U.S. providers. The CIS points out that the French and German regulators ''have not imposed any form of proportionate allocation requirement on their national carriers.'' [67] The Complaint correctly states that ''FT and DT, as a result of the proposed [investment and joint venture] agreements, will have an increased incentive and ability to direct their switched telecommunications traffic from France and Germany disproportionately to Sprint rather than other U.S. international carriers, either directly as part of the correspondent system, or outside that system through the Joint Venture Co. backbone network.'' [68]

As the proposed decree is now drafted, Sprint's Section III.E. obligation automatically expires when the French and German public switched voice and infrastructure markets are first opened to competition. DOJ does not (nor could it) presume that France and Germany will impose proportionate returns obligations to take effect when that happens. In fact, as indirect partial owners of Sprint (through their ownership of FT and DT), the French and German governments would have an interest in Sprint receiving preferential returns over AT&T, MCI, *et al.* It is wrong for the Decree to assume that the formal elimination of FT's and

[57] CIS, 60 F.R. at 44072.

[58] *See* Section V.Q.

[59] *See* Complaint ¶¶ 33, 36.

[60] A rate base, rate of return regulatory scheme would encourage the regulated entity to shift cost of its nonregulated businesses to its regulated business.

[61] CIS, 60 F.R. at 44072.

[62] *Id.* at 44062.

[63] *Id.* at 44063.

[64] *See* page 12, note 28, *supra*.

[65] *Id.*.

[66] The ''one or more'' licensee portion of the definition of Phase II also must be revised. *See* pages 27–28, *supra*.

[67] CIS, 60 F.R. at 44072.

[68] Complaint ¶ 40(c).

DT's legal monopolies and the mere licensing of ''one'' competitor (or even ''more'' competitors) will deter FT and DT from favoring Sprint or diverting correspondent traffic through their JVCo. Newly licensed entrants in public switched voice will need substantial time and effort to build up their international capacity to the point where it becomes a realistic alternative to FT and DT. Until that happens, FT and DT will not avoid favoring Sprint or JVCo because they fear retaliation by other U.S. carriers diverting returns to the new French and German international licensees.

In short, there is no basis for Section III.E. to expire at the end of Phase I. The obligation should be modified to run for the entire life of the decree.[69] Alternatively, the Section could be modified to run until *both* Phase I ends *and* the French and German governments promulgate (and demonstrate the intention to enforce) a proportionate returns requirement comparable to that in Section III.E.

2. Correspondent Operating Agreements

The Complaint says that, as a result of these proposed transactions, ''FT and DT will have an incentive to favor Joint Venture Co. and Sprint over their competitors, particularly new entrants and providers of new services, by denying operating agreements * * * or by offering such agreements on discriminatory terms.''[70] To address this concern, Section III.G.1. of the proposed Final Judgment forbids Sprint from offering any particular US correspondent service with FT or DT unless ''at least one other'' US international provider ''has also obtained an operating agreement with FT and DT for the provision of such service * * *.'' Once again, the Decree's failure to require more than ''one'' competitor is a major problem. Section III.G.2. attempts to remedy that problem by requiring Sprint to carry the correspondent traffic of any US provider that ''has requested but has not yet received an operating agreement with FT or DT * * *.'' Rates and terms and conditions for such substitute carriage by Sprint must be ''commercially competitive'' with those for the US providers that have operating agreements. The rate schedules must be annually updated to ''reflect the estimated value of any adjustments in proportionate return traffic that may be received by Sprint from France or Germany'' as a result of carrying the traffic originated by the US provider having no operating agreement. Section III.G.2. is limited to ''IDDD voice service or any other [correspondent] services that make use of the FT/DT PSTNs.''[71]

Like Section III.E. dealing with proportionate returns, Section III.G. automatically expires once Phase I ends. There is no basis for the apparent assumption that the problem to be remedied by Section III.G. will simply disappear on the day the first facilities-based domestic and international public switched voice competitor for FT and DT is licensed. It will take years for a newly licensed competitor to build up its facilities and geographic service areas to become an adequate and cost-competitive alternative to FT and DT for terminating US correspondent traffic. Given their continuing ownership of FT and DT (and derived ownership interests in Sprint and JVCo), the French and German governments may not impose and enforce a regulatory alternative to Section III.G.

Section III.G. should be modified so that it extends for the life of the decree.[72] As a next best alternative, Section III.G. could be modified so that it expires only when *both* Phase I terminates *and* the French and German governments promulgate (and demonstrate the intention to enforce) requirements that FT and DT not refuse to deal or discriminate in any way against Sprint's rivals in terms of correspondent operating agreements.

F. Provisions Requiring Access to Technical Interfaces (Section III.H.) and Public Data Network Protocols (Section III.I.) Should Be Extended to the End of Phase II and Broadened

As the Complaint explains, the investments in Sprint and JVCo will give FT and DT the incentive to use their market power over voice and data services and facilities to favor Sprint and JVCo.[73] Of particular concern is the danger of favoritism and discrimination ''in providing access to [FT's and DT's] local, domestic long distance and international telecommunications services and facilities and to their public data networks * * *.''[74] Sections III.H.–I. of the proposed Final Judgment are intended to address the technical side of the access problem, but they apply only during Phase I. The public interest requires that these provisions be strengthened and extended for the life of the Final Judgment.

1. Essential Modifications of Section III.H

Section III.H. in essence prohibits Sprint and JVCo, when providing services in the US that use FT or DT Products or Services, from accessing those Products or Services through ''any proprietary or nonstandardized interface or protocol'' if competitors cannot access the same Products or Services through ''a non-proprietary or standardized interface or protocol.'' By forbidding ''exclusive access,'' DOJ intends the provision to ''have a significant role in ensuring that competitors can obtain interconnection to the public switched [voice] networks in France and Germany.''[75]

There are two problems with Section III.H.'s approach. First, it provides no assurance that FT or DT will work cooperatively with Sprint's and JVCo's competitors when those competitors develop innovative services that need to interconnect with FT's and DT's networks through interfaces and protocols that are more technically advanced than FT's and DT's ''non-proprietary or standardized interface or protocol.'' By contrast, Section III.H. allows Sprint and JVCo to interconnect with FT's and DT's networks using ''proprietary or nonstandardized interface[s] or protocol[s].'' The anti-discrimination language in Section III.D.1.(iii)–(iv) does not expressly address this substantial risk of FT/DT technological favoritism toward Sprint and JVCo.

Second, making matters worse, Section III.H. automatically expires at the end of Phase I. This will occur even though the formal elimination of legal protections for FT's and DT's switched voice and infrastructure monopolies and the grant of ''one or more'' geographically unlimited voice licenses in each country will not instantaneously (if ever) establish alternative public switched networks as sufficient substitutes for FT's and DT's networks. Moreover, continuing French and German government ownership of FT and DT (and indirectly of Sprint and JVCo) does not augur well for government intervention to assure that

[69] If the French and German governments do in fact promulgate and effectively enforce a proportionate returns requirement, the parties could seek a modification or waiver under Section VIII of the decree, subject to public notice and comment.

[70] Complaint ¶ 40(b).

[71] Given the market power reflected in FT's and DT's public data networks (see Complaint ¶¶ 33, 36), this provision should be modified so as to afford protection for any non-voice correspondent services that are intended to interconnect with the FT and DT public data networks.

[72] The parties can always seek a Section VIII waiver or modification if the respective French and German governments establish and enforce a regulatory regime that accomplishes the same protection of fair competition intended by Section III.G.

[73] Complaint ¶ ¶ 2, 3, 31–36, 40(a)–(e).

[74] *Id* ¶ 3.

[75] CIS, 60 F.R. at 44073.

competitors will have access, not to mention the most technologically advanced access, to FT's and DT's public switched networks.

Plainly, the proper solution is to revise the decree the ensure that FT and DT cannot provide Sprint and JVCo more technologically advanced interconnection to their public networks and access to other FT and DT Products and Services. Further, the modified language should be applicable through the life of the decree, subject to Section VIII. waiver or modification proceedings conducted with adequate public notice and opportunity to comment.

2. Required Modifications of Section III.I

The public data ''counterpart'' to Section III.H.,[76] Section III.I. requires that FT's and DT's ''Public Data Networks that are based on the X.25 or any other protocol, continue to be available to all other United States international telecommunications providers on nondiscriminatory terms to complete data telecommunications between the United States and France and between the United States and Germany, and within France and Germany for traffic originating within the United States, France or Germany, using the X.75 standard protocol for interconnection between data networks, or any generally accepted standard network interconnection protocol that may modify or replace the X.75 standard.''

While this provision purports to assure ''nondiscriminatory terms,'' it leaves wide open the possibility that FT and DT will work cooperatively with Sprint and JVCo to develop advanced data services and a superior network interconnection protocol, but refuse to cooperate with their competitors who wish to engage in a similar innovative effort. The provision does not require cooperation nor forbid favoritism toward Sprint and JVCo in the level or degree of cooperation provided. Moreover, Section III.I. permits JVCo and Sprint to use interconnection protocols that may be more advanced than the ''X.25/X.75 protocols'' unless and until those advanced protocols become the new ''generally accepted standard.'' Of course, they may never become ''generally accepted'' if they remain proprietary and unavailable to others interconnecting the FT and DT data networks.

As ''the principal safeguard in th[e] proposed Final Judgment for competitive access to DT's and FT's public data networks,'' [77] Section III.I. falls woefully short. Given that those networks have tremendous market power (although not 100% monopoly shares) because of FT's and DT's infrastructure monopolies and the governments' ineffective regulation,[78] and given the governments' continuing direct and indirect ownership interests, there is no basis for the decree to require anything less than across-the-board nondiscrimination by FT and DT in providing technical access to their data networks and in working to improve interconnection of data networks. Further, because the mere formal elimination of infrastructure monopolies and the issuance of ''one or more'' licenses at the end of Phase I will not instantly result in fully operating facilities-based alternatives to FT's and DT's public data networks, this Section III.I should be modified so that it runs through the life of the decree. A waiver or modification, pursuant to public notice and comment procedures, can always be sought under Section VIII., if and when conditions become appropriate.

III. Conclusion

DOJ should withdraw the proposed Final Judgment and undertake to negotiate a new decree along the lines of the modifications and clarifications set out in Part II of these Comments.

Dated: October 23, 1995.

Respectfully submitted,

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Cable & Wireless Europe; Comments on Final Judgement of Department of Justice on Sprint Corp. Joint Venture—Phoenix.

Case 95–CV–1304

Exhibit D

Part I

Introduction

The position of Cable & Wireless Europe (C&WE) on the joint venture between Sprint Corporation, Deutsche Telekom AG (DT) and France Telecom (FT) known as ''Phoenix'', as notified is that it:

- is restrictive of competition
- poses a real risk of eliminating competition
- provides considerable potential to abuse a dominant position
- is not indispensable for addressing the target market

The Phoenix JV is restrictive of competition in that it effectively facilitates;

- the direct fixing of prices and other trading conditions
- the limitating or control of production, markets, technical development and investment
- market sharing between the parents
- discriminatory behaviour in the way the parents treat the JV and all other actual or potential competitors to the disadvantage of the latter.

It is inevitable that the effect of the Phoenix arrangements will be the coordination of prices by Sprint, DT and FT if it is to function as a one-stop-shop. Until now the relevant subsidiaries of DT, FT and Sprint have spearately set prices independently and competitively.

That Phoenix will engage in market sharing is clear from the published announcement of the European Commission (OJ C184 of 18.7.95) where it states:

''Phoenix products will be distributed by DT and FT in France and Germany, by Sprint in the United States and by the ''rest of Europe'' operating group in Europe''.

It is clear from the same published details that no attempt has been made to differentiate DT's and FT's monopoly activities from those activities open to competitive forces. This gives rise to a real threat that the assets of the monopoly will be leveraged into those areas where the notifying parties face competition. Such behaviour would be an abuse of a dominant position.

Section 10.6(b) of the Joint Venture Agreement submitted to the Department of Justice means that if a customer approaches FT and requests a private line service between France and, say the US, then FT should ''use commercially reasonable efforts to persuade'' the customer to use the JV for such services and must refer the request of the customer to the JV and its members if FT fails to convince the customer to purchase JV services. This is a clear abuse of a dominant position, and a pooling of information.

For example the published notification (OJ C184 of 18.7.95) states ''Phoenix products will be distributed by DT and FT in France and Germany * * *'' This means that the sales forces of the monopoly will promtoe the products of Phoenix giving the real possibility for illegal bundling and predatory cross-subsidies.

The Final Judgement of the Department of Justice on the JV recognised the substantial threats to competition in international telecommunications posed by the JV. The original structure of the JV provided a set of incentives for the relevant parties to behave in a discriminatory and anti-competitive manner to the advantage of themselves and to the disadvantage of all competitors, actual or potential. The most severe threats to competition posed by the JV are in the two home markets of the participating monopolies—Germany and France.

[76] CIS, 60 F.R. at 44073.

[77] *Id.* Section III.D.'s anti-discrimination language applies to ''FT or DT Products and Services,'' a category that expressly includes products or services needed for interconnection to ''FT/DT PSTNs'' but excludes ''services involv[ing] interconnection to the Public Data Network.'' Section V.L. (i) & (iv).

[78] *See* Complaint ¶ ¶ 32–36; CIS, 60 F.R. at 44061–62.

Any telecoms operator, from whatever home base, intending to address the global telecoms market must have an effective presence in the European Union. Germany and France in combination account for some 40% of the EU's telecoms market.

A large number of potential corporate customers have sizeable operations in the German and French markets and these potential corporate customers require global communications facilities in order to carry on their businesses. All potential or actual providers of the necessary communications capabilities must be able to offer cost effective and efficient telecoms services to these customers in these two markets if they are to provide a viable product. However in order to do so any competitor operator must deal with the relevant domestic monopolist.

Consequently, the monopolists in these markets could, if the incentives were in place, behave in a manner that would significantly distort competition in a vital part of the global market to the extent that competitors would not only be disadvantaged inside these markets but also be disadvantaged outside these marekts. Quite simply, if a competitor is unable to provide a cost effective solution in one vital segment of the global market it may be handicapped from gaining customers because these customers are seeking global (total) solutions to their communications needs.

Key Issues

In recognition of these conditions the Final Judgement of the Department of Justice proposed various restrictions on the JV, pertaining in particular to the conditions obtaining in Germany and France. Two questions arise:

- Are the restrictions adequate to ensure fair and undistorted competition so that all actual and potential competitiors have an equal opportunity of addressing the needs of the target customers in the relevant countries?
- Are the restrictions fully enforceable in the relevant countries?

Given the structure of the telecommunications services supply sector in the United States, the issue of adequacy does not present itself in the US. Furthermore, the question of enforceability does not arise in the United States because first, the parties do not hold monopoly positions in the US market and second, the Department of Justice has sufficient powers to ensure compliance with its decisions. The issues of adequacy and enforceability arise in the EU and in particular Germany and France. The restrictions of the Final Judgement appear to fall on both criteria.

Part III of these comments addresses the issues of adequacy and Part IV addresses the issue of enforceability.

Part II

Conditions in Germany and France

The principal markets of concern with respect to competition and access for competitor operators to the JV are France and Germany. This is clear both from the Final Judgement and from the brief details in the published (OJ C184 of 18.7.95) by the European Commission where it states ''Phoenix products will be distributed by DT and FT in France and Germany * * *''. This simple statement has ramifications for all actual or potential competitors in the provision of global telecoms services. Given the significance of these markets in the EU and the overall global telecoms market and the fact that the vast majority of the assets of DT and FT are located in Germany and France respectively, it is the conditions in these two markets that are the most relevant to the restrictions in the Final Judgement

(a) The situation in Germany. Self-evidently, DT holds a dominant position in all the most important product and service markets in the German telecommunications sector. The ''corporatisation'' of Deutsche Telekom AG (DT) into a joint stock company has made no material difference to its position on the German market or its effective relation with the Bundesministerium through the Bundesanstalt fur Post und Telekommunikation.

DT retains the exclusive legal right to supply public voice telephony as defined in the Services Directive (Directive 90/388/EEC), the major piece of specific legislation covering competition in telecoms services in the EU. All other services are legally open to competitive supply.

DT retains the exclusive right over the infrastructure necessary to deliver telecommunications services and, as the European Commission recognised in the *MSG Media Service* (Case IV/M.469) prohibition decision, owns and operates most of Germany's cable TV networks, which could provide an alternative source of infrastructure to competitors to DT.

DT is also the market leader in liberalised telecommunications services in the German market. According to the Services Directive, the monopoly in services only remains over the provision of telephony to the public, all the rest being ''liberalised''.

This fact is relevant to the restrictions enumerated in the Final Judgement of the Department of Justice. The press release of July 13, 1995 states on page 3 at bullet point 1 that the JV ''Cannot own, control or provide certain services until competitors have the opportunity to provide similar services in France and Germany.'' Under EU law the only service which remains the exclusive right of DT is public voice telephony. This implies that the Department's restrictions only apply to public voice telephony (the market fully controlled by DT). However, this service is not the target of the JV which seeks to attract corporate customers.

Therefore, there is some doubt as to the adequacy of the restrictions of the Department of Justice in its Final Judgement if these restrictions fall only on public voice rather than on liberalised services.

All competitors to DT in the liberalised sector have to lease infrastructure from DT if they wish to offer liberalised services. Equally, all competitors need to use DT for any switched traffic and call termination at interconnection (access) charge rates determined by DT. This state of affairs will continue in the future even when there are alternative providers of infrastructure given the ubiquity of DT. Therefore the costs of all competitors to DT in Germany are, and will continue to be, largely determined by DT.

This state of affairs has a substantial impact on the economics of any competitor to DT. Whereas it may be legally permitted to compete against DT it may not be economically feasible to do so. Again this reflects upon the restrictions of the Final Judgement. The ability of a competitor to gain a licence and to take advantage of the licence in a meaningful way are very different concepts in practice. Unlike the US and British telecommunications markets, there is no history in Germany of rate setting for leased lines and interconnection (access) charges by market mechanisms or developed regulatory intervention.

Also of relevance is the European Commission's ''Communication by the Commission to the European Parliament and the Council on the status and implementation of Directive 90/388/EEC on competition in the markets for telecommunications services'' (COM(95) 113). This is a status report on the degree of implementation of the Services Directive, which contains a report on conditions in Germany. As noted above this is the key piece of European legislation on liberalisation of telecoms.

In this document the Commission reported that the German Law of 14 September 1994 (*Postneuordnungsgesetz*—PTNeuOG) did not comply in full with the Services Directive. The new law did not reflect the definition of ''voice telephony'' of the Services Directive.

Consequently, since the new law did not reflect the definition of ''voice telephony'' of the Services Directive, DT has benefited from a monopoly definition that is wider than that sanctioned by the Services Directive. This has impeded competition in Germany by restricting the range of services competitors could offer to customers. Additionally, competition has been restricted by the failure to implement correctly Article 6 of the Directive causing delays in the use of some terminal equipment. These matters were only resolved following the intervention of the European Commission

Furthermore, the Commission's document found that the German Law did not implement in an appropriate manner Articles 6 and 7 of the Directive, of which the latter is the most important.

Article 7 of the Services Directive (Directive 90/388/EEC) instructs Member States to separate telecommunications regulatory and operational functions so that the regulatory body is independent of the telecommunications organisation.

The issue of Article 7 of the Services Directive does not appear to be fully resolved with the possibility that a regulator that is not independent may not act so as to prevent the restriction or distortion competition. This state of affairs concerning the non-implementation of the Services Directive has implications for the enforceability of the restrictions of the Final Judgement of the Department of Judgement in the Phoenix JV.

The absence of an effective regulator of DT was demonstrated in the case of the cross-subsidy from the monopoly sector into Datex-P. This case and the non-implementation of Article 7 of the Services Directive are

discussed in Part IV. DT has also been accused by its competitors (the Association of Private Telecommunications Operators) of cross subsidizing its leased line business. The draft new German Law for telecommunications is also discussed in Part IV as it has a bearing on the enforceability of the restrictions in the Final Judgement.

(b) The situation in France. The conditions in France are slightly less restrictive than those in Germany in that there has been some limited ''experimentation'' with alternative infrastructure. Nevertheless FT retains the exclusive legal right to supply public voice telephony as defined in the Services Directive and the exclusive right over the infrastructure necessary to deliver telecommunications services. FT is overwhelmingly dominant on the French market.

FT is the market leader in liberalised telecommunications services in the French market (e.g., paging), a position reinforced by the necessity for competitors to FT in the liberalised sector to have to lease infrastructure from FT and its subsidiaries if they wish to offer liberalised services. Equally, all competitors need to use FT for any switched traffic and call termination at interconnection charge rates determined by FT. The costs of all competitors to FT are largely determined by FT, both now and in the future. As with Germany, there is no history of cost based rate setting for leased lines and interconnection (access) derived from market forces or well developed regulatory intervention.

There is a strong doubt whether Article 7 of the Services Directive (Directive 90/388/EEC) has been implemented. For example, the French Regulator sits on the Board of FT and the regulatory function sits within the same Ministry that acts as the owner of FT. In these circumstances it is doubtful whether the French regulator is independent and there is a clear potential for a conflict of interest between promoting competition (and the interest of competitors) and defending FT from competition.

There are concerns that Colisee International behaves in an anti-competitive manner. The company is a subsidiary of FT which is engaged in reselling of the capacity of FT. Complaints about Colisee have been confirmed by the French regulator. The latter has found that:

- FT sells leased lines and the PSTN to Colisee at tariffs below the official list price whilst competitors to FT are forced to buy these inputs at the official published tariff.
- FT is offering Colisee direct access to its International Transit Centre but does not permit competitors similar access.

This behaviour is clearly abusive but the French regulator has not resolved the issues to the satisfaction of competitors to FT.

Part III

Adequacy of the Restrictions of Final Judgement of the Department of Justice

The restrictions detailed in the Final Judgement represent a sound and justifiable set that are appropriate to the circumstances, particularly on the trans-Atlantic route between the US and the two monopoly markets of Germany ad France.

However, these restrictions apply in part to services that competitors cannot legally supply in Germany and France. In the EU, the only service which remains the exclusive right of the monopolist is public voice telephony. Public voice telephony is supplied by DT and FT. This service is not the target of the Phoenix JV. All of the services of the target corporate customers are open to competition. Consequently, to the extent that the restrictions of the Final Judgement apply to services which are not the target of the JV, the restrictions are not adequate.

In other respects the restrictions contained in the Final Judgement are equivalent to a commitment on the parties to the JV to comply with the competition rules of the US and the EU—something to which the parties must comply in any event.

Whilst the monopoly of infrastructure remains in place in Germany and France, this monopoly can effectively limit access to networks in a way that excludes or severely restricts the possibilities of parties other than Sprint, DT and FT in the Germany and France even when the competition rules are adhered to. For example, DT and FT could charge non-discriminatory interconnection (access) but high charges to themselves and all competitors. As far as DT and FT are concerned, this would merely represent a transfer of funds from one part of the business to another. However, for competitors such charges are real costs that could limit the viability of their offerings.

This implies that the restrictions of the Final Judgement may not be adequate to achieve its objectives.

An adequate environment which would promote effective competition and thereby provide for the conditions in which the JV would not distort competition are listed below.

Legislative Framework

(a) Infrastructure. As has been made clear, the JV through the monopolies of infrastructure in Germany and France determine the costs (leased lines and interconnection) of all competitors on the relevant market. Equally, the monopolies of infrastructure allow the parties to the JV to control the functionality of competitors thereby determining the nature of offerings they can make to the market.

Competitors to the monopolists are at the same time major customers. Furthermore, this competitor/customer relationship means that competitors pass information on their customer to their monopoly competitors. Only the freedom of choice of infrastructure for all competitors would allow for competition to develop by allowing competitors more control over their costs and functionality.

Consequently, any remedy to the real risks to competition posed by the JV must include the acceleration of the liberalisation of infrastructure in Germany and France. Alternative infrastructure is available form cable TV operators and many utilities. The liberalisation of these facilities would enhance the prospects for competition. In this respect cable TV has a particular importance because it would provide an alternative to the local loop bottleneck.

To date both DT and FT (and the respective Governments) have exhibited a reluctance to support any such acceleration of the liberalisation of infrastructure.

(b) Interconnection. Even where alternative infrastructure is found, unavoidably competitors will use the assets of the monopolies for call termination and origination given the ubiquity of the monopolists. In these circumstances the terms for interconnection are of central importance if the access barrier is to

These terms of interconnection cover a wide range of matters, most of which are addressed in the European Commission's ''Proposal for a European Parliament and Council Directive on interconnection in telecommunications''.

Two issues of particular importance to the promotion of effective competition. There are:

- the points where interconnection is permitted.
- the charges for interconnection at these ponts.

Ideally these matters should be resolved through commercial negotiations. However the UK experience demonstrates that it is extremely difficult, if not impossible, to resolve these matters satisfactorily. Consequently, regulatory intervention is required.

In these circumstances the optimal solutions to these issues are the following:

- interconnection should be permitted at any technically feasible point within the hierarchy in the network rather than at a very limited number of points determined by the monopolist. This allows competitors to make choices and trade offs between functionality and costs
- interconnection must be charged in an unbundled manner, for only those assets or elements used in the network.

Whith respect to these interconnection charges it is appropriate that the competitor pays for the costs if causes. There are two dimensions to cost causality:

- the correct cost basis (level of the charge)
- the appropriate cost drivers (structure of the charge).

The correct cost basis for interconnection charges is Long Rung Average Incremental Costs (LRAIC), which is the methodology accepted by the UK regulator, Oftel.

The appropriate cost driver in telecoms is buy hour capacity. Competitors should therefore pay for the addition to busy hour capacity that they cause—termed Capacity Based charged (CBC).

Consequently, in order to promote effective competition and access the appropriate interconnection regime must be based on the principles of:

- interconnection at any technically feasible point
- LRAIC
- CBC.

Freedom of choice between competing infrastructure for service providers coupled with interconnection based on the principles outlined here would be necessary, though not sufficient, to permit the JV to go ahead. However, a second set of structural conditions also needs to be addressed.

Structural Change

Currently, no distinction has been made by the parties between the activities of the parent monopolies, DT and FT, and those of the JV. This absence of a separation gives rise to the real possibility for cross-subsidies from monopoly to competitive activities. The Datex-P case in Germany demonstrated the reality of this possibility. The absence of any separation also facilitates the pooling or transfer of information concerning customers and competitors.

The Phoenix notification is identical to the Atlas notification with respect to the absence of separation between the activities of the parent monopolies in Europe and Sprint. Consequently, the potential of Phoenix to prevent, restrict or distort competition and to behave abusively in the relevant market is substantial. This issue arises as a result of the absence of separation between monopoly and competitive activities.

The only feasible remedy is to impose the structural separation of Atlas and Phoenix from the parents. Such a structural separation should take the following form.

(a) Separation of monopoly and competitive products and services. Atlas and Phoenix should not be permitted to offer any product or service where there is any impediment (in terms of exclusive or special rights, licensing, authorisation, choice of infrastructure, conditions of interconnection) preventing an efficient competitor from supplying the same products and services. Effectively this condition would separate monopoly provided products and services from those in the competitive sector.

(b) Financial separation. There should be a complete financial structural separation between Atlas, Phoenix and the parents. The purpose is to provide for full transparency of the financial flows between Atlas, Phoenix and its parents and to safeguard against cross-subsidies. All services and products (including interconnection based on the principles outlined above) provided by the parents to the JVs (and vice versa) to be supplied at published tariffs and available to all competitors at identical terms and conditions.

(c) Other separation. The parents should not be permitted to transfer to the JVs any proprietary, customer, competitor or market sensitive information, or any other asset including all types of telephone numbers, which would give the JVs a competitive advantage. Only when the parents give 30 days notice to all competitors of such a transfer, and offer to supply competitors on exactly the same terms and conditions, should such transfers be permitted.

The feature of each of these types of separation is that they facilitate transparency and equality of treatment between the parents, Atlas, Phoenix and all competitors.

Whilst most of these conditions fall outside the jurisdiction of the Department of Justice, the Department should look towards substantial progress on these matters if the JV is not to distort competition and impede competitive entry to the key German and French markets for all potential entrants.

PART IV

Enforceability of the Restrictions of Final Judgement of the Department of Justice

Given that the Department will need to co-operate with the National Regulatory Authorities in Germany and France in order to effectuate an enforcement of its restrictions, it is important that these authorities are appropriately constituted.

It is questionable whether Article 7 of the Services Directive (concerning the independence of the Regulator) has been implemented in either Germany or France with important ramifications for the enforceability of the restrictions contained in the Final Judgement as they impact on the German and French markets.

The judgements of the European Court of Justice (ECJ) of 27 October 1993, the *Taillandier* (C–46/90) and *Decoster* (C–69/91) cases are pertinent to this particular matter. These judgements mean that two different services within the same Ministry performing the regulatory and operational functions does not comply with the requirements of Article 7 of the Services Directive. The judgements of the ECJ mean that there should be a real and not just a formal separation of functions. The ECJ has therefore decided that the operational and regulatory bodies should not both be answerable to the same Minister.

Currently, in both France and Germany the relevant Ministry effectively acts as both owner and regulator (the ''corporatisation'' of DBPT having no effective meaning in this matter). This condition does not comply with the European Services Directive and can act as a major impediment to the development of competition. There is the potential for a conflict of interest between the Ministry as regulator pursuing polices that promote effective competition and the Ministry as owner pursuing policies that protect the perceived value of the monopoly. Equally, there is a potential for a conflict of interest where the regulatory sits on the board of the monopolist.

Further, the Department of Justice should take particular note of the Datex-P case in Germany.

According to press reports 1994 (see for example *Financial Times* 26-May-94), the Bundeskartellamt (BKA) carried out an investigation into the affairs of Datex-P (which operates in the liberalised telecommunications sector) in Germany. These reports stated that the BKA found a cross-subsidy from the monopoly activities of DT (then called DBP–T) to Datex-P amounting to some DM 2 billion (allegedly a sum that exceeded the turnover of all competitors combined).

Normally, abuse of a dominant position of this magnitude would lead to the imposition of several penalties on the perpetrator and the payment of damages to injured parties. However, this has not occurred in the case of Datex-P. This is because the then DBP–T did not fall under the jurisdiction of the BKA and was therefore not fully subject to Germany's strict competition laws. This situation could only be acceptable if DBP–T was subject to similar controls to those of the BKA being exercised by the National telecommunications regulatory authority (NRA). However, this was not the case.

The NRA in Germany is the Bundesministerium Fur Post und Telekommunikation. The German telecommunications law of 1989, the Postverfassungsgesetz, (PVG) defines the tasks and organisation of this Ministry. Under the PVG, the Minister appoints one third of the members of the Supervisory Board of DBP–T/DT. The approval of the Minister is required for all the important decisions of DBP–T/DT (including presumably the Phoenix and Atlas JVs.). The same Minister defines the long term objectives of DBP–T/DT and earmarks the funds necessary for the development of telecommunications.

The Minister is responsible for the appointment of the official acting as the regulator of the sector, and as events have demonstrated, for the dismissal of the official.

In these circumstances the independent character of the NRA is not fulfilled as required by Article 7 of the Services Directive and the ECJ cases cited. DT is not regulated by an independent NRA neither is it regulated by the competition laws of Germany. In these circumstances it is possible for Datex-P to avoid the normal punishments for such anti-competitive behaviour.

The draft German law on the future regulation of telecommunications (*Diskussionsentwurf für ein Telekommunikationsgesetz* of 31.5.95) is silent or vague on the following key issues:

- equal access
- numbering portability and numbering in general
- licensing processes, appeal procedures, arbitration etc.
- duct/trench-sharing, mandatory or otherwise
- Ministry policy on international voice telephony
- principles applying to tariff policy and proposals for rebalancing.

Decisions on each of these subjects will have a substantial impact on the development of effective competition and access. For example there will be a major difference with respect to effective market access if the Ministry's policy on international voice favours a duopoly or full competition.

A policy on the critical commercial issue of interconnection has yet to be developed and this represents a serious impediment for the prospects for effective competition.

According to § 22 of the German Law against Restraints of Competition licensees which are dominant operators, or have a market share of at least 25%, may be required to provide certain universal services. Again this prospect gives rise to serious doubts concerning the development of effective competition and market access. § 22 could be used as a tax on success and certainly provides an incentive for competitors to stay below the 25% threshold. § 22 is incompatible with the development of effective competition and should be withdrawn.

Interestingly, if an operator cream-skims (*Mehrerlösabschöpfung*) deliberately or out of negligence contrary to a decree under § 32 issued by the NRA, it could be required to pay an equivalent sum to the NRA (§ 33). § 32

works in a manner that distorts the development of effective competition and should be withdrawn.

As yet therefore, there are very serious doubts as to whether the emerging regulatory environment in Germany is appropriate for effective competition and effective market access to all potential entrants. In these conditions it is inappropriate to allow Phoenix to proceed.

The new regulatory environment in France has not yet been defined and we are therefore unable to provide any information on it. A consultation document on the future regulatory environment is anticipated in November 1995. Would be inappropriate to permit Phoenix to proceed before this regulatory environment is known.

It would be instructive for the DoJ to examine the regulatory history and environment in the UK. Here we have a government committed to competition in telecoms, an independent regulator and a liberal regime.

Despite these apparently favourable conditions, over the last decade, Mercury Communications Ltd (the major challenger to BT) has found it extremely difficult to compete on a fair basis with BT. Mercury has never reached an interconnection agreement with BT, even though to do so would benefit Mercury. It has always been forced to seek a determination from the Office of Telecommunications (OFTEL). Interconnection charges have not been based on the correct cost basis. Mercury has had to pay Access Deficit Charges which OFTEL recognise as a severe distortion of the market. This concept is now popular with the monopolists in the rest of Europe. Furthermore, Mercury's functionality has been severely restricted by the limits on the technical point of interconnection with BT.

Consequently, the lesson from the UK is that even under a regime which favours competition the monopolist can substantially impede the process of competition.

Part V

Conclusions

The Final Judgement of the Department of Justice on the JV recognised the substantial threats to competition in international telecommunications posed by the JV.

In recognition of these conditions the Final Judgement of the Department of Justice proposed various restrictions on the JV, pertaining in particular to the conditions obtaining in Germany and France. Two questions arise:

- Are the restrictions adequate to ensure fair and undistorted competition so that all actual and potential competitors have an equal opportunity of addressing the needs of the target customers in the relevant countries?
- Are the restrictions fully enforceable in the relevant countries?

However, it appears that the restrictions are directed at an area of activity which the JV will not address (public voice telephony). In these circumstances the restrictions of the Final Judgement fail the adequacy test. Consequently, the restrictions will not bring about effective competition and effective market access.

There are also doubts with respect to the enforceability of the restrictions because there is a question mark over the independence of the regulators in Germany and France. Furthermore the absence of a regulatory regime, for interconnection and other vital matters, which would foster effective competition and effective market access in either country does not support the need for enforceability.

In Part III of these comments a set of conditions which would promote effective market access were presented. The most important of these concern infrastructure and interconnection. The Department of Justice should look for substantial progress on these matters before permitting the arrangements between Sprint, DT and FT to progress.

The Department of Justice should set the following minimum conditions before allowing Phoenix to proceed:

- the liberalization of alternative infrastructure including cable televisions
- interconnection at any technically feasible point
- interconnection charges based on LRIC and CBC

Additionally the structural issue needs to be addressed. The minimum conditions required in this respect are:

- Phoenix should not be permitted to offer any product or service where there is any impediment (in terms of exclusive or special rights, licensing, authorisation, choice of infrastructure, conditions of interconnection) preventing an efficient competitor from supplying the same products and services.
- there should be a complete financial structural separation between Atlas, Phoenix and the parents.
- the parents should not be permitted to transfer to the JVs any proprietary, customer, competitor or market sensitive information, or any other asset which would give the JVs a competitive advantage which are denied to competitors

Any remedies less demanding than those listed here would not be sufficient to address the ability of the JVs to prevent, restrict or distort competition and to behave abusively in the relevant market.

* * * * *

October 24, 1995.

Donald J. Russell, Esq.,
Chief, Telecommunications Task Force, Antitrust Division, Room 89104, 555 Fourth Street, NW., Washington, DC 20001

Re: United States v. Sprint Corporation and Joint Venture Co., Civil Action No. 95–1304 (D.D.C. filed July 13, 1995)

Dear Mr. Russell: On behalf of ACC Corp., we transmit an original and five (5) copies of its comments in the above-referenced proceeding. We regret that necessary coordination with overseas counsel delayed this filing until today, but we hope that you will be able to consider the comments on their merits. To avoid any prejudice to the defendants, copies of these comments are being sent by facsimile to the counsel identified below.

Should there be any questions concerning this matter, please do not hesitate to contact me.

Very truly yours,

Helen E. Disenhaus,

Counsel for ACC Corp.

Of Counsel:

Francis D.R. Coleman, Esq.,

Secretary and Corporate Counsel, ACC Corp.

October 24, 1995.

Donald J. Russell, Esq.,
Chief, Telecommunications Task Force, Antitrust Division, Room 89104, 555 Fourth Street, NW., Washington, DC 20001

Re: United States v. Sprint Corporation and Joint Venture Co., Civil Action No. 95–1304 (D.D.C. filed July 13, 1995)

Dear Mr. Russell: On behalf of ACC Corp. (''ACC''), a United States international telecommunications common carrier based in Rochester, New York, we submit these comments on the above-referenced proposed Consent Decree. ACC's comments chiefly describe certain initiatives undertaken by its subsidiaries in Germany and France in furtherance of its proposed domestic and international resale service offerings in these countries.

Currently pending before the Federal Communications Commission (''FCC'') are applications of ACC's wholly-owned subsidiary, ACC Global Corp., for authority pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, to provide international switched telecommunications services over international private lines on the U.S.-Germany and U.S.-France routes. See FCC File Nos. I–T–C–95–056; I–T–C–95–059. In an effort to keep the FCC apprised of relevant developments in Germany and France, ACC has regularly provided the Commission with updated chronologies reflecting significant contacts with the national regulators in those countries and with Deutsche Telekom (''DT'') and France Telecom (''FT''). The most recent chronologies, which are also being filed this day with the FCC by copies of this letter submitted for inclusion in the application dockets and the Sprint/DT/FT docket, are attached. Also attached is a copy of a letter sent to M. Bruno Lassere, of the DGPT in France, that summarizes ACC's analysis of the permissibility under existing French law of resale competition in France.

As a general matter, ACC has been actively pursuing opportunities for resale competition in both Germany and France. With respect to Germany, ACC has confirmed with senior officials of the Ministry of Posts and Telecommunications that resale competition is currently permissible in Germany under certain terms and conditions. ACC has also met with officials of DT to discuss implementation of such resale service in the near-term. While ACC has been encouraged by the recent interest shown by Ministry officials in its proposal, ACC is concerned that DT has been dilatory in scheduling follow-up meetings to address the issue and may be attempting to avoid giving substantive consideration to the proposal.

ACC therefore urges the Department to condition entry and the effective date of the proposed Consent Decree on DT's opening its services to resale competition to the extent permissible under current law in Germany, with DT agreeing to cooperate in the resale service implementation program to the extent necessary.

With respect to France, ACC is still exploring with DGPT officials the feasibility of resale competition under current French law. While ACC has had several productive meetings with regulatory officials, ACC is concerned about the lack of progress in France. As shown by the enclosed summary of the relevant legal issues, however, there should be no legal impediments to implementation of limited resale in the manner proposed by ACC in the near term. ACC also, therefore, urges the Department to condition entry and the effective date of the proposed Consent Decree on FT's opening its services to resale competition to the extent permissible under current law in France, with FT agreeing to cooperate in the resale service implementation program to the extent necessary.

ACC firmly believes that resale competition in domestic and international services abroad as well as in the U.S. is critical to ensuring that competition in the U.S. market is not adversely affected by the formation of global alliances by the world's largest facilities-based carriers. The FCC has long recognized the benefits of resale competition in ensuring that consumers in all market segments receive the economic benefits of a competitive telecommunications market. ACC is not asking for exclusivity with respect to resale competition but merely for a general lowering of unnecessary entry barriers that adversely affect competitive entrants.

ACC therefore urges the Department to condition entry and the effective date of a Consent Decree on the availability of market participation by U.S. carriers in all market segments in which such competitive entry is lawful, even if such entry is dependent upon DT and FT's taking affirmative steps to facilitate such entry before full services and infrastructure competition is lawful in Germany and France.

Very truly yours,

Helen E. Disenhaus,

Counsel for ACC Corp.

Of Counsel:

Francis D. R. Coleman, Esq.,

Secretary and Corporate Counsel, ACC Corp.

October 24, 1995.

Mr. Bruno Lasserre,

Director General of Posts and Telecommunications, Ministry of Industry, Posts and Telecommunications and Foreign Commerce

Dear Mr. Lasserre: As agreed at our September 22 meeting in your Paris office, ACC is pleased to provide you with the following summary of its legal research on the extent to which France Telecom (''FT'') may voluntarily delegate part of its telephone service monopoly to ACC under current French law:

- French law gives FT the benefit of a monopoly over the provision of real-time switched voice telephone services over the French PSN. (Articles L32, L33.1, L34.1 of Code of Post & Telecommunications, Article 3 of Law 90–568 of 2 July 1990 and Decree n°90–1213 of 29 December 1990.) Such services constitute, according to a legal tradition in the field of telecommunications in France, a public service mission entrusted to FT.
- To perform its public service mission, FT may form a subsidiary (Article 7 of Law 90–568 of 2 July 1990; Article 32 of Decree 90–1213 of 29 December 1990) which is part of FT's ''group of companies'' to provide services (as opposed to infrastructure) including switched voice telephone services.
- The concept of a ''group of companies'' is not defined in French corporate law. Accordingly there is no legal requirement that FT be the sole shareholder of such a subsidiary.
- However, it is reasonable to conclude that under French law the subsidiary would be considered a member of FT's ''group of companies'' if three criteria were met; (a) if FT owned a majority of the capital and voting rights of the subsidiary; (b) if FT held the power to appoint a majority of the members of the Board of Directors of the subsidiary; and (c) if FT had preponderant control over the management of the subsidiary. It should be possible for these conditions to be met even though ACC had minority ownership, operational involvement, and certain acceptable protective legal mechanisms with regard to the subsidiary.
- Such protective legal mechanisms for ACC could include those which apply now, and those which applied with FT's service monopoly decreased or ceased.
- The provision of public services (on FT's public infrastructure) by such a subsidiary would require the favorable opinion of the Public Service Commission for Posts & Telecommunications and the approvals of the Minister of Post & Telecommunications and the Minister of Economy & Finance (Article 32 of Decree 90–1213 of 29 December 1990).
- Such public support, or the absence of it, by the French government could be highly significant and persuasive in France, Europe, and the United States.

ACC Corp. would welcome an active dialogue with your office and with FT to explore the creation of an FT/ACC subsidiary in accordance with the above research at your earliest convenience.

If you have any questions, please do not hesitate to contact me.

Best personal regards.

Sincerely,

ACC Corp.

Francis D.R. Coleman,

Secretary and Corporate Counsel.

FDRC/csg

cc: Helen Disenhaus, Esq.
Scott Blake Harris, Chief-International Bureau, FCC
Diane J. Cornell, Chief-Telecommunications Division, FCC
Mr. Mickey Kantor-U.S. Trade Representative
Anne K. Bingaman, Esq., Assistant Attorney General, DOJ
Donald J. Russell, Chief-Telecommunications Task Force, DOJ

French Chronology

September 11, 1995

Informal discussion with Monsieur Lasserre at luncheon in Washington, D.C. prior to his remarks on anticipated changes in France's telecommunications regulatory framework. A meeting with ACC in Paris was agreed to for the near future.

September 12, 1995

Letter from ACC Corp. to Monsieur Lasserre requesting a meeting in Paris on September 22 to continue a dialogue on domestic and international resale for France.

September 22, 1995

Meeting at the DGPT with Monsieur Lasserre and Madam Niclot attended for ACC by Mr. Francis Coleman and Mr. Michael Taylor and Mr. Lucien Rapp of the law firm of Serra, Michaud & Associes. Monsieur Lasserre agreed to receive ACC's analysis of the extent to which portions of France Telecom's switched voice telephony monopoly might be delegated to independent third parties such as ACC with regulatory approval. At Monsieur Lasserre's request, ACC outlined the manner in which this issue was moving forward in Germany and agreed to provide copies of relevant correspondence to Monsieur Lasserre. Monsieur Lasserre expressed great interest in ACC's progress with Deutsch Telekom and the German Ministry and indicated that information on such progress could be relevant in France.

September 26, 1995

Letter from ACC Corp. to Monsieur Lasserre thanking him for the September 22, 1995 meeting, confirming that German correspondence would be sent to him shortly, and expressing the desire to continue discussions with him and his staff so that suitable progress could be made.

October 4, 1995

Letter from ACC Long Distance UK Ltd. to Monsieur Lasserre enclosing copies of ACC's correspondence with Deutsch Telekom and the German Ministry.

October 18, 1995

ACC's legal counsel in Paris receives request from Monsieur Lasserre for status of ACC's legal analyses of extent to which portions of France Telecom's service monopoly might be delegated to ACC.

October 24, 1995

Letter to Monsieur Lasserre (with copies to DOJ, FCC, and USTR) summarizing ACC's legal analyses (i.e., extent to which portions of France telephone service monopoly might be delegated to ACC with France governmental approvals) and requesting support for further progress.

Chronology—ACC France International Simple Resale Application

3 November 1994

Meeting between ACC Corp. and France Telecom to discuss the provision of domestic

simple voice resale and international simple voice resale in France.

10 November 1994

Submission of application by ACC Corp. on behalf of ACC France (a company in the process of being registered under French Law) to the French Ministry of Industry Ports, Telecommunications and External Affairs (Direction de la Reglementation Generale des Postes et Telecommunications (''DGPT'')) to provide domestic simple resale services in France and international simple resale services on the France-U.S. route, and for commercially reasonable interconnection to the public switched telephone network.

14 November 1994

ACC Corp. letter to France Telecom requesting support for ACC France's domestic simple resale services and international simple resale services application submitted to the DGPT, as well as for ACC France's request for commercially reasonable interconnection to the public switched telephone network.

16 November 1994

Submission of application by ACC Global Corp. to the Federal Communications Commission for authority to resell private lines for the provision of switched services interconnected to the PSN at both ends and at one end only between the United States and France.

18 November 1994

Response from Monsieur Bruno Lasserre, Director General of DGPT, to ACC-France's application for domestic and international simple resale dated 10 November 1994. Response raises public voice telephony regulatory issues and equivalency issues between France and the United States, and invites ACC-France to meet with Ms. Niclot, Head of Network and Fixed Services, DGPT.

2 December 1994

Letter from ACC-France to Monsieur Bruno Lasserre acknowledging letter of the 18th of November and confirming meeting with Ms. Niclot to discuss ACC-France's application of 10 November.

14 December 1994

Meeting with Ms. Claire Niclot, Head of Network and Fixed Services, DGPT, to discuss the parameters of services that ACC Corp. may provide to the general public and interconnection with France Telecom.

23 December 1994

Letter from ACC Corp. to Mr. Guillaume, Directeur Juridique, France Telecom advising him of ACC Corp.'s desire to discuss commercially reasonable interconnection with France Telecom.

23 December 1994

Letter from ACC Corp. to Ms. Claire Niclot seeking interpretation of services that ACC Corp. may provide in France under current French law. ACC Corp. also requests Ms. Niclot's view on when France Telecom's monopoly on voice services to the general public will likely be relaxed.

4 January 1995

Letter from Ms. Claire Niclot in response to ACC's letter of December 23, 1994, discussing regulatory issues and extending an invitation for further discussions.

13 January 1995

Letter from Congressmen Thomas Bliley, Chairman of the House Committee on Commerce; Jack Fields, Chairman of the House Subcommittee on Telecommunications and Finance; and Bill Paxon, House Subcommittee on Telecommunications and Finance member, to FCC Chairman Reed E. Hundt urging Chairman Hundt ''to press forward as strongly as possible to open [the French market] to the United States telecommunications providers.''

30 January 1995

Letter from ACC in response to Ms. Claire Niclot's letter of January 4, 1995. ACC expresses its pleasure for the opportunity to meet with Ms. Niclot to investigate further the regulatory issues raised in ACC's letter of December 23, 1994, and in Ms. Niclot's letter of January 4, 1995.

2 February 1995

Letter from Monsieur Bruno Lasserre, Director General, DGPT, to ACC inviting ACC to meet with him to discuss ACC's application and the services that ACC would be permitted to offer in France under appropriate interpretations of current French law and regulations. The purpose of the meeting would also enable Monsieur Lasserre to discuss with ACC the steps currently being considered to introduce regulations in contemplation of the liberalization of telecommunications in accordance with EU proposals.

5 February 1995

Monsieur Bruno Lasserre, Director General of DGPT, requests ACC's French counsel to continue discussions with the DGPT and, to this end, to schedule a meeting with Ms. Claire Niclot.

8 February 1995

Letter from ACC's French counsel to Monsieur Bruno Lasserre requesting him to meet with Mr. Francis Coleman, General Counsel of ACC, and Mr. Michael Taylor, Secretary of ACC Long Distance (U.K.) Limited, in Paris during the week of March 13, 1995.

2 March 1995

Letter from ACC Corp. to Monsieur Lasserre confirming a meeting with Monsieur Lasserre on March 15, 1995 and stating ACC's interest in obtaining approval to provide domestic and international simple resale in France. ACC's letter also raises the question of the extent to which France Telecom can voluntarily delegate to ACC any portion of its reserved switched voice telephony service monopoly.

2 March 1995

Letter from ACC Corp. to Monsieur Emmanuel Guillaume, Directeur Juridique, France Telecom, seeking a meeting to explore the extent to which France Telecom can voluntarily delegate any portion of its monopoly to third parties.

15 March 1995

Meeting at the DGPT with Monsieur Lasserre and Madam Niclot attended by Mr. Francis Coleman and Mr. Michael Taylor of ACC. Mr. Coleman reviewed the role of resale as an important and additional way to ensure competition and avoid the pitfalls of duopoly network pricing. Monsieur Lasserre reviewed the scope of France Telecom's switched voice telephony monopoly and the extent, if any, to which France Telecom may delegate portions of that monopoly and stated that France Telecom would not be permitted to delegate any portion of this monopoly. Invitation extended to Monsieur Lasserre and Madam Niclot to visit ACC's operations in the U.K. and the U.S.A.

15 March 1995

Meeting at France Telecom with Monsieur F. Guilbeau and Monsieur Jean-Francis Thomas attended for ACC by Mr. Francis Coleman and Mr. Michael Taylor. Purpose of meeting to discuss the timetable of liberalization of services and infrastructure in France and the benefits to France Telecom and the public of resale as a competitive service. Invitation extended to France Telecom to send a delegation to visit ACC's operations in the U.K. and the U.S.A. in April. The invitation was accepted. Purpose of trip will be to learn more of ACC's activities and ACC's competitive position in relation to other carriers. Future and continuing meetings are anticipated.

September 11, 1995

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October 24, 1995

Letter to Monsieur Lasserre (with copies to DOJ, FCC, and USTR) summarizing ACC's legal analyses (*i.e.*, extent to which portions of France telephone service monopoly might be delegated to ACC with France governmental approvals) and requesting support for further progress.

Chronology—ACC Germany International Simple Resale Application

2 November 1994

Meeting between ACC Corp. and Deutsche Bundespost (''DBP'') Telekom to discuss the provision of domestic simple voice resale and international simple voice resale in Germany.

2 November 1994

Meeting between ACC Corp. and the Federal Ministry of Posts and Telecommunications (''BMPT'') to discuss the provision of domestic simple voice resale and international simple voice resale in Germany.

14 November 1994

Submission of application by ACC Corp. on behalf of ACC Deutschland gmbh (in the process of formation) requesting authority from the BMPT to provide domestic simple resale services and international simple resale services on the Germany-U.S. route.

14 November 1994

ACC Corp. letter to DBP Telekom requesting support for ACC Deutschland's application for authority to provide domestic simple resale services and international simple resale services, submitted to the BMPT, and stating ACC Deutschland's request for commercially reasonable interconnection to the public switched telephone network.

16 November 1994

Submission of application by ACC Global Corp. to the Federal Communications Commission for authority to resell private lines for the provision of switched services interconnected to the PSN at both ends and at one end only between the United States and Germany.

22 December 1994

ACC Corp. letter to DBP Telekom regarding arrangement meeting to commence negotiations for an interconnection agreement.

5 January 1995

Phone conference between ACC Corp. and the BMPT. BMPT noted that ACC Corp.'s German application requesting authority from the BMPT to provide domestic simple resale services and international simple resale services on the Germany-U.S. route is under review.

13 January 1995

Letter from Congressman Thomas Bliley, Chairman of the House Committee on Commerce; Jack Fields, Chairman of the House Subcommittee on Telecommunications and Finance; and Bill Paxon, House Subcommittee on Telecommunications and Finance member, to FCC Chairman Reed E. Hundt urging Chairman Hundt ''to press forward as strongly as possible to open [the German market] to the United States telecommunications providers.''

5 June 1995

Letter from Francis Coleman to Herr Hefekauser enclosing a paper setting out the key areas that would comprise an arrangement with DBP Telekom providing for commercially reasonable interconnection to the PSN and confirming a meeting with Herr Hefekauser on June 16, 1995.

7 June 1995

Letter from Francis Coleman to Herr Hefekauser setting out a proposed rebiller scenario for discussion at the June 16, 1995 meeting.

7 June 1995

Letter from Francis Coleman to Herr Feier of the BMPT setting out a proposed rebiller scenario for discussion at a meeting scheduled from June 16, 1995.

8 June 1995

Letter from Francis Coleman to Dr. Manfred Witte of the BMPT confirming June 16, 1995 meeting.

16 June 1995

Meeting at the BMPT. Representing the BMPT was Herr Knobloch. Representing ACC were Francis Coleman and Michael Taylor.

The proposed rebiller scenario with DBP Telekom was discussed. Herr Knobloch confirmed that the BMPT did not find the scenario as presented to be contrary to the existing German regulatory framework. Herr Knobloch suggested that ACC, as a next step present the proposed rebiller scenario to DBP Telekom and request a proposed tariff for BMPT review and approval.

16 June 1995

Meeting with Herr Hefekauser, Christophe Dreier and Gerhard Horter of DBP Telekom attended by Francis Coleman and Michael Taylor. ACC and DBP Telekom discussed the proposed rebiller scenario and ACC informed DBP Telekom that the BMPT had found no regulatory prohibitions to prevent DBP Telekom from entering into a rebiller arrangement with ACC subject to BMPT review and approval of terms and tariffs. DBP Telekom and ACC agreed that ACC would provide further details and information requirements to proceed with discussions.

28 June 1995

Meeting with DG IV at the European Commission. Representing DG IV were Dr. Stefan Rating, Madam Suzette Schiff-Cockborne, Mr. Rein Wesseling and Mr. Kevin Coates. Representing ACC were Francis Coleman and Michael Taylor. Francis Coleman spoke about the benefits of resale as a means of introducing switched voice telephony competition prior to January 1, 1998.

Francis Coleman also updated those present on the German Ministry's confirmation of ACC's ability to enter into a rebiller arrangement with DBP Telekom in Germany.

8 August 1995

Letter from Michael Taylor to Herr Hefekauser setting out the benefits to DBP Telekom of appointing ACC as a rebiller and requesting tariff details including payment terms and billing information required for ACC to bill its customers.

9 August 1995

Letter from Michael Taylor to Herr Knobloch confirming ACC's ability to enter into a rebiller arrangement with DBP Telekom in Germany.

22 August 1995

ACC meeting with Bruce Rogers (Telecommunications officer at U.S. Embassy in London reporting directly to the U.S. Ambassador). Michael Taylor of ACC provided an update on ACC's initiatives in Germany.

6 September 1995

Oftel Director General Donald Cruikshank gives speech to Euro-Forum in Dusseldorf entitled ''Liberalisation and the Promotion of Competition in Infrastructure and Services: Lessons from the UK Experience.'' Mr. Cruikshank describes ''* * * how the UK opened up [its] regime to U.S. resale companies, starting with ACC back in 1992 * * *'' (Page 9) and states that ''* * * ACC, our first licensed International Simple Resale company back in 1992, have now applied to engage in resale in Germany. I wish them every success over here and hope that the authorities here will be far-sighted and quick footed enough to recognize the benefits that such foreign investment, experience, and entrepreneurship can bring to the German economy (page 12).

13 October 1995

Francis Coleman of ACC Corp. invited by FCC to October 17 meeting at FCC offices in Washington with Prof. Dr. Stephan Schrader, Telecommunications Advisor to Minister Botsch, following a meeting between the FCC and Minister Botsch in Bonn the week of September 25.

17 October 1995

Francis Coleman of ACC Corp. meets with Prof. Dr. Stephan Schrader to discuss resale in general and ACC's strategy and efforts to become a rebiller under contract to Deutsch Telekom now, as approved in principle by the German Ministry last June. Mr. Coleman requested Dr. Schrader to encourage Minister Botsch's office to strongly support ACC's efforts now.

23 October 1995

As suggested by Dr. Schrader, Mr. Coleman sends letter to Prof. Dr. Eberhard Witte at Ludwig Maximilians Universitat in Munchen, Germany, requesting discussions in furtherance of ACC's efforts to become a

German rebiller. Dr. Witte chairs a seven person Committee reporting to Minister Botsch on German telecommunications deregulation.

October 24, 1995.

Donald J. Russell, Esq.,
Chief, Telecommunications Task Force, Antitrust Division, Room 89104, 555 Fourth Street, N.W., Washington, D.C. 20001

Re: United States v. Sprint Corporation and Joint Venture Co., Civil Action No. 95–1304 (D.D.C. filed July 13, 1995)

Dear Mr. Russell: On behalf of Esprit Telecom United Kingdom Limited, we transmit an original and five (5) copies of its comments in the above-referenced proceeding. We regret that the unexpected absence from his office of the company's European counsel delayed this filing until today, but we hope that you will be able to consider the comments on their merits. To avoid any prejudice to the defendants, copies of these comments are being sent by facsimile to the counsel identified below.

Should there be any questions concerning this matter, please do not hesitate to contact me.

Very truly yours,

Helen E. Disenhaus,

Counsel for Esprit Telecom United Kingdom Limited.

Of Counsel:

David E. Reibel,

Corporate Counsel, Esprit Telecom Benelux B.V., World Trade Center.

October 24, 1995.

Donald J. Russell, Esq.,
Chief, Telecommunications Task Force, Antitrust Division, Room 89104, 555 Fourth Street, N.W., Washington, D.C. 20001

Re: United States v. Sprint Corporation and Joint Venture Co., Civil Action No. 95–1304 (D.D.C. filed July 13, 1995)

Dear Mr. Russell: On behalf of Esprit Telecom United Kingdom Limited (''Esprit''), which recently received from the Federal Communications Commission (''FCC'') authority pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, to operate as a United States international facilities-based carrier (see FCC File No. I–T–C–95–435), we submit the following comments on the proposed Consent Decree filed in the above-referenced action.

Esprit and its affiliates have provided value-added and liberalized services in Europe since 1992. As documented in comments filed with the FCC by Esprit and by third parties, Esprit's attempts to enter and compete in the German and French markets have met with serious obstacles imposed by the dominant carriers, Deutsche Telekom (''DT'') and France Telecom (''FT''), and their respective national regulatory authorities. Esprit is therefore concerned that the restrictive provisions and reporting conditions of the proposed Consent Decree will be insufficient to prevent DT and FT from continuing to use their monopoly power in the still-reserved leased line and voice services market segments, as well as their dominant positions in all services in their home markets, to impair the ability of new entrants to compete in those markets.

Moreover, as a new entrant in the U.S. international services market, Esprit is particularly concerned that the proposed alliance with Sprint Corporation (''Sprint''), by allowing DT and FT to leverage their market power in their home markets, will limit competition in the U.S. international services market. DT and FT will be uniquely advantaged because their joint venture will be able to provide end-to-end international services (including but not limited to those on the U.S.–Germany and U.S.–France routes) that are foreclosed to their competitors. This advantage is increased by the fact that DT and FT have already stymied many of the efforts of potential competitors to establish themselves in the German and French markets as providers of enhanced and liberalized services. At the very least, German and French regulators should make a commitment to license competitors on an expedited basis, with the implementation of joint venture services suspended while applications from new entrants filed within 60 days of the entry of any Consent Decree in this action remain pending.

Moreover, as a condition of entry of a Consent Decree, DT and FT should be precluded from predatory pricing of end-user services and should be required to provide leased lines at wholesale, cost-based rates on an expedited and priority basis to competing carriers. DT and FT should not be allowed to provide leased lines for end-to-end joint venture services unless they provide leased lines in a non-discriminatory manner, including ensuring that joint venture services are not provisioned while competitors' service orders remain unfilled. Competitors must receive equal treatment with respect to all terms and conditions affecting service, including price and provisioning intervals.

While the Phase I conditions proposed by the Department go farther than the conditions imposed on the British Telecommunications alliance with MCI, they may not go far enough to avoid the alliance's having an adverse impact on competition. The Department acknowledges the current limitations on the effectiveness of the German and French regulators. Because the Department but not competitors will have access to the only information providing any degree of transparency into DT, FT, Sprint, and joint venture costs and prices, the Department must be prepared to thoroughly review on an expedited basis all data filed with it and to utilize such data in promptly considering competitor complaints. When colorable complaints are presented to the Department, it must be prepared to provide complainants the necessary data to support their claims unless the Department immediately implements remedial action. Because of the dependence of competitors on interconnection with the carriers' networks and access to the carriers' facilities, without vigorous oversight and enforcement by the Department, mere reporting conditions and abstract prohibitions against preferential treatment of alliance affiliates are insufficient protection against discrimination. Unless the Department undertakes an aggressive role in entertaining and investigating complaints of anticompetitive conduct, the Consent Decree will be little more than a piece of paper.

Some of Esprit's specific concerns about the anticompetitive conditions in the German and French telecommunications markets are briefly described in Attachment A, which also includes a copy of comments filed by Esprit before the FCC, as well as some recent trade press addressing these issues. Esprit would be pleased to meet with officials of the Department to discuss these concerns and possible additional competitive safeguards that would promote continuation of the vigorous competition now exhibited by the U.S. telecommunications market and promote expanded competition aboard.

Very truly yours,

Helen E. Disenhaus,

Counsel for Esprit Telecom United Kingdom Limited.

Of Counsel:

David E. Reibel,

Esprit Telecom, World Trade Center.

Concerns of Esprit Telecom About the ''Phoenix'' Alliance Among Sprint Corporation, Deutsche Telekom, and France Telecom

The experiences of the Esprit Telecom (''Esprit'') companies in attempting to compete in the French and German telecommunications markets as providers of enhanced and liberalized telecommunications services demonstrate that without regulators committed to a competitive telecommunications market and effective regulatory oversight, Deutsche Telekom (''DT'') and France Telecom (''FT'') will continue to be able to exercise their market power to forestall effective competition. Moreover, upon consummation of the Phoenix joint venture, their market power will be enhanced by the addition of Sprint Corporation (''Sprint'') to their alliance. Unless the Department undertakes an aggressive continuing oversight program, the Phase I restrictions and reporting requirements included in the proposed Consent Decree will be inadequate to prevent anticompetitive conduct that will affect not only the domestic markets in Germany and France, but also the U.S. and worldwide international telecommunications markets.

As the Department recognizes, unlike the situation in the United Kingdom at the time the British Telecom/MCI venture was approved, neither France nor Germany has a well-established, effective regulator committed to a competitive marketplace, and restrictive entry barriers have limited competitors to a few narrow niche services rather than to competition in all service categories. The Department should therefore give serious consideration to expanding the prophylactic measures included in the proposed Consent Decree to ensure that the Phoenix Alliance results in a net increase in telecommunications competition rather than promoting the development of a marketplace composed exclusively of a few international behemoths that function as an oligopoly.

In particular, Esprit's concerns focus on the following issues:

Regulatory Transparency—It is critical that France and Germany implement regulatory systems that provide transparency by affirmatively disseminating information about licensing procedures, cost accounting/orientation, tariffs, interconnection regimes, and infrastructure use and development. Current *ad hoc* procedures disadvantage new entrants by making it difficult for them to find out about, much less take advantage of, market entry opportunities, as well as by limiting their ability to challenge discriminatory conduct by the dominant providers.

Effective Enforcement—The Department has recognized the serious adverse implications of the fact that, while France is planning to establish an independent regulatory body, one is not yet in place. Similarly, as the Department recognizes, the independence of the German regulator is uncertain, especially in light of questions raised about the continuing involvement of key officials with DT.

It is also of major concern that neither DT nor FT has been privatized, raising a substantial conflict of interest for regulators in both countries, who are employed by governments with a vested interest in the profits of DT and FT. Given this motivation for continued preferential regulatory treatment of the state-owned national carriers, the Department must ensure that there are in place effective measures for ensuring a fair hearing of challenges to regulatory actions even when such challenges raise the issue that the regulator has impermissibly favored the dominant carrier.

Esprit's concerns in this area are particularly great because there is considerable doubt as to whether the national carriers and the national regulators in Germany and France have in the past fully complied with European Union and national laws affecting telecommunications regulation and competition. As detailed in the attached letter submitted last November to the EU's Director-General of DG–IV, the Competition Directorate of the European Commission, Esprit strongly opposes rewarding non-compliant national carriers and governments by allowing them to exploit new opportunities while they benefit from violations of existing law. These concerns are particularly relevant here, because the European Commission has itself cited several deficiencies in the implementation by Germany and France of the current Services Directive. Additionally, it appears that neither DT nor FT has complied fully with the Leased Line Directive (94/44/EEC), which, under Article 10(2), required the regulators of Member States to ensure that their telecommunications operators implemented and effective cost accounting system by December 31, 1993. Nor do the regulators appear to have complied even with the requirements of Article 10(1) of that Directive, which required compliance with basic principles of cost orientation and transparency. As a direct result of these deficiencies in regulatory oversight, consumers and competitors have been—and continue to be—overcharged for leased lines, and there is insufficient information to permit effective review of possible occurrences of cross-subsidization.

The Department should therefore ensure, at the very least, that both countries have established independent regulators prior to U.S. approval of Phoenix by the FCC and the District Court. Approval should also be conditioned on the establishment by the countries' competition agencies of procedures for expedited consideration of complaints of anticompetitive conduct, as well as the availability of remedies before the European Union and its regulatory agencies. Additionally, the Department should exercise continuing oversight of the competitive practices of Phoenix and its members. The Department should entertain complaints of, and be prepared to take appropriate remedial actions with respect to, anticompetitive activities by Phoenix members, regardless of whether the challenged activities actually occur within the U.S.

Cross-Subsidization—As a competitor and potential competitor of DT and FT, Esprit is also particularly concerned about the carriers' opportunities for cross-subsidization that can facilitate both unreasonably high wholesale rates and predatory pricing of end-user customer prices. Absent effective national regulators with broad authority and interest in ensuring that such cross-subsidization is both prohibited and prevented, competition will not flourish.

DT and FT must be required to demonstrate that they have priced their services and those of the joint venture on the basis of well-documented costs, without lowering prices to end-users in a predatory manner or discriminatorily raising prices charged competitors. Issues of cross-subsidization arise at both the ''macro'' and the ''micro'' levels.

With respect to ''macro'' cross-subsidization, the marketplace and the regulators must have full information about any start-up investments, transfers of assets, bank guarantees, loans, and other occasions of cross-subsidization. They must receive guarantees and time commitments for implementation of specific measures designed to prevent such cross-subsidization and its anticompetitive consequences, including the provision of sufficient information to allow competitors to challenge pricing effectively. One major concern of many potential new entrants is that Atlas/Phoenix will attempt to increase its market share quickly by ''dumping'' telecommunications services at prices below their actual costs (*i.e.*, engage in ''predatory pricing''). Evidence of such pricing practices has already been apparent to firms that have initiated competition in the limited market segments now open to them.

Similarly, new entrants are at a substantial disadvantage in that in many cases they must lease lines from the dominant operators. Not only does this provide opportunities for carriers with market power to delay provisioning or provide inferior quality circuits, but also it provides an opportunity for the dominant carriers to substantially increase the operating costs of their competitors. For a carrier such as Esprit, leased line costs may account for 40%–50% of the company's operating costs. but such costs may be dramatically changed at the whim (or the will) of the dominant carrier, which has a substantial opportunity for cross-subsidization.

At the ''micro'' level, both DT and FT have been found to have cross-subsidized their telecommunications services when competition enters a market segment. The record before the Department includes evidence concerning the substantial fine recently imposes on DT for cross-subsidization of its data services, and Worldcomm has been attacking DT cross-subsidization in Germany for some time. Similarly, as indicated in the attached article from La Monde Informatique, French regulators have found FT to be cross-subsidizing with monopoly revenues the activities of FT's competitive subsidiary, Colisée International. In addition to implementation of prophylactic measures to ensure that such activities do not continue, appropriate compensation should be made to adversely affected consumers and competitors as a pre-condition to approval of the Phoenix alliance.

Availability of ''Alternative'' Infrastructure—While we understand that both Germany and France are accelerating the availability of alternative infrastructure, these market segments should be fully liberalized before Phoenix is implemented. Not only should alternative infrastructure be available from public utilities and cable television operators, as is currently planned in the relatively near-term, but also competitors such as Esprit should be allowed to provide their own infrastructure (and the availability of this option should be made public information, without the necessity of *ad hoc* initiatives and narrow rulings limited to a single operator).

The availability of such alternative sources of circuit capacity will do much to prevent anticompetitive leased line provisioning by dominant carriers, and therefore it is critical that there be written commitments to authorize complete infrastructure competition in the near-term. Moreover, in the meantime, prior to its availability, DT and FT should be required to provide high quality leased lines in timely fashion and at cost-based prices to competitive carriers.

Interconnection Arrangements—Perhaps the greatest obstacle to implementation of a competitive marketplace is the absence of an effective regulatory regime that will ensure that the dominant carriers provide in timely fashion interconnection arrangements that are cost-based, feature-rich, and transparent across networks. Before Phoenix is approved, the Department should insist that, pending publication of the European Commission's forthcoming interconnection directive, both DT and FT publish proposed interconnection plans that include standard terms and conditions, cost-based tariffs, quality standards, and provisioning intervals, and that these proposals are made subject to public comment and scheduled for regulatory consideration on an expedited basis.

Conclusion

The Department is correct in insisting on detailed reporting of information to ensure

that the members of the Phoenix alliance act in a non-discriminatory manner vis-a-vis their competitors. At this time, neither Germany nor France has in place the types of detailed accounting rules established by the Federal Communications Commission to ensure transparency into carrier cost accounting and tariffing. Nor is there any transparency as to the carriers' terms and conditions of service provisioning. Mere reporting, however, is insufficient to address Espirit's substantial concerns about regulatory transparency, effective enforcement, cross-subsidization, availability of alternative infrastructure, and availability of proper interconnection arrangements.

The Department should seriously consider adding to the proposed Consent Decree the described above recommendations of Esprit. Additionally, it should make a clear-cut commitment to vigorous oversight and enforcement of the activities of the Phoenix joint venture and its members. To the extent that the reporting requirements of the Decree deny competitors access to critical information necessary to document the basis of their complaints of discrimination, the Department must assume an active role in reviewing all the data presented to it and must address complaints in timely fashion. Only if the Department undertakes this level of continuing oversight can approval of the alliance increase rather than substantially lessen competition in the international telecommunications services market.

21 November 1994.

Mr. Claus-Dieter Ehlermann,
Director General, DG–IV, Commission of the European Union, Rue de la Loi 200, B–1049 Brussels, Belgium

Re: Telecommunications Alliances

Dear Mr. Ehlermann: I am writing to request that you consider the following principles that Esprit Telecom proposes ought to be used for evaluating telecommunications alliances in Europe prior to Commission approval:

- The Commission should not permit the formation of alliances if a monopoly member is not fully compliant with all aspects of Commission directives. In particular, monopoly members should comply with the Open Network Provision (ONP) and the implementation of related liberalisation legislation. (Even the most basic provisions, such as those requiring cost accounting have not been achieved by many monopoly providers.)
- The Commission should not permit the formation of alliances if a National Regulatory Authority under which a monopoly member operates has not fully complied with Commission directives. Moreover, the Commission should not permit operators to join alliances while continuing to violate their own national regulations and laws.

The failure of Member States to fully implement Commission directives has permitted some monopoly operators to benefit from a protected home market—often with the aid of their national regulatory authorities—while aggressively pursuing opportunities in liberalised markets abroad. Esprit Telecom believes that if the objective criteria outlined above are utilised by the Commission, a more rapid and comprehensive liberalisation of the European market can be achieved. Esprit Telecom believes that liberalisation is a precondition for providing consumers with more choices and lower costs.

Sincerely,

Michael Potter,

President.

Federal Communications Commission

Opposition of Esprit Telecom, U.K., to Sprint Corporation Petition for Declaratory Ruling

In the Matter of: Sprint Corporation Petition for Declaratory Ruling Concerning Sections 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended. File No. I–S–P–95–002.

I. Introduction

Esprit Telecom, U.K. (''Esprit''), by its undersigned counsel, submits its Opposition to the Petition for Declaratory Ruling (''Petition'') of Sprint Corporation (''Sprint'')[1] seeking confirmation that its ''Global Partnership'' arrangement with France Telecom (''FT'') and Deutsche Telekom (''DT'') does not violate the Communications Act or the Commission's Rules. Specifically, Sprint seeks confirmation that (1) its formation of a ''Global Partnership'' with DT and FT and the related investment in Sprint by DT and FT does not involve a transfer of control within the meaning of Section 310(d) of the Communications Act; (2) a level of 28% foreign ownership in Sprint is not inconsistent with the public interest under Section 310(b)(4) of the Communications Act; and (3) the transaction is otherwise consistent with the public interest.

As explained below[2] Esprit strongly opposes approval of Sprint's Petition prior to the introduction of switched voice competition in France and Germany and the establishment of independent regulatory bodies in France and Germany that can and will effectively enforce regulations, including those relating to transparency of cost information and imputation of costs, that are designed to prevent anticompetitive behavior.

II. Statement of Interest

Esprit, owned and controlled by United States citizens, is a wholly-owned subsidiary of Esprit Telecom (Jersey) Limited, which is organized under the law of Jersey, Channel Islands, in the United Kingdom. While it has recently applied for authority to enter the U.S. telecommunications market as a common carrier,[3] Esprit operates primarily as a value-added services provider to large and medium-sized business users in the European telecommunications market. Specifically, in the U.K. Esprit provides to large and medium-sized businesses a wide range of value-added, switched and dedicated, voice and data services liberalized by the U.K. government. In continental Europe, Esprit's affiliates[4] provide value-added private network and facsimile services in Spain, Belgium, the Netherlands, and France, again serving primarily large and medium-sized business users. To date, however, Esprit has made no progress in its efforts to provide in Germany the value-added services liberalized by the European Union (''EU''), and it has experienced increasingly high leased line provisioning rates in both Germany and France.

Esprit is concerned that the proposed alliance among DT, FT, and Sprint will have a substantial adverse impact on Esprit's plans to construct a pan-European network absent commitments by regulators in France and Germany to implement immediately and fully all service and infrastructure liberalization directives promulgated by the EU and, further, to open the infrastructure and services monopolies of DT and FT to competition prior to consummation and implementation of the alliance. As a new entrant into the U.S. international services market, Esprit has a substantial concern that FT and DT will be able to leverage their monopoly positions in their home markets to enhance their position in the U.S. market and reduce the current level of competition here. Accordingly, Esprit has a direct interest in any Commission action that would have the effect of relieving the pressure on FT and DT and the French and German regulators to open the French and German telecommunications markets to competition in order for FT and DT to receive the U.S. regulatory approvals necessary to consummate their proposed investment in Sprint.

III. Approval of Sprint's Proposed Joint Venture Will Retard Rather Than Enhance Competition in the Global Telecommunications Market

Instead of promoting the Commission's articulated goal of fostering a competitive global telecommunications market, approving Sprint's proposed Global Partnership now, prior even to the authorization of resale competition in all service categories, much less full liberalization of the French and German telecommunications markets, would eliminate the chief incentive for the French and German governments to open their telecommunications markets to effective competition. The Commission must consider the potential adverse impact on the continuation of robust competition in the U.S. market, as well as the adverse impact on

[1] See Sprint Corporation Petition for Declaratory Ruling, File No. ISP–95–002 (filed Oct. 14, 1994); FCC Public Notice, Report No. I–8084 (released August 4, 1994).

[2] Esprit is currently the recently-filed ''Competitive Impact Statement'' of the Department of Justice and may supplement these comments in a reply pleading following its review of those documents.

[3] Application of Esprit Telecom of the United Kingdom Ltd. for Authority Pursuant to Section 214 to Operate as an International Resale Carrier Between the United States and Various Points, File No. I–I–C–95–435.

[4] Services in Belgium and the Netherlands are provided by Esprit Telecom Benelux B.V. Services in France are provided by Esprit Télécom France S.A. Services in Spain are provided by Esprit Telecom de España S.A.

the ability of U.S.-owned carriers to penetrate foreign markets, that would result from permitting the largest U.S. carriers to enter into alliances with the largest foreign monopoly carriers. In addition, while enhancing the competitive positions of the large U.S. carriers through financial investment, such alliances simultaneously deprive the U.S. market of some of its most vigorous new entrants. They also introduce new and unreasonable market distortions to the extent that alliance members are allowed to offer end-to-end services their competitors are foreclosed from providing. Therefore, it is imperative that the Commission permit such alliances to go forward only after it is convinced that any potential adverse impact on the level of competition in the U.S. market is offset by increased global competition that affords new opportunities for U.S.-owned carriers.

Here, the proposed Global Partnership involves three, rather than two, of the world's largest carriers, two of which retain substantial monopolies in their home markets, and competition in the French and German markets is far less extensive than that prevailing in the U.K. at the time the British Telecom /MCI joint venture was approved. Sprint's proposed alliance with FT and DT raises even more serious competitive concerns than did the BT/MCI ''Concert'' alliance. Moreover, instead of being in the vanguard of liberalization in Europe as is the U.K.'s regulatory regime, both France and Germany are only beginning to develop independent regulatory agencies [5] and regulations designed to ensure that the opportunity for fair competition develops.

Illustrating the magnitude of the problem, despite the EU's mandate, Germany simply has not adopted any laws to implement the EU's Services Directive [6] and authorize the offering of the liberalized services (virtually all services other than switched voice services) in its market. Moreover, neither the French nor the German government has fully implemented the Leased Lines Directive [7] requiring national regulators to obtain and review accounting separations data to ensure that the dominant carriers do not abuse their facilities monopolies or virtual monopolies by cross-subsidization [8] or by imputing lower costs to their competitive operations than they charge their competitors. While France, commendably, has allowed value-added service providers to enter the market without formal application procedures or processing delays,[9] in Germany the regulator's failure to implement European law with respect to liberalized services, leased lines, and open network provisioning [10] has chilled market entry by potential service providers who cannot rely on obtaining the necessary authorizations and leased lines in any predictable time frame. The few competitive authorizations that have been issued to date have, moreover, been issued on an *ad hoc* basis that gives little guidance as to the factors that will be considered in awarding such authorizations. In both countries, the efficient working of the competitive marketplace is already hampered by the regulators' failure to carry out their mandate to implement the EU Directives, and the problem could be worsened if the proposed Sprint/DT/FT alliance is allowed to proceed at this time.

IV. Continued Regulatory Pressure is Critical

In light of the virtually complete monopoly status of FT and DT in their respective markets and the current absence of competition in switched voice services in those markets, approving this alliance would eliminate all incentive for FT and DT to relinquish their respective strangleholds on the French and German telecommunications markets and could sound the death knell for emerging competitive carriers like Esprit. Even if France and Germany were to open their markets to competition, however, the potential and opportunity for anticompetitive behavior and discrimination in favor of Sprint and the joint venture company to be formed with Atlas is great and would likely have a preclusive effect on the entry of any new carriers. Therefore, until the regulator in each country establishes clear and transparent regulations with respect to application procedures, accounting separation procedures and cross-subsidization safeguards, as well as requiring cost-based leased line rates [11] and commercially reasonable interconnection charges, the Commission should not approve the proposed Sprint/DT/FT alliance. Although in recent months the French and German regulatory authorities have appeared to be more favorably disposed to increased telecommunications services competition, neither France nor Germany has yet taken any effective action to open its basic telecommunications services market to competition.

Accordingly, Esprit urges the Commission to deny Sprint's Petition until, at a minimum, concrete steps, such as implementing the European Community's Services, Open Network Provisioning, and Leased Line Directives, are taken in both Germany and France to liberalize their respective telecommunications markets. Given that FT and DT are the two largest telecommunications carriers in Europe, access to the French and German telecommunications markets is critical to successful market penetration by competitive entrants. The Commission should therefore decline to approve the proposed alliance until the French and German regulators adopt (1) transparent application procedures for licensing carriers to provide all services, (2) transparent rules to authorize competitive carriers to construct their own fiber and microwave networks, (3) rules to implement the European Community Leased Lines, Open Network Provisioning, and Services directives,[12] and (4) cost accounting rules to permit cross-subsidization.

V. Conclusion

For the foregoing reasons, Esprit respectfully urges the Commission to deny Sprint's Petition at this time as contrary to the public interest in promoting a competitive global telecommunications market.

Dated: September 1, 1995.

Respectfully Submitted,

Esprit Telecom, U.K.

Margaret M. Charles,

William B. Wilhelm, Jr.,

Swidler & Berlin, Chartered.

Certificate of Service

I hereby certify that, on this 1st day of September 1995, a copy of the Opposition of Esprit Telecom, U.K., to Sprint Corporation Petition for Declaratory Ruling was served by hand delivery to the following:

International Transcription Service, Inc., 2100 M Street, NW., Suite 140, Washington, DC 20037

International Reference Room, International Bureau, 2000 M Street, Room 102, Washington, DC 20554

Katherine A. Swall.

Harvard University Law School

October 19, 1995.

Mr. Donald Russell,

Chief, Telecommunications Task Force, Antitrust Division, Room 89104, 555 Fourth Street, NW., Washington, DC 20001

Re: Proposed Final Judgment and Competitive Impact Statement; *United States* v. *Sprint Corporation and Joint Venture Co.*

Dear Mr. Russell: The purpose of this letter is to comment on the Proposed Final Judgment and Competitive Impact Statement in *United States* v. *Sprint Corporation and Joint Venture Co.*, Civ. Action No. 95–1304 (D.D.C. July 13, 1995), published at 60 Fed. Reg. 44049 (August 24, 1995). In particular, I want to recommend that the Justice Department require, as a condition for

[5] The Direction Générale des Postes et Télécommunications in France and the Ministry for Post and Telecommunications, assisted by a new Regulierungsrat (Regulation Council), in Germany.

[6] 90/388/EEC: Commission Directive on 28 June 1990 on Competition in the Market for Telecommunications Services, 1990 O.J. (L 192/10).

[7] 92/44/EEC: Council Directive of 5 June 1992 on the Application of Open Network Provision to Leased Lines, 1992 O.J. (L 165).

[8] The substantial governmental investment interest in both European carriers also raises further concerns about the potential for substantial cross-subsidization and the regulatory directives to preclude it.

[9] See Article L. 34 of Law No. 90–1170 of 29 December 1990. (This section modifies the Code des Posts et Télécommunications to provide that the France Telecom monopoly extends only to ''services provided to the public, which, in the case of reserved voice telephony is ''the commercial provision of a system of direct, real-time voice transmissions between users connected to termination points of a telecommunications network,'' and establishes a notification procedure for competitive entry into most unreserved service segments.)

[10] 90/387/EEC: Council Directive of 28 June 1990 on the Establishment of the International Market for Telecommunications Services Through the Implementation of Open Network Provision, O.J. (L 192/1).

[11] Critical to Esprit's business plan of providing reliable competitive telecommunications services across Europe is the ability to lease lines at commercially reasonable rates or construct its own network.

[12] *See, supra,* notes 6, 7, and 10.

settling the case, that France Telecom remove all obstacles that hinder or render impossible the use by its competitors whether in the telecommunication sector (fixed telephone or mobile) or in the data processing sector, of public information contained in the French telephone directory it maintains in its capacity as a public utility.

Since 1989, France Telecom has been adamantly refusing to share with its competitors—specifically in the data processing sector—the contents of what has become known as the ''Orange List''. French regulations promulgated in 1989 have prohibited anyone from soliciting individuals who have informed France Telecom of their request not to be disturbed by commercial solicitations emanating from the telephone directory. France Telecom has created a list of such individuals which it calls the Orange List.

As a result of France Telecom's conduct, the French telephone directory is mixed with Orange List individuals whom no one other than France Telecom can identify. Yet, under French law, it is a crime to solicit such people. France Telecom refuses to share this information with its competitors, subjecting them to the risk of criminal prosecution if they compile their data from the telephone directory, and actually filing criminal complaints with the public prosecutor against its own competitors.

Using regulations intended strictly to protect a small group of individuals who wish not to be disturbed by commercial solicitations, France Telecom has basically made it impossible for any other entity to participate in the data base end of the direct marketing business, a business so crucial to the flow of goods and services from the U.S. to the French consumer market.

Indeed, the Orange List has potential implications beyond the data processing sector. If and when deregulation occurs in France, AT&T and MCI may seek to enter the telecommunication market in France. When they do so, they will, in all likelihood, need to solicit potential customers through direct mail or telemarketing. The only conceivable source of information they can use in such a campaign would be the French telephone directory; no other source would allow them to reach the totality of French households and entities. Unfortunately, because of France Telecom's refusal to share the Orange List with competitors, the U.S. competitors of Sprint would be unable to use the information contained in the directory. Should they do so, France Telecom would surely complain to the authorities which would lead to their criminal prosecution.

On the other hand, France Telecom and Sprint could easily reach the totality of the French population, because unlike its competitors, France Telecom can identify those individuals listed in the telephone directory who have put themselves on the Orange List.

A recent initiative undertaken by France Telecom in the mobile telephone sector will illustrate another aspect of the problem. The mobile telephone sector in France is open to competition and France Telecom has two competitors operating mobile telephone networks. France Telecom has recently informed its mobile telephone subscribers that they may request to be included in the telephone directory, and if they do so they will be automatically put on the Orange List.

The French regulation is clear about the fact that the request to be put on the Orange List must come from the individual and not at the initiative of France Telecom. But in moving to expand the reach of the Orange List, France Telecom has chosen to make it impossible for any of its competitors to solicit its clients, since it is unlawful to solicit individuals who are on the Orange List. Yet if another mobile operator published a directory of its subscribers, nothing could stop France Telecom from soliciting its competitor's clients.

The problem I am focusing on is not at all about protecting privacy, but about how much one is willing to pay France Telecom for the directory information purged of the Orange List. To obtain the entire directory purged of the Orange List would cost between $1.5 million and $3 million, depending on which of France Telecom's departments one buys it from. Paying this price will not get a data processing company or a marketing director of a competing telecommunications company very far because—on the very following day—the directory purchased will not contain the new additions to the Orange List. Since France Telecom does not supply the Orange List, the customer will have to procure the entire directory again and again. Quite frankly, it is just absurd—except for procuring a monopoly position by France Telecom, millions of dollars will have to be spent on nothing more than a telephone directory available on every street corner in Paris and which will be rendered obsolete the next day.

Meanwhile, France Telecom's U.S. operations in the transmission and processing of data are continuing to grow. Its on-line ''Minitel'' network of services is now available all over the United States to anyone with a modem-equipped personal computer. The France Telecom telephone and business directories are available to U.S. residents by simply dialing a local telephone number. France Telecom can use this access it has to American consumers, not only for direct profit (use of each on-line service generates income for France Telecom) but also to attract clients to its global telecommunications services. No one else can offer data processing services emanating from an all-encompassing and exhaustive data base of French residents.

France Telecom is seeking to profit as a market participation in the United States telecommunications economy, through its involvement in the Joint Venture Co., and must therefore live with the regulatory consequences of making this choice, including complying with applicable United States antitrust laws and policies. Since the preparation and distribution of telephone directories and related information is an integral aspect of the telecommunications business—the ''telecommunication service'' and the ''public data network'' that are the subject of the Proposed Final Judgment—that will be pursued by the Joint Venture Co, and since France Telecom's monopoly position has allowed it to limit competition concerning such directories and information to the detriment of United States businesses, the Antitrust Division's authority to require France Telecom to share the Orange List with its competitors for the sole and non-commercial purpose of allowing them to purge their data bases of those individuals who do now wish to be solicited, is not open to serious dispute. France Telecom should also be compelled to make available to its competitors updated versions of the telephone directory at a commercially reasonable price which takes into account the fact that its own data processing divisions obtain it, I presume, at no or little cost. These conditions should be specifically included in the final judgment in *United States* v. *Sprint Corporation and Joint Venture Co.*

My initial interest in this matter stems from consulting work I did for the New York law firm of Fisher and Soffer representing a French data marketing firm and its United States subsidiary in litigation with France Telecom over access to such telephone subscriber lists. My primary motivation for writing to you now, however, is to bring to your attention an important public policy issue within the scope of your mission, and not merely to advocate a position on behalf of a client.

The United States antitrust laws have played an important role in maintaining a level playing field for business competitors, both domestic and foreign, who seek to profit by participating in the United States economy. This role has become more demanding, and crucial, with the growth of our globalized economy. I urge the Antitrust Division to uphold this important role of the antitrust laws, and to require France Telecom to make its telephone directory truly available to competitors.

Respectfully submitted,

Charles M. Haar

Exhibit H

Notice Pursuant to Article 19 (3) of Council Regulation No 17 [1] and Article 3 of Protocol 21 of the European Economic Area Agreement Concerning a Request for Negative Clearance or an Exemption Pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement

Case No IV/35.337—Atlas

(95/C 337/02)

(Text With EEA Relevance)

Introduction

1. Atlas was notified to the Commission on 16 December 1994. This transaction brings about a joint venture owned 50% by France Telecom (FT) and 50% by Deutsche Telekom (DT). Atlas is also the instrument of DT and FT's participation in a second transaction, named Phoenix, with Sprint Corporation [2]. In the course of the procedure before the Commission, FT and DT agreed to modify both the Atlas and the Phoenix agreements.

[1] OJ No 13, 21. 2 1962, p. 204/62.

[2] Notification announced in OJ No C 184, 18. 7. 1995, p. 11.

described in a separate notice pursuant to Article 19 (3) of Regulation No 17, published in this edition of the *Official Journal of the European Communities.*

2. The Atlas venture will be structured at two levels. A holding company established in Brussels, Atlas SA, will be incorporated as a *société anonyme* under the laws of Belgium. Atlas SA will have three operating subsidiaries, namely one in France (Atlas France), one in Germany (Atlas Germany), and one for the rest of Europe. Atlas France and Atlas Germany will initially provide technical and sales support to FT and DT, i.e. the French and German distributors of Atlas and Phoenix products. After full liberalization of the telecommunications infrastructure and services markets in France and Germany, scheduled to occur by 1 January 1998, DT's subsidiary for the provision of standardized low-level packet-switched X.25 data communications, Datex-P, will be merged with Atlas Germany while FT's subsidiary for the provision of standardized low-level packet-switched X.25 data communications, Transpac France, will be merged with Atlas France.

A. The Parties

3. Deutsche Telekom AG (DT) and France Telecom (FT) are the public TO in Germany and France. Both supply telephone exchange lines to homes and businesses; local, trunk and international communications to and from their respective home country. Worldwide turnover in 1994 was ECU 31,8 billion, a 4,3% increase over 1993, for DT and ECU 21,7 billion, a 1,8% increase over 1993, for the FT group.

B. The Relevant Market

1. Product Markets

4. Atlas will address the markets for the provision of value-added telecommunications services to corporate users both Europe-wide and nationally. Atlas will target two separate product markets for value-added services, namely:

5. *The market for advanced telecommunications services to corporate users*

This market comprises mostly customized combinations of a range of existing telecommunications services, mainly data communications and liberalized voice services including voice communication between members of a closed group of users (virtual private network (VPN) services), high-speed data services and outsourced telecommunications solutions specially designed for individual customer requirements. The market for advanced telecommunications services to corporate users, enhanced by features such as tailored capacity allocation, billing, 24h/24h technical service, etc., is currently changing and evolving rapidly. Whether each of these services constitutes a separate product market can be left open for the purpose of this case, as Atlas and its competitors usually offer customized packages of such services in combination with individual enhanced features.

These services are provided over high-speed large-capacity leased lines linking sophisticated equipment on customer premises to the service provider's nodes. Alternatively, other means of transmission, e.g. satellite or mobile radio capacity, can be used to ensure the geographic coverage demanded from time to time. Such services employ advanced state-of-the-art standards, data compression techniques, equipment and software. In this market, Atlas is expected to offer a portfolio of services including the following:

—date services: high speed packet-switched and Frame Relay services; pre-provisioned, managed and circuit-switched bandwidth,
—value-added application services: value-added messaging and video-conferencing services,
—voice VPN services,
—intelligent network services,
—integrated very small aperture satellite (VSAT) network services, and
—outsourcing: customers are offered to transfer responsibility and ownership of their networks to Atlas. In this connection, Atlas may integrate into its own offerings third-party products already owned by customers who wish to keep such offerings, as the case may be.

6. Due to the high cost of building and operating the networks needed to provide advanced corporate services, such services can be commercially viable only if provided to large businesses and other large telecommunications users who generate continued high traffic volumes [3]. Customers for advanced services targeted by Atlas are multinational corporations, extended enterprises, and other intensive users of telecommunications and notably the largest among these customers. Many of these potential customers have huge telecommunication needs and have often acquired expertise in managing own internal networks; they are not likely to switch to service providers such as Atlas unless doing this proves to be cost-effective. Finally, given their knowledge of the market these customers are in a position to request offers from different competitors.

7. *The market for standardized low-level packet-switched data communications services*

Atlas will also be active on a separate market for packet-switched data communications services. The Commission considers data communications services a distinct telecommunications product market, without prejudice to the existence of narrower markets [4]. One narrower market is that for packet- and circuit-switched services [5]. Packet switching is a means to improve network capacity utilization and consists of splitting data sequences into 'packets', feeding these and other 'packets' into the network optimizing utilization of available capacity, switching the 'packets' to the desired destination and rearranging the 'packets' to obtain the data sequences sent. The most common standard used for the provision of packet-switched data services is the 'X.25' standard.

Packet-switched data communications services constitute a distinct product market because they are provided over basic terrestrial network infrastructure and based on more mature technology. These services are provided to different customer segments within the same products market, namely:

1. On the one hand, customers who generate mostly erratic and geographically widespread traffic. These features are due either to the specific type of use (e.g. banks operating cash machines nationwide, networks of points-of-sale in shops) or to the size of such customers, i.e. small and medium-sized enterprises (SMEs). Such services are billed according to published tariffs that are proportional to the actual time of use of the network.

All incumbent Member State TOs including DT and FT operate dense public data networks with nationwide coverage providing packet-switched data communications services to this customer segment. In each Member State there is only one public data network built by the respective incumbent TO under a public service obligation before market liberalization.

2. On the other hand, larger corporate customers and other extended users generate more substantial and regular traffic. The requirements of these users justify that either third-party service providers or the potential customer itself assume the high cost of creating customized leased lines circuits to meet individual service demand. Packet-switched data communications services to such users are billed according to negotiated rates that take account of the individual demand features of a particular customer.

8. Virtually all companies active in each individual Member State of the European Union are potential if not actual customers for national standardized low-level packet-switched data communications services. These services are also required by SMEs, albeit in smaller volumes and possibly less regularly than by larger users. Seldom will such volumes justify that service providers invest in leased lines with the specific purpose of reaching these SMEs, which are therefore in a weak negotiating position and hardly capable to date of switching from the current provider, typically the incumbent TO, to a competitor.

9. Standardized low-level packet-switched data communications may also be offered as one service combined with advanced corporate service offerings. However, even as part of such combined offerings packet-switched data communications services are provided over standard terrestrial infrastructure. At the national level, choice from a wider range of offerings than merely standardized low-level packet-switched data communications services may also be available to larger customers that are not using the TO's public data networks but are served over customized leased-line circuits. However, most existing customers for standardized low-level packet-switched data communications currently generate annual

[3] See Commission decision in Case No IV/34.857 (BT–MCI) of 27 July 1994 (OJ No L 223, 27. 8. 1994).

[4] Commission's Guidelines on the application of EC competition rules in the telecommunications sector (OJ No C 233, 6. 9. 1991, p. 2, paragraph 27).

[5] As defined in Article 1 (1), 9th indent of Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services (OJ No L 192, 24. 7. 1990, p. 10), (the 'Services Directive').

turnover of far below ECU 10 000 each and are not therefore potential users of advanced corporate network services. Therefore, packet-switched data communications offered by Atlas constitute a product market separate from the advanced network services market equally targeted by Atlas.

2. Geographic Markets

The markets for advanced telecommunications services to corporate users

10. Given that price differences are quite substantial, demand for these services exists in at least three distinct geographic markets, namely at a global, a cross-border regional and a national level. Atlas will provide advanced telecommunications services to corporate users Europe-wide and nationally. Through Phoenix, advanced telecommunications services offered by Atlas will also have global 'connectivity', i.e. the technical option to extend a given service offering beyond Europe by linking a customer's premises worldwide over the Phoenix 'Global Backbone Network'.

11. Given the considerable costs involved, advanced services are today mainly demanded by large multi-national corporations, extended enterprises, as well as major national and other intensive users of telecommunications. The requirements of such users, that extend to all products or corporate services provided by Atlas, were discussed in detail in the BT–MCI decision [6]. Essentially, customers demand a customized package of sophisticated telecommunications and information services offered by one single provider. This provider is expected to take full responsibility for all services contained in the package from 'end to end'. Accordingly, DT and FT intend to offer such customers through Atlas what existing technology allows to offer from time to time within the applicable regulatory framework. In this regard, the parties have indicated that Atlas will eventually extend to international voice traffic and other basic services, regulation permitting.

12. Due to the cost structure of advanced corporate services, notably the cost of leasing the required infrastructure, prices of such services are related to geographic coverage, as is the cost of additional features (e.g. one-stop-billing, help-desk and technical assistance around the clock, customized billing). There is indication that increasing availability of trans-European networks will ultimately blur the distinction between national and cross-border or ultimately Europe-wide advanced corporate services. However, certain national sophisticated value-added services (e.g. national voice VPN services as well as data communications services based on Asynchronous Transfer Mode (ATM) or equivalent switching technology) currently available from DT and FT in Germany and France respectively will not be integrated into the Atlas offerings. This circumstance illustrates that a distinction between national and cross-border advanced network services remains valid to date.

[6] See footnote 3 above.

The markets for standardized low-level packet-switched data communications services

13. Price differences may be less acute than for advanced corporate services. However, a national, cross-border regional and global geographic level can be distinguished for standardized low-level packet-switched data communications services. In terms of traffic volumes, supply and demand of standardized low-level packet-switched data communications services are mostly national. For instance, in Germany DT's existing Datex-P packet-switched data communications services division hardly ever provides such services across the border while FT's German subsidiary Info AG, in spite of appertaining to FT's seamless cross-border Transpac network, only provides one fifth of its packet-switched data communications services across the border. This assessment was confirmed by interested third parties who submitted observations further to the Commission's notice on the Atlas notification [7].

14. At a global and Europe-wide level, low-level data services and advanced network services may be partly converging to the extent that large customers of the latter do not require separate provision of standardized low-level packet-switched data communications services once such services are available as part of service combinations offered over advanced networks. Accordingly, large European telecommunications users demand services with global 'connectivity', i.e. that may be extended beyond Europe if so required. DT and FT have moved to meet this demand in entering the Phoenix agreements with Sprint. Along with increased availability of advanced cross-border network infrastructure, the market is generally expected to overcome distinctions along national borders in the medium term. However, separate national geographic markets subsist to date for standardized low-level packet-switched data communications services and advanced network services respectively.

C. Market Shares of Atlas

The markets for advanced corporate telecommunications service

15. The parties estimate the European corporate telecommunications services markets (exclusive of data communications services) to be worth approximately ECU 505 million (1993 figures). Of this total, end-to-end services accounted for approximately ECU 15,1 million, VPN services for approximately ECU 220,6 million, VSAT services for approximately ECU 173,2 million and outsourcing services for approximately ECU 96,4 million. According to the notification DT and FT's aggregate market shares (1993 figures) in the European Union were 25% in the end-to-end services market, 27% in the VPN services market and 2,3% in the outsourcing services market. Market shares for VSAT services are difficult to calculate given that TOs mostly use VSAT terminals either as back-up facilities for other services or to extend the geographic scope of services despite terrestrial infrastructure shortcomings; however DT and FT taken together operated 10 907 VSAT terminals by June 1994, equivalent to 29% of the total installed base of interactive, data one-way or business television VSAT terminals in the European Economic Area.

As to different segments of the advanced corporate services market at the national level, DT and FT's aggregate market shares in France and Germany respectively are 93% in the French VPN market (where DT has no presence) against 0% in the German VPN market, and 60% in the French market for end-to-end services against 35% in the equivalent German market. DT and FT's outsourcing joint venture, Eunetcom BV, achieved 36% of total outsourcing turnover generated in France and 29% of total outsourcing turnover generated in Germany. As for VSAT services, DT has installed approximately 25% of all VSAT terminals in Germany; this Member State accounts for 18% of the total installed base of such terminals in the EEA.

The market for standardized low-level packet-switched data communications services

16. DT and FT estimate the European market for data communications services to be worth approximately ECU 2,8 billion (1993 figures). According to the notification DT and FT's aggregate shares (1993 figures) of this market were 35%. Among national markets, Atlas will have a particularly strong position in France and Germany. DT and FT's aggregate market share for all data communications services is 79% in Germany and 77% in France, of which approximately half accounts for services provided by DT's Datex-P division and FT's Transpac France subsidiary, both of which remain outside the scope of Atlas until the French and German telecommunications infrastructure and services markets are fully liberalized as scheduled for 1 January 1998.

D. Main Competitors of Atlas

The markets for advanced corporate telecommunications services

17. Since the Commission's BT–MCI decision many players, acting alone or jointly with partners, have entered or are entering the market for international value-added services. Among the most important of these players, albeit with disparate geographic scope and target customers, are: AT&T WorldPartners, Concert, IBM-Stet, International Private Satellite Partners, Unisource or Uniworld. Some of the above are mere projects of strategic alliances between TOs, others are awaiting regulatory approval. However, all of the above share the aim to position the respective partners in view of the full liberalization to come.

The market for standardized low-level packet-switched data communications services

18. The market for standardized low-level packet-switched X.25 data communications services features a substantially larger number of players than that for customized offerings comprising advanced corporate services. Among the global players in this

[7] Notification of a joint venture (Case No IV/35.337—Atlas) (OJ No C 377, 31. 12. 1994, p. 9).

market are the alliances mentioned at paragraph 17 above competing with providers such as EDS, FNA, Infonet, SITA or SWIFT and operating subsidiaries of large global companies such as AT&T Istel, Cable & Wireless Business Networks, DEC's Easynet, or GEIS.

In addition, a large number of smaller players compete at a cross-border regional or national level in the EEA. For instance, FT's indirect German subsidiary Info AG, that provides most of its data communications services within Germany, is DT's second-largest competitor in the German national market for standardized low-level packet-switched data communications services. None of these smaller players can compare with large alliances in terms of reach, access to transmission capacity and financial backing.

E. The Transaction

19. The Atlas transaction notified to the Commission comprises a set of agreements whose main features are described below.

1. Agreements as Originally Notified

(a) The Atlas Joint Venture Agreement (JV Agreement) is the main agreement providing for the establishment of the Atlas joint venture.

(b) The Intellectual and Industrial Property Transfer and License Agreements will be concluded by each of FT and DT with Atlas SA. Under these agreements FT and DT make available to Atlas SA the intellectual property rights (IPRs) needed to operate the Atlas business.

(c) The Services Agreements will be framework agreements setting forth the basic terms and conditions with respect to the supply by DT and FT of certain services to Atlas SA and the supply by Atlas SA of certain services to FT and DT.

(d) The Distribution Agreements: two substantially similar distribution agreements with FT and DT respectively will lay out, for the home countries (France and Germany respectively), the marketing and sale of Atlas products.

(e) The Agency Agreements under which each parent appoints Atlas SA non-exclusive worldwide agent for the sale of DT and FT's international leased lines (half-circuits) with the territorial exception of Germany as regards DT's half-circuits.

2. Contractual Provisions

20. In particular, the above agreements provide for the following:

1. Structure of the Atlas Venture

Atlas SA will be created as a joint venture between FT and DT, each owning half the share capital. The management structure of Atlas SA will be as follows:

(a) Shareholders' meeting: Prior approval of the shareholders' meeting is necessary for matters such as the amendment of the articles of association, modification of capital, issuance of shares, mergers, sale of all or a substantial part of the assets, and liquidation.

(b) Strategic Board: It is envisaged that the Strategic Board of Atlas SA will have two co-chairmen and eight members, one half appointed by each parent, who may be freely removed and shall meet at least twice a year. The Strategic Board has a quorum of a majority of its members, including at least two members appointed by each party; the co-chairmen do not have a tie-breaking vote. Prior approval by the Strategic Board is required for matters such as the entry into a joint venture or other strategic alliance with a third party, any significant modification of the scope of Atlas's business and such matters as may from time to time be submitted to it by a vote of one half of the members of the Board of Directors. The Strategic Board shall also review all strategic plans of Atlas SA.

(c) The Board of Directors: It is envisaged that Atlas SA's Board of Directors will have nine members, four elected by each of DT and FT and one by Sprint. Prior approval by the Board of Directors is required for a number of important decisions such as the approval of business plans and annual budgets and changes in the scope of Atlas, the conclusion of important contracts, etc. Decisions on changes in the Atlas business, management appointments, and the approval of the business plan, the annual operating plan, and the budget require that at least two directors nominated by each party vote with the majority. Matters on which the Board of Directors fails to reach agreement shall be brought before the Strategic Board.

(d) Chief Executive Officers (CEOs): It is envisaged that Atlas SA will have two CEOs, one nominated by FT among is representatives in the Board of Directors, the other by DT among its representatives in the Board of Directors. The CEOs shall be jointly responsible for day-to-day operations and the management of the business and affairs of Atlas. Approval of both co-CEOs is required for all important decisions including the hiring or dismissal of key employees.

The parties will contribute to Atlas their existing European assets outside France and Germany (as well as some assets in France and Germany) used for the provision of services coming within the scope of Atlas.

2. Purpose and Activities of Atlas

The Atlas venture is to provide seamless national and international end-to-end services to corporate customers (i.e. to multinational companies (MNCs) and SMEs alike). The portfolio of Atlas services comprises data network services, international end-to-end services, (managed links), voice VPN services, customer-defined networks, outsourcing and VSAT services. These services are fully liberalized in the European Union and are widely liberalized worldwide. Atlas will have the responsibility for the services portfolio mentioned above outside of France and Germany.

In France and Germany, Atlas will be providing sales support to FT and DT's sales forces as regards all services mentioned in the Atlas portfolio, with the exception of public X.25 packet-switched network services within France and Germany, which will be provided by FT's Transpac France subsidiary and DT's Datex-P subsidiary respectively until the telecommunications infrastructure and services markets are fully liberalized in France and Germany, as scheduled for 1 January 1998.

Each acting as an exclusive distributor, DT will sell Atlas services in Germany, while FT will sell Atlas services in France. Atlas products will be sold in France and Germany under the common globally used Atlas/Phoenix brands. Passive sales of Atlas services by DT in France, by FT in Germany and by any Atlas operating entity in both Member States will be allowed. Outside France and Germany, Atlas products will be sold by the Atlas operating entity for the rest of Europe.

It is planned that there will be a balancing payment by DT at each closing to equalize the respective contribution values of the two parties. It is further envisaged that certain adjustment payments will be made on the respective net worth of the entities concerned at the time of contribution to Atlas. A separate adjustment payment may be made between FT and DT if the actual performance of the FT contributed businesses in France or the DT contributed businesses in Germany falls significantly short of projections in 1995 (and possibly 1996).

3. Provisions Concerning Dealings With/by Atlas

Mutual service provision between Atlas and FT/DT will be the object of two Services Agreements pursuant to which dealings between FT/DT and Atlas shall be transparent, non-discriminatory and at arm's length.

As for services generally offered by DT or FT, the prices and other terms which DT or FT generally apply from time to time to their customers shall equally apply for Atlas. As for services not generally offered by FT or DT, market prices and terms shall apply and be negotiated between the Parties in good faith at arm's length. Consequently, Atlas will purchase such services from DT or FT at the same prices and conditions that any third party generally offering such services would apply under the same circumstances. If information on relevant market prices is not available, the prices applicable for Atlas shall be determined on the basis of a calculation model that is used, within FT, to make offers to customers with special requests and, within DT, to calculate intra-group transfer prices. Prices resulting from such calculation shall cover, for the relevant period, all costs as well as a reasonable profit margin.

4. Non-Compete Provisions

Pursuant to Article XIII of the Atlas JV Agreement, FT and DT will not engage anywhere in the production of services that are substantially the same or compete directly with the Atlas services, and will not engage outside of France and Germany in the marketing, sale or distribution of services that are substantially the same or compete directly with the Atlas services. Furthermore, FT will not market or distribute Atlas services in Germany and DT will not market and distribute Atlas services in France; passive sales are however permitted by FT outside of France, by DT outside of Germany and by Atlas in both France and Germany.

5. Provisions Relating to Intellectual and Industrial Property

FT and DT will each conclude an Intellectual and Industrial Property Transfer and License Agreement with Atlas SA under

which the parties make available to Atlas SA the intellectual property rights (''IPRs'') which are needed to operate the Atlas business in accordance with the following principles:

(a) IPRs owned by, or licensed to, the parties that are used exclusively for the Atlas business shall be transferred to Atlas SA;

(b) IPRs owned by, or licensed to, the parties that are used predominantly for the Atlas business shall also be transferred to Atlas SA, and a sub-license shall be granted to the parties (Grant Back License sub-license); and

(c) IPRs owned by, or licensed to, the parties that are used predominantly for the parties' business are (sub-)licensed to Atlas SA.

F. Changes Made and Undertakings Given Further to the Commission's Intervention

21. Certain features of the Atlas transaction as notified appeared to be incompatible with Community competition rules. Consequently, the Commission by letter of 23 May 1995 informed the parties of its concerns. In the course of the notification procedure the parties have amended the original agreements and given undertakings to the Commission.

1. Contractual Changes

22. Non-appointment of Atlas SA as an agent for international half-circuits. Further to the Commission's letter of 23 May 1995, DT and FT abolished the Agency Agreements and amended the original Service Agreements to take account of the non-appointment of Atlas SA as a non-exclusive agent for DT and FT's half-circuits.

23. Non-integration of French and German public data networks before full liberalization of the telecommunications infrastructure and services markets. Atlas SA shall not acquire legal ownership or control within the meaning of Article 3 of Council Regulation 4064/89 [8] of the French and German public X.25 packet-switched data networks, Transpac France and Datex-P respectively, before the telecommunications infrastructure and services markets are fully liberalized in France and Germany, as is scheduled to occur by 1 January 1998. Until then, it is envisaged that:

1. Transpac SA will be split into Transpac France and Transpac Europe;

2. Transpac Europe will be contributed to Atlas;

3. Transpac France will be a wholly owned subsidiary of FT;

4. DT's Datex-P services division will be incorporated as a separate company under German law and become a wholly owned subsidiary of DT;

5. DT and FT's outsourcing joint venture, Eunetcom BV, will be fully contributed to Atlas SA; and

6. Atlas SA will create a subsidiary in France and Germany (Atlas France and Atlas Germany respectively) to provide the following services:

(i) sales support regarding Atlas products to distributors in France and Germany; and

(ii) services within the scope of Atlas other than X.25 packet-switched data network services including:

—VSAT services,
—international end-to-end services,
—voice VPN services,
—customer-defined solutions (excluding national X.25 data communications services in France and Germany), and
—outsourcing services.

Provided the telecommunications infrastructure and services markets are fully liberalized in France and Germany on 1 January 1998, Transpac France and Datex-P will be contributed to Atlas on that date in such a way that Atlas France and Atlas Germany will be merged with Transpac France and Datex-P respectively.

24. Technical cooperation. Ahead of full liberalization of the telecommunications infrastructure and services markets in France and Germany, scheduled to occur by 1 January 1998, DT and FT will cooperate in the development of common technical network elements. This cooperation will comprise only the following areas:

1. FT and DT will cooperate in the development of common products and common technical network elements (i.e. such products and elements that share the same features, yet separately built and owned); such cooperation will extend to the French and German public X.25 packet-switched data communications networks. Only the following functions will be managed by Atlas SA for Transpac France and Datex-P respectively:

(a) product management and development, provided that product branding and pricing as well as product implementation in the network will be managed by Transpac France and Datex-P respectively;

(b) certain network planning functions; and

(c) information systems, provided that central information system functions (e.g. billing information and statistics) will be operated by Transpac France and Datex-P respectively.

The above areas of cooperation shall in no case be tantamount to a *de facto* integration of the French and German public switched data networks, which will be controlled by two separate network management centres; and

2. Atlas may subcontract certain operational functions to Transpac France and Datex-P respectively.

25. Non-integration of assets of FT's indirect German subsidiary. The assets of FT's German corporate telecommunications services provider Info AG shall not be integrated into Atlas save as indicated at paragraph 27 below. Moreover, FT shall divest Info AG.

2. Non-Discrimination

26. In order to provide the services described under paragraph 5 above, Atlas or any other service provider is dependent on the public switched telecommunications network (PSTN) and reserved services.[9] In France and Germany, only FT and DT provide both access to the PSTN and reserved services. Given that FT and DT are indirect shareholders of Atlas it is essential for the safeguarding of fair competition between Atlas and other existing or future telecommunications services providers to eliminate the risk that the former are granted more favourable treatment regarding access and use of the French and German PSTN and reserved services.

The Commission set out in its notice on the Infonet joint venture [10] how prohibition to discriminate must be understood in detail. Accordingly, to ensure the absence of discrimination, the Commission intends to decide that DT, FT and Atlas shall comply with the following:

1. Terms and conditions: The terms and conditions applied by DT and FT to Atlas for access to the PSTN and for the provision of reserved services (e.g. provision of leased lines) in connection with the services described under paragraph 5 above shall be similar to the terms and conditions applied to other providers of similar services. This requirement covers availability price, quality of service, usage conditions, delays for installation of requested facilities, and repair and maintenance services among other services.

2. Scope of services available. Atlas shall not be granted terms and conditions, or be exempt from any usage restrictions regarding the PSTN and reserved services, which would enable it to offer services which competing providers are prevented from offering.

3. Technical information: DT and FT shall not discriminate between Atlas and any other service provider competing with Atlas in connection with either a decision to substantially modify technical interfaces for the access to reserved services or the disclosure of any other technical information relating to the operation of the PSTN.

4. Commercial information: DT and FT shall not discriminate between Atlas and other providers of services as described under paragraph 5 above as regards the disclosure of certain commercial information. This means that DT and FT shall not provide Atlas with systemized and organized customer information derived exclusively from the operation of the PSTN or the provision of reserved services if such information would confer a substantial competitive advantage and is not readily and equally available elsewhere by service providers competing with Atlas.

3. Undertakings Given by the Parties

27. *Divestiture of Info AG.* FT shall divest of its interest in Info AG. To the extent separable from the product divisions of Info AG that shall be divested, advanced network services for multinational clients whose headquarters are outside Germany may be transferred to Atlas.

28. DT and FT have also given the additional undertakings described below.

[8] OJ No. L 395, 30. 12. 1989, p. 1.

[9] Reserved services are services which are provided pursuant to special or exclusive rights granted by the EU Member States to their respective TOs in compliance with EC law.

[10] Notice pursuant to Article 19(3) of Council Regulation No. 17 concerning Case No. IV/33.361—Infonet, (OJ No. C 7, 11. 1. 1992, p. 3, at paragraph 9).

1. Use of DT and FT's Public Data Networks

Each of FT and DT will as of 1 January 1996 establish and thereafter maintain third-party access to their public switched data networks in France and Germany respectively. Non-discriminatory, open and transparent access will be granted to all data services providers that offer X.25 packet-switched data communications services. To ensure non-discriminatory access to their national public X.25 packet-switched data networks, FT and DT shall:

(a) establish and maintain standardized X.75 interfaces to access their national public X.25 packet-switched data networks; this interconnection is suitable for the provision of end-to-end services based on X.25 specifications for end-user access speeds up to 64 kbps; and

(b) offer such access on non-discriminatory terms, including price, availability of volume or other discounts and the quality of interconnection provided.

FT and DT shall further ensure non-discriminatory access by making publicly available the standard terms and conditions for such X.75 interface standards, including, if any, volume and other discounts, as of 1 January 1996. FT and DT will make available for inspection by the Commission any agreements relating to such X.75 interfaces, including all specifically agreed terms. Until such time as Transpac France and Datex–P are integrated into Atlas, neither Transpac France nor Datex-P shall disclose to Atlas any such specifically agreed terms that are identified and maintained as confidential by the party obtaining interconnection through such X.75 interfaces. Finally the above obligations shall likewise apply to any generally used CCITT-standardized interconnection protocol that may modify, replace or co-exist as a standard related to the X.75 standard and is used by FT and DT.

Proprietary interfaces may be retained or established among Transpac France, Datex-P and Atlas; such interfaces are defined by the particular type of technology, hardware and software that a network operator uses to provide advanced or customized services. Atlas will be allowed to access the Transpac France and Datex-P public packet-switched data networks through these proprietary interfaces, also for the provision of X.25 data communications services, provided access granted to Atlas through such interfaces is economically equivalent to third-party access to the Transpac France and Datex-P networks.

2. Cross-Subsidization

DT and FT shall not engage in cross-subsidization within the meaning of the Commission's competition guidelines for the telecommunications sector [11] in connection with the Atlas venture. To avoid that Atlas benefits from cross-subsidies stemming from the operation of public telecommunications infrastructure and of reserved services by either DT or FT, all entities formed pursuant to the Atlas venture will be established as distinct entities separate from DT and FT.

Atlas SA, Datex-P and Transpac France shall obtain their own debt financing on their own credit, provided that FT and DT:

(a) may make capital contributions or commercially reasonable loans to such entities as required to enable Atlas SA, Datex-P and Transpac France to conduct their respective business;

(b) may pledge their venture interests in such entities, in connection with non-recourse financing for such entities; and

(c) may guarantee any indebtedness of such entities, provided that FT and DT may only make payments pursuant to any such guarantee following a default by such entities in respect of such indebtedness.

Atlas SA, Datex-P and Transpac France shall not allocate directly or indirectly any part of their operating expenses, costs, depreciation, or other expenses of their business to any parts of FT or DT's business units (including without limitation the proportionate costs based on work actually performed that are attributable to shared employees or sales or marketing of Atlas products and services by DT or FT employees), provided however that nothing shall prevent Atlas SA, Datex-P and Transpac France from billing DT or FT for products and services provided to DT or FT by such entities on the basis of the same price charged third parties (in the case of products or services sold to third parties in commercial quantities) or full cost reimbursement or other arm's length pricing method (in the case of products and services not sold to third parties in commercial quantities).

Atlas SA, Datex-P and Transpac France shall keep separate accounting records that identify payments or transfers to or from DT and FT. Moreover, Atlas SA, Datex-P and Transpac France shall not receive any material subsidy (including forgiveness of debt) directly or indirectly from DT or FT, or any investment or payment from DT or FT that is not recorded in the books of such entities as an investment in debt or equity.

DT, FT and Atlas shall comply with the above until the telecommunications infrastructure and services markets in France and Germany are fully liberalized, as is scheduled to occur by 1 January 1998.

3. Auditing

Atlas SA (which includes its consolidated subsidiaries), Transpac France and Datex-P shall be audited on a regular and customary basis, and such audit shall confirm from an accounting viewpoint that the transactions between these entities, on the one hand, and FT and DT, on the other hand, have been conducted at arm's length. This obligation shall remain in force until the telecommunications infrastructure and services markets in France and Germany are fully liberalized, as is scheduled to occur by 1 January 1998.

4. Recording and Reporting

To allow the Commission to monitor compliance with the undertakings the parties have agreed the following:

(a) *Recording obligations.* DT, FT and Atlas each undertake to keep records and documents suitable to prove compliance with the terms of the above undertakings ready for inspection by the Commission.

(b) *Inspection of records.* For the purpose of ascertaining and ensuring compliance by DT, FT or Atlas with the above undertakings, DT, FT or Atlas shall, on reasonable notice, during office hours, and without a need for the Commission to invoke the powers of inspection pursuant to Regulation No. 17, give the Commission's Directorate-General for Competition access to DT, FT or Atlas' business premises to inspect records and documents covered by the above recording obligations and to receive oral explanations relating to such documents.

(c) *Reporting obligations.* DT, FT and Atlas also undertake to provide the Commission's Directorate-General for Competition, for the purpose of ascertaining whether DT, FT and Atlas comply with the requirements of the above undertakings, with:

—any records and documents in the possession or control of DT, FT or Atlas necessary for that determination, and

—oral or written complementary explanations.

These recording and reporting obligations will remain in force until the telecommunications infrastructure and services markets in France and Germany are fully liberalized, as is scheduled to occur by 1 January 1998.

29. In so far as related to existing obligations under national or Community law, the above is intended to ensure the parties' firm commitment to comply with the applicable legal framework.

G. The Regulatory Situation

30. In letters sent to the Commission, the French and German Governments have undertaken to take the necessary steps to liberalize alternative infrastructure for the provision of liberalized telecommunications services by 1 July 1996 and to liberalize the voice telephony service and all telecommunications infrastructure fully by 1 January 1998. The availability of alternative telecommunications infrastructure in Germany and France render competitors of Atlas independent of DT and FT's infrastructure for the purposes of creating trunk network infrastructure to provide liberalized services.

Early alternative infrastructure liberalization in France and Germany adds to a regulatory framework in the home countries of the Atlas partners that is designed to ensure a level playing field in the telecommunications markets.

1. France

1. Separation of Regulatory and Operative Functions

Pursuant to French law, the minister for telecommunications shall ensure that regulation of the telecommunications markets is undertaken separately of service provision in these markets. A specific national regulatory authority (NRA), the Direction Générale des Postes et Télécommunications (DGPT), is competent for licensing providers of telecommunications networks and services in France based on objective and transparent

[11] Guidelines on the application of EEC Competition Rules in the Telecommunications Sector (OJ No. C 233, 6. 9. 1991, paragraph 102 *et seq.*).

criteria. The DGPT shall survey FT's market behaviour and approve FT's tariffs for (i) reserved services and leased lines and (ii) such liberalized services that are not in fact provided by a third party active in the French market.

2. Non-Discriminatory Access

Further to the adoption of the Commission's Services Directive and the ONP Framework Directive [12] Article L. 32–1–4° of the French Law of 29 December 1990 grants all users equal access to the public network on objective, transparent and non-discriminatory conditions. FT is under an obligation to effectively grant such access and must publish information on the network (e.g. technical features, tariffs and usage conditions) and on leased line offerings. The DGPT may verify FT's compliance with these obligations and investigate complaints filed against FT for non-compliance with these obligations. The DGPT shall further ensure compliance with FT's obligation to share available transmission capacity for liberalized services with competitors and shall publish annual statistical reports on FT's compliance with these obligations.

3. Prevention of Cross-Subsidies

To allow the DGPT to supervise FT's market behaviour, FT is under the legal obligation to keep an analytical accounting system that relates costs to each individual FT service. Where an offering comprises the provision of both reserved and liberalized services, FT must separate each kind of service in the contract and in the invoice. In this connection, FT's data communications services are already provided by a separate legal entity.

2. Germany

1. Separation of Regulatory and Operative Functions

Pursuant to the German 1989 Poststrukturgesetz, the 1994 Postneuordnungsgesetz and the 1994 Post- und Telekommunikation Regulierungsgesetz, regulatory competencies are assigned to a Federal agency created under the Federal Ministry of Post and Telecommunications (BMPT) while telecommunications operations are undertaken by DT, a fully State-owned joint stock corporation. Regulatory obligations of DT are policed by independent bodies, so-called regulatory chambers.

2. Non-Discriminatory Access

Under the current and future German regulatory framework, DT shall provide third parties with both access to monopoly infrastructure and reserved or mandatory services on a non-discriminatory and transparent basis according to objective criteria. Upon application, DT shall supply state-of-the-art leased lines over service-neutral access points without delay. With the only restriction of voice telephony service provision, leased lines may be freely interconnected and used for any service. Leased lines must meet market demand and DT must publish data concerning availability and quality of such lines.

3. Prevention of Cross-Subsidies

The BMPT (i) shall approve both tariffs and other price-sensitive contractual terms for DT's reserved services and (ii) may object to DT's tariffs for mandatory services. The BMPT may also seize DT's profits stemming from tariffs in excess of the approved amount and take any measure necessary to reestablish a fair competitive environment jeopardized by unlawful cross-subsidization. Moreover, DT's subsidiaries an affiliates shall use reserved services for the provision of competitive services under the same terms as DT's customers and must use such terms to account internal services transfer.

The Commission's Intentions

31. On the basis of the foregoing, the Commission intends to take a favourable position on the notified transactions under the competition rules of the EC Treaty and under Article 53 of the EEA Agreement and to grant Atlas an individual exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement. Before doing so, the Commission invites interested third parties to send their observations within six weeks from the publication of this notice to the following address, quoting the reference 'IV/35.335—Atlas':

European Commission, Directorate-General for Competition (DG IV), Directorate for Information, Communication and Multimedia, Rue de la Loi/Wetstraat 200, B–1049 Brussels. Fax: (32–2) 296 98 19.

Notice Pursuant to Article 19 (3) of Council Regulation No. 17 [1] and Article 3 of Protocol 21 of the European Economic Area Agreement Concerning a Request for Negative Clearance or an Exemption Pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement

Case No IV/35.617—Phoenix

(95/C 337/03)

(Text With EEA Relevance)

Introduction

1. The Phoenix transaction was notified to the Commission on 29 June 1995. The Phoenix transaction is linked to a separate transaction bringing about a joint venture, Atlas, owned 50% by France Telecom (FT) and 50% by Deutsche Telekom (DT), given that Atlas is a parent to the joint venture entities created pursuant to the Phoenix agreements. The Atlas Agreements, notified on 16 December 1994, are described in a separate notice published in this *Official Journal of the European Communities.*

2. The Phoenix agreements comprise two main transactions involving two European Union telecommunications organizations (TO) and one US telecommunications operator:

(i) each of FT and DT is to acquire an equity stake of approximately 10% in Sprint obtain proportionate board representation and investor protection as minority shareholders in Sprint; as detailed below, provisions have been included in the Investment Agreement to prevent DT and/or FT, either separately or jointly, from controlling or influencing Sprint; and

(ii) Atlas and Sprint are to create a joint venture, Phoenix, for the provision of enhanced and value-added global telecommunications services and other telecommunications services to corporate users, carriers and consumers. The Phoenix joint venture will be structured into several operational entities under the strategic supervision of a Global Venture Board (collectively referred to as the 'Phoenix entities'). One such entity will provide Phoenix services worldwide except in Europe and the United States (the 'Rest of World (ROW) entity'), a second entity will provide Phoenix services in Europe except in France and Germany (the 'Rest of Europe (ROE) entity') and a third entity will operate the global backbone network of Phoenix (the 'Global Backbone Network (GBN) entity'). The Global Venture Board shall take decisions on matters of policy only and will not engage in the management of individual operational entities created pursuant to the Phoenix agreements.

A. The Parties

3. Deutsche Telekom AG (DT) and France Telecom (FT) are the German and French public TO respectively. DT is the world's second-largest and FT the world's fourth-largest telecommunications carrier in terms of revenue. Details of both undertakings are provided in the notice on the Atlas venture published in this issue of the Official Journal.

4. Sprint Corporation (Sprint) is a holding company in the United States. The Sprint group of companies is a diversified telecommunications group providing global voice, data and video-conferencing services and related products. Sprint's main subsidiaries provide local (US) exchange, cellular wireless as well as domestic (US) and international long-distance telecommunications services. Other Sprint subsidiaries engage in wholesale distribution of telecommunications products and the publishing and marketing of white and yellow page telephone directories. Worldwide turnover for Sprint in 1994 was ECU 10,9 billion; Sprint is the world's 11th largest telecommunications carrier in terms of revenues.

B. The Relevant Market

1. Creation of the Phoenix Entities

5. The Phoenix entities will address several product and geographic markets, namely (i) the markets for value-added telecommunications network services to corporate users both globally and regionally, (ii) the market for traveller services and (iii) the market for so-called carrier's carrier services.

1. Product Markets

The markets for value-added telecommunications network services

6. The Phoenix entities will be active on the same markets for both advanced

[12] Council Directive of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (OJ No. L 192, 24.7. 1990, p. 1).

[1] OJ No 13, 21.2. 1962, p. 204/62.

telecommunications services to corporate users and standardized low-level packet-switched data communications services described in the separate notice on the Atlas venture published in this issue of the Official Journal.

The market for traveller services

7. The market for traveller telecommunications services comprises offerings that meet the demand of individuals who are away from their normal location, either at home or at work. Among the most relevant of these offerings are those offered by the Phoenix entities, namely calling cards (i.e. prepaid cards with or without a code and postpaid cards), including those in combination with credit cards and other branded service cards ('affinity cards').

8. Customers for traveller services include both business travellers and other travellers. In the card business targeted by Phoenix, the former are by far the largest group of buyers. Business travellers are generally intensive card users, the main incentive for card usage being the possibility to avoid paying hotel telephone surcharges.

The market for carrier's carrier services

9. The market for carrier's carrier services comprises the lease of transmission capacity and the provision of related services to third-party telecommunications traffic carriers. Along with liberalization and globalization of telecommunications markets, demand for efficient, high-quality traffic transportation capacity has risen among old and new carriers. In this connection, the traditional model of separate arrangements with other individual carriers is increasingly challenged by players with global network infrastructure that offer carriers an array of services. The most relevant of such services are:

(a) switched transit, i.e. transport of traffic over bilateral facilities between the originating carrier, the transit carrier and the terminating carrier; neither the originating carrier nor the terminating carrier need bilateral facilities between themselves, but only with the transit carrier;

(b) dedicated transit, i.e. transport of traffic over permanent, dedicated facilities through the domestic network of the transit carrier; facilities used for this purpose may include discrete voice circuits or a highbandwidth digital circuit that can be used for both voice and data services; and

(c) traffic hubbing offerings, where the provider takes care of all or part of international connections; these offerings are typically designed for emerging carriers, who are interconnected with the provider over bilateral facilities and whose international traffic is merged with other traffic on the provider's global network.

As international telecommunications markets are deregulated, demand for carrier's carrier services is increasingly driven by alternative carriers concerned with entrusting the incumbent TO with their international traffic, for reasons such as technical dependency and commercial sensitivity of customer information.

10. Purchasers of carrier's carrier services include established and emerging carriers. Both groups of clients have substantial bargaining power and are highly competition-sensitive. Among the latter group, one may distinguish facilities-based carriers that provide telecommunications services over alternative infrastructure or cable television networks seeking greater efficiency in the transport of international client traffic, while non facilities-based carriers seek to preserve a competitive advantage by avoiding dependence on a local TO for international client traffic.

2. Geographic Markets

11. Along the lines of the Commission's findings in its BT–MCI decision,[2] the geographic scope of certain markets targeted by the Phoenix entities as well as the market that must be considered in respect of the investment of DT and FT in Sprint is international and even global. Although national borders subsist for many services, strategic alliances like Phoenix are built not only in anticipation of a market unaffected by national boundaries but even with the express purpose to offer large global telecommunications users seamless end-to-end services anywhere by overcoming the difficulties inherent in the current market structure split along national borders. However, the service offerings of the Phoenix entities will be relevant to different existing geographic markets.

The markets for value-added telecommunications network services

12. As described in the separate Atlas notice, demand by corporate users for advanced services exists in at least three distinct geographic markets, namely at a global, a cross-border regional and a national level. Phoenix services will have global reach given that each of DT, FT, Sprint and the ROE and ROW entities will be interconnected over the Phoenix global backbone network. In the global market for advanced telecommunications services to corporate users, the Phoenix venture will therefore create competition for instance for BT and MCI's existing Concert venture. In the European Union, the ROE entity will cooperate with DT, FT and ATLAS to provide advanced telecommunications services to corporate users at the cross-border regional level; these services will have 'global connectivity', i.e. allow for an extension beyond the European Union if a customer so requires.

13. Standardized low-level packet-switched data communications services in each geographic market mentioned in the previous paragraph are a part of the Phoenix offerings portfolio. However, such services will be provided at the national level only if so decided by the regional Phoenix operating entity. Therefore, the ROE entity will provide Europe-wide packet-switched data communications services, that will initially be based on the existing Transpac and Sprint networks. The extent to which the ROE entity will provide such services in national markets within the EEA will depend on the coordination between Atlas and the ROE entity as the competent Phoenix entity in that region.

The market for traveller services

14. Along with the globalization of the economy the market for traveller services appears to be increasingly global; worldwide travellers demand offerings which include a single bill and integrated functions such as voice messaging, voice response and information systems. Geographic limitations of current traveller service offerings are generally due to technical shortcomings set to be overcome in the near future, such as the incompatibility of mobile communications systems or differences in prepaid cards without an individual user code. As illustrated at paragraph 7 above, none of the services targeted by the Phoenix entities is affected by these shortcomings; however, the geographic scope of the traveller services offered by Phoenix can be left open for the purposes of this case, as the finding of narrow geographic markets would not affect the assessment of the parties' competitive position.

The market for carrier's carrier services

15. Both supply of and demand for carrier's carrier services are by nature international. Geographic proximity between purchaser and supplier of switched transit capacity is hardly relevant for switched transit which carriers use either as a substitute for operating own international lines or to deal with peak traffic on such lines. Likewise, dedicated transit services offer cable- or satellite-based routing capacity across third countries. Finally, using hubbing services is an alternative to entering into an undetermined number of bilateral agreements with individual carriers.

2. DT and FT's Investment in Sprint

16. The acquisition by DT and FT of new equity equivalent to an approximate 20% stake in Sprint aims at consolidating a strategic alliance to enter the global telecommunications markets, which serves the parties best interest to improve and extend service in new market segments. Telecommunications markets are developing quickly and there is uncertainty about what they will look like in a few years' time: the prospect of full liberalization is pushing TO's to take positions, in order to be in the best possible situation when full liberalization comes. As shown by the BT–MCI alliance, investment in a US carrier offers one efficient way to address multinational companies, i.e. the largest target customer group for global value-added telecommunications network services, notably in the United States.

C. Market Shares of Phoenix

The markets for advanced telecommunications services to corporate users

17. Global market. The parents estimate the global value-added telecommunications network services market addressed by Phoenix (exclusive of data communications services) to be worth approximately ECU 4,8 billion (1993). Of this total, end-to-end services accounted for approximately ECU 37,6 million, VPN services for approximately ECU 2,8 billion, VSAT services for approximately ECU 1,4 billion and outsourcing services for approximately ECU 527 million. In 1993, the aggregate turnover of DT, FT and Sprint in the different market

[2] Commission decision of 27 July 1994 (OJ No L 223, 27. 8. 1994, p. 36).

segments amounted to approximately ECU 3,8 million for end-to-end services, approximately ECU 576 million for VPN services and approximately ECU 6 million for outsourcing services, giving Phoenix a theoretical market share of 11,8% in the global market for advanced telecommunications services to corporate users.

18. Cross-border regional market. Services in the European Union (exclusive of data communications services) accounted for approximately ECU 505 million in 1993, According to the notification the Phoenix parents' aggregate market shares in the European Union in 1993 were [. . .] %[3] in the end-to-end services market, [. . .] %[4] in the VPN services market [. . .] %[5] in the outsourcing services market and [. . .] %[6] in the VSAT market. However, market shares for VSAT services are difficult to calculate given that TOs mostly use VSAT terminals as back-up facilities for other services or to extend the geographic scope of services despite terrestrial infrastructure shortcomings.

19. National markets. National markets for advanced telecommunications services to corporate users within the EEA are discussed in the notice on the Atlas venture, published in this issue of the Official Journal. In this regard, Sprint has a significant share of total outsourcing turnover generated in Member States such as the Netherlands [. . .] %[7] and the United Kingdom [. . .] %[8], where DT and FT's outsourcing joint venture, Eunetcom BV, has a lesser presence (5% of total turnover in both Member States). As for France and Germany, adding Sprint to DT and FT brings Phoenix's fictional aggregate share of total turnover generated by outsourcing services to [. . .] %[9] in France and to [. . .] %[10] in Germany, compared with 31% in France and 33% in Germany for the second-largest provider, Concert's Syncordia, in both these national markets.

The market for standardized low-level packet-switched data communications services

20. The global market for standardized low-level packet-switched data services was worth approximately ECU 5,3 billion in 1993, while DT, FT and Sprint's aggregate sales were [. . .] %[11] or [. . .] %[12] worldwide. The European market for data communications services is discussed in the separate notice on the Atlas transaction, published in this issue of the Official Journal. Sprint's turnover for standardized low-level packet-switched data services was [. . .] in 1993, bringing DT, FT and Sprint's aggregate shares of that market to [. . .] %[13]. As for national markets, Sprint achieved its highest turnover in France, Germany, Italy and the United Kingdom. Neither DT nor FT have a significant market presence in the latter two Member States, where Sprint has [. . .] %[14] and [. . .] %[15] market share respectively. In turn, Sprint's turnover in France (ECU [. . .] %[16]) and Germany (ECU [. . .] %[17]) equals market shares in these Member States of only [. . .]% and [. . .]% respectively[18]. The market for traveller services

21. Total calling card revenue in the European Union was approximately ECU 120,5 million in 1994, most of which generated by national dialling. In 1993, DT had issued 200,000 cards (all of which in German), equivalent to 2,1% of the total card subscriber base in the European Union; FT had issued 1,5 million cards (all of which in France), equivalent to 15,7% of the card subscriber base in the European Union; and Sprint had issued 12 million cards worldwide, of which 500,000 (equivalent to a 5,2% market share) in the European Union. The aggregate market shares of the parents would therefore make Phoenix the largest calling-card services provider in the European Union (23% market share) in terms of subscriber numbers, ahead of AT&T and BT with 21 and 17,8% market share respectively. In terms of calling card traffic within the European Union, the aggregate market shares of FT (21%) and DT (3%) are equal to BT's market share of 24%.

The market for carrier's carrier services

22. The market for global switched transit services is estimated to be worth approximately ECU 301,1 million, equivalent to 1 500 million minutes of international traffic or approximately 3% of the world's international telephony traffic. Of this total, approximately ECU 165,6 million are services provided by European carriers, of which approximately ECU 30,1 million to other European carriers. Within the global switched transit market (1994), with 5–6% annual growth, DT had a turnover of ECU [. . .][19], FT of ECU [. . .][20] and Sprint of ECU [. . .][21]. The aggregate market shares of DT, FT and Sprint make Phoenix the thrid largest global switched transit provider behind AT&T and BT (20,2% each).

D. Main Competitors of the Phoenix Entities

The market for value-added telecommunications network services

23. The situation in these markets is discussed in the separate notice on the Atlas venture published in this issue of the Official Journal.

The market for traveller services

24. More than one third of calling cards in Europe are issued by US operators. AT&T is estimated to have 2 million postpaid card customers in Europe, equivalent to 21% of all cards issued there. These customers generate 59% of calling card traffic initiated in Europe on the US route. MCI is estimated to have 1 million postpaid card customers in Europe (10,5%), which generate 27% of calling card traffic initiated in Europe on the US route. Executive Telecard International (ETI) markets calling cards in Europe through agreements with local operators or credit card companies; ETI's market position is similar to that of MCI.

The market for carrier's carrier services

25. Major players in the market for carrier's carrier services and notably global switched transit services competing in the EEA include AT&T, BT (each holding approximately one fifth of the market), Cable & Wireless, MCI and Teleglobe Canada. Along with the increasing proliferation of new carriers that seek to be independent of the incumbent TO for their international traffic, new suppliers of such services, some with substantial infrastructure resources, are emerging in the market, e.g. Hermes Europe Railtel.

E. The Transaction

26. The transaction notified to the Commission comprises a set of agreements whose main features are described below.

1. Agreements as Originally Notified

1. Agreements Regarding the Phoenix Joint Venture

The parties have to date submitted one final agreement: the Phoenix Joint Venture Agreement (the 'JV Agreement'), that sets out the parties' essential commitments and business objectives. Attached as annexes to the JV Agreement are detailed term sheets for all agreements described below, which will be submitted upon closing of the Phoenix Transaction. These term sheets detail the agreed content of the following agreements:

(a) the Transfer Agreements will provide for the transfer by Sprint, FT, DT, and Atlas (collectively referred to an the 'parents') of certain basic and related businesses to the relevant ROE, ROW, and GBN entities.

(b) The Intellectual Property and Trademark Licence Agreements will concern the grant by the parents and certain affiliates to the Phoenix entities of non-exclusive, non-transferable licences to use certain of the parents' technical information and trademarks.

(c) The Services Agreements will specify the terms and conditions of trading relationships among Sprint, Atlas, and the ROE and ROW entities, including the supply and support services needed to provide Phoenix services worldwide.

2. Agreements Regarding FT and DT's Investment in Sprint

(a) The Investment Agreement will provide for the purchase by each of FT and DT of approximately 10% of the common stock of Sprint.

(b) The Standstill Agreement will bind FT and DT for a period of 15 years not to acquire additional shares in Sprint which would increase their combined aggregate voting rights to more than 20%.

(c) The Registration Rights Agreement is required in order for each party to consummate the transactions contemplated by the Investment Agreement.

[3] Business secret (less than 30%).
[4] Business secret (less than 30%).
[5] Business secret (less than 5%).
[6] Business secret (less than 25%).
[7] Business secret (less than 10%).
[8] Business secret (less than 10%).
[9] Business secret (less than 45%).
[10] Business secret (less than 40%).
[11] Business secret.
[12] Business secret (less than 25%).
[13] Business secret (less than 40%).
[14] Business secret (less than 5%).
[15] Business secret (less than 5%).
[16] Business secret.
[17] Business secret.
[18] Business secret (less than 5% respectively).
[19] Business secret (market share less than 10%).
[20] Business secret (market share less than 15%).
[21] Business secret (market share less than 5%).

2. Main Contractual Provisions

1. Concerning the Phoenix Entities

(a) Structure of the Phoenix Venture

The JV Agreement provides for the creation of the following operating entities: Phoenix Rest of Europe (ROE), Phoenix Rest of the World (ROW) and Global Backbone Network (GBN). The ROE entity will conduct the Phoenix business within the ''rest of Europe'' region (i.e. outside of France and Germany), while the ROW entity will conduct the Phoenix business within the ''rest of the world'' region (i.e. outside Europe and the United States). The GBN entity will own and operate as global transmission network over which Phoenix services and other traffic will be routed.

FT and DT will each be the exclusive distributor of Phoenix services in France and Germany respectively; however, FT and DT will meet unsolicited customer requests for services regardless of the customer's location. Moreover, the French and German subsidiaries of Atlas will provide FT and DT with (i) sales support services regarding Phoenix products to distributors in France and Germany; and (ii) services within the scope of Phoenix other than X.25 packet-switched data network services.

A new, wholly-owned subsidiary of Sprint (the ''Sprint Subsidiary'') and Atlas will each initially own 50% of the outstanding voting equity of each of the parent entities of the ROW entity and the GBN entity. The Sprint Subsidiary and Atlas will initially own 33⅓ and 66⅔%, respectively, of the voting equity of the parent entity of the ROE entity.

A Global Venture Board will be established to set global policies and monitor compliance of the operating groups with their business plans. Any initiative of the Global Venture Board will generally require a unanimous vote.

Day-to-day operations will be the responsibility of the chief executive officers of the operating entities, who are under the supervision of the governing board of the relevant parent entity of either ROE, ROW, or GBN entity. Most decisions of each governing board will be adapted by simple majority vote of the members present. Unanimous consent is however required for a number of important decisions including final approval of business plans, certain changes in structure and capitalization, and certain decisions on technology and investments.

(b) Purposes and Activities of Phoenix Entities

The business of the joint venture will initially consist of the provision of (i) global international data, voice, and video business services for multinational companies and business customers; (ii) international services for consumers, initially based on card services for travellers, and (iii) carrier services providing certain transport services for the parents and other carriers. The Phoenix entities may also offer telecommunications equipment and invest in national operations.

To market these services the Phoenix joint venture will be responsible for the planning and management functions of operations, as well as marketing and customer support, including the following:

(i) Central coordination of product development and management to ensure seamless global services; the Phoenix entities shall notably define functionality, technical standards, and service level requirements for Phoenix services;

(ii) Implementation of a common global network and information systems platform rationalizing and integrating the currently separate international data, voice, and overlay networks of the parents; the GBN will link overlay and backbone networks in each operating area (i.e. ROE and ROW) while proprietary interfaces will allow provision of seamless services; within its first few years of operating, Phoenix will begin to deploy the next generation of Asynchronous Transfer Mode (ATM) technology, comprising any and all of transmission, switching, signalling, network intelligence, and service management elements;

(iii) Integration and development of information systems for coordinated billing, customer support, and other backoffice functions, supporting national distributors; and

(iv) Development of a sales presence in the ROE and ROW territories either directly or through distribution arrangements using a common ''masterbrand''; in particular, national service operations will be established or consolidated in each major country, and will be responsible for distributing Phoenix services within that country; in addition, regional sales offices will be established to provide technical and sales support, including identification of potential customers and assisting in preparation of customer proposals.

(c) Provisions Concerning Dealings With/by Phoenix Entities

Pursuant to the JV Agreement, transactions among the Phoenix entities, on the one hand, and FT, DT, and Atlas, on the other, will generally be conducted on the most favourable terms and conditions that are offered to third parties. If products, services, or facilities relevant to these transactions are not commercially available, such transactions shall be conducted in accordance with an arm's length pricing method, using full-cost reimbursement or such other arm's length pricing method as may be agreed on by the parties. The parents shall have the first right to offer to supply certain products, services, and facilities to the Phoenix entities. Notwithstanding, each Phoenix entity may purchase from a third party which, on otherwise comparable terms and conditions, offers lower prices, either once the parties have been given the opportunity to match such terms and conditions or if a customer so requires.

Each of the Phoenix entities and their parents have the first right to offer to perform in their respective territory any facilities or services required by another party to the Phoenix agreements. Such services may be obtained from a third party at a lower price under comparable terms and conditions, or where a customer so requires. In accordance with this principle, the ROE and ROW entities will be required to purchase telecommunications network transmission capacity from the GBN entity to the extent available.

(d) Non-Compete Provisions; Distribution

Pursuant to the JV Agreement as originally notified, albeit subject to various exceptions, no party or affiliate of a party may distribute any international telecommunications services which are either provided by the Phoenix entities or substitutable for such services. Likewise, no party or affiliate of a party may invest in any entity that offers such services. Moreover, no party or any of its affiliates may offer national long-distance services in competition with either a national operation of Phoenix or a pubic telephone operator affiliated with Phoenix (e.g. a national distributor of Phoenix). Nor may any party or any of its affiliates make investments in any entity offering such competing national long distance services or in any national operation allied with a major competitor of Phoenix.

Outside the parents' home countries exclusivity will be granted to distributors on a case-by-case basis. Passive sales by one distributor to customers in the respective sales territory of any other distributor will be allowed in the EEA.

(e) Licenses to be Granted to Phoenix Entities

Under the Intellectual Property Agreements; each parent will grant each of the Phoenix entities non-exclusive, non-transferable licences to use certain technical information of that parent in the respective territories of such entities to conduct the Phoenix business. Each Phoenix entity shall have the right to sub-license the rights granted to any other Phoenix entity or any affiliated national operation or local partner, to the extent such sub-licence is necessary to conduct the Phoenix business. Likewise, each Phoenix entity shall on request also sub-licence such rights to any parent or affiliate of such parent, to the extent such sub-licence is necessary to conduct the Phoenix business.

Royalties shall be payable as customary in the market and negotiated by the parties on an arm's-length basis. License rights granted to a party under the Intellectual Property Agreements will continue in the event of either termination of the Phoenix venture or transfer of such party's interest in the Phoenix venture.

Similarly, pursuant to the Trademark Licence Agreement each parent grants each of the Phoenix entities non-exclusive, non-transferable rights to use certain trademarks owned by or licensed to such parent in connection with the marketing or sale of certain authorized products and services in the respective territories of such entity.

2. Concerning FT and DT's Investment in Sprint

(a) Restrictions on Transfer of Shares by FT or DT and Limits on Increases of Their Shareholding in Sprint

Pursuant to the Investment Agreement, neither FT or DT may dispose of its shares in Sprint for five years after the closing date. Thereafter restrictions apply to large transfers, which would in most circumstances give Sprint the rights of first refusal.

Pursuant to the Standstill Agreement, FT and DT shall each have the right to acquire additional Sprint shares to reach and

maintain a 10% shareholding, but shall not for 15 years after the closing date acquire additional shares that would increase their aggregate voting rights to more than 20%. Once this initial 'standstill' period has expired, FT and DT may acquire additional shares, but may not increase their aggregate voting rights about 30% nor conduct certain activities intended at taking control of Sprint.

(b) Consent Rights and Board Representation of FT and DT

FT and DT have the right to elect directors to the Sprint board in proportion to their shareholding, provided that each has the right to elect at least one director. Neither FT or DT may have access to confidential, competitive information on Sprint's activities in the EEA through their representation on Sprint's board. Nor may these representatives provide Sprint with confidential information that FT or DT may have obtained from US competitors through correspondent relationships.

As the sole holders of Sprint's class A common stock, FT and DT have been granted substantial consensual rights with respect to certain corporate actions of Sprint, which nevertheless fall considerably short of control. These actions include major equity issuances, disapproval of investments in Sprint by major competitors, participation rights in transactions involving change of control, and other bilateral corporate transactions. FT and DT have a right of first offer with respect to long-distance assets of Sprint for a fixed period of time.

F. Changes Made and Undertakings Given Further to the Commission's Intervention

27. Some features of the agreements as notified appeared to be incompatible with the Community competition rules. In the course of the notification procedure the parties have amended certain clauses in their agreements and given undertakings to the Commission.

1. Contractual Changes

28. Non-appointment of Phoenix as an agent for international half-circuits. Following an announcement made in the Phoenix notification, which did not yet reflect the parties commitments regarding Atlas further to the Commission's intervention, DT, FT, Atlas and Sprint have deleted FT and DT's 'international private lines', i.e. FT and DT's international half-circuits, from the list of products that Phoenix would distribute as agent.

29. Non-compete provisions. The parties have not yet sought an exemption pursuant to Articles 85 (3) of the EC Treaty and 53 (3) of the EEA Agreement for any specific agreements regarding national long-distance services. The non-compete clause in the original JV Agreement has therefore been amended: the parties are now obliged to refrain only from either (i) competing with or (ii) investing in a competitor of entities providing long-distance services provided such entities are controlled by Phoenix.

2. Non-Discrimination

30. Just as DT and FT shall be prohibited from discriminating in favour of the joint venture, as described in the separate notice on the Atlas transaction, the Commission intends likewise to prohibit DT and FT from discriminating in favour of the Phoenix entities. The same is true for the specific elements covered by this requirement.[22]

3. Undertakings Given by the Parties

31. Carrier's carrier services. Neither Atlas, Phoenix, DT, FT, Sprint or any affiliate of these entities shall make a particular telecommunications operator's ability to use Phoenix international carrier services conditional upon use or distribution by that telecommunications operator of services provided by Atlas, Phoenix, FT, DT or Sprint. Neither shall Atlas, Phoenix, DT, FT, Sprint or any affiliate of these entities make its commercial dealings (i.e. terms, conditions, price, discounts) with any telecommunications operator conditional upon use or distribution by that telecommunication's operator of services provided by Atlas, Phoenix, FT, DT or Sprint.

32. DT, FT and Sprint have also given further undertakings that mirror the undertakings given in connection with the Atlas notification; reference is therefore made to the separate notice on the Atlas transaction published in this issue of the Official Journal.

1. Cross-Subsidization

As in the context of the Atlas transaction, DT and FT shall not engage in cross-subsidization within the meaning of the Commission's competition guidelines for the telecommunications sector[23] in connection with the Phoenix venture. To avoid that the Phoenix entities or their distributors benefit from cross-subsidies stemming from the operation of both public telecommunications infrastructure and reserved services by either DT or FT, all entities formed pursuant to the Phoenix venture will be established as distinct entities separate from DT and FT.

The ROE and ROW entities will obtain their own debt financing on their own credit, provided that Sprint, FT and DT:

(a) may make capital contributions or commercially reasonable loans to such entities as required to enable the ROE and ROW entities to conduct the Phoenix business;

(b) may pledge their venture interests in such entities in connection with non-recourse financing for such entities; and

(c) may guarantee any indebtedness of such entities, provided that Sprint, FT and DT may only make payments pursuant to any such guarantee following a default by such entities in respect of such indebtedness.

The ROE and ROW entities shall not allocate directly or indirectly any part of their operating expenses, costs, depreciation, or other expenses of their businesses to any parts of DT or FT's business units (including without limitation the proportionate costs based on work actually performed that are attributable to shared employees or sales or marketing of Phoenix products and services by DT or FT employees). However, nothing shall prevent such Phoenix entities from billing DT or FT for products and services provided to DT or FT by such entities on the basis of the same prices charged to third parties (in the case of products or services sold to third parties in commercial quantities) or full cost reimbursement or other arm's length pricing method (in the case of products and services not sold to third parties in commercial quantities).

The ROE and ROW entities shall keep separate accounting records that identify payments or transfers to or from DT and FT. The ROE and ROW entities shall not receive any material subsidy (including forgiveness of debt) directly or indirectly from DT or FT, or any investment or payment from DT or FT that is not recorded in the books of such entities as an investment in debt or equity.

2. Recording and Reporting

The same undertakings apply as described in the notice on the Atlas transaction published in this issue of the Official Journal.

33. In so far as related to existing obligations under national or Community law, the above is intended to ensure the parties' firm commitment to comply with the applicable legal framework.

G. The Regulatory Situation

34. The regulatory situation in France and Germany is described in the notice on the Atlas transaction. As for the United States, pursuant to the 1934 Communications Act, Sprint shall publish tariff schedules and contracts describing its network arrangements and services. Furthermore, the 1934 Communications Act, enforced by the Federal Communications Commission (FCC), prohibits Sprint from providing services that unjustly or unreasonably discriminate against Sprint's competitors or foreign correspondents, which may lodge a formal complaint before the FCC if Sprint does not comply with these obligations.

35. While the European Commission was assessing the Phoenix notification under Community law, the US Department of Justice has concluded a procedure under US anti-trust law by entering a consent decree. This consent decree spells out undertakings by the parties that largely resemble those described in this notice.

The Commission's Intentions

36. On the basis of the foregoing, the Commission intends to take a favourable position on the notified transaction under the competition rules of the EC Treaty and under Article 53 of the EEA Agreement and to grant Phoenix an individual exemption pursuant to Article 85 (3) of the EC Treaty and Article 53 (3) of the EEA Agreement. Before doing so, the Commission invites interested third parties to send their observations within six weeks from the publication of this notice to the following address, quoting the reference 'IV/35.617—Phoenix':

European Commission,
Directorate-General for Competition (DG IV),
Directorate for Information, Communication and Multimedia,
Rue de la Loi/Wetstraat 200,
B–1049 Brussels.

[22] See notice pursuant to Article 19 (3) of Council Regulation No 17 concerning Case No IV/33.361—Infonet (OJ No C7, 11. 1. 1992, p. 3, at paragraph 9).

[23] Guidelines on the application of EEC Competition Rules in the Telecommunications Sector (OJ No C 233, 6. 9. 1991, p. 2, paragraph 102 *et seq.*).

Fax: (32 2) 296 98 19.

Exhibit I

Federal Republic of Germany Ministry for Post and Telecommunication

United States Department of Justice,
Antitrust Division,
Mr. Carl Willner,
Telecommunications Task Force,
Judiciary Center Building,
555 4th Street, NW,
Washington, DC 20001

Your reference, Your letter of
Your telefax of 29 November 1995

My reference, my letter of 112b B 1311
Bonn 14–11 28

U.S. Antitrust Review of ''PHOENIX'' Joint Venture including Deutsche Telekom AG

Dear Mr. Willner: Thank you very much indeed for your telefax of 29 November 1995 requesting additional information on the planned legal framework governing telecommunications. I am of course pleased to provide you with such information on specific regulatory issues at short notice. In doing so. I also take account of your intention to use these clarifications in the above antitrust review.

1. Your first question concerns the regulation of ownership and landing rights for submarine cables.

Under the draft Telecommunications Act any company will be allowed to set up and operate transmission lines and offer voice telephony, However, both activities—if offered to the public—will be subject to license and may hence also be subject to certain requirements. The setting up and operation of transmission lines will be permitted as from 1 July 1996 provided that such lines are not used to offer voice telephony for the public (alternative infrastructures); provision of voice telephony to the public will be permitted as from 1 January 1998.

Regulatory intervention through the licensing of operators of transmission lines and voice telephony providers is exclusively limited to German territory which include German coastal waters covering three, in some cases 12, nautical miles.

Unlike US law (Submarine Cable Landing License Act), German law does not provide for the granting of landing licenses for access to the national territory. As a consequence, a particular landing license is neither envisaged for the future nor does it exist under current German law. This regulation is based on the idea that unnecessary state intervention in market developments should be avoided. In addition, the nationality of the operator or owner of the submarine cable is of no legal relevance. This means that we will have a non-discriminatory, open and transparent access regulation in Germany for submarine cables.

In order to preclude possible misunderstandings I wish to point out that the above regulations refer to the telecommunications market. There are also further legal provisions from other areas such as the environmental and nature protection or marine traffic legislation which must be complied with in respect of submarine cables. Such legislation does not, however, refer to market entry in telecommunications.

2. The second question refers to the regulation of interconnection with public telecommunications networks. A draft ordinance of this Ministry on this issue has not been drawn up as yet. Nor has an exact date for its submission been scheduled at present. It is however intended to issue the relevant ordinance immediately following the entry into force of the Telecommunications Act. This ordinance will also be in line with the targets laid down by the European Union. Might I also request you to consider in this respect that recently, ie on 31 August 1995, the European organs submitted a Proposal for a European Parliament and Council Directive on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network provision (ONP). As regards the legal procedure at European level it is fair to say that to date the EU has not fully determined all details to which further action in Germany will strictly be geared in the future. Some preparatory work has yet to be done in this field.

I hope that this information will be of assistance to you in the above antitrust review. Please do not hesitate to contact me if you require clarification on further aspects of our planned market regulation.

Sincerely yours,

By direction of the Minister

Dr. Witte

Exhibit J

French Republic

Paris, December 8, 1995.

Ministry Delegate of Post, of Telecommunications and of Space
Directorate General of Posts and Telecommunications

The Director General

Dear Mr. Willner, I understand that, in connection with the review by the Department of Justice of the Phoenix transaction, you have asked counsel for France Telecom whether U.S. companies will be able to participate fully in the liberalized French telecommunications market after July 1, 1996. Currently, French law does not limit foreign equity participation in the construction and operation of facilities, or in the provision of liberalized services. Indeed, today, several U.S. companies hold VSAT licenses and MFS has just been granted a license to build a metropolitan fiber network in Paris to provide services that have been liberalized.

The only exception in French law to the general rule is that companies not established in the European Union can own up to 20% of entities providing public wireless services. By law, however, this cap may be lifted if other countries have opened their public wireless markets to French enterprises.

Furthermore, as demonstrated by the very liberal offer of the European Union in the context of the World Trade Organization discussions, France fully supports opening up all telecommunications services in all markets. We hope that agreement can be reached among like-minded countries on the rules for further market liberalization and that, as a consequence of these negotiations or, should the latter fail, on a bilateral basis, any then-existing restrictions in French law on foreign ownership of infrastructure or service providers would be removed for U.S. companies.

As an evidence of this policy, I would like to stress that the Government-sponsored recent draft legislation which will permit the granting in 1996 of experimental licenses for innovative multimedia services, including the provision of public voice telephony services on geographically limited areas does not contain any foreign-ownership limit for wire-line based services.

Very truly yours,

Bruno Lasserre,

Carl Willner, Esq.,

Antitrust Division, Telecommunications Task Force, U.S. Department of Justice.

Exhibit K

November 21, 1995.

Carl Willner, Esq.,
Antitrust Division, United States Department of Justice, 555 4th Street, N.W.,
Washington, D.C. 20001

Re: *U.S. v. Sprint Corp.*

Dear Carl: Enclosed is the text of a revision to Section 10.6(b) of the Joint Venture Agreement among Sprint, FT and DT. The revision to Section 10.6(b) will be part of the closing documentation for the transaction. The attached language has been presented to the European Commission for purposes of their review. It should resolve any confusion by third parties regarding the scope of the Agreement among Sprint, FT and DT. Specifically, I want to assure you that it was never the intent of the parties to cause FT or DT to steer customers of FT and DT reserved services to Phoenix. In order to resolve any doubt on this issues, however, the parties have agreed to the revised language enclosed with this letter.

Sincerely,

Kevin R. Sullivan

KRS:ss
Enclosure
cc: J. Cunard, M. Ryan, J. Hoffman

King & Spalding

November 21, 1995.

Carl Willner, Esq.,
Antitrust Division, United States Department of Justice, 555 4th Street, N.W., Washington, D.C. 20001

Re: *U.S. v. Sprint Corp.*

Dear Carl: Enclosed is the text of a revision to Section 10.6(b) of the Joint Venture Agreement among Sprint, FT and DT. The revision to Section 10.6(b) will be part of the closing documentation for the transaction. The attached language has been presented to the European Commission for purposes of their review. It should resolve any confusion by third parties regarding the scope of the Agreement among Sprint, FT and DT. Specifically, I want to assure you that it was never the intent of the parties to cause FT or DT to steer customers of FT and DT reserved services to Phoenix. In order to resolve any doubt on this issues, however, the parties

have agreed to the revised language enclosed with this letter.

Sincerely,

Kevin R. Sullivan

KRS.ss
Enclosure
cc: J. Cunard, M. Ryan, J. Hoffman
November 21, 1995.

Phoenix JVA Section 10.6(b) [p. 81]; Unsolicited Customer Requests

''(b) If a Party or any of its Affiliates receives an unsolicited request from a customer of a Party or any of its Affiliates or of the Joint Venture to enter into a Contract to provide to such customer in conjunction with other Persons a service that is then currently Offered by the Joint Venture, such Party or its Affiliates will use commercially reasonable efforts to persuade such customer to purchase such service from the Joint Venture. If despite such Party's efforts, the customer prefers not to purchase such service from the Joint Venture, such Party will refer such matter to the Global Venture Office which, within ten (10) Business Days, will present its observations regarding such matter to one of the representatives of such Party on the Global Venture Committee for final resolution by such representative. Not withstanding the foregoing, the Parties agree that the customer's preference will be honored in all cases. *The Parties further agree that, notwithstanding the foregoing, this Section 10.6(b) shall not apply to ''FT or DT Products and Services'' as defined in Section V.L. of the Final Judgment in U.S. v. Sprint Corporation, Civ. No. 95–1304 (D.D.C. July 17, 1995), provided that, for purposes hereof, such FT or DT Products or Services are agreed to include not only ''leased lines or international half circuits between the United States and France or between the United States and Germany'' as defined in Subpart V.L. (iii) of such Final Judgment, but also international leased lines or international half circuits between France or Germany and any other country or territory.''*

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