

## V

*Remedies Available to Private Litigants*

Section 4 of the Clayton Act (15 U.S.C. § 15) provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorney fees. Under the provisions of Section 5(a) (15 U.S.C. § 16(a)), this Consent Decree has no *prima facie* effect in the lawsuits which may be brought against the defendants.

## VI

*Procedures Available for Modification of the Proposed Consent Decree*

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed Consent Decree should be modified may submit written comments to Christopher S. Crook, Acting Chief, San Francisco Office, U.S. Department of Justice, Antitrust Division, 450 Golden Gate Avenue, Box 36046, Room 10-0101, San Francisco, California 94012, within the 60-day period provided by the Act. The comments and the Government's responses to them will be filed with the Court and published in the Federal Register. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Consent Decree at any time period to its entry if it should determine that some modification of the Consent Decree is necessary to the public interest. The proposed Consent Decree itself provides that the Court will retain jurisdiction over this action, and that the parties may apply to the Court for such orders as may be necessary or appropriate for the modification or enforcement of the Consent Decree.

## VII

*Determinative Documents*

No materials and documents of the type described in Section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16(b)) were considered in formulating this proposed Consent Decree. Consequently, none are filed herewith.

Dated: February 6, 1997.

Christopher S. Crook,

Richard B. Cohen,

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

[FR Doc. 97-4389 Filed 2-21-97; 8:45 am]

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**Antitrust Division****U.S. v. US WEST, Inc. and Continental Cablevision, Inc.; Public Comments and Response on Proposed Final Judgment**

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(c)-(h), the United States publishes below the comments received on the proposed final judgment in *U.S. v. US WEST, Inc. and Continental Cablevision, Inc.*, Civil Action No. 96-2529 TPS, filed in the United States District Court for the District of Columbia, together with the United States' response to that comment.

Copies of the comments and response to the comments are available for inspection and copying in Room 215 of the U.S. Department of Justice, Antitrust Division, 325 7th Street, N.W., Washington, D.C. 20530 (telephone: (202) 514-2481), and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained upon request and payment of a copying fee.

Constance K. Robinson,  
*Director of Operations.*

In The United States District Court for The District of Columbia

*United States of America*, Plaintiff, v. *US West, Inc. and Continental Cablevision, Inc.*, Defendants.

**[No. 96-2529 TPS (Antitrust)]**

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

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16(b)-(h)) ("APPA"), the United States of America 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 and remains convinced that entry of the proposed Final Judgment is in the public interest.

**I.—Background**

This action was commenced on November 5, 1996, 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 Continental Cablevision, Inc. ("Continental") by US WEST, Inc. ("US WEST"), would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. US WEST is the dominant provider of local

telecommunications services, including dedicated services, within its telephone service area in the States of Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. At the time the acquisition was announced, Continental owned 20% of Teleport Communications Group, Inc. ("TCG"), a competitive access provider ("CAP") providing dedicated services in various cities across the nation, including Denver, Omaha, Phoenix and Seattle. The complaint alleges that US WEST's acquisition of Continental's interest in TCG would substantially lessen competition in the sale of dedicated services in the areas within Denver, Omaha, Phoenix and Seattle in which TCG provides such services.

Contemporaneously with filing its Complaint, the United States submitted a proposed Final Judgment, a Competitive Impact Statement and a Stipulation signed by the defendants consenting to entry of the proposed Final Judgment. The proposed Final Judgment orders US WEST to divest the TCG Common Stock by certain specified dates and contains other provisions designed to bar US WEST's access to highly sensitive TCG business information, and to treat TCG as a passive business investment. The Competitive Impact Statement explains the basis for the Complaint and the reasons why entry of the proposed Final Judgment would be in the public interest. In the Stipulation, the defendants and the United States consented to entry of the proposed Final Judgment by the Court after completion of the procedures required by the APPA.

**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 November 18, 1996, and terminated on January 16, 1997. During this period, the United States received only one comment relating to the proposed Final Judgment.<sup>1</sup> The United States herein responds to this comment. Upon publication of this comment and the following response of the United States to this comment in the Federal Register 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, and the Court may enter the proposed Final

<sup>1</sup> This comment is attached hereto as Exhibit A.

Judgment. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this response of the United States have been published in the Federal Register.

### III.—Response to Public Comments

The only comment received by the United States was filed by TCG. TCG does not object to the substantive provisions of the proposed Final Judgment. In particular, TCG does not object to the requirement that US WEST divest its interest in TCG nor to the timing or manner in which such divestiture must be carried out. Indeed, TCG's comments do not relate to either the anticompetitive consequences of the acquisition or the adequacy of relief provided by the proposed Final Judgment to remedy the antitrust violations alleged in the Complaint. The only objection that TCG raises with respect to the proposed Final Judgment relates to the provision requiring US WEST to deliver to the United States periodic affidavits setting forth the fact and manner of US WEST's efforts to comply with the divestiture provisions of the proposed Final Judgment. Because these affidavits are likely to contain sensitive business information relating to the sale or attempted sale of TCG Common Stock, TCG requests that the proposed Final Judgment be modified so as to require that such affidavits "be submitted confidentially to the plaintiff and not filed in the public docket of the Court." Letter from W. Terrell Wingfield to Donald J. Russell, dated December 18, 1996, Exhibit A at 2.

The United States shares TCG's concerns about the potential disclosure of highly confidential and sensitive business information. For the following reasons, however, the United States does not believe that a modification of the proposed Final Judgment is necessary to protect affidavits containing such information. First, it is not the standard practice of the United States to voluntarily disclose affidavits submitted pursuant to a consent decree. Second, there are only two situations in which disclosure could occur: (1) If the United States is ordered or otherwise finds it necessary to file such affidavits on the public docket in any legal proceeding; and/or (2) If a request is made under the Freedom of Information Act, 5 U.S.C. 552 *et seq.* ("FOIA"), and the United States determines that any such affidavit does not fall into one of the FOIA exemptions to disclosure.

In the event that the United States receives an order, a subpoena and/or otherwise intends to use such information in any legal proceeding,

Section IX.D of the proposed Final Judgment requires the United States to give the defendants ten (10) calendar days notice prior to divulging any material to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure and which the defendants have marked as being, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure."

In the event that the United States determines that any such affidavit is not exempt from FOIA, then the United States would follow the procedures set forth in 28 CFR 16.7. Section 16.7 provides, in relevant part, that the United States:

shall, to the extent permitted by law, provide a submitter [of confidential and sensitive business information] with prompt written notice of a Freedom of Information Act request or administrative appeal encompassing its business information. \* \* \* in order to afford the submitter an opportunity to object to disclosure \* \* \* Such written notice shall either describe the exact nature of the business information requested or provide copies of the records or portions thereof containing the business information.

16 CFR 16.7(c). Section 16.7(b) defines a submitter as "any person or entity who provides business information, directly or indirectly to the Department." Absent exigent circumstances, the United States generally gives the submitter ten (10) calendar days notice of a request or intention to disclose the business information so as to allow the submitter sufficient time to file an objection to disclosure or otherwise move to protect the information. TCG has been informed of the foregoing protections and has authorized the United States to inform the Court that these protections are adequate to address TCG's concerns. Given these facts, the United States does not believe that a modification of the proposed Final Judgment is warranted in the public interest.

### IV.—Standard of Review

Pursuant to 15 U.S.C. § 16(e), the proposed Modified 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 Modified 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 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 consequence 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 and for the reasons stated herein and in the Competitive Impact Statement, the United States continues to believe that the proposed Final Judgment is adequate to remedy the antitrust violations alleged in the Complaint. There has been no allegation or showing that the proposed settlement constitutes an abuse of the United States' discretion nor that it is inconsistent with the public interest. Accordingly, entry of the proposed Final Judgment should be deemed to be in the public interest.

Dated: February 7, 1997.

Respectfully submitted,

Yvette Benguerel,

*Attorney, Telecommunications Task Force,  
U.S. Department of Justice, Antitrust Division,  
555 4th Street, N.W., Room 8104, Washington,  
D.C. 20001, (202) 514-5808.*

[December 18, 1996—Via Federal Express]

Donald J. Russell, Esq.,

*Chief, Telecommunications Task Force,  
Antitrust Division, U.S. Department of  
Justice, Room 8104, 555 4th Street, N.W.,  
Washington, D.C. 20001.*

Re: *United States of America v. U S West Inc.  
and Continental Cablevision, Inc.,  
United States District Court for the  
District of Columbia*

On behalf of Teleport Communications Group Inc. (TCG), and in accordance with the provisions of 15 U.S.C. Sec. 16(d), we hereby submit the following comments in connection with the matter of *United States of America v. U S West Inc. and Continental Cablevision Inc.* TCG seeks an amendment to the Final Judgment providing that the Affidavits submitted pursuant to Section VII will be submitted confidentially and not be filed in the public docket of the Court. The undersigned has been in communication with Robert J. Sachs, counsel for Continental, and has been advised that they do not oppose this request.

The proposed Final Judgment provides, inter alia, that U S West use its best efforts to divest the approximately 11% interest of TCG held by Continental as expeditiously as possible. The proposed Final Judgment further provides that U S West divest a portion of its interest in TCG sufficient to cause it to own less than 10% by June 30, 1997, and divest any remaining portion of the TCG interest by December 31, 1998. The divestiture must be made to a purchaser or purchasers in a manner that "shall not injure TCG."

The proposed Final Judgment orders U S West to deliver periodic Affidavits to the plaintiff setting forth its efforts in connection with the ordered divestiture. Said Affidavits are to include such information as the names of potential purchasers contacted or expressing interest, and describe "in detail each contact." These Affidavits could be

subject to public disclosure unless they are submitted confidentially pursuant to an Order of this Court.

TCG is a publicly traded company with approximately 30 million shares traded on the NASDAQ National Market. TCG is concerned that information concerning efforts to sell a major block of the company's stock could have a significant adverse impact on the market for TCG stock. Traders may engage in speculative activity based on information contained in these Affidavits causing significant volatility in TCG's stock price. As a result, premature disclosure of U S West's activities could significantly disrupt the market for TCG's securities. Further, the information contained in these Affidavits is subject to being available selectively to certain investors and not others, thereby possibly requiring TCG to fully disseminate such information so as to be in full compliance with securities laws.

Additionally, there may be a chilling effect on some of the prospective purchasers of U S West's interest in TCG if the possibility exists that an inquiry or expression of interest is subject to being publicly disclosed. Such prospective purchasers may not even want their interests made public, much less risk a "public negotiation" for TCG. This may have the effect of reducing the universe of prospective purchasers, some of whom may be best suited to insure the continued viability of TCG. Furthermore, public disclosure of the negotiations may jeopardize or render unavailable any exemption under federal and state securities law upon which the parties intend to rely. This would cause additional expense and may complicate or even terminate negotiations.

TCG proposes that the required Affidavits be submitted confidentially to the plaintiff and not filed in the public docket of the Court. In the event the divestiture is not accomplished in the time frame set out in the Final Judgment, a Trustee is appointed to effect the divestiture. Although the Trustee is similarly required to submit monthly status reports, such reports are specifically to be submitted confidentially. It appears the failure of the proposed Final Judgment to contain similar confidentiality protection was an oversight by the parties, and a similar restriction should be imposed upon the pre-Trustee status reports as well.

TCG believes the overriding principle in the Final Judgment is to force a divestiture of U S West's interest in TCG in a fashion that is not injurious to TCG and that could not lessen competition. However, information contained in the status Affidavits could impact TCG's financial well-being pending the disposition. If there is any possibility that such an outcome may occur, it is in the best interest of the public to support TCG's request and maintain the confidentiality of such information.

TCG further submits that existing federal securities laws provide an appropriate framework for the public disclosure of the disposition of U S West's holdings in TCG. Because U S West will be subject to the public reporting obligations under both Section 13 and 16 of the Securities Exchange Act of 1934 with respect to its TCG stock, U S West is already required to make public

filings as to changes in its TCG stock holdings when it enters into binding agreements to dispose of such stock. TCG believes that the public disclosure mandated by these securities laws provides the best and most orderly mechanism for the public disclosure of changes in U S West's holdings.

In conclusion, TCG asserts that its request is consistent with the underlying premise of the proposed Order—to cause a divestiture of U S West's holdings in TCG in a manner that is not injurious to TCG. In light of the fact that the request is not contested by Continental, we request the United States concur and submit such request to the Court.

Sincerely,

W. Terrell Wingfield, Jr.,

*Vice President and General Counsel.*

#### Service List

C. Loring Jetton, Jr., Wilmer, Cutler & Pickering, 2445 M Street, NW., Washington, DC 20037.

John McGrew, Wilkie Farr & Gallagher, Three Lafayette Center, 1155 21st Street, NW., Washington, DC 20036-3384.

W. Terrell Wingfield, Jr., Vice President and General Counsel, Teleport Communications Group, 429 Ridge Road, Dayton, NJ 08810.

Sean C. Lindsay, U.S. West, Inc., 7800 East Orchard Road, Suite 490, P.O. Box 6508, Englewood, CO 80155-6508.

Robert J. Sachs, Senior Vice President, Corporate and Legal Affairs, Continental Cablevision, Inc., The Pilot House, Lewis Wharf, Boston, MA 02110.

#### Certificate of Service

I, Tracy Varghese, hereby certify under penalty of perjury that I am not a party to this action, that I am not less than 18 years of age, and that I have on this day caused the Comments Relating to Proposed Final Judgment and Response of the United States to Comments to be served on defendants, intervenors, and other interested persons by mailing a copy, postage prepaid, to each of the individuals and organizations on the attached service list.

February 7, 1997.

Tracy Varghese.

[FR Doc. 97-4377 Filed 2-21-97; 8:45 am]

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#### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Commercial Turf Products, Ltd. Joint Research, Development and Production Joint Venture

Notice is hereby given that, on January 9, 1997, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. § 4301 *et seq.* ("the Act"), Commercial Turf Products, Ltd. filed written