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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 1, 1994

BY HAND

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street N.W.
Washington, D.C. 20554

Re: **FCC Docket No. 93-252; Regulatory Treatment of Mobile Services; Further Reply Comments of E.F. Johnson Company; Corrected Service List**

Dear Mr. Caton:

On July 29, 1994 we submitted, on behalf of E.F. Johnson Company, Further Reply Comments in the above referenced proceeding. The Further Reply Comments contained an incomplete service list showing FCC personnel served, but not other parties to this proceeding.

According, submitted herewith is a copy of the Further Reply Comments with a full service list. Except as indicated, all parties were served by first class mail on July 29.

Should there be any questions concerning this matter, please contact the undersigned directly.

Cordially yours,

Russell H. Fox

Russell H. Fox

Attachment

No. of Copies rec'd 0+9
List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
Implementation of Sections 3(n)	)	
and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile	)	
Services	)	

To: The Commission

Further Reply Comments of
E.F. JOHNSON COMPANY

E.F. Johnson Company ("E.F. Johnson" or the "Company"), by its attorneys, hereby submits these Further Reply Comments to the Federal Communications Commission ("FCC" or "Commission") in response to the Further Notice of Proposed Rule Making ("Further Notice")[1] adopted in the above referenced proceeding.[2] The Further Notice, pursuant to Congressional mandate, seeks to establish a new regulatory framework for mobile communications services. The Company submitted comments and reply comments in this proceeding, and offers these Further Reply Comments in light of additional information that has only recently come to the Company's attention and which is directly relevant to issues under consideration by the FCC in the Further Notice.

[1] Further Notice of Proposed Rule Making, GN Docket No. 93-252, FCC 94-100 (Released May 20, 1994).
[2] E.F. Johnson recognizes that the time for the submission of comments and reply comments in this proceeding has past. However, its Further Reply Comments address the issue of interoperability, which relatively few parties discussed. Because the Company was only recently made aware of the presentation that it seeks to have included in the record of this proceeding, it did not have an opportunity to include this material in its Reply Comments which were timely submitted on July 11. Moreover, the attached material represents important statements of the Department of Justice on matters before the Commission. Accordingly, it is in the public interest for the Commission to accept these Further Reply Comments. All parties responding to the Further Notice have been served with a copy of this pleading. Therefore, no party has been prejudiced by the late submission of these Further Reply Comments.

In its comments and reply comments, the Company argued that the FCC should impose interoperability requirements on wide area specialized mobile radio ("SMR") SMR systems. The Company pointed out that because wide area SMR systems are substantially similar to cellular systems, upon which the Commission imposed an interoperability standard, a similar requirement should be imposed on wide area SMR systems. The Company noted that this approach is consistent with the regulatory and judicial standards for interoperability of equipment on the landline telephone network. As demonstrated in the Company's reply comments, the type of interconnection discussed by the Commission in the Further Notice and which is consistent with judicial and regulatory standards (the use of equipment from different manufacturers on a system) will not occur in the wide area SMR industry without FCC intervention.

Further support for the Company's assertions is provided by the position of the Department of Justice's ("Department" or "DOJ") Antitrust Division. Attached to these Further Reply Comments is the text of an address by Steven C. Sunshine, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, entitled "Antitrust Policy Toward Telecommunications Alliances" ("DOJ Address"). The Commission will note that the Department of Justice agrees with the Company. Mr. Sunshine confirms that the Department favors "open networks and architecture, which tend to allow competitors and potential entrants access, and are more likely to accommodate increased consumer demand."[3]

As also noted in the Company's reply comments, Motorola, through its economic and technological partnerships with announced wide area SMR providers will foreclose others from manufacturing wide area SMR equipment. It is precisely this type of vertical arrangement that the DOJ believes "may facilitate coordinated interaction with the merging parties' rivals or the exercise of unilateral market power, in either case resulting

[3]DOJ Address at p. 5. As the Company noted in its reply comments, open networks are appropriate in the mobile communications context for at least 800 MHz wide area SMR service and cellular service, which either are, or are expected to be, consumer oriented mobile telephone like services.

in a lessening of competition."[4] The FCC should act, in the context of this proceeding, to promote the public interest, by ensuring that there is no decrease in competition among mobile communications equipment manufacturers.

WHEREFORE, THE PREMISES CONSIDERED, E.F. Johnson Company submits the foregoing Further Reply Comments and urges the Commission to proceed in a manner consistent with the views expressed herein.

Respectfully submitted:

E.F. JOHNSON COMPANY

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Its Attorneys

Dated: July 29, 1994

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[4]DOJ Address at p. 8.

Department of Justice

ANTITRUST POLICY TOWARD TELECOMMUNICATIONS ALLIANCES

Address by

STEVEN C. SUNSHINE
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Before the
American Enterprise Institute
For
Public Policy Research

Washington, D.C.
July 7, 1994

The title of today's session, or so I'm told, is Antitrust Policy Towards Telecommunications Alliances. As a student of the common law, I'm tempted to say that such a "policy" arises from a line of decided cases, and since we haven't decided very many, it's not clear what the policy is. I recognize that that's not a very satisfactory answer for this audience (and one that would make it difficult to talk for my full allotted time). So instead of relying on inductive reasoning, I will attempt to articulate some principles of general applicability to telecommunications mergers.

Our point of departure for analysis of many telecommunications mergers is grounded in a fundamental principle: antitrust enforcement is designed to promote innovation and efficiency. There can be little doubt that innovation, whether in the form of improved product quality and variety or of production efficiency that allows lower prices, is a powerful engine for consumer welfare. One need not look further than the AT&T divestiture to see the critical role that competition plays in spurring innovation and investment. In the early 1970's, Corning developed fiber optic cable and tried to sell this wonderful new product to AT&T. AT&T, one can surmise, probably didn't respond, "Thank you very much, we'd be thrilled to adopt and rapidly deploy a new technology that will make our huge and undepreciated plant obsolete." Instead, it took a consortium of small long distance carriers to lay the first fiber optic network, followed by Sprint and the pin drop and MCI before AT&T laid its first such network.

The lesson of my parable is that monopolists are often not innovators -- they are frequently too worried about cannibalizing sales from existing product. Incentives to innovate increase when competition spurs rivals to create new and better products. This is especially true when innovation in an industry can be characterized as drastic, that is, where a new invention by one firm can make all other firms' products obsolete. We do appreciate that innovation competition often means duplicating R&D assets, but we believe on balance that consumer welfare is enhanced when innovative diversity and competition is preserved.

A good example of the significance of innovation to our analysis is our recent suit challenging the proposed acquisition of GM's Allison Division by ZF Friederichshafen. The transaction, which would have combined the parties' bus and truck automatic transmissions businesses, would have resulted in very high levels of concentration in a few limited application-specific bus and truck markets in the U.S. Our concern over the merger was not limited to those narrow product markets in which the two firms were competing at the time. Rather, one of our principal concerns was that the combined firm would have controlled most of the assets world-wide necessary for innovation in truck and bus transmissions. Because innovation was tightly linked to possession of productive capacity necessary to carry out R&D, and only those two firms possessed the requisite capacity, the merger would have likely stifled innovation. Our complaint therefore alleged an anticompetitive effect, not just in specific goods markets that had been the subject of direct sales competition in the past, but in a market for innovation.

Having delivered this short disquisition on innovation, I would like to return to telecommunications. We are faced today with extraordinary change in the telecommunications and information industries. We appear to be at the point where technology for voice, data, and video services are converging. Competitive options may be emerging, but it's not clear when or how the new services will evolve or which ones will succeed. There is considerable speculation about the ability of cable companies to provide telephony, of telephone companies to provide video, of PCS and enhanced SMR providers to compete with cellular providers, and for wireless providers to compete with landline facilities. One can hardly open the newspapers these days without seeing new deals announced. Dozens or even hundreds of designs for that over-used cliche, dare I say it, the "information superhighway," are being developed and implemented by diverse firms in the marketplace. No doubt many will fail; in some cases, the parties will think better of the transaction before it gets off the ground.

Which designs and alliances will succeed? We surely don't know -- but we are greatly comforted by the fact that it's not our job to know. Instead, it is our job to encourage competition and to ensure a competitive marketplace so that the much heralded information superhighway can emerge from the free play of competitive forces. We strive to prevent incumbent firms from engaging in transactions that tend to erect barriers to entry, thereby chilling innovation and capital investment.

Special risks arise in telecommunications because certain firms own networks already in place -- whether they are local telephone exchanges, long distance networks, cellular exchanges, or cable services networks. Firms with these existing networks should not be allowed to disadvantage unfairly their competitors, both actual and potential. Emerging competition should not be lost through private restraints that extend existing market power into other existing or new markets or create new market power.

Generally speaking, we favor open networks and architecture, which tend to allow competitors and potential entrants access, and are more likely to accommodate increased consumer demand. Our bias lies in the direction of a future of interconnected networks rather than one of a number of closed systems.

Not surprisingly, we analyze telecommunications mergers between horizontal competitors under the 1992 Horizontal Merger Guidelines. Those guidelines, of course, provide a well-accepted framework for analyzing mergers under principles of market definition, concentration, competitive effects, entry, and efficiencies.

The rapid pace of technological change in the telecommunications industry raises some particular challenges for merger enforcement. We recognize that evidence of significant innovation may lead to a prediction of entry by a new firm or product. Such entry may have the effect of deconcentrating the affected market and will lead to a conclusion that a particular transaction presents no concerns. Changing market conditions owing to technological development may also suggest that a merger will not lead to the creation or exercise of market power.

Technological change, however, does not always counsel against merger enforcement. Even if change makes market structure and dynamics uncertain, it may be vitally important to preserve competition in innovation. Consistent with our GM/ZF complaint, we will act to preserve competition in innovation if we believe that a telecommunications merger threatens to retard technological development.

Some have suggested that telecommunications firms ought to be allowed to merge and to form alliances because it is only through such alliances that the necessary investments will be made and the associated risks endured. This argument posits that such mergers should be allowed even though they contravene normal antitrust standards. Although we reject this argument as a general proposition, it is possible that economies of scale or scope may justify allowing a merger that creates market power because the merger is demonstrably necessary to sustain incentives for innovation or to bring the benefits of significant innovation to market more quickly. The Department's analysis is flexible enough to account for such instances where the special facts required for such an exception can be clearly demonstrated.

So far I have addressed only mergers between horizontal competitors. In our experience, the more difficult questions arise when non-horizontal mergers may have potential anticompetitive effects. A vertical merger may lessen competition if it forecloses all or a substantial part of a market to other competitors, or if it raises the costs of those competitors, with a resulting price increase to consumers. Under certain circumstances, a vertical merger may facilitate coordinated interaction with the merging parties' rivals or the exercise of unilateral market power, in either case resulting in a lessening of competition.

We are not ready to make sweeping policy pronouncements, in the form of vertical merger guidelines or otherwise, but we are studying potential anticompetitive effects from such mergers in specific investigations. However, if we find appropriate circumstances indicating likely competitive harm, we will not shy away from challenging a vertical merger.

A case in point is the Department's challenge and settlement in connection with the British Telecom and MCI transaction. MCI, of course, is a significant interexchange carrier in the U.S. and BT is the dominant provider of telephone services in the U.K. Last summer, BT and MCI announced that they would enter into a global joint venture to provide enhanced business telecommunications services and that BT would take a 20% equity position in MCI.

After an extensive investigation, the Department concluded that the proposed transaction could have the effect of reducing competition in two markets, seamless global telecommunications services and international correspondent services between the United States and the United Kingdom. As a result of the proposed joint venture, BT would have increased incentives and the ability to use its dominant position in the U.K. to favor the joint venture and MCI and to disfavor all other global seamless networks providers. With such potential disfavored accessed to the U.K. telecommunications network, competitors would have a lessened ability to develop and offer global seamless services and to compete effectively, thereby possibly increasing the prices and decreasing the quality of such services to U.S. customers.

BT's acquisition of the MCI equity position would increase BT's incentive to discriminate in favor of MCI and against other international telecommunications carriers. Such discrimination could take many forms, including offering MCI favored terms and conditions, providing better quality of service, supplying of advanced information to MCI about planned network changes, funneling to MCI of its competitors' confidential information learned by BT through its correspondent relationships, or through diversion of traffic to MCI.

The Department's settlement with the parties ameliorates these potential anticompetitive effects through several means. Most importantly, the parties agreed to transparency, that is, the provision of detailed information about the terms and conditions of services provided to the joint venture and MCI by BT. With this information, disfavored competitors may lodge a complaint with regulatory authorities in either the U.S. or the U.K. Both regulatory regimes are committed to non-discrimination and with transparency both regimes should be able to regulate their respective markets effectively.

Other remedies in the settlement include the prohibition of the receipt from BT by the joint venture and MCI of competitors' confidential information, and restrictions on the ability of BT to divert U.K. to U.S. traffic to private or leased lines until other carriers have an opportunity to obtain such lines through international simple resale. Additionally, the Department and the parties agreed that if a significant act of discrimination occurs in favor of the joint venture or MCI, the Department may seek an appropriate modification imposing additional obligations of non-discrimination.

The Department's action in BT/MCI demonstrates how we will remain vigilant in protecting U.S. consumers from higher prices and poorer quality service. In that case, the threatened harm arose from an ability by a dominant firm to use its existing network to disadvantage competitors in an existing market and an emerging one. By ensuring access to the affected markets, the Department's enforcement action will allow consumers to reap the benefits of vigorous competition in those markets.

In conclusion, I note that the Department has a history of successful intervention in telecommunications markets. Today, we are cognizant of the competitive risks associated with existing dominant telephone and cable networks. But if the technological, structural, and legal barriers that gave rise to those risks can be alleviated, we cannot ignore the potential competitive benefits of likely new entry and technological convergence. Our goal is to promote conditions that allow competition to flourish, whether its through price, quality, or innovation. With respect to telecommunications, these principles have worked successfully in the past and there is no reason to depart from them now.

CERTIFICATE OF SERVICE

I, Donna Fleming, a secretary in the law firm of Gardner, Carton & Douglas, hereby certify that I have on this 29th day of July, 1994, sent by First Class United States mail, postage prepaid, copies of the foregoing **FURTHER REPLY COMMENTS OF E.F. JOHNSON COMPANY** to the following:

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