UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, VS. HEWLETT PACKARD ENTERPRISE CO., ET AL., DEFENDANTS.	**5:25-CV-00951-PCP** SAN JOSE, CALIFORNIA MARCH 23, 2026 PAGES 1- 79

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE P. CASEY PITTS
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF:
UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
LIBERTY SQUARE BUILDING
450 FIFTH STREET, NW, SUITE 3036
WASHINGTON, D.C. 20530
BY: HENRY C. SU

UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
450 GOLDEN GATE AVENUE, ROOM 10-101
SAN FRANCISCO, CALIFORNIA 94102
BY: J. MICHAEL GOLDSTEIN
MIRIAM M. ARGHAVANI
MICHAEL LEPAGE

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER:
IRENE L. RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

A P P E A R A N C E S: (CONT'D)

FOR THE PLAINTIFF: DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
950 PENNSYLVANIA AVENUE
SUITE 3109
WASHINGTON, D.C. 20530
BY: GREGORY CHARLES BELLER

FOR THE DEFENDANTS: GIBSON, DUNN & CRUTCHER
333 S. GRAND AVENUE
SUITE 4400
LOS ANGELES, CALIFORNIA 90071
BY: SAMUEL G. LIVERSIDGE
DANIEL S.J. NOWICKI
ERIC D. VANDEVELDE

FRESHFIELDS US LLP
700 13TH STREET NW, 10TH FLOOR
WASHINGTON, D.C. 20005
BY: JENNIFER MELLOTT
JULIE S. ELMER

FOR THE STATE OF COLORADO:
COLORADO DEPARTMENT OF LAW
1300 BROADWAY, 10TH FLOOR
DENVER, COLORADO 80203
BY: ARTHUR BILLER
ROBIN E. ALEXANDER
AMY BOWLES

10:07:11

FOR THE STATE OF CALIFORNIA:
CALIFORNIA ATTORNEY GENERAL'S OFFICE
455 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102
BY: MICHAEL JORGENSON
BRIAN WANG

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

A P P E A R A N C E S: (CONT'D)

COMMONWEALTH OF MASSACHUSETTS:

MASSACHUSETTS ATTORNEY GENERAL'S OFFICE
1 ASHBURTON PLACE, 20TH FLOOR
BOSTON, MASSACHUSETTS 02108
BY: ANTHONY W. MARIANO

SAN JOSE, CALIFORNIA MARCH 23, 2026

P R O C E E D I N G S

(COURT CONVENED AT 10:06 A.M.)

10:06:00 **THE CLERK:** ALL RIGHT. CALLING CASE NUMBER
10:06:03 25-CV-00951 PCP, U.S. VERSUS HP. ON FOR THE MOTION FOR ENTRY
10:06:08 OF FINAL JUDGMENT.

10:06:08 WILL THE PARTIES PLEASE STATE THEIR APPEARANCES FOR THE
10:06:11 RECORD BEGINNING WITH THE PLAINTIFF'S COUNSEL.

10:06:12 **MR. SU:** GOOD MORNING, YOUR HONOR.

10:06:14 HENRY SU FROM THE U.S. DEPARTMENT OF JUSTICE ON BEHALF OF
10:06:18 THE UNITED STATES.

10:06:18 WITH ME AT COUNSEL TABLE ARE SEVERAL OTHER MEMBERS OF MY
10:06:22 COLLEAGUES, INCLUDING MR. CHARLES BELLER, WHO IS A DEPUTY
10:06:26 ASSISTANT ATTORNEY GENERAL WITH THE ANTITRUST DIVISION;
10:06:29 MS. MIRIAM ARGHAVANI, ALSO AT COUNSEL TABLE; AND ALSO ON HAND
10:06:32 ARE MR. MICHAEL LEPAGE AND MR. JEREMY GOLDSTEIN.

10:06:35 **THE COURT:** GOOD MORNING.

10:06:38 I WILL HEAR FROM THE DEFENDANTS FIRST, AND THEN I'LL GIVE
10:06:42 THE INTERVENORS AN OPPORTUNITY TO MAKE THEIR APPEARANCES.

10:06:43 **MR. LIVERSIDGE:** GOOD MORNING, YOUR HONOR.

10:06:45 SAM LIVERSIDGE FOR HEWLETT PACKARD ENTERPRISE. AND I'M
10:06:51 JOINED BY MY COLLEAGUES, ERIC VANDEVELDE AND DANIEL NOWICKI AND
10:06:55 AS WELL AS OUR COCOUNSEL, JENNIFER MELLOTT AND JULIE ELMER.

10:07:01 **THE COURT:** GOOD MORNING.

10:07:04 **MR. BILLER:** GOOD MORNING, YOUR HONOR.

ARTHUR BILLER FOR THE ATTORNEY GENERAL OF THE STATE OF COLORADO.

WITH ME TODAY ARE ROBIN ALEXANDER AND AMY BOWLES ALSO FROM THE STATE OF COLORADO;

AND FROM THE COMMONWEALTH OF MASSACHUSETTS, ANTHONY MARIANO;

AND FROM THE STATE OF CALIFORNIA, BRIAN WANG AND MICHAEL JORGENSON, AND PROFESSOR CARL SHAPIRO IS ALSO HERE TODAY IN PERSON TODAY.

THE COURT: THANK YOU. SO WE ARE HERE ON THE MOTION FOR ENTRY OF FINAL JUDGMENT BY THE UNITED STATES.

I ALSO DID NOTICE THE FILING OF THE MOTION IN LIMINE WITH RESPECT TO DR. SHAPIRO'S TESTIMONY. I WILL PLAN TO RESOLVE THAT IN CONNECTION WITH MY FINAL ORDER ON THE ISSUES. I DON'T THINK I NEED FURTHER ARGUMENT ON THAT ISSUE. ALTHOUGH MAYBE I WILL ASK JUST FOR AN ORAL RESPONSE FROM THE INTERVENING STATES ON THAT MOTION SINCE THEY HAVEN'T HAD A CHANCE TO FILE A WRITTEN RESPONSE AT THIS POINT.

BUT OTHER THAN THAT, I THINK WE SHOULD PROCEED ON THE ASSUMPTION THAT I WILL CONSIDER THAT TESTIMONY, BUT, YOU KNOW, I WILL DETERMINE, YOU KNOW, THE MERITS OF THAT MOTION IN LIMINE IN CONNECTION WITH ISSUING A WRITTEN ORDER ON THE UNITED STATES' MOTION FOR ENTRY OF FINAL JUDGMENT.

SO IT IS THE UNITED STATES' MOTION, SO I WILL HEAR FROM THE UNITED STATES FIRST.

10:08:23 **MR. BELLER:** GOOD MORNING, YOUR HONOR.

10:08:25 AS MY COLLEAGUE INTRODUCED ME, CHARLIE BELLER. I'M THE ACTING DEPUTY ASSISTANT ATTORNEY GENERAL OF THE ANTITRUST DIVISION. I'D LIKE TO REQUEST LEAVE OF THE COURT TO OFFER A FEW PREFATORY REMARKS BEFORE MY COCOUNSEL PRESENTS THE ARGUMENT ON BEHALF OF THE UNITED STATES.

10:08:40 **THE COURT:** CERTAINLY.

10:08:40 **MR. BELLER:** JUST OVER A YEAR AGO, FORMER ASSISTANT ATTORNEY ABIGAIL SLATER HIRED ME AS HER COUNSEL IN THE FRONT OFFICE. I NOW REPORT TO ACTING ASSISTANT ATTORNEY GENERAL ASSEFI. LIKE ALL OFFICERS IN THE DEPARTMENT, I ULTIMATELY REPORT UP TO THE ATTORNEY GENERAL.

10:08:59 IT'S DISAPPOINTING TO SEE THAT THE ANTITRUST DIVISION'S LIMITED RESOURCES ARE BEING DEVOTED TO A POLITICAL DIVERSION. AT EVERY TURN THE STATES HAVE SOUGHT TO TURN THIS TUNNEY ACT PROCEEDING INTO A MEDIA CIRCUS.

10:09:12 FORTUNATELY, THE QUESTION BEFORE YOU TODAY IS A LEGAL ONE, NOT A POLITICAL ONE: DOES THE PROPOSED AMENDED FINAL JUDGMENT SATISFY THE TUNNEY ACT?

10:09:21 THE ANSWER IS YES. THE TUNNEY ACT INQUIRY IS A NARROW ONE FOCUSED ON THE COMPETITIVE IMPACT ON THE ULTIMATE SETTLEMENT. IN THIS CASE THE UNITED STATES HAS COMPLIED WITH THE TUNNEY ACT AND HAS COOPERATED WITH EXTENSIVE DISCOVERY ORDERED BY THIS COURT. THE UPSHOT OF ALL OF THAT DISCOVERY IS A DOG THAT DIDN'T BARK.

LACKING TRUE SCANDAL, THE STATES NEVERTHELESS REQUEST AN IMPOSSIBLE TUNNEY ACT STANDARD THAT ALMOST NO POST-COMPLAINT ANTITRUST SETTLEMENT COULD EVER SURVIVE. UNDER THE STATE STANDARD, THE UNITED STATES WOULD HAVE VERY LITTLE INCENTIVE TO EVER SETTLE A CASE AFTER FILING A TRIAL COMPLAINT. THAT WOULD BE CONTRARY TO BEDROCK PRINCIPLES OF JUDICIAL EFFICIENCY.

SETTLEMENT PRESERVES EFFICIENT, JUDICIAL, AND EXECUTIVE RESOURCES. EVERY DAY THE DEPARTMENT OF JUSTICE DECISIONS, UP AND DOWN THIS CHAIN, ARE MADE TRADING OFF PRIORITIES AND OPPORTUNITY COSTS. YOU MIGHT CALL THOSE DAILY SETTLEMENTS.

FURTHER DELAYS APPROVING THE SETTLEMENT HERE WOULD PREJUDICE THE UNITED STATES AND OUR ABILITY TO ENFORCE THE ANTITRUST LAWS BOTH THROUGH LITIGATION BUT ALSO THROUGH SETTLEMENT.

UNLESS THE COURT HAS FURTHER QUESTIONS, I'D LIKE TO TURN IT OVER TO MY COCOUNSEL TO PRESENT THE ARGUMENT.

THE COURT: THANK YOU.

MR. SU: MAY IT PLEASE THE COURT. OBVIOUSLY WE RECOGNIZE THAT THIS ISSUE REGARDING THE PUBLIC INTEREST DETERMINATION HAS BEEN EXTENSIVELY BRIEFED. SPEAKING JUST FOR THE GOVERNMENT, WE HAVE A RESPONSE TO PUBLIC COMMENTS, WE HAVE OUR MOTION FOR ENTRY OF FINAL JUDGMENT, AND WE ALSO HAVE A REPLY BRIEF. SO I JUST WANT TO COVER SOME BIG HIGH POINTS FOR THE COURT.

FIRST OF ALL, WE'RE HERE TODAY TO ADDRESS WHETHER ENTRY OF

THE AMENDED PROPOSED FINAL JUDGMENT IS IN THE PUBLIC INTEREST.

AND WHAT DOES THE AMENDED PROPOSED FINAL JUDGMENT SAY? IT'S A SETTLEMENT. IT'S A SETTLEMENT WITH TWO COMPLIMENTARY STRUCTURAL REMEDIES THAT ARE HERE FOR THE COURT TO EVALUATE. ONE IS THE DIVESTITURE OF THIS INSTANT ON BUSINESS THAT WAS HPE'S. THE OTHER IS THE LICENSE OF THIS MIST AI OPS SOURCE CODE.

BOTH OF THOSE ARE UNDERGOING AN AUCTION PROCESS, AND IT'S STILL ONGOING. SO ONE THING I WANT TO STRESS TODAY IS THAT TIME IS OF THE ESSENCE. THE SOONER THAT WE CAN GET THE PROPOSED FINAL JUDGMENT ENTERED, THE SOONER WE CAN CONCLUDE THIS AUCTION PROCESS, GET THESE ASSETS IN THE HANDS OF COMPETITORS WHO CAN START INJECTING COMPETITION INTO THIS RELEVANT MARKET, AND THAT'S THE RELEVANT MARKET ALLEGED IN THE COMPLAINT, WHICH IS FOR ENTERPRISE-GRADE WLAN SOLUTIONS IN THE UNITED STATES.

THIS IS THE ONLY DEAL -- THIS IS THE ONLY SETTLEMENT THAT IS BEFORE THE COURT. AS DISCOVERY HAS SHOWN, THERE ARE NO SIDE DEALS, THERE ARE NO OTHER AGREEMENTS BETWEEN THE UNITED STATES AND HPE OR JUNIPER. IT'S JUST THESE TWO REMEDIES.

AND THE QUESTION IS DO THESE TWO REMEDIES, ARE THEY -- DO THEY FALL WITHIN THE REACHES OF THE PUBLIC INTEREST?

WE SAY THEY DO.

AS BECHTEL TELLS THE COURT, YOU KNOW, THE PUBLIC INTEREST NEEDS TO BE FOCUSED ON ANTITRUST, ON COMPETITION, NOT ON

BROADER SOCIETAL INTERESTS.

THE COURT: SO IS YOUR VIEW THE NATIONAL SECURITY CONCERNS ARE NOT A RELEVANT FACTOR IN MAKING THE DETERMINATION?

MR. SU: YES, YOUR HONOR, AND THAT'S WHY WE DID NOT ADDRESS THEM IN THE RESPONSE TO PUBLIC COMMENTS.

YOU KNOW, THEY MAY HAVE BEEN IN THE BACKGROUND THAT MAY HAVE FORMED THE ATTORNEY GENERAL'S DISCRETION, BUT IN TERMS OF THE COMPETITIVE IMPACT, IN TERMS OF WHETHER THE SETTLEMENT ADDRESSES THE PUBLIC INTEREST THAT IS IN SAFEGUARDING PROMOTING COMPETITION, IT IS THESE TWO REMEDIES, THE INSTANT ON DIVESTITURE AND THE MIST AI OPS LICENSE.

THE COURT: OKAY. WHAT DO YOU SAY TO THE -- ESPECIALLY THERE'S BEEN A LOT OF BACK-AND-FORTH ABOUT THE ADEQUACY OF -- LET'S START WITH THE MIST AI OPS LICENSE AND WHETHER THERE IS -- AT THIS POINT THAT IS -- IT MIGHT BE AT THIS POINT THAT IT IS NOT AS VALUABLE AS IT WAS SIX YEARS AGO OR THAT THERE ARE KEY COMPONENTS, I THINK IN PARTICULAR THE ABILITY TO NOT ONLY IDENTIFY ERRORS BUT TO AUTOMATICALLY CORRECT THOSE PROBLEMS THAT ARE OMITTED FROM THAT SOURCE CODE.

MR. SU: WELL, YOU KNOW, THE POINT IS THAT THE SOURCE CODE, REGARDLESS OF WHEN THIS VERSION WAS COMPLETED, STILL PROVIDES A HEAD START TO WHOEVER LICENSES IT. AND IT COULD BE ONE OR TWO LICENSEES, BUT IT PROVIDES A HEAD START.

AND THESE ARE -- THE BIDDERS THEMSELVES ARE COMPANIES WHO ARE KNOWLEDGEABLE IN THIS INDUSTRY. THEY'RE NOT GOING TO JUST

GET HANDED SOMETHING AND SAY, WELL, WHERE DO I START? WHAT DO I DO?

AND ON TOP OF THAT, THE PROPOSED FINAL JUDGMENT MAKES CLEAR THAT, YOU KNOW, THE WINNING LICENSEE GETS TRANSITIONAL SERVICES 12 MONTHS, MADE EXTENDABLE TO 18 MONTHS, AND THAT INCLUDES THE ASSISTANCE OF ENGINEERS AND SALESPEOPLE.

THE COURT: BUT JUST TO BE CLEAR, DO YOU DISAGREE WITH ANYTHING IN THE SUPPLEMENTAL REPORT THAT WAS FILED BY THE STATES, OF THEIR EXPERT, ON THIS ISSUE ABOUT WHAT IS OR IS NOT INCLUDED IN THE LICENSE?

MR. SU: I WILL DEFER TO HPE'S COUNSEL ON THAT POINT BECAUSE IN TERMS OF THE NITTY GRITTY AND THE DISPUTES THAT ARE PENDING BETWEEN THE STATES' EXPERT AND HP'S WITNESSES, I WILL DEFER.

BUT THE POINT IS, IS THE PROPOSED FINAL JUDGMENT HAS TERMS TO ENSURE THAT WE GET WHAT IS EXPECTED UNDER A LICENSE. IF SOMETHING IS NOT CLEAR, IF SOMETHING IS NOT -- IS MISSING, THAT CAN BE ADDRESSED IN THE ENFORCEMENT OF THE JUDGMENT. THAT IS NOT A FATAL DEFECT.

AND, AGAIN, THESE BIDDERS ARE EXPERIENCED PLAYERS IN THE INDUSTRY. THEY KNOW WHAT THEY'RE GETTING. THEY KNOW WHAT THEY CAN DO WITH IT.

THE COURT: WHY -- AND SO WHY IS THE OTHER PIECE OF THIS DIVESTITURE OF INSTANT ON, WHICH WAS ADMITTEDLY A SMALL -- A VERY SMALL PIECE OF HP'S BUSINESS, AND I UNDERSTAND AND

10:15:47 FOCUSED ON SMALL AND MEDIUM BUSINESSES, ALTHOUGH THERE'S AN ARGUMENT ABOUT HOW ADAPTABLE IT WILL BE IN TERMS OF PROVIDING LARGER SCALE SERVICES, BUT WHY IS THAT KIND OF -- WHY SHOULD I VIEW THAT AS SOMETHING OTHER THAN SORT OF CREATING THE APPEARANCE OF A STRUCTURAL REMEDY, PARTICULARLY WHERE OBVIOUSLY HP'S MAJOR ARGUMENT WAS THAT AT LEAST AS TO JUNIPER SPINNING OFF ANY PARTICULAR BUSINESS WAS NOT POSSIBLE, BUT HERE NOW APPARENTLY WITHIN HP IT'S EASY TO JUST SAY IT'S ON, AND WE'RE DIVESTING THAT SMALL PART OF OUR BUSINESS.

10:16:29 WHY IS THAT NOT SORT OF JUST ATTEMPTING TO CREATE THE LOOK OF A STRUCTURAL REMEDY WHEN IT'S, IN FACT, NOT PARTICULARLY SIGNIFICANT AS FAR AS THIS MARKET IS CONCERNED?

10:16:39 **MR. SU:** WELL, WHERE I WOULD DISAGREE WITH WHAT THE COURT HAS JUST SAID IS THAT IT'S CREATING THE APPEARANCE. IT'S NOT THE APPEARANCE. IT IS -- THERE IS A BUSINESS HERE THAT IS BEING DIVESTED, AND IT IS AN ENTERPRISE-GRADE WLAN SOLUTION, IRRESPECTIVE OF HOW HPE MAY HAVE POSITIONED IT IN THE MARKETPLACE, BUT IT IS SOMETHING THAT IS VALUABLE TO COMPETITORS AND CAN BE USED AGAIN TO INJECT ADDITIONAL OR GREATER COMPETITION IN THIS RELEVANT MARKET.

10:17:12 **THE COURT:** BUT IT DOESN'T -- I MEAN, IT'S NOT THE TRADITIONAL STRUCTURAL REMEDY IN THE SENSE THAT IT'S NOT SAYING, YOU KNOW, THE COMBINED ENTITY WILL NOT BE OPERATING IN A PARTICULAR AREA OR IS GOING TO COMPLETELY SPLIT OFF, YOU KNOW, THAT ASPECT OF THE WORK, CORRECT?

MR. SU: THAT'S CORRECT.

THE COURT: I MEAN, THERE'S A LOT OF HOPE ON BOTH OF THESE FRONTS. THERE SEEMS TO BE A LOT OF HOPE THAT MAYBE SOMEONE WITH ACCESS TO THESE RESOURCES WILL BE ABLE TO ENGENDER FURTHER COMPETITION IN THE MARKET AS OPPOSED TO KNOWING THAT YOU ARE PUTTING AND YOU ARE CREATING AN ENTITY THAT THE FOLLOWING WEEK IS READY TO GO, GO TO BET AND START COMPETING. I MEAN, WE DON'T HAVE A REMEDY LIKE THIS IN THIS CASE, CORRECT?

MR. SU: RIGHT. IN TERMS OF THE DIVESTITURE OF A STANDALONE ENTITY OR BUSINESS THAT BASICALLY WAS, YOU KNOW, JUNIPER'S CAMPUS AND BRANCH BUSINESS, THAT'S NOT WHAT WE'RE TALKING ABOUT. AND THAT WAS WHAT THE UNITED STATES BARGAINED FOR, IT WAS TRYING TO NEGOTIATE FOR, AND IT WOULD HAVE BEEN THE REMEDY THAT THE UNITED STATES WOULD HAVE ASKED FOR HAD IT PREVAILED AT TRIAL. BUT THAT'S NOT WHY WE ARE HERE. WE ARE HERE BECAUSE OF A COMPROMISE.

AND THE POINT HERE IS THAT, YES, IT'S NOT, IT'S NOT -- WHILE IT MAY NOT BE THAT DISCRETE, RIGHT, IT IS STILL SOMETHING THAT CAN, YOU KNOW, INJECT COMPETITION INTO THIS MARKET WHETHER IT'S FROM AN INCUMBENT OR FROM AN ENTRY FROM A COMPETITOR IN AN ADJACENT MARKET.

THE COURT: I MEAN, I GUESS THE QUESTION OR THE THING I'M STRUGGLING WITH IS IN TERMS OF THINKING ABOUT THE STANDARD, IS THE QUESTION SOMETHING ALONG THE LINES OF, WELL, I HAVE TO CONCLUDE THAT SOMETHING, NO MATTER HOW INADEQUATE IT MIGHT BE

10:19:04 GIVEN THE CONCERNS ABOUT THE LOSS OF COMPETITION IN THE PARTICULAR MARKET, SOMETHING IS BETTER THAN NOTHING. I MEAN, IS THAT ULTIMATELY THE STANDARD I SHOULD BE APPLYING HERE TO SAY THAT, WELL, ALMOST WE'RE STILL GOING TO HAVE THIS SUBSTANTIAL INCREASE IN THE HHI RESULTING FROM THIS, AND WHETHER THAT IS A SCREENING TOOL OR CREATES A STRUCTURAL PRESUMPTION IS A DIFFERENT ISSUE, BUT -- AND THAT THE CONCLUSION IS JUST THAT, YOU KNOW, OBVIOUSLY IT'S THE GOVERNMENT'S DECISION ON WHETHER TO GO TO TRIAL OR NOT.

10:19:31 NOW, I DO THINK THERE WAS A CONCERN THAT THERE WAS A QUESTION RAISED IN THE BRIEFING ABOUT THE CONSTITUTIONALITY OF THE TUNNEY ACT, WHICH I DON'T FIND ANY MERIT TO BECAUSE OBVIOUSLY THE GOVERNMENT IS HERE ASKING ME TO ENTER AN ORDER IN MY AUTHORITY AS A MEMBER OF ARTICLE III, AND SO I DON'T THINK -- I THINK IT IS APPROPRIATE THAT THERE ARE STANDARDS THAT ARE APPLIED THAT THE GOVERNMENT IS SEEKING SUCH RELIEF.

10:19:56 IT'S A DIFFERENT QUESTION OF WHETHER YOU CAN COMPEL ONGOING LITIGATION, BUT THERE ARE DIFFERENT WAYS TO DO THAT WITHOUT SEEKING A CONSENT DECREE OR A COURT ORDER. SO I SEE THAT.

10:20:06 I'M SORRY, I JUST WANTED TO SAY THAT BECAUSE THAT WAS ONE OF THE ISSUES THAT CAME.

10:20:10 **MR. SU:** I APPRECIATE THAT, YOUR HONOR.

10:20:12 **THE COURT:** BUT DO YOU THINK THE ISSUE WAS ULTIMATELY THAT -- OR IF I HAVE CONCERNS ABOUT THE DISCREPANCY BETWEEN THE

HOPE THAT THESE REMEDIES MIGHT PROVIDE SOME BENEFIT TO COMPETITION IN THE MARKET AND THE ACTUAL, YOU KNOW, DOCUMENTED INCREASE IN CONCENTRATION WITHIN THIS MARKET POST-MERGER, DO I NEED TO JUST SAY, WELL, I DEFER TO THE GOVERNMENT'S CHOICE THAT SOMETHING IS BETTER THAN NOTHING, OR IS THERE A DIFFERENT STANDARD WHEREIN I HAVE TO -- IT MAY NOT BE THE WAY THAT THE STATE'S EXPERT DID IT, BUT TO SAY SOMETHING, OKAY, HOW MUCH DO I THINK THE GOVERNMENT WAS AT RISK OF LOSING THE CASE IN WHICH CASE YOU GET NOTHING AS OPPOSED TO SOMETHING?

HOW SHOULD I BE THINKING ABOUT THAT?

MR. SU: SO, YOUR HONOR, THE STANDARD I WOULD POINT THE COURT TO HERE IS WHAT THE COURT IN SBC COMMUNICATIONS ADOPTED, WHICH IS TO SAY THAT WITHIN THE REACHES OF THE PUBLIC INTEREST NEEDS, A, THERE IS A FACTUAL FOUNDATION; AND THEN, B, THAT THESE REMEDIES ARE REASONABLY ACCEPTABLE.

AND I WOULD SAY THAT, YOU KNOW, WE MEET BOTH PRONGS. THERE'S A FACTUAL FOUNDATION TO SUPPORT WHAT IS BEING DIVESTED HERE IN ADDITION TO THE RESPONSE TO PUBLIC COMMENTS AND A COMPETITIVE IMPACT STATEMENT, THE COURT HAS THE BENEFIT OF ALL OF THE DISCOVERY THAT HAS BEEN DONE INCLUDING DECLARATIONS AND DEPOSITIONS FROM HPE'S WITNESSES EXPLAINING EXACTLY WHAT THIS IS THAT'S BEING DIVESTED.

AND THEN SECONDLY, IN TERMS OF REASONABLY ACCEPTABLE, WE WOULD SUBMIT THESE ARE REASONABLY ACCEPTABLE. THEY DO INJECT COMPETITION INTO THIS RELEVANT MARKET.

AND THIS COURT WILL NOT BE THE FIRST BENCH TO STRUGGLE WITH THE FACT THAT MERGERS ARE FUNDAMENTALLY ABOUT PREDICTION, RIGHT? AND SO NO ONE CAN GUARANTEE THAT SOMETHING HAPPENS THE WAY WE THINK IT WILL HAPPEN OR AS QUICKLY AS WE THINK IT WILL HAPPEN, BUT THESE TWO REMEDIES BOTH HAVE SUBSTANCE AND THEY CREATE -- THEY PROVIDE THE OPPORTUNITY FOR ENTRY REPOSITIONING OR ENHANCEMENT OF COMPETITION.

THE COURT: AND I KNOW THAT THE UNITED STATES GOVERNMENT'S POSITION IS BASICALLY THAT THE PROCESS LEADING TO THE PROPOSED CONSENT DECREE AND SETTLEMENT IS NOT RELEVANT AT ALL TO THE ISSUES BEFORE ME, AND I UNDERSTAND THAT'S WHY YOU'VE BRIEFED THE CASE IN CERTAIN WAYS. BUT OBVIOUSLY HPE PUT AN EXTENSIVE SORT OF DESCRIPTION OF ITS UNDERSTANDING OF THAT PROCESS AND PROCESS OF DECIDING TO FILE THIS CASE IN THE FIRST INSTANCE.

DO YOU HAVE ANY CONCERNS WITH THAT? WAS THAT ACCURATE IN YOUR UNDERSTANDING?

MR. SU: THEY OBVIOUSLY HAVE THEIR WAY OF TELLING WHAT HAPPENED HERE, BUT WHAT I WOULD SAY TO THE COURT IS THE RECORD THAT THE PROCESS, YOU KNOW, THAT THE STATES HAVE BEEN TALKING ABOUT IS ONE OF CONTENTIOUS, HARD-FOUGHT NEGOTIATION.

IT'S NOT UNUSUAL FOR THE GOVERNMENT TO MAKE AN ENFORCEMENT DECISION, BUT AT THE SAME TIME, YOU KNOW, OPEN UP, YOU KNOW, A CHANNEL FOR NEGOTIATIONS WHILE THE PARTIES ARE PREPARING FOR TRIAL.

AND THERE WAS A LOT OF BARGAINING. AND AT THE END OF THE DAY, JUDGE ALDRICH'S COMMENT IN GILLETTE IS WHAT I WOULD POINT THE COURT TO HERE, WHICH IS THE STATES JUST WANTED OR THEY WISHED THAT THE GOVERNMENT BARGAINED A LITTLE HARDER, BUT THAT'S NOT THE WAY IT WORKS. THE SETTLEMENT AND THE NEGOTIATION, THAT IS THE PROVINCE OF THE EXECUTIVE BRANCH.

BUT WHAT WE'RE HERE TODAY IS TO PUT BEFORE YOUR COURT FOR ITS INDEPENDENT JUDGMENT THE PRODUCT OF THAT PROCESS, WHICH IS THIS AMENDED PROPOSED FINAL JUDGMENT WITH THESE TWO REMEDIES.

THE COURT: WELL, LET ME ASK YOU TWO PARTICULAR QUESTIONS ABOUT THE PROCESS, AND IF YOU'RE OF THE VIEW THAT IT'S INAPPROPRIATE FOR YOU TO ANSWER THE QUESTIONS, YOU CAN.

BUT ONE REPRESENTATION THAT HAS BEEN MADE BY HP IS THAT THEIR UNDERSTANDING WAS THAT THERE WAS NOT, UNTIL JUST BEFORE THE FILING OF THE CASE, THAT THERE WAS -- THAT AT LEAST STAFF WAS RECOMMENDING THAT NO LITIGATION BE FILED, AND THAT THAT WAS SUBSEQUENTLY OVERRIDDEN BY MR. ASSEFI, I BELIEVE.

IS THAT YOUR UNDERSTANDING OF THE FACTS?

MR. SU: WE UNDERSTAND THAT THERE ARE PRESS REPORTS TO THAT EFFECT, BUT MY RESPONSE TO YOU IS THAT I CANNOT ANSWER THAT, YOU KNOW, BECAUSE IT'S A DELIBERATIVE PROCESS.

THE COURT: AND IS IT YOUR UNDERSTANDING THAT THERE WAS AT LEAST PERHAPS NOT A FORMAL AGREEMENT BUT SOMETHING LIKE A SHARED UNDERSTANDING OF A MOVEMENT TOWARDS A SETTLEMENT CLOSER TO THE TERMS OF THE SETTLEMENT THAT IS BEFORE ME THAN TO

ONE THAT WOULD INCLUDE THE ACTUAL DIVESTITURE OF THE CAMPUS AND BRANCH BUSINESS AS A TERM OF THAT? IS THAT ACCURATE?

MR. SU: YES. AGAIN, WHAT WE SEE FROM THE RECORD IN JUNE IS THE TRADING OF PROPOSALS. THE ANTITRUST DIVISION WANTED A FULL DIVESTITURE OF CAMPUS AND BRANCH.

THE COURT: BUT I THINK HPE'S PRESENTATION IS THAT THAT WAS SORT OF AFTER THERE HAD BEEN A PRIOR DISCUSSION AND SEEMING EFFORT, INCLUDING THE THEN ASSISTANT ATTORNEY GENERAL IN CHARGE OF THE DIVISION, THAT WOULD COALESCE AROUND SOMETHING THAT DIDN'T INCLUDE THAT KIND OF REMEDY, AND THAT THAT REMEDY WAS -- THEN HP PRESENTS THAT THEY WERE SURPRISED WHEN THERE WAS A SHIFT IN STRATEGY TO REQUIRE THAT KIND OF DIVESTITURE.

MR. SU: YEAH. CERTAINLY THE REMEDIES ARE CLOSER TO WHAT IS BEFORE THE COURT HAD BEEN PRESENTED TO THE ANTITRUST DIVISION IN EARLY JUNE FOR CONSIDERATION, YES.

SO, AGAIN, IT IS A PROCESS OF MOVING TOWARDS, YOU KNOW, THE BOTH SIDES MOVING TOWARDS A DECISION, BUT DEFINITELY THE ANTITRUST DIVISION LOOKED AT THE REMEDIES THAT ARE CURRENTLY BEFORE THE COURT. THEY HAD BEEN PART OF A PROPOSAL THAT HPE'S COUNSEL HAD PRESENTED.

THE COURT: YOU'VE BEEN GOING FOR A WHILE. I DO WANT TO GIVE HP AND THE STATES AN OPPORTUNITY. IS THERE ANYTHING ELSE YOU WOULD LIKE TO ADDRESS?

MR. SU: NO. AGAIN, JUST TO SUMMARIZE, I THINK IF YOU LOOK AT SBC COMMUNICATIONS, WHICH ALSO ADHERES TO WITHIN

10:27:08 THE REACHES OF THE PUBLIC INTEREST STANDARDS, THE KEY INGREDIENTS HERE ARE IS THERE A FACTUAL FOUNDATION TO SUPPORT A DETERMINATION THAT THESE REMEDIES ARE IN THE PUBLIC INTEREST, MEANING THAT THEY ADDRESS, YOU KNOW, THE COMPETITIVE CONCERNS ALLEGED IN THE COMPLAINT? AND THEN, B, ARE THEY REASONABLY ACCEPTABLE?

AGAIN, IT'S UNREASONABLE. THE COURTS HAVE SAID AS MUCH, THAT TO EXPECT THAT THE GOVERNMENT IS GOING TO COME BEFORE YOU WITH THE IDEA OR THE PERFECT REMEDY OR THE REMEDY THAT MIGHT HAVE BEEN OBTAINED HAD THE GOVERNMENT GONE TO TRIAL AND PREVAILED. SETTLEMENTS ARE A PRODUCT OF COMPROMISE AND A PRODUCT OF ASSESSING LITIGATION RISKS.

THE COURT: I GUESS THE ONLY OTHER QUESTION I HAVE FOR YOU IS DOES THE SUCCESS OR FAILURE OF PRIOR GOVERNMENT DECISIONS WITH RESPECT TO ALLOWING OR NOT ALLOWING SUCH MERGERS OR, YOU KNOW, CONDITIONING MERGERS ON CERTAIN KINDS OF REMEDIES BEAR UPON MY THINKING HERE ABOUT WHETHER A MERGER, ALLOWING THIS MERGER TO MOVE FORWARD PURSUANT TO THE TERMS THAT ARE PROPOSED WOULD SERVE THE PUBLIC INTEREST?

MR. SU: I WOULD SUBMIT, NO, YOUR HONOR, BECAUSE, AGAIN, EACH MERGER, EACH PROPOSED REMEDY IS DIFFERENT, IT'S FACT SPECIFIC, AND THAT'S WHY WE NEED A FACTUAL FOUNDATION.

AND THE COURTS ARE CLEAR THAT, YOU KNOW, IN THIS REGARD, YOU KNOW, THE COURT SHOULD, YOU KNOW, DEFER TO THE GOVERNMENT'S ASSESSMENT OF THE REMEDIES.

THE COURT: CAN YOU POINT ME TO A MERGER THAT WAS ALLOWED TO GO FORWARD AFTER PROVIDING THESE KINDS OF REMEDIES WHERE YOU THINK THAT THE REMEDIES ACTUALLY WERE ADEQUATE IN PREVENTING THE COMPETITIVE HARMS THAT WERE OF CONCERN?

MR. SU: YES, YOUR HONOR. A RECENT ONE WAS T-MOBILE, OR DEUTSCHE TELEKOM, WHERE IN THE OPINION THERE'S A LOT OF DISCUSSION ABOUT, YOU KNOW, WHETHER IT WAS THE PERFECT RESOLUTION OR NOT, AND IT WASN'T.

BUT IT WAS WITHIN THE REACHES OF THE --

THE COURT: NO. I'M JUST NOT THINKING ABOUT THE QUESTION OF APPROVAL, BUT HISTORICALLY WHERE THE GOVERNMENT, YOU KNOW, ALLOWED A MERGER TO GO FORWARD WHILE PROCURING CERTAIN REMEDIES OR AS A CONDITION OF ALLOWING IT TO MOVE FORWARD, AND WE WOULD LOOK BACK NOW AND SAY, YEAH, THAT REMEDY WORKED GREAT, AND, IN FACT, WE WERE ABLE TO PRESERVE COMPETITION IN THE MARKET.

I'M SORT OF AWARE THAT THERE SEEMED TO BE MANY INSTANCES WHERE PEOPLE WOULD NOW SAY ACTUALLY THE REMEDIES THAT THE GOVERNMENT AGREED TO DID NEXT TO NOTHING. THERE'S LITIGATION ONGOING AND SOME WOULD SAY IN ONE OF THOSE INSTANCES IN THE SOUTHERN DISTRICT OF NEW YORK OBVIOUSLY, AND IT'S NOT BEFORE ME.

BUT ONE QUESTION IS TO THINK ABOUT HOW -- IS THERE ANYTHING TO BE LEARNED BY A HISTORICAL EXPERIENCE WITH RESPECT TO WHEN THESE KINDS OF MERGERS ARE ALLOWED TO MOVE FORWARD AND

THE PARTICULAR KINDS OF REMEDIES THAT ARE PROVIDED, AND WHETHER THOSE ARE ACTUALLY LIKELY TO MEANINGFULLY PROTECT COMPETITION OR WHETHER ULTIMATELY THE REMEDIES WOULD DO COMPARATIVELY LITTLE IN THAT RESPECT?

MR. SU: OFF THE TOP OF MY HEAD, I CANNOT GIVE YOU A SPECIFIC ANSWER ABOUT A PARTICULAR CASE THAT WENT THROUGH THE TUNNEY ACT PROCESS.

I WILL SAY THAT --

THE COURT: IT DOESN'T HAVE TO BE THE TUNNEY ACT PROCESS. I MEAN, I THINK IT COULD BE PROCURING AN AGREEMENT IN THE MERGER REVIEW PERIOD AND FEELING LIKE THE REMEDIES OR THE COMMITMENTS THAT WERE RECEIVED WERE SUFFICIENT TO PRESERVE COMPETITION IN THE RELEVANT MARKET.

MR. SU: I COULD SPEAK TO A CASE THAT I PERSONALLY WORKED ON THAT ACTUALLY ALSO WENT UP TO THE NINTH CIRCUIT, AND THAT'S THE ST. ALPHONSUS CASE WHERE WE WERE ABLE TO GET A REMEDY AND ENSURE THAT THE MARKET FOR PRIMARY CARE PHYSICIANS IN THIS -- IN NAMPA, IDAHO WAS SUFFICIENT AND WOULD PRESERVE COMPETITION IN THAT MARKET.

THE COURT: AND WHAT WAS THE REMEDY THAT WAS AGREED TO THERE?

MR. SU: IT WAS BASICALLY TO DIVEST, IF YOU WILL, FROM THE PRACTICE THAT ST. LUKE'S WAS ACQUIRING THE PRIMARY CARE PHYSICIANS, AND IT WAS -- BUT IN THAT CASE IT WENT TO TRIAL AND GOT THAT RELIEF POST-TRIAL.

THE COURT: THAT WAS A TRIAL CASE?

MR. SU: YES, YOUR HONOR.

THE COURT: AND APPARENTLY IT SOUNDS LIKE THE DIVESTITURE OF A PHYSICIAN GROUP PRESUMABLY IMMEDIATELY WOULD COMPETE IN THE MARKET, CORRECT?

MR. SU: CORRECT, YES.

THE COURT: OKAY.

MR. SU: THE ONLY OTHER THING I WOULD SAY IS OBVIOUSLY, AND AGAIN, THIS FALLS WITHIN THE PROVINCE OF THE EXECUTIVE BRANCH, BUT BOTH THE DEPARTMENT OF JUSTICE AND THE FEDERAL TRADE COMMISSION DO PERIODICALLY CONDUCT MERGER RETROSPECTIVES TO BETTER UNDERSTAND, YOU KNOW, THE SUCCESS OF THEIR WORK.

BUT, AGAIN, I WOULD SAY THAT'S NOT TO INFORM THE COURT. THAT'S TO INFORM OUR OWN THINKING, OUR OWN ASSESSMENT WHEN WE'RE DECIDING WHAT TO -- YOU KNOW, WHAT REMEDIES TO ACCEPT, WHAT TO BRING FORWARD TO THE COURT FOR APPROVAL.

THE COURT: OKAY. THANK YOU.

MR. SU: THANK YOU, YOUR HONOR.

THE COURT: I'LL LET HP SPEAK NEXT.

MR. LIVERSIDGE: THANK YOU, YOUR HONOR.

I'D LIKE TO START BY JUST TALKING ABOUT SOME FACTS THAT PUT THIS SETTLEMENT IN SOME CONTEXT, AND I KNOW YOU'VE HEARD THESE POINTS FROM US BEFORE, AND I APOLOGIZE FOR REPEATING THEM, BUT I THINK THAT THEY ARE IMPORTANT HERE.

THIS IS A SETTLEMENT THAT WAS REACHED IN THE CONTEXT OF A PROPOSED MERGER WHERE NOT A SINGLE OTHER ENFORCEMENT AGENCY IN THE WORLD FILED SUIT TO CHALLENGE IT. FOURTEEN OTHER JURISDICTIONS LOOKED AT IT. NOT ONE OF THEM CHALLENGED IT. NOT ONE OF THEM ACTUALLY ISSUED A SECOND REQUEST.

THE COURT: WHAT DO I DO WITH -- I MEAN, OBVIOUSLY I THINK THERE IS SOME DEGREE OF COORDINATION BETWEEN INTERNATIONAL ENFORCEMENT AUTHORITIES AND THE UNITED STATES AND AS WELL BETWEEN THE UNITED STATES AND THE STATE-LEVEL ENFORCEMENT AUTHORITIES. SO HOW MUCH SHOULD I DRAW FROM THAT FACT WHEN IT COULD SIMPLY REFLECT THAT THERE WAS AN UNDERSTANDING THAT THE UNITED STATES AND THE UNITED STATES DEPARTMENT OF JUSTICE WOULD BE TAKING THE LEAD ON THE ANALYSIS HERE AND THE DETERMINATION ON WHETHER A CHALLENGE TO THE MERGER WAS APPROPRIATE PERHAPS BECAUSE THE UNITED STATES MARKET WOULD BE MOST IMPACTED AND THINGS MAY BE DIFFERENT IN MARKETS WHERE HUAWEI IS MORE A PARTICIPANT IN A MORE ACTIVE WAY SO THAT IT COULD BE A DIFFERENT ANALYSIS.

SO IT COULD BE THAT EVERYONE JUST DETERMINES THAT WE'RE GOING TO LET THE UNITED STATES TAKE THE LEAD ON THIS, AND, IN FACT, THE UNITED STATES ULTIMATELY DID MAKE THE DECISION TO FILE THIS LITIGATION.

MR. LIVERSIDGE: UNDERSTOOD, YOUR HONOR. OBVIOUSLY WE DON'T KNOW EXACTLY WHY PEOPLE MADE THE DECISIONS THEY'VE MADE, BUT WE'VE SEEN IN THE PAST THAT THE EUROPEAN COMPETITION

AUTHORITIES, THE U.K. COMPETITION AUTHORITIES, ARE INCREDIBLY ACTIVE AND WHERE THEY SEE A NEED TO BE IN THE MIX AND CHALLENGE SOMETHING, THEY DO.

IT'S ALSO, I THINK, TELLING THAT THEY DID NOT GET A SECOND REQUEST FROM ANY OF THESE OTHER ENFORCEMENT AGENCIES.

THE COURT: IS IT RIGHT THAT THOSE ARE -- AND I'M SORRY I DON'T KNOW THE DETAILS PERHAPS AS INTIMATELY AS I SHOULD. BUT IN MOST OF THOSE MARKETS IS HUAWEI ALSO A PARTICIPANT?

MR. LIVERSIDGE: HUAWEI?

THE COURT: HUAWEI. I AM SORRY.

MR. LIVERSIDGE: YES, I BELIEVE -- I DON'T THINK IN THE U.K., BUT I THINK IN A NUMBER OF THOSE MARKETS THEY ARE.

THE COURT: SO PRESUMABLY HOW THEY WOULD VIEW THE COMPETITIVE EFFECTS OF THIS -- THE MERGER MAY BE VERY DIFFERENT IN THEIR MARKETS THAN IT WOULD BE IN THIS MARKET, CORRECT?

MR. LIVERSIDGE: IT'S POSSIBLE, YOUR HONOR. I THINK THE BOTTOM LINE IS THAT THIS MERGER GOT ALMOST NO ATTENTION FROM THESE OTHER COMPETITION AUTHORITIES, GOT VERY LITTLE, BY THE WAY OF A LOOK, VERY LITTLE INTEREST IN IT, AND WE -- I KNOW THERE WAS TALK ABOUT THE DOJ STAFF AND THEIR REPORTING. THE REPORTING WAS ACTUALLY THE WORDS OF A SPEECH GIVEN BY THE CURRENT HEAD OF THE ANTITRUST DIVISION.

AND WE HAVE ALWAYS SUSPECTED THAT THE STAFF RECOMMENDED AGAINST BRINGING THIS CASE, AND HE CONFIRMED IT IN THAT SPEECH.

WE HAVE A CASE WHERE THE DOJ STAFF INVESTIGATED FOR A YEAR AND DID NOT WANT TO BRING THE ACTION. THEY RECOMMENDED AGAINST IT, AND YET WE STILL HAVE A SETTLEMENT WITH VERY REAL AND MEANINGFUL REMEDIES. THEY DIDN'T WANT TO BRING THE CASE.

WE ALSO KNOW FROM THAT YEAR-LONG INVESTIGATION THAT THEY DID NOT IDENTIFY A SINGLE CUSTOMER, COMPETITOR OR INDUSTRY PARTICIPANT WHO WAS OPPOSED TO THE DEAL. NOT ONE. AND WE ALSO NOW KNOW THAT WE HAVE A SETTLEMENT, WE HAVE A SETTLEMENT WHERE NO ONE IN THE INDUSTRY IS OBJECTING TO IT.

WE HAVE A MERGER AND WE HAVE A SETTLEMENT WHERE THERE IS NO OPPOSITION FROM ANYONE, NOT ONLY IN THE RELEVANT MARKET, BUT IN THE ENTIRE INDUSTRY.

WE ALSO HAVE A --

THE COURT: I MEAN, IT'S A LITTLE HARD TO KNOW WHAT TO MAKE OF THAT.

YOU KNOW, IT'S ODD. IF THIS IN FACT IS GOING TO BE SIGNIFICANTLY MEANINGFUL IN TERMS OF THE ABILITY TO COMPETE WITH CISCO, I WOULD HAVE THOUGHT AT LEAST THAT CISCO WOULD HAVE STATED SOME OBJECTIONS.

USUALLY YOU WOULD EXPECT TO SEE THE OTHER PARTY THAT IS SUPPOSEDLY GOING TO BE SIGNIFICANTLY DISADVANTAGED BY HP'S INCREASED ABILITY TO COMPETE, THAT TO COME UP WITH A REASON TO EXPLAIN WHY IT'S NOT THE CASE.

SO THE FACT THAT THEY DIDN'T SAY ANYTHING COULD SUGGEST THAT THERE ARE OTHER DYNAMICS DRIVING THE FAILURE TO

PARTICIPATE OR OBJECT AND SIMPLY THE VIEW THAT THIS IS EVERYONE'S VIEW THAT THIS IS IN THEIR INTEREST.

MR. LIVERSIDGE: YEAH, I OBVIOUSLY CAN'T SPEAK TO WHY THEY MADE THE DECISIONS THAT THEY DID. OBVIOUSLY SOMETIMES THEY PARTY WITH A SIGNIFICANT MARKET SHARE THAT IS SOMETIMES LABELED A MONOPOLIST IN THE SPACE IS NOT ANXIOUS TO WEIGH IN AGAINST SOMETHING THAT MAY CREATE FURTHER COMPETITION, BUT I CAN'T SPEAK TO THE REASONS THEY MADE THE DECISIONS THAT THEY DID.

I WOULD ALSO POINT TO THE FACT THAT WE HAVE A MERGER WHERE THE MERGED ENTITY IS ABOUT 25 PERCENT OF THE MARKET, WHICH IS A BELOW THE LEGAL THRESHOLD OF 30 PERCENT SET BY THE SUPREME COURT WHERE THERE IS EVEN A REBUTTAL OR PRESUMPTION OF HARM TO COMPETITION.

THE STATES KNOW THAT AND HAVE LATCHED ON TO HHI THRESHOLDS. BUT EVEN THERE, WHETHER YOU ACCEPT THE HHI'S INCREASE IN THIS CASE AS 270 OR 330 OR 340, IT'S ONE OF THE LOWEST HHI INCREASES OF ANY LITIGATED CASES BY THE DOJ IN THE LAST 25 YEARS. AND THE STATES HAVE LATCHED ON TO THAT NUMBER TO THE EXCLUSION OF ALL OTHER EVIDENCE IN THE CASE.

WE HAVE A CASE WHERE THERE IS ROBUST EVIDENCE THAT THERE ARE EIGHT OTHER COMPETITORS THAT REGULARLY WIN BUSINESS IN THE MARKET, INCLUDING BUSINESS AT MAJOR CORPORATIONS. ALL OF THAT EVIDENCE IS IGNORED.

THE COURT: WHAT PERCENTAGE OF TIME WERE JUNIPER AND

HP DIRECTLY COMPETING FOR BUSINESS?

MR. LIVERSIDGE: OVERALL WHAT PERCENTAGE WERE THEY DIRECTLY COMPETING? I DON'T KNOW IF I HAVE THAT NUMBER AT HAND. I BELIEVE THE ESTIMATE FROM OUR EXPERT IN TERMS OF SITUATIONS WHERE THEY WERE THE FIRST AND SECOND CHOICE WAS AROUND 3 PERCENT OF INSTANCES. I BELIEVE THAT'S THE NUMBER FROM HIS REPORT AND SOMEBODY WILL I'M SURE CORRECT ME IF I HAVE THAT WRONG, BUT THAT'S WHAT I'M RECALLING.

THE COURT: DID YOUR -- I'M RECALLING THAT YOUR EXPERT ALSO FOUND NO SIGNIFICANT DISCOUNT, DIFFERENCE IN THE DISCOUNT BEING OFFERED TO HP'S CUSTOMERS WHEN JUNIPER WAS A PARTICIPATE IN THAT BID?

MR. LIVERSIDGE: CORRECT, CORRECT. THAT WAS THE DATA ANALYSIS BY OUR EXPERT, AND THAT IS EXACTLY WHAT HE FOUND.

THE COURT: OKAY.

MR. LIVERSIDGE: YOUR HONOR, I APPRECIATE YOU INDULGING THOSE POINTS, BUT I THINK THAT GIVES YOU THE CONTEXT IN WHICH THIS SETTLEMENT WAS REACHED, AND I ALSO THINK THAT THE REMEDIES HERE ARE MEANINGFUL. THESE ARE REAL REMEDIES, AND I WANT TO JUST ADDRESS THEM QUICKLY.

WE HAVE ONE REMEDY THAT ESSENTIALLY HANDS A WLAN COMPETITOR A FULL CAMPUS AND BRANCH NETWORKING BUSINESS. HP IS REQUIRED TO FULLY DIVEST ITS INSTANT ON BUSINESS. IT COMES WITH WLAN SOLUTIONS SWITCHING IN GATEWAYS, BUT IT ALSO INCLUDES ALL OF THE CONTRACTS, ALL OF THE CUSTOMER RELATIONSHIPS AND

OVER 100 EMPLOYEES.

THE ACQUIRER ALSO GETS A LICENSE TO THE FULL CODE SET OF AOS 8, WHICH IS THE OPERATING SYSTEM USED TODAY FOR THE ARUBA BRANDED ACCESS POINTS. THAT'S PART OF THE ACQUISITION. THIS IS A $130 MILLION-A-YEAR WORLDWIDE BUSINESS WITH ABOUT 30 MILLION OF THAT CURRENTLY IN WLAN.

THERE ARE OVER 200 CUSTOMERS CURRENTLY SERVED BY THAT BUSINESS, AND SOME OF THOSE ARE PRETTY SIGNIFICANT COMPANIES.

I WOULD ALSO SAY --

THE COURT: SO YOU SAY $30 MILLION OF WLAN BUSINESS, AND I THINK THE ESTIMATES ARE THAT THE OVERALL MARKET THAT WE'RE TALKING ABOUT HERE IS ABOUT $4.6 BILLION A YEAR; IS THAT CORRECT?

MR. LIVERSIDGE: CORRECT, YOUR HONOR.

THE COURT: OKAY.

MR. LIVERSIDGE: AND I WOULD JUST POINT OUT, BY THE WAY, THAT THE EXPERTS IN THEIR EVALUATION OF POTENTIAL HARM TO COMPETITION IN THE MODEL THAT THEY AGREE ON ARE TALKING ABOUT SOMETHING BETWEEN 0 AND 60 MILLION. THAT'S LIKE THE PROJECTED HARM TO THIS MARKET FROM THE DEAL. IT'S ALMOST NONEXISTENT.

SO A $30 MILLION WLAN BUSINESS IS REAL IN THE CONTEXT OF THE CASE THAT WE ARE SETTLING.

THE COURT: AND JUST TO BE -- CLARIFY THAT FOR ME BECAUSE I REMEMBER THERE WAS A LOT OF PAPER, AND I TRIED TO GET THROUGH AS MUCH AS I COULD AND UNDERSTAND AS MUCH.

WAS THAT THE ANNUAL HARM TO COMPETITION?

MR. LIVERSIDGE: CORRECT.

THE COURT: OKAY. AND THAT WOULD BE THE INCREASE PAID PRESUMED BY THE ESTIMATE OF THE INCREASED COSTS PAID BY CUSTOMERS AS A RESULT OF THE LOSS OF COMPETITION IN THIS MARKET?

MR. LIVERSIDGE: THAT'S THE GENERAL GIST OF IT, YOUR HONOR.

AND THESE ARE ALSO ANNUAL NUMBERS IN TERMS OF $120 MILLION A YEAR, 30 MILLION IN WLAN.

I THINK THE OTHER THING I WOULD POINT TO IN TERMS OF INSTANT ON IS THE BIDDER FOR INSTANT ON IS ONE OF THE TIER 1 COMPETITORS IN THIS PLACE. THIS IS A COMPANY WITH A MASSIVE MARKET CAP, MUCH MORE SIGNIFICANT THAN HP'S MARKET CAP. THIS IS A COMPANY THAT WANTS THIS ASSET, WANTS TO DEPLOY IT IN THE WLAN SPACE TO ENHANCE ITS ABILITY TO COMPETE. THIS IS A REAL, THIS IS A REAL REMEDY. THIS IS A REAL ASSET WITH A REAL OPPORTUNITY.

WE HAVE SEEN OTHER COMPANIES IN THIS SPACE THAT HAVE COME IN AND STARTED AT SMB AND WORKED THEIR WAY UP AND HAD INCREDIBLE SUCCESS DOING THAT. THIS IS A COMPANY THAT IS ALREADY ESTABLISHED IN THE HIGHER ENDS OF THE MARKET AND WANTS TO USE THIS TO FILL OUT ITS PORTFOLIO AND ENHANCE ITS ABILITY TO COMPETE.

SO THIS IS SOMETHING THAT WE THINK INJECTS REAL

COMPETITION IN THE MARKET AND CAN BE USED HOWEVER THIS COMPANY WANTS. THERE'S NO LIMITATIONS ON WHAT CAN BE DONE WITH THIS ASSET IN TERMS OF THE CODE SET. FEATURES CAN BE ACTIVATED. HP POSITIONED IT IN SAY A CERTAIN WAY, BUT THERE'S NO LIMITATION ON THIS ASSET FOR WHOEVER ACQUIRES IT AND A COMPANY HAS BEEN IDENTIFIED AS THE ACQUIRER FOR THAT ASSET, AND IT'S A SIGNIFICANT COMPANY.

I'D LIKE TO SPEND JUST A MINUTE ON THE SECOND REMEDY THAT PROVIDES A LICENSE TO THE SOURCE CODE THAT IS AT THE HEART OF THE GOVERNMENT'S CASE.

WE ESSENTIALLY LITIGATED AN ENTIRE CASE. IT WAS LARGELY FOCUSED ON THIS SOURCE CODE AND THE IDEA THAT IT WAS A SECRET SAUCE THAT WAS A COMPETITIVE DIFFERENTIATOR FOR JUNIPER.

THAT IS LARGELY WHAT THE CASE WAS ABOUT.

AND WE SPENT A LOT OF TIME LITIGATING THAT ISSUE, AND WE HAVE A REMEDY THAT DIRECTLY ADDRESSES THAT CLAIM, DIRECTLY.

THE LICENSEE GETS A WORLDWIDE IRREVOCABLE LICENSE TO THE SOURCE CODE UNDERLYING THE MIST AI OPS FOR WLAN. THEY GET UP TO 18 MONTHS OF TRANSITION SERVICES THAT INCLUDE ALL OF THE KNOW-HOW AND BUG FIXES. THEY CAN TAKE UP TO 30 ENGINEERS THAT HAVE EXPERIENCE WITH THE SOURCE CODE. THEY CAN TAKE UP TO 25 SALES PERSONNEL THAT HAVE EXPERIENCE SELLING MIST. THEY GET INTRODUCTIONS TO THE ORIGINAL DESIGN MANUFACTURER, THEY GET INTRODUCTIONS TO DISTRIBUTION PARTNERS. AND UNDER THE SETTLEMENT THE GOVERNMENT HAS THE RESPONSIBILITY TO VET AND

ENSURE THAT THE COMPANY IS POSITIONED TO COMPETE IN THE MARKET AND THAT IT HAS A PLAN TO DO SO.

THE COURT: WHY SHOULD -- I THINK ONE OF THE PROPOSALS WAS DEFICIENCIES, PURPORTED DEFICIENCIES IDENTIFIED WAS THAT THIS IS A LICENSE TO PROPERTY THAT WILL REMAIN HP'S PROPERTY AS OPPOSED TO REQUIRING THE SALE OF THIS SOURCE CODE AND THEN A LICENSE BACK TO HP.

SO WHY ISN'T THAT A BETTER REMEDY TO PROTECT THE SORT OF COMPETITIVE CONCERNS THAT WE'RE DEALING WITH?

MR. LIVERSIDGE: I GUESS I WOULD START, YOUR HONOR, BY SAYING THAT THE LAW IS PRETTY CLEAR THAT THE TEST IS NOT WHETHER THERE IS SOMETHING BETTER. I THINK THAT'S PRETTY ESTABLISHED, INCLUDING IN THE NINTH CIRCUIT. THE QUESTION IS NOT WHETHER THIS IS THE BEST. WE THINK THIS IS A GREAT REMEDY THAT SPEAKS DIRECTLY TO A CLAIM.

BUT I WILL ALSO MAKE THE POINT THAT WE DON'T THINK THAT A DIVESTITURE OF THIS ENTIRE SOURCE CODE IS FEASIBLE. THIS IS IP THAT RUNS ACROSS ALL OF THE -- I'M NOT GOING TO SAY ALL -- MANY OF THE PRODUCTS IN THE NETWORKING BUSINESS THAT HP ACQUIRED. THEY SHARE THIS IP.

THAT WAS ONE OF THE MAJOR ASSETS PURCHASED. AND THE TALK OF DIVESTING THE ENTIRE SOURCE CODE ACROSS ALL OF THESE PRODUCTS. I DON'T ACTUALLY KNOW IF IT'S FEASIBLE. YOU WOULD DISABLE PRODUCTS THAT ARE CURRENTLY RUNNING THAT SOURCE CODE, AND THEN I DON'T KNOW WHAT DIFFERENCE IT WOULD MAKE IF WE WERE

ABLE TO DO IT, WE DIVESTED IT, AND THEN LICENSED IT BACK. I DON'T KNOW HOW THAT WOULD CHANGE THINGS, BUT I ALSO DON'T KNOW IF THAT WOULD BE POSSIBLE.

WHAT I DO KNOW IS ALL OF THESE PRODUCTS RUN THAT IP, AND YOU WOULD BE ESSENTIALLY TAKING THAT IP AWAY FROM THEM AS PART OF A REMEDY THAT IS SUPPOSED TO BE ABOUT WLAN IN SOME FASHION.

SO WE THINK THAT THIS IS NOT ONLY A GOOD REMEDY, BUT WE THINK THIS IS A REMEDY THAT REALLY DOES WHAT THE TUNNEY ACT IS TALKING ABOUT, WHICH DIRECTLY ADDRESSES THE ALLEGATIONS IN THE COMPLAINT. YOU ARE GETTING THE SECRET SAUCE.

THERE'S BEEN A LOT OF TALK AMONGST THE EXPERTS ABOUT WHAT IS INCLUDED AND WHAT IS NOT INCLUDED. WHAT IS INCLUDED IS ALL OF THE SOURCE CODE FOR MIST AI OPS FOR WLAN. ALL OF THE SOURCE CODE THAT WAS POINTED TO AS THE SECRET SAUCE, THE THING THAT WAS A DIFFERENTIATOR FOR JUNIPER.

THE COURT: WELL, LET ME ASK YOU, YOU KNOW, THERE WAS SORT OF A FOLLOW-UP DECLARATION FILED BY THE STATES WITH THEIR SURREPLY FROM THEIR EXPERT ON THIS ISSUE.

DO YOU -- DID THAT ACCURATELY IDENTIFY WHAT IS AND IS NOT INCLUDED IN THE SOURCE CODE? AT THIS POINT I UNDERSTAND YOU HAVE AN EXPERT WHO IS SAYING THIS IS WRONG IN THE INITIAL REPORT.

IS IT NOW CORRECT IN TERMS OF LAYING OUT THOSE THINGS?

MR. LIVERSIDGE: I DON'T THINK SO, YOUR HONOR.

THE COURT: OKAY. IN WHAT RESPECT?

MR. LIVERSIDGE: WELL, I THINK THERE ARE SOME OF THESE, DOES IT HAVE THIS PARTICULAR DETECTION ABILITY, ERROR DETECTIONS AND THINGS LIKE THAT.

MY UNDERSTANDING IS THAT THOSE THINGS ARE IN THE CODE. WHAT I BELIEVE THEIR EXPERT IS COMPLAINING ABOUT IS HE THINKS THERE SHOULD BE ADDITIONAL CAPABILITIES.

WHAT IS BEING LICENSED IS THE THING THAT EXISTED WHEN THE DEAL CLOSED AND WHEN WE DID THE AUCTIONING.

HE'S NOW TALKING ABOUT, FOR EXAMPLE, SOME OF THESE DRIVERLESS CAPABILITIES THAT ARE THINGS THAT ARE IN DEVELOPMENT. THEY HAVEN'T EVEN BEEN RELEASED YET.

HE TALKED ABOUT THOSE AT SOME LENGTH. THOSE ARE NOT IN THE SOURCE CODE, AND SO THEY'RE NOT BEING LICENSED.

WE ARE NOW IN A WORLD WHERE THIS HAS DRAGGED ON FOR SO LONG THAT THEY ARE TALKING ABOUT THINGS THAT THE COMPANY IS WORKING ON TO DEVELOP AND INNOVATE, THAT THEY ARE, IT SEEMS, CONTENDING SHOULD BE SOMEHOW LICENSED.

THAT IS NOT THE REMEDY THAT WE SHOULD BE EVALUATING. IT IS AN INDICATION THAT THE COMPANY IS DOING WHAT IT SAID IT WAS GOING TO BE DOING, WHICH IS CONTINUE TO INNOVATE. IT'S CONTINUING TO DO THESE THINGS.

BUT I DON'T THINK THERE'S A CREDIBLE CLAIM THAT WE SHOULD NOW BE TALKING ABOUT INCLUDING WITHIN THE SOURCE CODE DEVELOPMENTS, FUNCTIONALITIES THAT ARE UNDER DEVELOPMENT AND TO BE RELEASED AT SOME DATE IN THE FUTURE.

10:48:38 **THE COURT:** OKAY. SO I GUESS THAT'S WHAT I -- SO I WAS TRYING TO UNDERSTAND WHERE THIS CAME FROM, AND YOU'RE SAYING THAT THEY'RE DRAWING THE EXISTENCE OF THESE CAPABILITIES FROM DESCRIPTIONS OF SERVICES THAT POSTDATE YOUR ENTRANCE INTO THE SETTLEMENT OR ARE PREDICTIVE IN SOME SENSE?

10:48:56 **MR. LIVERSIDGE:** I THINK THAT'S PART OF IT. I THINK PART OF IT IS THAT THEY'RE POINTING TO -- LOOK, I DON'T PRETEND TO BE ABLE TO EXPLAIN ALL OF THIS IN COMPLETE DETAIL, BUT SOME OF THESE PRODUCTS THAT FIT UNDER THIS BROADER MARKETING TERM ARE PRODUCTS THAT EXIST IN THE MARKETPLACE THAT ARE NOT PART OF THE AI OPS FOR WLAN. THEY'RE NOT PART OF IT.

10:49:22 THEY MAY BE THINGS THAT CAN -- THEY MIGHT BE THINGS THAT CAN BE USED IN THE MARKET AND CAN BE USED TO ADDRESS WLAN, THAT'S PART OF IT, BUT THEY WERE NEVER PART OF THIS SOURCE CODE. AND THERE ARE OTHER THINGS THAT ARE CURRENTLY IN DEVELOPMENT. THERE ARE OTHER THINGS THAT THEY SEEM TO THINK SHOULD BE PART OF IT THAT ARE NOT, BUT WE ARE GIVING THE THING THAT WAS THE SUBJECT OF THE COMPLAINT, I GUESS IS WHAT I'M SAYING, WE ARE GIVING EVERYTHING.

10:49:45 NOTHING IS BEING HELD FROM WITHIN THAT SOURCE CODE. ALL OF THAT SOURCE CODE IS BEING PROVIDED.

10:49:50 AND SO I THINK TO ANSWER YOUR QUESTION, I THINK THERE'S A NUMBER OF DIFFERENT BUCKETS HERE OF THINGS THAT WE'RE TALKING ABOUT. YOU KNOW, I DON'T KNOW HOW HELPFUL THAT IS, BUT I THINK WE'RE GIVING EVERYTHING THAT WAS PART OF THE SOURCE CODE THAT

WAS AT ISSUE IN THE GOVERNMENT'S COMPLAINT, THERE ARE THINGS THAT ARE NOT PART OF THE SOURCE CODE THAT WERE NEVER PART OF THE SOURCE CODE AND MAY BE AVAILABLE IN THE MARKET, AND HAVE NEVER BEEN CLAIMED BY THE DOJ TO BE DIFFERENTIATORS FOR JUNIPER.

AND SO WE'RE NOW IN A WORLD WHERE THE STATES ARE MAKING NEW ARGUMENTS ABOUT THINGS THAT THEY THINK ARE NOW IN THE MARKET OR AVAILABLE IN THE MARKET THAT ARE SOMEHOW DIFFERENTIATORS THAT WERE NEVER PART OF THE CASE TO BEGIN WITH. THAT'S WHAT WE'RE TALKING ABOUT HERE.

THE COURT: SO LET ME ASK A FUNDAMENTAL QUESTION, AND I ASKED YOUR COLLEAGUE FROM THE UNITED STATES THIS QUESTION AS WELL, BUT THE VARIATION WOULD BE SOMETHING ALONG THE LINES OF HAVE THERE EVER BEEN A CASE WHERE A MERGER THAT REDUCED ON ITS FACE WAS MEANINGFULLY REDUCING COMPETITION IN A PARTICULAR INDUSTRY OR MARKET, AND THERE WERE SOME KIND OF REMEDIES PROCURED AS A CONDITION OF THE MERGER GOING FORWARD WHERE THOSE HAVE ACTUALLY BEEN SUCCESSFUL IN PREVENTING THE LOSS OF COMPETITION. WAS THAT OF CONCERN?

THE OTHER WAY OF SAYING THIS IS WHAT IS WRONG WITH YOUR OWN CLIENT'S OWN LAWYER'S STATEMENT AT THE TIME OF THE LITIGATION BEING ANNOUNCED THREE INTO TWO YOU MUST SUE I THINK IS HOW MR. DAVIS CHARACTERIZED IT ON TWITTER.

SO THERE IS -- IT MAY BE -- YOU KNOW, IS THERE A CONCERN HERE THAT THERE IS A LOSS OF COMPETITION IN THIS MARKET AND

THAT HHI SHOWS THAT AND IT MAY BE -- IS THERE ANY CASE WHERE THESE KINDS OF REMEDIES HAVE ACTUALLY WORKED AS OPPOSED TO THE CASES WHERE YOU LOOK BACK AND SAY, OH, THE HARM IS TO COMPETITION CAME ABOUT JUST AS EVERYONE WAS CONCERNED THAT THEY WOULD.

MR. LIVERSIDGE: YEAH. I MEAN, AND I'M HESITANT TO THROW OUT THIS EXAMPLE, BECAUSE I FEEL LIKE YOU'RE NOT GOING TO AGREE WITH ME THAT IT ADDRESSED EFFECTIVELY THE HARMS, BUT WE OBVIOUSLY CITED IN OUR PAPERS THE AMERICAN AIRLINES/U.S. AIRWAYS MERGER WHERE THERE WAS A REDUCTION OF A COMPETITOR IN THE MARKET, AND THE RELIEF THAT WAS PROVIDED AND APPROVED WAS SOMETHING MUCH, MUCH LESS THAN TRYING TO RESTORE FULLY THAT LEVEL OF COMPETITION.

I THINK AMERICAN GAVE UP THE SLOTS THAT IT HAD AT VARIOUS AIRPORTS AS PART OF THE REMEDIES, AND THERE WERE COMPLAINTS THAT THAT WASN'T SUFFICIENT, BUT THE COURT SAID IT DOESN'T HAVE TO BE PERFECT, I NEED TO DEFER TO THE DEPARTMENT OF JUSTICE IN THEIR EVALUATION OF WHAT MAKES SENSE HERE.

SO THAT IS A SITUATION WHERE I THINK THERE WAS NOT EVEN AN ATTEMPT TO ADDRESS THE REDUCTION AND NUMBER OF COMPETITORS FULLY, BUT THERE WAS A CONCLUSION BY THE COURT AND THE DEPARTMENT OF JUSTICE THAT THE REMEDIES WERE ADEQUATE TO ENHANCE COMPETITION IN THE MARKET AND MOVE FORWARD WITH THE DEAL.

THE COURT: AND SO, THE QUESTION IS, LIKE, WHAT

ARE -- I'M SURE IT'S CONTESTED, BUT IS THERE A VIEW ON THE STATE OF COMPETITIVENESS WITHIN THE AIRLINE MARKET AFTER THE LOSS OF U.S. AIR AS AN ADDITIONAL COMPETITOR IN THAT MARKET OR WHERE ARE WE IN THAT MARKET AS IT STANDS HAVING ALLOWED IT TO GO FORWARD?

MR. LIVERSIDGE: YOUR HONOR, LOOK, I COULD SIT HERE AND SAY IT'S ALL BEEN SOLVED, YOU KNOW, BUT I DON'T -- I HAVE NOT STUDIED THAT. I CANNOT SPEAK TO WHETHER THE REDUCTION IN COMPETITION FROM U.S. AIRWAYS WAS SOLVED BY THIS AND HOW THINGS STAND IN THE AIRLINE MARKET TODAY IN TERMS OF THE LEVEL OF COMPETITION.

THE COURT: THERE'S BEEN FURTHER CONSOLIDATION, CORRECT, AT LEAST WITH ALASKA AND HAWAII AND THEN THE ACTUAL I THINK FRONTIER AND SPIRIT FELL THROUGH ULTIMATELY OR WAS BLOCKED. SO PRESUMABLY A LOT OF PEOPLE HAVE SPENT TIME RECENTLY THINKING ABOUT THIS QUESTION.

MR. LIVERSIDGE: YOU MAY BE RIGHT THAT THEY HAVE. I DON'T DOUBT THAT THEY HAVE. I DON'T KNOW THAT I CAN ADEQUATELY ADDRESS THAT ISSUE.

I DO KNOW THAT THE REMEDY WAS ACCEPTED IN THAT CASE.

AND, YOU KNOW, I ALSO -- I THINK THE RECORD IS PRETTY ROBUST. YOU KNOW, WE'VE HAD SOME -- WE HAVE DISAGREED ON THE EXTENT TO WHICH THE MERITS ARE TRULY RELEVANT IN THIS PROCESS A LITTLE BIT. I THINK THERE IS A ROBUST RECORD IN THIS CASE THAT THIS IS A VERY INTENSE, INTENSELY COMPETITIVE MARKETPLACE. I

THINK THERE IS -- WE DO HAVE SIGNIFICANT COMPETITORS IN THIS SPACE THAT REALLY ARE WINNING BUSINESS AT ALL LEVELS OF THE CUSTOMER STACK. I THINK THE THREE TO TWO, YOU KNOW, TWEET AT THE OUTSET OF THE CASE, WITH ALL DUE RESPECT, WAS NOT ACCURATE. THAT IS NOT WHAT THIS CASE IS. AND I THINK THE EVIDENCE SHOWS THAT, AND I THINK A LOT WAS PUT FORWARD TO THE COURT HEADING INTO TRIAL THAT SUPPORTED THAT.

THE COURT: I MEAN, WHAT ARE THE OTHER -- I MEAN, I THINK THE IDEA OF THAT WAS THAT THESE WERE BY FAR THE THREE MAJOR COMPETITORS, ALTHOUGH WE KNOW THAT THAT WAS MOSTLY CISCO AND THEN 10 AND 16 BETWEEN JUNIPER AND HP, OR THERE'S VARIATIONS ON THOSE NUMBERS, SOMETHING ALONG THOSE LINES.

YOU KNOW, HAVE ANY OF THE OTHER PARTICIPANTS IN THE MARKET INCREASED THEIR MARKET SHARE SIGNIFICANTLY SINCE THE TIME THAT THIS CASE WAS FILED MORE THAN A YEAR AGO?

MR. LIVERSIDGE: YEAH. MY UNDERSTANDING IS THE MOST RECENT DATA THAT I'VE SEEN FOR THE U.S. DOES NOT SHOW ANY CHANGE.

THE COURT: OKAY. SO IT'S STILL THE CASE THAT THE ONLY SORT OF PARTICIPANT ABLE TO GET TO THE 10 PERCENT OF THE MARKET THRESHOLD WAS JUNIPER, CORRECT?

MR. LIVERSIDGE: WELL, I DON'T KNOW IF JUNIPER EVER DID.

THE COURT: OR GOT CLOSE?

MR. LIVERSIDGE: THEY GOT CLOSE. I THINK ACTUALLY

WHEN WE WERE GETTING -- DURING THE TIME THAT WE WERE LITIGATING THE CASE, I THINK UBIQUITY ACTUALLY SURPASSED JUNIPER IN TERMS OF MARKET SHARE, AT LEAST IN SOME REPORTS. I THINK THEY INCREASED THEIR MARKET SHARE FAIRLY SIGNIFICANTLY.

I DO BELIEVE, YOU KNOW, THERE ARE --

THE COURT: AND ARE THEY STILL A PARTICIPANT OR THEY WEREN'T MERGED WITH CISCO, CORRECT?

MR. LIVERSIDGE: CORRECT. I THINK YOU'RE MAYBE THINKING OF MERAKI THAT CISCO BOUGHT A WHILE AGO. THEY WERE AN SMB PLAY WHERE CISCO BOUGHT THEM AS AN SMB BUSINESS AND BUILT THEM UP OVER TIME.

BUT UBIQUITY HAS COME IN AT THE LOW END OF THE MARKET AND REALLY BUILT A SUCCESSFUL BUSINESS WORKING ITS WAY UP TO THE HIGHER ENDS OF THE ENTERPRISE, AND THEY, THEY EQUALED OR OVERTOOK IN SOME REPORTS THE MARKET SHARE OF JUNIPER AT THAT TIME.

BUT I HAVEN'T SEEN THE MOST RECENT QUARTER FOR THE U.S., BUT MY UNDERSTANDING IS FROM THE QUARTER BEFORE THAT THAT WE DIDN'T SEE A MEANINGFUL CHANGE IN MARKET SHARES AT THAT POINT.

THE COURT: ANYTHING ELSE YOU WOULD LIKE? ANY OTHER POINTS YOU WOULD LIKE TO ADDRESS?

MR. LIVERSIDGE: JUST, YOUR HONOR, THERE'S BEEN A LOT OF TALK ABOUT WHETHER THERE'S SOMETHING MORE OR DIFFERENT OR BETTER THAT COULD HAVE OR SHOULD HAVE BEEN DONE HERE, AND I DON'T THINK THAT IS THE TEST. I THINK THE TEST UNDER THE

TUNNEY ACT IS WHETHER WE HAD A SETTLEMENT THAT IS REASONABLE UNDER THE CIRCUMSTANCES, WITHIN THE REACHES OF THE PUBLIC INTEREST GIVING ALL DEFERENCE TO THE DECISION OF THE DEPARTMENT OF JUSTICE BASED ON WHATEVER FACTORS THEY MAY HAVE TAKEN INTO ACCOUNT TO SETTLE THE CASE.

AND I THINK -- I DO THINK THAT THESE ARE MEANINGFUL REMEDIES. I THINK THEY'RE REAL REMEDIES AND THEY ARE INJURIES TO REAL COMPANIES. I THINK THEY ARE GOING TO CLEARLY ENHANCE COMPETITION IN THE MARKET, AND SO WE THINK THAT THIS SETTLEMENT CLEARLY MEETS THE STANDARD UNDER THE TUNNEY ACT AND SHOULD BE APPROVED.

THE COURT: THANK YOU.

MR. LIVERSIDGE: THANK YOU.

THE COURT: LET ME HEAR FROM THE INTERVENOR STATES.

MR. BILLER: ARTHUR BILLER FOR THE ATTORNEY GENERAL FOR THE STATE OF COLORADO AND APPEARING FOR THE INTERVENORS.

SO, YOUR HONOR, I THINK IT'S IMPORTANT TO TAKE A STEP BACK HERE FOR A MOMENT AND UNDERSTAND THAT MUCH OF THE UNDERLYING FACTS HERE ACTUALLY ARE NOT IN DISPUTE, ALTHOUGH THE PARTIES OBVIOUSLY DIFFER AS TO THE CONCLUSIONS THAT SHOULD BE DRAWN FROM THOSE FACTS.

BUT LET ME START WITH THE UNDERLYING MERGER.

THERE IS NO DISPUTE IN THIS CASE ABOUT MARKET DEFINITION. THAT'S VERY RARE IN THE WORLD OF MERGER LITIGATION BECAUSE -- AND MOST CASES ARE ACTUALLY WON AND LOST ON MARKET DEFINITION,

AND I'LL EXPLAIN WHY IN A MOMENT. BUT THE FACT IS THAT THE U.S. AND HPE AGREED THAT THE RELEVANT MARKET HERE WAS ENTERPRISE-GRADE WLAN SOLUTIONS IN THE UNITED STATES.

THE REASON WHY THAT IS SO IMPORTANT IS BECAUSE MERGING PARTIES TYPICALLY ARGUE FOR A MUCH BROADER MARKET DEFINITION THAN WHAT THE GOVERNMENT SETS FORTH BECAUSE OBVIOUSLY A BROADER MARKET DILUTES THE MERGING PARTY'S SHARES, WHICH IN TURN MAKES IT HARD TO SHOW THAT THE MERGER IS ANTICOMPETITIVE.

BUT ONCE MARKET DEFINITION IS SET, IT'S BASICALLY A MATTER OF SIMPLE MATH TO CALCULATE MARKET SHARES AND THEN MARKET CONCENTRATION, AND THAT'S LEADS TO THE CRUCIAL FACT THAT WAS NOT IN DISPUTE IN THIS CASE, WHICH IS THAT THE MERGER WAS PRESUMPTIVELY ANTICOMPETITIVE PURSUANT TO THE STRUCTURAL PRESUMPTION.

NOW, HP IN THEIR BRIEFING TRIES TO CONFUSE THE ISSUE ON THIS, BUT THE NINTH CIRCUIT IS VERY CLEAR. IN THE ST. ALPHONSUS CASE, WHICH WE'VE CITED, THEY SAID SUFFICIENTLY LARGE HHI FIGURES ESTABLISH THE GOVERNMENT'S PRIMA FACIE CASE THAT A MERGER IS ANTICOMPETITIVE, AND THEN THEY EXPRESSLY ADOPTED THE PRESUMPTION LEVELS IN THE MERGER GUIDELINES THAT WERE IN EFFECT AT THAT TIME, WHICH WAS THE 2010 VERSION, AND SAID THAT MERGERS THAT INCREASE THE HHI MORE THAN 200 POINTS AND RESULT IN HIGHLY CONCENTRATED MARKETS ARE PRESUMED TO BE LIKELY TO ENHANCE MARKET POWER.

SO HERE, ALTHOUGH THE U.S. AND HP PUT FORTH SLIGHTLY

DIFFERENT MARKET SHARES, AND, THEREFORE, SLIGHTLY DIFFERENT HHI SCORES, EVEN IF YOU GO WITH HPE'S HHI SCORES, THOSE ARE STILL OVER THE PRESUMPTION SET IN THE 2023 MERGER GUIDELINES, WHICH ARE IN EFFECT TODAY, AND THEY'RE OVER THE LEVEL THAT THE ST. ALPHONSUS CASE WAS LOOKING AT UNDER THE 2010 GUIDELINES.

THE COURT: AND WHAT WAS THE PROCEDURAL CONTEXT OF THE ST. ALPHONSUS CASE IN WHICH IT SAID THAT?

MR. BILLER: IT WAS AN APPEAL FROM THE DISTRICT COURT DECISION I BELIEVE ENJOINING THE MERGER, AND THE COURT AFFIRMED, THE NINTH CIRCUIT AFFIRMED.

THE COURT: OKAY. SO IT DIDN'T SAY IT WAS APPLYING THAT AND PRESUMABLY IT WAS -- I MEAN, WAS IT REVIEWED? WAS IT A FACTUAL ISSUE REVIEWED FOR CLEAR ERROR?

MR. BILLER: I THINK THAT'S -- WELL, THAT PARTICULAR ISSUE WAS NOT A FACTUAL ISSUE, THAT WAS A LEGAL ISSUE AS TO WHAT WAS NECESSARY TO ESTABLISH A PRESUMPTION AND ESTABLISH A PRIMA FACIE CASE.

SO AS A MATTER OF LAW, THE NINTH CIRCUIT THERE WAS SAYING THAT THAT'S WHERE THE PRESUMPTIVE LEVEL IS, IS WHAT WAS LAID OUT IN THE 2010 GUIDELINES AT THAT TIME, AND IF YOU'RE OVER THAT LEVEL, YOU ESTABLISH A STRUCTURAL PRESUMPTION, AND THAT ESTABLISHES THE GOVERNMENT'S PRIMA FACIE CASE, AND THEN THE BURDEN SHIFTS TO THE DEFENDANT TO THEN TRY TO REBUT THAT, AND THAT'S A KEY FACT HERE.

SO EVEN IF YOU VIEW ST. ALPHONSUS AS SORT OF FREEZING IN

TIME THOSE HHI LEVELS AND YOU DON'T WANT TO LOOK TO THE 2023 GUIDELINES, WHICH WE WOULD DISAGREE WITH, BUT EVEN IF YOU LOOK AT THAT HIGHER LEVEL THAT THE NINTH CIRCUIT ADOPTED IN ST. ALPHONSUS, THIS CASE IS OVER THAT LEVEL, AND IT'S PRESUMPTIVELY ANTICOMPETITIVE.

AND THE REASON WHY THAT'S IMPORTANT IS BECAUSE THEN HPE WOULD HAVE HAD TO SHOW REBUTTAL EVIDENCE STRONG ENOUGH TO OVERCOME THAT PRESUMPTION, WHICH IS A HARD THING TO DO. IT'S NOT IMPOSSIBLE, BUT IT'S A HARD THING TO DO.

AND THAT TASK IS MADE HARDER BY THE FACT THAT THE UNITED STATES ALSO HAD ADDITIONAL EVIDENCE OF HARM BEYOND JUST THE STRUCTURAL PRESUMPTION, AND A LOT OF THAT WASN'T IN DISPUTE EITHER.

THE COURT: SO LET ME -- SO JUST TO SAY, SO IS YOUR VIEW THAT THE NINTH CIRCUIT DISPLACED OR SAID EITHER 25 PERCENT OR A SUFFICIENT INCREASE IN HHI'S -- OR EITHER MORE THAN 30 PERCENT MARKET SHARE OR A SUFFICIENT INCREASE IN HHI IS SUFFICIENT TO CREATE A STRUCTURAL PRESUMPTION OF HARM TO COMPETITION?

MR. SU: THAT'S EXACTLY RIGHT, THERE'S TWO WAYS TO ESTABLISH A STRUCTURAL PRESUMPTION. ONE IS TO SHOW THAT THE MARKET SHARES ARE ABOVE 30 PERCENT WITH A SIGNIFICANT INCREASE IN CONCENTRATION WHICH IN THE 2023 GUIDELINES TODAY IS 100, AN INCREASE OF 100 IN HHI'S, OR SHOW THAT THERE'S A SIGNIFICANT INCREASE IN CONCENTRATION THAT RESULTS IN A HIGHLY CONCENTRATED

MARKET.

SO IN 2010 THAT WAS AN INCREASE OF 200 IN THE HHI AND A RESULTING MARKET CONCENTRATION SCORE OF 2,500. TODAY IT'S LOWER, IT'S 100 AND 1800. BUT EITHER WAY, THIS MERGER IS ABOVE EITHER OF THOSE LEVELS.

THE COURT: WELL, BUT NO. THEY WERE ALSO REFERENCING WHAT THEY DESCRIBED AS A SUPREME COURT RECOGNIZING THE LEVEL OF PRESUMPTION AS THE MERGING -- CREATING -- IS REQUIRING THAT THE MERGING COMPANY, THE MERGING ENTITY HAVE GREATER THAN 30 PERCENT MARKET SHARE, WHICH IS NOT SATISFIED HERE.

MR. BILLER: PHILADELPHIA NATIONAL BANK, YES, YOUR HONOR, DREW THE LINE AT 30 PERCENT IN TERMS OF MARKET SHARE, BUT THEY WERE VERY CLEAR THAT THAT WASN'T CREATING A SAFE HARBOR FOR MERGERS THAT WERE UNDER 30 PERCENT, AND THAT WAS JUST ONE WAY TO ESTABLISH THAT A MERGER IS PRESUMPTIVELY ANTICOMPETITIVE.

THE COURT: AND WHAT WOULD HAVE BEEN THE MARKET SHARE OF THE PROPOSED MERGED ENTITIES IN ST. ALPHONSUS?

MR. BILLER: I DON'T HAVE THAT IN FRONT OF ME, YOUR HONOR, AND I CAN'T RECALL OFF THE TOP OF MY HEAD IF THAT'S REFERENCED IN THE CASE, BUT I COULD CERTAINLY LOOK THAT UP.

THE COURT: IT COULD BE RELEVANT TO THINKING HOW FAR DOES THAT CASE GO TO THINK ABOUT WHETHER THE COURT WAS CONSIDERING A CIRCUMSTANCE, ARGUABLY, YOU KNOW, HERE WHERE YOU HAVE LESS THAN 30 PERCENT MARKET SHARE WITH A COMBINED MERGED

ENTITY, BUT THESE HHI INCREASES.

I MEAN, THE OTHER QUESTION I WOULD HAVE IS DO YOU KNOW THE EXTENT TO WHICH IN THAT CASE THERE WAS A THIRD PARTY NOT INVOLVED IN THE MERGER THAT WAS SUBSTANTIALLY CONTRIBUTING TO THE HHI -- BOTH THE OVERALL HHI NUMBERS AND THE OVERALL INCREASE?

MR. BILLER: I TAKE THAT QUESTION TO BE WHETHER THERE WAS LIKE A CISCO SORT OF ENTITY.

THE COURT: YES, WHETHER THEY WERE DEALING -- IF THEY WERE DEALING WITH THE TWO COMPARATIVELY SMALL COMPETITORS TO ONE VERY LARGE MARKET SHARE COMPETITOR.

MR. BILLER: RIGHT. THERE'S NOT ANY KIND OF REFERENCE TO THAT IN THAT CASE, YOUR HONOR, BUT IT'S, FRANKLY, IRRELEVANT.

YOU DON'T GET SAVED BY -- IN A MERGER THAT IS GOING TO SUBSTANTIALLY INCREASE MARKET CONCENTRATION AND RESULT IN A HIGHLY CONCENTRATED MARKET, YOU DON'T GET SAVED BY POINTING TO THERE'S ANOTHER ENTITY THAT IS THE BIGGER --

THE COURT: THAT MIGHT BE THE QUESTION. IT MIGHT ALSO AFFECT THE DEGREE OF DIFFICULTY OR LACK THEREOF OF OVERCOMING THE PRESUMPTION CREATED BY THE HHI NUMBERS IN THAT SENSE. IT MIGHT BE RELEVANT TO THINK ABOUT WHAT IS THE OVERALL SHAPE OF THE MARKET.

MR. BILLER: RESPECTFULLY, YOUR HONOR, NO. AND THERE ARE CASES WHERE DEFENDANTS -- WHERE MERGING PARTIES TRIED TO

MAKE THIS ARGUMENT THAT, HEY, THERE'S THIS OTHER BIG COMPETITOR AND IF THE TWO OF US COMBINED, WE WILL BE ABLE TO FIGHT HARDER AGAINST THE BIG GUY, BUT COURTS REJECT THAT TYPE OF REASONING. AND PART OF THE REASON FOR THAT IS ANOTHER ONE OF THE FORMS OF HARM THAT WE HAVE IN THIS CASE IS THE POTENTIAL FOR COORDINATED EFFECTS.

WHEN YOU GET INTO A HIGHLY CONCENTRATED MARKET, THE REASON THAT SIX DECADES OF ECONOMICS HAS TAUGHT US THAT THOSE BIG FIRMS ARE ACTUALLY GOING TO BE MORE LIKELY TO PULL THEIR PUNCHES AGAINST EACH OTHER THAN ACTUALLY COMPETE HARDER AGAINST EACH OTHER.

THE COURT: OKAY. AND I GUESS THE ONE QUESTION I HAVE ON THAT, AND I KNOW THERE'S A BACK-AND-FORTH OF THE EXPERTS ON THIS RISK, BUT DOES THIS -- DOES THE CHANGE BEING PROPOSED HERE DO A LOT TO INCREASE THE RISK?

I MEAN, IS IT THE CASE THAT HP WILL BE ENGAGING IN THESE SORT OF COORDINATED MATTERS WITH 25 PERCENT OF MARKET SHARE BUT NOT WITH 16 PERCENT MARKET SHARE AND IT WASN'T DOING SO BEFORE JUNIPER SORT OF ROSE IN THIS REALM?

MR. BILLER: WELL, JUNIPER HAD AN INCENTIVE TO COMPETE VERY HEARTILY, AND THAT'S WHAT THEY WERE DOING. AND THEIR INCENTIVE TO WAS TO STEAL BUSINESS FROM THE LARGE COMPETITORS, AND THEY WERE DOING THAT, AND THEY WERE DOING IT THROUGH AGGRESSIVE PRICE CUTTING AND THROUGH INNOVATION, AND THEY WERE HAVING SUCCESS WITH IT, AND THEIR PLAN WAS TO

CONTINUE ON THAT PATH, BUT THE DYNAMIC CHANGES WHEN YOU ARE ONE OF TWO FIRMS THAT HOLDS 80 PERCENT OF THE MARKET, AND THAT'S JUST A MATTER OF BASIC ECONOMICS.

THE COURT: BUT THEY AT LEAST SUGGESTED OR THE EVIDENCE SUGGESTS THAT THERE WAS -- THAT THERE WASN'T A PERCEIVABLE REDUCTION IN THE PRICES BEING CHARGED BY HP WHEN JUNIPER WAS A PARTICIPANT AS OPPOSED TO WHEN IT WASN'T, CORRECT?

MR. BILLER: I THINK THAT'S ONE AREA WHERE THERE IS DISPUTE BETWEEN EXPERTS IN TERMS OF WHAT THE IMPACT WAS OF JUNIPER BEING IN THE BIDDING VERSUS NOT.

I KNOW THAT THERE ARE -- HP'S EXPERT HAS, YOU KNOW, SOME ANALYSIS OR ACTUALLY IT MIGHT HAVE BEEN DR. BAILEY, BUT THEY TAKE THE POSITION THAT, YOU KNOW, THAT HP WASN'T DISCOUNTING MORE WHEN THEY WERE COMPETING AGAINST JUNIPER.

I THINK THE DOJ'S EXPERT HAD A DIFFERENT VIEW OF THAT. SO THAT WAS AN AREA WHERE THERE WAS SOME DISPUTE.

AND PROFESSOR SHAPIRO HAS SOME DISCUSSION OF THAT IN WHAT HE SUBMITTED AS WELL.

BUT, YOU KNOW, THE FACT IS UNDER THE GUIDELINES TODAY, THE INCREASE IN CONCENTRATION THAT WE HAVE IS THREE TIMES OVER THE PRESUMPTIVE LEVEL.

THE COURT: AND IT'S ALSO SUBSTANTIALLY BELOW WHAT THE NINTH CIRCUIT WAS DEALING WITH IN ST. ALPHONSUS, CORRECT? I MEAN, I THINK --

MR. BILLER: ULTIMATELY IT'S BELOW WHAT THAT MERGER WAS.

THE COURT: I THINK THE MARKET WAS 6,219 AND THE INCREASE WAS 1607; IS THAT CORRECT?

MR. BILLER: THAT SOUNDS RIGHT, YOUR HONOR.

THE COURT: SO THEY MIGHT HAVE TALKED ABOUT THE PRESUMPTIONS, BUT BASED ON THE GUIDELINES, BUT WE WERE -- THE NUMBERS THEMSELVES WERE WELL, WELL IN EXCESS OF EITHER OF THOSE GUIDELINES, CORRECT?

MR. BILLER: THAT'S TRUE, YOUR HONOR, BUT THEY DIDN'T SET THE LINE AT WHERE THAT MERGER WAS. THEY WERE VERY CLEAR THAT -- A DIRECT QUOTE FROM THAT CASE, "MERGERS THAT INCREASE THE HHI MORE THAN 200 POINTS AND RESULT IN HIGHLY CONCENTRATED MARKETS ARE PRESUMED TO BE LIKELY TO ENHANCE MARKET POWER," AND THEY CITED DIRECTLY FROM THE 2010 HORIZONTAL MERGER GUIDELINES FOR THAT PROPOSITION.

SO THAT'S WHERE THE NINTH CIRCUIT CHOSE TO SET THE LINE.

THE COURT: AGAIN, YOU KNOW, THE DECISIONS ARE NOT STATUTES, THEY'RE EXPLANATIONS OF THE COURT'S REASONING IN REACHING AN OUTCOME. SO YOU HAVE TO SOMETIMES BE CAREFUL IN TREATING DECISIONS AS STATUTES AND CONSIDERING THE LANGUAGE OUT OF CONTEXT. SO I WOULD JUST NOTE THAT.

MR. BILLER: OF COURSE, YOUR HONOR.

BUT I WOULD ALSO NOTE THAT COURTS HAVE GENERALLY ACCEPTED THE LEVELS IN THE MERGER GUIDELINES AS SETTING THE PRESUMPTIVE

THRESHOLD.

THE COURT: RIGHT. BUT I THINK WE SHOULD -- IT MAKES SENSE TO MOVE ON BECAUSE, YOU KNOW, THERE'S A -- I THINK THE ARGUMENT YOU'RE MAKING IS THAT THEY WOULD HAVE BEEN ABLE TO SHOW A -- TO CREATE A PRESUMPTION OF HARM TO COMPETITION, RIGHT, WHICH I THINK IS THE RELEVANT STANDARD IN THE CASE, CORRECT?

MR. BILLER: YES, EXACTLY.

THE COURT: RIGHT, WHICH IT IS INTERESTING THAT THEY SAY MARKET POWER, THERE'S A LITTLE BIT OF DIFFERENCE IN THE LANGUAGE THAT THEY'RE USING THERE VERSUS NECESSARILY THE LANGUAGE OF THE CLAYTON ACT.

BUT YOU MAY BE SAYING, OKAY, THAT THERE WOULD CREATE A STRUCTURAL PRESUMPTION OF HARM TO COMPETITION FOR PURPOSES -- THAT WOULD THEN BE THEIR BURDEN TO OVERCOME THE QUESTION OF WHETHER THEY COULD OR COULD NOT HAVE OVERCOME THAT IS THE QUESTION.

AND THE QUESTION IS HOW DOES THAT -- YOU KNOW, THERE IS LITIGATION RISKS. ADMITTEDLY, THERE IS LITIGATION RISKS. PRESUMABLY A SETTLEMENT WOULD HAVE BEEN REACHED A LOT EARLIER IF THERE WERE NO LITIGATION RISK FOR THE GOVERNMENT. PRESUMABLY HPE AND JUNIPER WERE SOPHISTICATED ENTITIES THAT EITHER WOULD HAVE REACHED AN AGREEMENT IMMEDIATELY OR WALKED AWAY FROM THE MERGER IF IT WAS SO OBVIOUS THAT IT WAS UNLAWFUL.

SO WE DIDN'T GET THERE. THERE WAS LITIGATION RISKS FOR

THE GOVERNMENT AND LITIGATION RISKS FOR HP IN MOVING FORWARD.

HOW DO I MEASURE THAT LITIGATION RISK IN THE FIRST INSTANCE? AND THEN IN YOUR VIEW, HOW DOES THAT LITIGATION RISK PLAY INTO MY TUNNEY ACT REVIEW OF THE PUBLIC INTEREST?

MR. BILLER: RIGHT. SO WHAT I WOULD SAY, YOUR HONOR -- AND THE REASON I STARTED WITH THIS IDEA OF THE STRUCTURAL PRESUMPTION IS THAT THERE WAS NO DISPUTE THAT THEY WERE OVER THE LEVELS SET IN THE GUIDELINES. DOJ KNEW THAT. HPE KNEW THAT. THEY KNEW THAT WHEN THEY WERE NEGOTIATING WITH EACH OTHER.

YOU KNOW, THAT'S WHY THE ANTITRUST DIVISION DREW THE LINES IN THE SETTLEMENT NEGOTIATIONS ABOUT INSISTING ON A DIVESTITURE.

AND THE REASON WHY THE STRUCTURAL PRESUMPTION IS ALSO IMPORTANT HERE IN TERMS OF EVALUATING THE REMEDIES HERE IS WHEN YOU HAVE A MERGER THAT EVERYONE AGREES IS OVER THE STRUCTURAL PRESUMPTION, THEN YOU NEED TO HAVE A HELP REMEDY THAT SOMEHOW ADDRESSES THAT MARKET STRUCTURE. IT'S GOT TO CHANGE THE STRUCTURE. THAT'S THE IDEA OF STRUCTURAL RELIEF. IT'S GOING TO DO SOMETHING TO CHANGE THE STRUCTURE OF THE MARKET.

AND HERE NEITHER OF THE REMEDIES DO THAT.

THE INSTANT ON DIVESTITURE IS ONLY .1 PERCENT. THAT'S A BUSINESS LINE THAT IS .1 PERCENT OF THIS MARKET. IT DOESN'T MOVE THE NEEDLE ON THE MARKET STRUCTURE.

THE LICENSE, THE SAME THING, IT DOESN'T MOVE THE NEEDLE ON

THE MARKET STRUCTURE. IT'S NOT DIVESTING. IT'S NOT A DIVESTITURE. IT'S NOT AN ONGOING LINE OF BUSINESS. IT'S GIVING A BUYER --

THE COURT: SO --

MR. BILLER: I'M SORRY.

THE COURT: LET'S SAY THEY'VE RESPONDED TO THAT IN VARIOUS WAYS, BUT LET'S SAY SOME OF YOUR CRITICISMS ARE CORRECT IN THAT SENSE. LET'S SAY IF THE GOVERNMENT WERE TO ALSO HAVE ULTIMATELY CREDITED THE REPRESENTATION THAT IT WAS SIMPLY NOT FEASIBLE TO DIVEST THE CAMPUS AND BRANCH BUSINESS OF JUNIPER BECAUSE WE'RE NOT TALKING ABOUT A SINGLE FACTORY. WE'RE NOT TALKING ABOUT SIMPLY A CLIENT LIST. WE ARE TALKING ABOUT DISENTANGLING THE COMPANY AND CREATING AN ENTIRELY NEW COMPANY OUT OF JUNIPER AND SPINNING IT OFF, INTERTWINED WITH EVERYTHING THAT THEY ARE KEEPING. AND THIS WAS THE REPRESENTATION THAT THEY MADE.

SO IF THE GOVERNMENT ULTIMATELY DECIDED THAT THAT WAS A CORRECT VIEW OR AT LEAST A REASONABLE POSITION BY HP, THEN WE'RE SORT OF BACK ON THE POSITION THAT THE GOVERNMENT HAS SORT OF PRESENTED AS JUSTIFYING THEIR TUNNEY ACT STATEMENT ABOUT ALTERNATIVES CONSIDERED BEING THEIR DECISION WAS EITHER MOVE FORWARD WITH LITIGATION AND RISK GETTING NOTHING OUT OF THIS AND JUST SIMPLY MOVING THE MERGER FORWARD WITHOUT ANYTHING VERSUS REACHING A SETTLEMENT THAT PROVIDES SOMETHING.

I MEAN, IS THAT -- HOW DO I THINK ABOUT THAT ISSUE IN

TERMS OF THE TUNNEY ACT?

MR. BILLER: RIGHT. SO THIS GOES BACK TO YOUR HONOR'S QUESTION TO MR. SU ABOUT WHETHER THE COURT SHOULD TAKE THAT SORT OF "SOMETHING IS BETTER THAN NOTHING" APPROACH TO THIS.

YOU KNOW, THE ANSWER FOR US IS NO, AND THERE'S A COUPLE OF FACTORS THAT GO INTO THIS.

ONE IS EVEN IF YOU TAKE THE VIEW THAT MR. SU WAS PUTTING FORWARD IN TERMS OF YOU NEED TO HAVE A FACTUAL FOUNDATION AND IT NEEDS TO BE REASONABLY ACCEPTABLE.

THERE'S NO FACTUAL FOUNDATION, AND IT'S NOT REASONABLY ACCEPTABLE.

THERE'S NO FACTUAL FOUNDATION FOR THE INSTANT ON DIVESTITURE, PERIOD. NOBODY CAN MAKE AN ARGUMENT ABOUT THAT.

JUNIPER DID NOT COMPETE WITH INSTANT ON. JUNIPER DID NOT HAVE A BUSINESS LINE, DID NOT HAVE A PRODUCT IN THE MARKET THAT COMPETED WITH INSTANT ON. NO DISPUTE ABOUT THAT.

THE COURT: I MEAN, THEIR OTHER ARGUMENT IS THAT IT IS ESSENTIALLY A TURNKEY MEANS OF COMPETING, AND THAT THE LACK OF COMPETITION WAS A FUNCTION OF MARKETING RATHER THAN CAPABILITY.

SO WHAT IS THE RESPONSE TO THAT?

MR. BILLER: I DON'T THINK IT'S A TURNKEY, YOUR HONOR. I DO UNDERSTAND THAT THERE ARE THESE LATENT FEATURES THAT THEY SAY ARE THERE THAT CAN BE TURNED ON BY

11:17:07 SOMEBODY, BUT THOSE LATENT FEATURES ARE NOT -- DON'T MAKE YOU EQUIVALENT TO WHAT JUNIPER WAS AND WHAT HPE IS TODAY, OR WHAT THESE OTHER COMPETITORS ARE THAT SELL TO THE LARGER ENTERPRISES, THE POOL THAT SORT OF MIST WAS PLAYING IN.

IT IS CERTAINLY MISSING THESE ADVANCED CAPABILITIES IN TERMS OF THE ARTIFICIAL INTELLIGENCE THAT JUNIPER HAD, THAT HP HAS TODAY. AND, YOU KNOW, THERE'S A LOT ELSE THAT GOES ALONG WITH THIS, AND THIS GOES TO THE QUESTION OF THE ISSUE OF THE FACT THAT THERE ARE HIGH BARRIERS TO ENTRY AND EXPANSION IN THE MARKETPLACE, RIGHT? AND THERE'S TESTIMONY IN THE RECORD THAT WE HAVE PUT FORWARD AND DOCUMENTS SHOWING THAT IT IS VERY DIFFICULT TO EXPAND IN THIS MARKET. IT'S NOT SIMPLY A MATTER OF TAKING THIS PRODUCT. YOU NEED TO HAVE A LARGE ENOUGH SALES FORCE TO GO AND SELL THIS STUFF TO THE LARGE ENTERPRISES. YOU HAVE TO HAVE ALL OF THE OTHER FEATURES THAT THEY'RE LOOKING FOR, LIKE THE ARTIFICIAL INTELLIGENCE AND EVERYTHING. YOU HAVE TO BE ABLE TO OFFER A PRICE THAT IS COMPETITIVE WITH EVERYONE ELSE AND VARIOUS OTHER FACTORS, AND WE HAVE PUT THAT IN OUR BRIEF.

BUT THERE IS A REASON THAT YOU HAVE -- ALL OF THESE OTHER COMPETITORS THAT HP IS POINTING TO, THEY'RE ALL SINGLE DIGIT MARKET SHARES, AND NONE OF THEM HAS BEEN ABLE TO BREAK THROUGH 5 PERCENT. THAT'S WHAT THE EVIDENCE IN THE RECORD SHOWS.

MR. LIVERSIDGE WAS QUOTING SOMETHING THAT IS NOT IN THE RECORD TODAY, BUT WHAT WE ACTUALLY HAVE IN THE EVIDENCE IS THAT

NOBODY WAS ABLE TO GET PAST 5 PERCENT OTHER THAN CISCO, HPE, AND JUNIPER.

AND OVER THE LAST THREE YEARS THAT WE ACTUALLY HAVE DATA FOR, 2021 TO 2024, THE ONLY COMPANIES THAT WERE ABLE TO GROW THEIR MARKET SHARE BY MORE THAN HALF A PERCENTAGE POINT OVER THE COURSE OF THREE YEARS WAS JUNIPER AND HPE. AND JUNIPER WAS BY FAR THE FASTEST-GROWING FIRM IN THIS MARKET.

SO THE IDEA THAT SOMEONE CAN JUST TAKE SOME BUSINESS -- SOME PRODUCT THAT IS INTENTIONALLY BEING MARKETED TO SMALL AND MEDIUM BUSINESSES, AND ONLY OCCUPIES ONE-TENTH OF 1 PERCENT OF THIS MARKET, AND ALL OF A SUDDEN IT'S GOING TO BE MAGIC BEANS FOR THEM AND THEY ARE GOING TO DO WHAT ALL OF THESE OTHER COMPETITORS HAVEN'T BEEN ABLE TO DO WITH PRODUCTS THAT ARE INTENTIONALLY BEING MARKETED TO THESE ENTERPRISES IS JUST A TOTALLY UNREASONABLE POSITION TO TAKE, AND THERE IS NO FACTUAL FOUNDATION FOR THAT. THERE'S NO ECONOMIST IN THIS CASE THAT IS SAYING THAT, EITHER. THERE'S NO EXPERT ANALYSIS ABOUT THIS. THE UNITED STATES DOESN'T HAVE AN ECONOMIST IN THE COURTROOM TODAY.

THE COURT: WELL, I MEAN, THAT'S PART OF THE BASIS FOR THE MOTION IN LIMINE, WHICH WAS THE ARGUMENT WAS THAT THERE WAS NOT AN ADEQUATE DISCLOSURE EARLY IN THE PROCESS, THAT THERE WAS AN INTENT TO PROVIDE AN ECONOMIST ON THESE ISSUES AND WITH LEAVING THE GOVERNMENT WITH SEVEN DAYS IN ORDER TO TRY AND IDENTIFY AN EXPERT AND THEN PROVIDE A RESPONSIVE REPORT.

MR. BILLER: I'M HAPPY TO ARGUE THE MOTION IN LIMINE RIGHT NOW, YOUR HONOR, IF YOU WANT ME TO, BUT THEY FILED THEIR MOTION IN JANUARY, AND THEY MADE A CHOICE TO NOT INCLUDE ECONOMIC ANALYSIS WITH THAT, AND THEY ALSO MADE A CHOICE NOT TO INCLUDE ECONOMIC ANALYSIS WITH THEIR IMPACT STATEMENT, AND THEY MADE A CHOICE TO NOT INCLUDE ECONOMIC ANALYSIS IN THEIR RESPONSE TO THE PUBLIC COMMENTS.

THE COURT: AND THEY HAVEN'T -- AND I THINK THAT REFLECTS THEIR PARTICULAR VIEW OF THE ISSUES BEFORE ME, AND I MAY NOT BE IN AGREEMENT WITH THAT VIEW IN ALL RESPECTS, BUT I UNDERSTAND THAT CHOICE.

THE ISSUE ON THE MOTION IN LIMINE IS THERE WAS A REQUEST FOR AN IDENTIFICATION OF EXPERTS, AND THERE WAS NOT AN IDENTIFICATION UNTIL THE TIME OF THE ACTUAL FILING OF THE OPPOSITION AS I UNDERSTAND IT.

MR. BILLER: RIGHT. SO LET ME ADDRESS THAT, YOUR HONOR.

THE SITUATION IS THAT THE STATES, AS I'M SURE THE COURT RECALLS, VERY FAIRLY ARGUED IN FAVOR OF EXPERT DISCOVERY IN THIS CASE. THE UNITED STATES VERY CLEARLY ARGUED AGAINST EXPERT DISCOVERY IN THIS CASE. THEY WON ON THAT ISSUE. WE LOST. WE DIDN'T GET ANY EXPERT DISCOVERY, AND NEITHER DID THEY.

BUT WHAT THE COURT SAID WAS THAT "IF ANY OF THE PARTIES WANT TO RELY UPON EXPERT TESTIMONY IN SUPPORT OF THEIR

SUBMISSIONS, YOU KNOW, I THINK THEY CAN DO SO WITH THEIR FILINGS WITH THE COURT."

THAT'S FROM THE DECEMBER 16TH HEARING THAT WE HAD.

THE COURT: AND THAT'S FAIR, BUT THERE'S A SEPARATE -- I MEAN, THERE'S A SEPARATE QUESTION, WHETHER WE WERE GOING TO STAGE THIS AS EXPERT DISCOVERY.

AND MAYBE I DECLINED TO ENTER EXPERT DISCOVERY, SO THE FULL DISCLOSURE OBLIGATIONS MAY NOT APPLY, BUT HERE THEY MEAN AS SIMPLE AS WHAT SEEMS TO BE A PROPER INTERROGATORY SAYING PLEASE IDENTIFY THE NAMES OF THE EXPERTS THAT YOU INTEND TO USE.

AND THERE WAS NOT A RESPONSE TO THAT UNTIL THE TIME OF THE FILING, CORRECT?

MR. BILLER: THAT'S NOT ENTIRELY CORRECT. WE OBJECTED TO DOING THAT, YOUR HONOR, BECAUSE WE VIEWED IT AS ACCELERATING THE DEADLINE ON US FOR IDENTIFICATION OF THE EXPERTS.

WE VIEWED THE COURT'S STATEMENT IN DECEMBER AS SETTING A DEADLINE FOR US OF DISCLOSING OUR EXPERTS WITH OUR SUBMISSIONS. AND AT THE TIME THAT THEY POSED THE INTERROGATORIES, YOU KNOW, WE WERE STILL WORKING ON THOSE ISSUES, AND SO WE MADE AN OBJECTION. WE SERVED THAT OBJECTION A MONTH AGO. ON FEBRUARY 23RD IS WHEN WE SERVED OUR OBJECTIONS. WE MADE OUR POSITION VERY CLEAR THAT WE'RE GOING TO DISCLOSE OUR EXPERTS WITH OUR BRIEFING.

IF THEY HAD AN ISSUE WITH THAT, THEY SHOULD HAVE BROUGHT IT TO THE COURT'S ATTENTION. THEY SHOULD HAVE FILED A JOINT DISCOVERY DISPUTE LETTER AS THE PARTIES HAVE DONE WITH VARIOUS OTHER THINGS IN THIS CASE WHEN THEY WERE DISSATISFIED WITH THE OTHER SIDE'S DISCOVERY RESPONSES.

AND THE COURT COULD HAVE MADE A DECISION AT THAT POINT, WHETHER WE WERE REQUIRED TO, YOU KNOW, PROVIDE SOME KIND OF EARLY DISCLOSURE OR NOT. BUT WE MADE OUR POSITION VERY CLEAR THAT THAT'S THE WAY THAT WE WERE READING THE COURT'S ORDER, THAT WE WERE REQUIRED TO DISCLOSE OUR EXPERTS AT THE TIME OF OUR OPPOSITION BRIEF.

AND THEY DID NOTHING ABOUT THAT UNTIL THE FRIDAY NIGHT BEFORE THIS MONDAY MORNING HEARING THEY FILED A MOTION IN LIMINE.

SO TO THE EXTENT THAT THERE IS ANY SANDBAGGING GOING ON, IT'S BY THE UNITED STATES, NOT BY US.

THE COURT: CAN YOU REMIND ME, WAS THE SCHEDULE ALWAYS FOR THE OTHER PARTIES TO FILE A WEEK AFTER YOUR FILING OR DID WE ORIGINALLY PROVIDE A LITTLE MORE TIME BEFORE MOVING YOUR DEADLINE BACK BY A WEEK? IN OTHER WORDS, WAS THE ORIGINAL DEADLINE FOR THE REPLIES MARCH 9TH OR MARCH 16TH?

MR. BILLER: I CAN'T REMEMBER, YOUR HONOR. I APOLOGIZE.

THE COURT: THAT'S FINE.

MR. BILLER: IN ANY EVENT, THEY'VE BEEN SITTING ON

THIS FOR A MONTH IS MY POINT, YOUR HONOR. AND IF IT WAS REALLY THAT IMPORTANT TO THEM TO KNOW WHO OUR EXPERTS WERE BEFORE OUR OPPOSITION BRIEF, THEN THEY SHOULD HAVE BROUGHT IT TO THE COURT'S ATTENTION.

IT'S ALSO, YOU KNOW, NOT THE STATES' RESPONSIBILITY TO TELL THE UNITED STATES WHAT EXPERT TESTIMONY THEY SHOULD BE RELYING ON FOR THEIR OWN MOTION TO ENTER FINAL JUDGMENT IN THIS CASE.

THEY MADE A STRATEGIC CHOICE NOT TO RELY ON EXPERTS IN THEIR OPENING BRIEF, AND THEY TOOK THE RISK THAT THE STATES WOULD PUT IN EXPERTS WITH THEIR OPPOSITION AND THAT THEY WOULDN'T HAVE VERY MUCH TIME TO GET AN EXPERT ON REPLY, AND THAT'S WHAT ENDED UP HAPPENING.

THEY ARGUED FOR IT AND GOT THE SCHEDULE THAT THEY WANTED WITH RESPECT TO EXPERT DISCOVERY, AND RESPECTFULLY, YOUR HONOR, NOW THEY HAVE TO LIVE WITH IT.

THE COURT: AND THAT MIGHT BEAR, I MEAN, BEAR MORE ON YOUR MOTION IN LIMINE THAN ON THE QUESTION OF HOW MUCH TO DRAW FROM THE FACT THAT THEY DID NOT IN THE WEEK BETWEEN THE FILING OF YOUR OPPOSITION AND THE FILING OF THEIR REPLY HAVE SOMEONE PREPARE AN ADDITIONAL EXPERT REPORT ADDRESSING THESE ISSUES.

MR. BILLER: RIGHT, YOUR HONOR. BUT THE OVERARCHING POINT, MUCH BIGGER THAN WHAT THEY DID IN REPLY, IS WHAT THEY DID WHEN THEY WERE FIRST ASKING THIS COURT TO ENTER THE FINAL JUDGMENT, WHICH IS THAT THEY'RE NOT RELYING ON ANY ECONOMIC

ANALYSIS TO SHOW WHAT THESE REMEDIES WOULD DO. IT'S PURELY LAWYER ARGUMENT AND BRIEFING THAT, YOU KNOW, YEAH, SOMEBODY WILL BE ABLE TO TAKE THIS AND COMPETE. THERE'S NO EVIDENCE TO BACK IT UP.

AND HPE DOESN'T FILL THAT VOID EITHER. I UNDERSTAND THEIR POSITION THAT THIS MERGER WAS NEVER A PROBLEM TO BEGIN WITH, BUT THEY'RE ALSO NOT, YOU KNOW, CARRYING THE WATER ON ACTUALLY SHOWING WHAT ANYBODY WOULD BE ABLE TO DO WITH INSTANT ON OR WITH THIS LICENSE.

THE COURT: I THINK THEY'RE DRAWING -- LET ME ASK, DO YOU DISAGREE WITH HP'S CHARACTERIZATION, AT LEAST TO THE EXTENT THAT THE EVIDENCE OF THE PROCESS HAS BEEN GENERATED THAT THERE WAS AN OVERRULING OF STAFF IN THE DECISION TO PURSUE THE LITIGATION IN THE FIRST INSTANCE AND THAT THERE WAS A DISCUSSION OF A NARROWER SETTLEMENT ALONG THOSE LINES THAT WAS PURSUED AND SEEMED TO HAVE BEEN MAKING PROGRESS UNTIL SOME POINT IN MAY OR EARLY JUNE 2024 -- YES, OR 2025, AFTER THE FILING OF THE CASE, TO MOVE AWAY FROM THE ORIGINAL PROPOSAL?

I MEAN, OBVIOUSLY A LOT OF THINGS THAT WE HEARD ABOUT IS WHAT HAPPENED FROM THAT POINT FORWARD, BUT THEY'VE SUGGESTED THAT, YOU KNOW, PERHAPS NOTWITHSTANDING THE NUMBERS THAT YOU'VE IDENTIFIED TO ME, THAT THE FOLKS WITHIN THE ANTITRUST DIVISION WERE RECOMMENDING AGAINST PURSUING THIS CASE PERHAPS BECAUSE HP HAD MADE A COMPELLING ARGUMENT AS TO HOW THEY WERE GOING TO RESPOND.

MR. BILLER: I WOULD SAY A FEW THINGS ON THAT, YOUR HONOR. FIRST THING IS THAT THERE IS A LOT OF SPECULATION ABOUT THAT, BUT NO ACTUAL CLEAR EVIDENCE AS TO, YOU KNOW, WHAT THE RECOMMENDATION WAS.

THE COURT: RIGHT. AND PRESUMABLY THAT WOULD BE A DELIBERATE WORK PROCESS AND AN ATTORNEY WORK PRODUCT. I MEAN, NOTWITHSTANDING THAT, AND PERHAPS IT DOES APPEAR THAT THERE'S BEEN A STATEMENT IN A PUBLIC SPEECH THAT WAS REPORTED AS TO THE DECISION TO PURSUE THE CASE OVER THE OBJECTION OVER THE POSITION OF STAFF, CORRECT?

MR. BILLER: A VAGUE REFERENCE, YES, YOUR HONOR, WITHOUT SPECIFICALLY NAMING THIS CASE.

BUT LET'S JUST GRANT THAT WHAT THEY'RE SAYING IS TRUE FOR PURPOSES OF THIS CONVERSATION, RIGHT? LET'S ASSUME THAT THE STAFF DID, IN FACT, RECOMMEND AGAINST BRINGING A LITIGATION.

WE STILL DON'T KNOW WHAT THE REASONS FOR THAT WERE. THERE ARE A LOT OF THINGS THAT THE GOVERNMENT CONSIDERS WHEN DECIDING WHETHER TO BRING A CASE AND, YOU KNOW, A LOT OF THAT OBVIOUSLY IS THE MERITS OF THE CASE, BUT THERE ARE OTHER CONSIDERATIONS AS WELL.

THERE'S RESOURCES, AND THERE'S, YOU KNOW, DIFFERENT VIEWS ABOUT POLICY AND THINGS LIKE THAT.

THE OTHER THING IS IN TERMS OF, YOU KNOW, THIS STORYLINE ABOUT THE NEGOTIATIONS THAT WERE HAPPENING IN APRIL IS I WOULD NOTE THAT THAT WAS A TRANSITION PERIOD BETWEEN THE PRIOR

11:28:43 ADMINISTRATION AND THE NEW ADMINISTRATION, AND FOLKS WERE GETTING CAUGHT UP WITH WHAT WAS GOING ON, AND THERE'S A PERIOD OF TIME WHEN MR. ASSEFI WAS HANDLING THOSE NEGOTIATIONS, AND THEN ULTIMATELY MS. SLATER KIND OF TOOK BACK CONTROL OF THAT, AND THEN HAD SOME OF HER DEPUTIES SORT OF TAKE THE LEAD ON THAT, AND THEN MR. ASSEFI WAS NO LONGER IN CHARGE.

11:29:14 SO IT WAS A TIME OF TRANSITION, AND, YOU KNOW, TO THE EXTENT THAT, YOU KNOW, HP MAYBE THOUGHT THEY HAD A DEAL ON SOME OTHER GROUNDS AND IT TURNED OUT THEY DIDN'T, THE RECORD IS A LITTLE UNCLEAR AS TO EXACTLY HOW MUCH OF THAT IS TRUE.

11:29:33 BUT WHAT WE DO KNOW IS THAT VERY EARLY IN MAY THE DEPARTMENT OF JUSTICE SENDS THEIR FIRST SETTLEMENT DEMAND, AND THAT IS FOR A STRUCTURE REMEDY, A DIVESTITURE OF THE OVERLAPPING BUSINESS LINE.

11:29:49 AND THEN THERE WAS A SECOND DEMAND MADE IN JUNE THAT ALSO INSISTED ON THAT DIVESTITURE WITH THE POTENTIAL TO LICENSE BACK THE SOURCE CODE TO HPE WITH RESPECT TO THE MIST AI OPS.

11:30:07 SO IT'S VERY CLEAR, YOU KNOW, IN MAY AND JUNE WHERE THE ANTITRUST DIVISION IS STANDING ON THIS CASE. AND BY THAT POINT THERE WAS ALSO ADDITIONAL DISCOVERY IN THIS CASE. THERE IS A LOT THAT COULD HAVE HAPPENED THAT MAYBE CHANGED STAFF'S VIEW FROM JANUARY TO MAY.

11:30:27 BUT WHAT WE DO KNOW IS THAT, YOU KNOW, ON JUNE 5TH THERE WAS AN IN-PERSON MEETING, AND THIS VERY SETTLEMENT PROPOSAL THAT WE HAVE IN FRONT OF US WAS DISCUSSED AT THAT MEETING, THE

DIVESTITURE AND A LICENSE OF A MIST AI OPS CODE, AND THE ANTITRUST DIVISION MADE VERY CLEAR THAT THEY WERE NOT ACCEPTING THAT PROPOSAL.

AND THEN AFTER THAT THEY GET TOTALLY EXCLUDED FROM THE SETTLEMENT NEGOTIATIONS, AND, YOU KNOW, WE'VE PUT IN AN EXTENSIVE TIMELINE OF WHAT HAPPENED AFTER THAT.

THE COURT: WELL, I MEAN, THERE'S SOME QUESTION AND SOME PIECES WHERE THE EVIDENCE IS SORT OF A LITTLE BIT SPOTTY.

YOU KNOW, WHY -- SETTING ASIDE THE QUESTION OF SORT OF INTERNAL DYNAMICS AT THE DEPARTMENT OF JUSTICE, AND, YOU KNOW, THE ABILITY TO INFLUENCE THINGS THERE AND THE ABILITY TO INFLUENCE STAFFING THERE. YOU KNOW, FROM THE PERSPECTIVE OF HPE, WHAT IS WRONG PROCEDURALLY WITH EFFECTIVELY SAYING, OKAY, THE ANTITRUST DIVISION HAS MADE ITS POSITION CLEAR, AS YOU SAY, THAT ANYTHING SHORT OF A DIVESTITURE OF THE CAMPUS AND BRANCH BUSINESS IS INADEQUATE, THE PROPER -- YOU KNOW, WE HAVE A RIGHT TO PETITION THE GOVERNMENT. THE THING TO DO IS TO MOVE UP THE CHAIN, WHICH THEY SAY IS WHAT THEY DID HERE.

WHAT'S WRONG WITH THAT?

MR. BILLER: SO IF THAT WERE WHAT HAPPENED, THAT WOULD HAVE BEEN FINE, BUT THAT'S NOT WHAT HAPPENED, YOUR HONOR.

WHAT HAPPENED IS VERY DIFFERENT FROM THAT.

SO, YOU KNOW, THEY -- THE DECISION THAT THEY MADE TO THEN GO ABOVE THE ANTITRUST DIVISION IS SOMETHING THAT, YEAH, SURE, THEY'RE FREE TO DO TO TRY TO APPEAL TO THE ANTITRUST DIVISION

SUPERIORS, BUT THE POINT IS HOW THEY DID THAT AND WHO THEY USED TO DO THAT.

SO, YOU KNOW, THEY DIDN'T USE GIBSON, DUNN TO APPEAL TO MR. MIZELLE AND MR. WOODWARD. THEY DIDN'T USE THE FRESHFIELDS FIRM TO DO THAT. IF YOUR HONOR LOOKS AT THOSE EMAILS, IT'S THE FRESHFIELDS FIRM COMMUNICATING WITH THE ANTITRUST DIVISION IN MAY AND EARLY JUNE.

THEY MADE A CONSCIOUS DECISION TO USE OTHER INDIVIDUALS, MR. DAVIS AND MR. LEVI, AND THOSE ARE INDIVIDUALS WHO HAVE A LARGE AMOUNT OF INFLUENCE OVER DOJ LEADERSHIP. MR. LEVI IS THE ONE WHO RECOMMENDED THOSE PEOPLE INTO THOSE POSITIONS. MR. DAVIS HAS TREMENDOUS INFLUENCE AS WELL OVER THOSE SENATE-CONFIRMED POSITIONS. AND HE'S NOT SHY ABOUT TALKING PUBLICLY ABOUT THE INFLUENCE THAT HE DOES HAVE.

SO WHAT HAPPENED DURING THAT TIME IS HPE CONSCIOUSLY USED PEOPLE THAT WERE ABLE TO EXERT VERY STRONG POLITICAL INFLUENCE OVER THOSE DECISION-MAKERS. NOT ONLY THAT, BUT THEY DIRECTLY MADE THREATS TO THE JOBS OF THE PEOPLE IN THE ANTITRUST DIVISION, AND --

THE COURT: AM I RIGHT THAT THE EVIDENCE THAT WE HAVE OF THAT IS MR. ALFORD'S RECOLLECTION OF SEEING A TEXT MESSAGE ON MS. SLATER'S PHONE?

MR. BILLER: YES, YOUR HONOR, THAT'S THE EVIDENCE IN THE RECORD, THAT MR. ALFORD SAW THOSE TEXT MESSAGES.

THE COURT: OKAY. AND OTHERS HAVE STATED THAT THEY

DON'T RECALL HEARING ABOUT THEM, CORRECT?

MR. BILLER: WELL, NOBODY ELSE WOULD HAVE SEEN THAT, YOUR HONOR, OTHER THAN MS. SLATER WHO WE DON'T HAVE TESTIMONY FROM, AND OBVIOUSLY MR. DAVIS, WHO ADMITTED TO SENDING HER TEXT MESSAGES AND BEING, YOU KNOW, EXTREMELY UPSET WITH HER, ALTHOUGH HE DIDN'T SAY EXACTLY WHAT IT IS THAT HE TOLD HER.

BUT THE OTHER EVIDENCE THAT WE DO HAVE IS THAT MS. SLATER ENDS UP GETTING FIRED, AND THEN MR. DAVIS, YOU KNOW, TAKES A VICTORY LAP ABOUT IT PUBLICLY AND ADMITS THAT HE WAS BEHIND IT.

SO MY POINT IS THAT THE INFLUENCE THAT THEY HAD OVER THOSE PEOPLE'S JOBS WAS NOT NEARLY THEORETICAL. IT WAS REAL. AND THEY USED IT BECAUSE THEY GOT MS. SLATER FIRED AND MS. SLATER'S TWO TOP DEPUTIES WERE FIRED SHORTLY AFTER THIS CASE.

THE OTHER PROBLEM IS THAT --

THE COURT: AND WHAT ABOUT THE FOLKS WHO IN YOUR VIEW THEY REACHED OUT TO AND PUSHED THROUGH THE SETTLEMENT? ARE THOSE FOLKS STILL ALL SERVING IN THE ADMINISTRATION?

MR. BILLER: SO MR. MIZELLE HAD VOLUNTARILY LEFT AFTER MR. WOODWARD WAS CONFIRMED AS THE ASSOCIATE ATTORNEY GENERAL, AND MR. WOODWARD IS STILL THERE.

THE OTHER PROBLEM, YOUR HONOR, IS THEN WHAT HAPPENS ONCE THAT APPEAL IS MADE, BECAUSE THEN AFTER THAT THE ANTITRUST DIVISION IS TOTALLY EXCLUDED FROM THESE DISCUSSIONS. AND, YOU KNOW, WE PUT IN A DECLARATION FROM WILLIAM BAER THAT I THINK IS VERY HELPFUL TO EXPLAIN HOW THESE SITUATIONS ARE TYPICALLY

HANDLED AND WHAT THE SUPERIORS ARE SUPPOSED TO DO IN THAT SITUATION.

NOW, IF THEY WANT TO DISAGREE WITH THE PEOPLE AT THE ANTITRUST DIVISION, THAT'S FINE, BUT THERE SHOULD BE SOME KIND OF A REASONED DISCUSSION ABOUT THAT AND THEY SHOULD INFORM THEMSELVES OF THE SUBSTANCE OF THE CASE BEFORE THEY THEN GO AND ACCEPT THE SETTLEMENT WITHOUT TALKING TO ANYBODY WHO ACTUALLY KNOWS ANYTHING ABOUT THE CASE, NOT THE TRIAL TEAM, NOT THE FOLKS AT THE ANTITRUST DIVISION THAT WERE LEADING THE SETTLEMENT NEGOTIATIONS UP TO THAT POINT, YOU KNOW, NOT TO ANY OF THE ECONOMISTS THERE.

AND, YOU KNOW, YOUR HONOR I THINK HAS IDENTIFIED THE IMPORTANCE OF THAT TO THIS CASE IN THE DECEMBER 1ST ORDER GRANTING INTERVENTION AND THE DECEMBER 31ST ORDER ON THE TUNNEY ACT REVIEW WHERE THE COURT REFERRED TO THIS QUESTION OF WHETHER THE SETTLEMENT BEARS THE HALLMARKS OF REGULARITY AND PRINCIPLE DECISION-MAKING THAT WOULD JUSTIFY, YOU KNOW, GIVING DEFERENCE TO THE UNITED STATES IN THIS CASE AND WHETHER THERE WAS A CONSIDERED AND FAIR EVALUATION OF THE RELEVANT FACTORS AND EVIDENCE THAT THE CONDITIONS JUSTIFYING SUCH A PRESUMPTION, YOU KNOW, REFERRING TO A PRESUMPTION THAT THE EXECUTIVE BRANCH ACTS IN THE PUBLIC INTEREST WITH RESPECT TO THE PROPOSED CONSENT JUDGMENT HERE.

AND, YOU KNOW, WE SHOULD NOT ACT LIKE ANY OF THIS BEARS THE HALLMARKS OF REGULARITY OR THAT IT'S NORMAL OR THAT IT'S

ACCEPTABLE OR THAT ANYTHING THAT HAPPENED HERE WAS ACTUALLY THE PRODUCT OF A REASONED AND PRINCIPLED DECISION-MAKING PROCESS BECAUSE IT WASN'T.

THE ANTITRUST DIVISION WAS TOTALLY CUT OUT OF THIS. THEY WERE TOLD ON THE DAY THAT THE SETTLEMENT WAS FILED WITH THE COURT THAT A DEAL HAD BEEN REACHED. HPE HAD ACTUALLY DRAFTED THE COMPETITIVE IMPACT STATEMENT IN THIS CASE, AND IT WAS HANDED TO THE ANTITRUST DIVISION JUST A FEW HOURS BEFORE IT WAS FILED WITH THIS COURT.

THE ANTITRUST DIVISION MADE NO SUBSTANTIVE EDITS TO THAT COMPETITIVE IMPACT STATEMENT, AND THAT IS SOMETHING THAT IS THE RESPONSIBILITY OF THE GOVERNMENT OF THE UNITED STATES TO EXPLAIN TO THE PUBLIC WHAT THE COMPETITIVE IMPACT IS OF THE PROPOSED SETTLEMENT THAT THEY'RE ENTERING INTO, AND THEY TOTALLY ABDICATED THEIR RESPONSIBILITY ON THAT.

AND THEN OBVIOUSLY AFTER THAT YOU HAVE THE AFTERMATH THAT I REFERRED TO WITH EVERYBODY WHO WAS AGAINST THIS THING IS NOW GONE.

IT'S NOT REASONED AND PRINCIPLED DECISION-MAKING, YOUR HONOR. IT'S PATRONAGE, QUITE FRANKLY AND IT'S POLITICAL INFLUENCE OF THE KIND THAT THE TUNNEY ACT IS CONCERNED WITH, AND UNDER THE COURT'S RUBRIC IT MEANS THAT THE DEPARTMENT OF JUSTICE GETS NO DEFERENCE IN THIS CASE BECAUSE THEY DIDN'T GO THROUGH THAT REASONED AND PRINCIPLED DECISION-MAKING PROCESS, AND WE SHOULD VIEW THE SETTLEMENT WITH GREAT SKEPTICISM, AND

IT'S AN EXPLANATION FOR WHY THIS SETTLEMENT IS WHAT IT IS, FOR WHY IT DOESN'T ADDRESS ANY OF THE STRUCTURAL ISSUES WITH THE MARKET AND WHY THIS LICENSED CODE IS SO INADEQUATE.

AND, YOUR HONOR, I THINK THIS GOES BACK TO THE ORIGINAL QUESTION THAT BROUGHT US HERE, WHICH IS HOW TO EVALUATE THIS SETTLEMENT. AND, YOU KNOW, WE THINK THAT THE SETTLEMENT PROCESS OBVIOUSLY SHOWS THAT THE UNITED STATES IS NOT ENTITLED TO THE KIND OF DEFERENCE THAT YOU SEE IN OTHER CASES.

THERE'S PRECEDENT FOR THIS. YOU KNOW, IN THE AT&T CASE THE COURT RECOGNIZED THAT THERE WAS A HISTORY OF AN IMPROPER RELATIONSHIP BETWEEN AT&T AND THE GOVERNMENT, AND EVEN THOUGH THAT RELATIONSHIP HAD OCCURRED 30 YEARS PRIOR, YOU KNOW, IN THE WESTERN ELECTRIC CASE, WHICH BY THE WAY, WAS ONE OF THE CASES THE CONGRESS WAS CONCERNED WITH WHEN THEY PASSED THE TUNNEY ACT.

EVEN THOUGH IT WAS 30 YEARS AGO, THE COURT SAID THAT STILL INFECTS WHAT I'VE GOT BEFORE ME TODAY, AND SO I JUST CAN'T LEAVE IT TO THE GOVERNMENT AND TO AT&T TO DETERMINE WHAT IS BEST HERE. I NEED TO DO A MORE THOROUGH REVIEW.

AND THE FACTS HERE ARE FAR MORE CONCERNING THAN EVEN FROM THE WESTERN ELECTRIC CASE AND THAT WARRANTS GREAT SKEPTICISM.

AND WHAT THE COURT IS REQUIRED TO DO BY THE TUNNEY ACT IS TO CONSIDER THE COMPETITIVE IMPACT OF THE PROPOSED FINAL JUDGMENT, INCLUDING TERMINATION OF ALLEGED VIOLATIONS, AND TO CONSIDER THE IMPACT OF ENTRY OF SUCH JUDGMENT UPON COMPETITION

IN THE RELEVANT MARKET. THAT'S WHAT IS IN THE STATUTE. THAT'S WHAT THE COURT HAS TO DO.

AND, YOU KNOW, IN ORDER TO DO THAT -- THIS IS WHY I STARTED WITH THE STRUCTURAL PRESUMPTION, YOUR HONOR, BECAUSE YOU NEED TO UNDERSTAND WHAT THE EFFECT OF THE MERGER IS, HOW THE MERGER IMPACTS COMPETITION IN THE RELEVANT MARKET TO THEN UNDERSTAND WHETHER THESE PROPOSED REMEDIES ACTUALLY DO ANYTHING ABOUT IT.

AND HERE THEY DON'T, AS I'VE SAID, THEY DON'T MOVE THE NEEDLE ON THE STRUCTURAL PRESUMPTION.

THE COURT: ARE THEY BETTER THAN THE GOVERNMENT SIMPLY DROPPING ITS OPPOSITION TO THE MERGER, WHICH HAS -- THAT'S SOMETHING THAT IT CAN DO WITHOUT ME STANDING IN THE WAY, CORRECT?

MR. BILLER: THEY COULD DROP IT, YEAH. AND, FRANKLY, THIS WOULD BE ABOUT THE SAME AS THEM DROPPING THE CASE BECAUSE YOU DON'T HAVE A DIVESTITURE OF AN OVERLAPPING BUSINESS LINE, AND YOU'VE GOT A LICENSING PROPOSAL THAT -- YOUR HONOR, THE MARKET IS TELLING YOU WHAT, YOU KNOW, THAT LICENSE IS WORTH. YOU HAVE -- THE COURT HAS THE BIDS IN FRONT OF THEM. I RECOGNIZE THAT IT'S UNDER SEAL, BUT THE COURT CAN REVIEW THAT AND SEE WHAT THE MARKET THINKS ABOUT HOW VALUABLE THIS LICENSE IS.

SO, YOU KNOW, THIS DOESN'T FALL WITHIN, YOU KNOW -- WHATEVER, WHATEVER THE PHRASE WITHIN THE REACHES OF THE PUBLIC

INTEREST MEANS, THIS IS NOT WITHIN THE REACHES OF THE PUBLIC INTEREST. THIS IS NOT REASONABLE. THERE IS NO FACTUAL BASIS FOR IT.

EVEN IF THE COURT WERE TO GIVE THE DOJ THE ORDINARY KIND OF DEFERENCE, THIS SETTLEMENT WOULD STILL FALL FAR SHORT OF WARRANTING APPROVAL BECAUSE IT DOESN'T DO ANYTHING ABOUT THE MERGER.

THE COURT: I MEAN, THAT'S THE CHALLENGE, IT SEEMS TO ME, IS THAT IN THINKING ABOUT THE SETTLEMENT, WHAT IS THE ALTERNATIVE, AND IF THE ALTERNATIVE IS SUCCESSFULLY LITIGATING IT TO THE END AND BEING SUCCESSFUL AND HAVING A DECISION IN THE GOVERNMENT'S FAVOR BEING AFFIRMED ON APPEAL; AND ANOTHER OPTION IS LITIGATING IT UNSUCCESSFULLY; AND THE OTHER POINT AND OPTION IS SIMPLY DROPPING THE CASE IN ITS ENTIRETY.

SO THINKING, IT SEEMS TO ME, THAT AT SOME LEVEL I HAVE TO BE THINKING ABOUT THIS AS COMPARED TO THOSE DIFFERENT OPTIONS IN TERMS OF WHAT IS IN THE PUBLIC'S INTEREST AND IS RELEVANT. IT IS POSSIBLE FOR MERGERS TO BE CHALLENGED BY ENTITIES OTHER THAN THE UNITED STATES GOVERNMENT, WHICH SEEMS TO BE ANOTHER RELEVANT PIECE OF MY CONSIDERATION.

MR. BILLER: IT IS, YOUR HONOR, AND THE TUNNEY ACT MAKES REFERENCE ALSO IN THE MANDATORY FACTORS THAT THE COURT SHOULD CONSIDER, AND I WANT TO MAKE SURE THAT I GET IT RIGHT, CONSIDERATION OF THE PUBLIC BENEFIT, IF ANY, TO BE DERIVED FROM A DETERMINATION OF THE ISSUES AT TRIAL.

SO THERE IS CONSIDERATION IN THE TUNNEY ACT THAT SOMETIMES YOU CAN'T REACH AN AGREEMENT, EVEN WHEN PEOPLE ARE NEGOTIATING IN GOOD FAITH. YOU KNOW, LET'S SAY THAT THERE WAS A SITUATION WHERE --

THE COURT: WELL, THE ISSUE THEN, I COULDN'T COMPEL A TRIAL ON THE MATTER IF I DON'T -- IF THE GOVERNMENT WANTS TO DROP IT NOW AGAIN, YOU MAY COME UP AND OFFER TO INTERVENE OR CONTINUE PURSUING THE CLAIMS, BUT IN THE ABSENCE OF THAT, I CAN'T -- I DO THINK THAT THERE'S A CONSTITUTIONAL PROBLEM, ME COMPELLING THE GOVERNMENT TO PURSUE A CASE.

MR. BILLER: ABSOLUTELY. IT'S GOING TO BE THE UNITED STATES'S DECISION, IF THE SETTLEMENT IS REJECTED, WHAT TO DO NEXT. AND THEY MAY DECIDE TO GO TO TRIAL, THEY MAY DROP THE CASE, THEY MAY DECIDE TO NEGOTIATE SOMETHING DIFFERENT. YOU KNOW, THERE'S A BUNCH OF DIFFERENT THINGS THAT CAN HAPPEN.

BUT THE JOB FOR THE COURT ON THIS PARTICULAR MOTION IS WHETHER TO ACCEPT IT OR NOT, AND ACCEPTING IT WOULD REQUIRE A FINDING, AN AFFIRMATIVE FINDING THAT THE SETTLEMENT IS IN THE PUBLIC INTEREST. AND THERE'S JUST NO WAY TO DO THAT ON THIS RECORD. THERE'S ZERO BASIS FOR IT. IT DOESN'T MOVE THE NEEDLE.

IT DOESN'T CHANGE THE STRUCTURAL PRESUMPTION AND, YOU KNOW, THE LICENSED CODE AT THIS POINT IS AT BEST AMBIGUOUS.

YOU HAVE THE UNITED STATES SAYING THAT THEY'RE NOT SURE NOW AT THIS POINT WHAT IS IN THIS CODE. THERE'S OBVIOUS

DISAGREEMENT IN THE BRIEFING BETWEEN THE UNITED STATES'S REPLY AND THE HP REPLY ABOUT, YOU KNOW, EXACTLY WHAT IT INCLUDES.

AND, YOU KNOW, THIS IDEA ABOUT WHAT THEY'RE LICENSING IS, YOU KNOW, THE FOCUS OF THE COMPLAINT IS JUST NOT TRUE. I MEAN, IF YOU READ THE COMPLAINT, THEY DON'T TALK ABOUT JUST THIS -- THESE BASIC FUNCTIONS THAT ARE BEING LICENSED.

THE COMPLAINT ALSO MAKES REFERENCE TO MARVIS AND MARVIS MINIS AND THE SELF-DRIVING NETWORK AND REFERS TO THOSE THINGS ALL AS DIFFERENTIATORS.

SO THE AI OPS CODE WAS ONE EXAMPLE OF WHAT DIFFERENTIATED JUNIPER. IT WAS NOT THE SOLE THAT THE UNITED STATES RELIED ON. AND THE IDEA THAT HPE HAS COME UP WITH THIS GREAT SETTLEMENT AND THEY'RE LICENSING OUT, YOU KNOW, EVERYTHING THAT THE UNITED STATES THOUGHT WAS SO IMPORTANT IS JUST NOT TRUE. IT'S JUST BASED ON THE PLAIN READING OF COMPLAINT.

THE UNITED STATES WAS CLEAR THAT THERE WAS A LOT OF THINGS THAT MADE JUNIPER INNOVATIVE AND DIFFERENTIATED THEM FAR BEYOND WHAT IS IN THIS CODE.

THE COURT: WE'VE BEEN GOING FOR QUITE A WHILE, AND SO IF THERE'S A FINAL POINT YOU WOULD LIKE TO MAKE, I'LL LET YOU DO SO NOW.

MR. BILLER: SURE, YOUR HONOR.

TWO FINAL POINTS IF I MAY, YOUR HONOR?

ONE IS WHEN THE -- WHEN MR. LIVERSIDGE WAS ARGUING, YOU KNOW, HE MADE REFERENCE TO THIS $63 MILLION OF HARM, AND BOTH

TODAY AND IN THE BRIEFING THEY TRY TO PAINT THAT AS THE ONLY EVIDENCE OF HARM, AND I JUST WANT TO EMPHASIZE THAT'S COMPLETELY WRONG.

OKAY. THE $63 MILLION FIGURE IS THE QUANTIFIABLE HARM THAT COMES FROM THE ANALYSIS OF THE UNILATERAL PRICE EFFECTS FROM THE LOSS OF COMPETITION AND SO THAT IS ANALYZING SOLELY THE IMPACT ON PRICE FROM THE ELIMINATION OF THE HEAD-TO-HEAD COMPETITION THAT EXISTED BETWEEN HP AND JUNIPER BEFORE THE MERGER.

THERE ARE OTHER FORMS OF HARM HERE, INCLUDING THE COORDINATED EFFECTS, THE HARM TO INNOVATION, AND THE TYPES OF HARMS THAT WE KNOW COME FROM A HIGHLY CONCENTRATED MARKET THAT ARE MUCH HARDER TO QUANTIFY, AND THEY DON'T HAVE A DOLLAR FIGURE ASSOCIATED WITH THEM BECAUSE THEY ARE VERY DIFFICULT TO QUANTIFY AND PREDICT, BUT THE POINT IS THAT IT'S NOT JUST $63 MILLION OF HARM. THERE ARE SEVERAL OTHER KINDS OF HARM ON TOP OF THAT $63 MILLION. THEY'RE JUST NOT ABLE TO BE QUANTIFIED. SO I THINK THAT'S VERY IMPORTANT.

THE LAST THING THAT I'LL SAY, YOUR HONOR, IS, YOU KNOW, JUST BRINGING THIS BACK TO THE STATUTE AND THE FACT THAT THE COURT IS REQUIRED TO ANALYZE THE COMPETITIVE IMPACT AND THE IMPACT OF ENTRY OF JUDGMENT UPON COMPETITION IN THE RELEVANT MARKET, IT'S IMPORTANT TO UNDERSTAND, AS I'VE SAID, THAT THE MERGER IS PRESUMPTIVELY ANTICOMPETITIVE AND THAT THE DIVESTITURE AND THE LICENSE DON'T MOVE THE NEEDLE ON THE MARKET

STRUCTURE. THERE'S ADDITIONAL EVIDENCE OF HARM THAT COMES FROM ELIMINATING A FAST-GROWING COMPETITOR, AND THERE'S NO DISPUTE IN THE CASE THAT JUNIPER WAS IN FACT THE FASTEST-GROWING COMPETITOR IN THE MARKET FOR SEVERAL YEARS LEADING UP TO THE MERGER.

THERE ARE HIGH BARRIERS TO ENTRY AND EXPANSION THAT ALREADY MAKE IT VERY HARD FOR COMPETITORS TO EXPAND THEIR MARKET SHARE, AND JUNIPER WAS UNIQUE IN BEING ABLE TO DO THAT.

AND WHEN YOU COMBINE THOSE UNDISPUTED FACTS HERE WITH THE EGREGIOUS METHOD BY WHICH THIS SETTLEMENT WAS REACHED, THERE'S NO QUESTION THAT IF THERE WERE EVER A CASE IN WHICH A COURT SHOULD REJECT A SETTLEMENT, IT'S THIS ONE, BECAUSE IF THIS SETTLEMENT IS ACCEPTED, IT WILL SEND A MESSAGE TO THE MARKETPLACE THAT ANY MERGER CAN GET THROUGH SO LONG AS YOU HIRE THE RIGHT INFLUENTIAL SO-CALLED "ADVISORS" WHO KNOW HOW TO PULL THE RIGHT LEVERS OF POWER IN WASHINGTON.

AND WE'RE ALREADY SEEING THIS IN OTHER CASES, SADLY.

IF A SETTLEMENT LIKE THIS ONE ON THESE FACTS IS APPROVED, THEN, YOUR HONOR, I HAVE A MODEST PROPOSAL FOR WHAT WE CAN DO WITH THE TUNNEY ACT (RIPPING PAPER).

THE COURT: THANK YOU. I WILL BE GOING IN REVERSE ORDER. WE'VE BEEN GOING FOR A LONG TIME. I'D LIKE TO FINISH AT NOON. SO I'LL GIVE FIVE MINUTES TO HP AND THEN FIVE MINUTES TO THE UNITED STATES IF THERE'S ANYTHING ELSE YOU WOULD LIKE TO OFFER.

MR. LIVERSIDGE: THANK YOU, YOUR HONOR. VERY QUICKLY. I WOULD JUST MAKE THE POINT AT THE OUTSET THAT WE DON'T AGREE THAT THE STATE SATISFIED THE STRUCTURAL PRESUMPTION SUCH THAT THEY HAVE MET THEIR PRIMA FACIE BURDEN IN THE CASE.

THE DOJ GUIDELINES ARE NOT BINDING ON THIS COURT. THE NINTH CIRCUIT SAID THAT. THEY SAID IT IN THE OLIN CASE. IN ST. ALPHONSUS THEY TOOK IT INTO ACCOUNT IN MAKING A DETERMINATION ABOUT THE PRIMA FACIE CASE, THAT THE HHI INCREASE WAS SO DRAMATIC, 1600 AND 6,219 OVERALL LEVEL OF CONCENTRATION. SO I WOULD JUST MAKE THAT POINT VERY QUICKLY.

ON THE REMEDIES, I COMPLETELY DISAGREE WITH THE ARGUMENT ABOUT INSTANT ON. I THINK THE ARGUMENT WAS SOMETHING TO THE EFFECT OF IT'S NOT TURNKEY AND IT WOULD NOT ALLOW -- THERE'S NO INDICATION THAT IT WOULD ALLOW A COMPETITOR TO COMPETE WITH A JUNIPER.

THE COMPANY THAT WANTS TO ACQUIRE THAT ASSET IS ALREADY A TIER 1 COMPETITOR. IT WAS IN THE SAME BUCKET OF COMPETITORS AS JUNIPER. IT COMPETES WITH JUNIPER. IT IS LOOKING TO ENHANCE ITS LEVEL OF COMPETITION IN THE MARKETPLACE.

THE COURT: BUT IT'S NEVER BEEN AS SUCCESSFUL AS JUNIPER, CORRECT?

MR. LIVERSIDGE: WELL, I GUESS WE SHALL SEE. THEY DON'T HAVE THE SAME MARKET SHARE AS JUNIPER, BUT THEY HAVE -- THEY HAD AND HAVE A MUCH MORE SIGNIFICANT MARKET CAP, AND THEY ARE OBVIOUSLY PREPARED TO INVEST IN THIS SPACE IN THIS

11:52:24 BUSINESS.

11:52:25 JUST ON THE LICENSE, AND THERE'S A SUGGESTION THAT SOMEHOW THIS LICENSE IS WORTHLESS. FIRST OF ALL, I DISAGREE WITH THAT COMPLETELY, BUT, SECONDLY, IT'S NOT CORRECT TO SAY THAT THIS SOURCE CODE WAS NOT A FOCUS OF THE U.S. DOJ'S COMPLAINT. IT ABSOLUTELY WAS A FOCUS. AND TO SAY THAT SOMEHOW -- TO SAY THAT SOMEHOW REMEDYING THAT CLAIM AND THAT FOCUS ISN'T MEANINGFUL REALLY DOES SHED LIGHT ON THE STRENGTH OF THE CASE TO BEGIN WITH.

11:53:00 IF YOU'RE SAYING THAT THAT SOURCE CODE REALLY ISN'T MEANINGFUL IN THE MARKETPLACE, THAT REALLY SAYS SOMETHING ABOUT THE CASE THAT WAS BROUGHT IN THE FIRST PLACE. WE'RE DIRECTLY ADDRESSING THAT CLAIM, WHICH I THINK IS PRETTY HARD TO ARGUE WAS NOT AT THE CENTER OF THE CASE.

11:53:16 I THINK THE STATES ACTUALLY CAME HERE AT ONE POINT TO THE COURT AND SAID THAT THEY NEEDED TO INTERVENE IN ORDER TO STOP THAT PRODUCT FROM BEING LICENSED. I BELIEVE THAT WAS THE POSITION THAT THEY TOOK WITH THE COURT.

11:53:27 I JUST WANT TO MAKE A QUICK COMMENT ABOUT THE STATEMENTS FROM THE STATES ABOUT THE APPEAL THAT WAS TAKEN UP TO MR. MIZELLE AND MR. WOODWARD. FIRST OF ALL, IT'S JUST NOT CORRECT THAT MR. LEVI AND MR. DAVIS WERE INVOLVED IN THOSE SETTLEMENT DISCUSSIONS. MR. DAVIS WAS NOT.

11:53:56 AND I THINK THE OTHER THING THAT IS REALLY MISSING FROM THIS IS THE KEY PLAYER ON THE HP SIDE FOR THE SETTLEMENT

DISCUSSIONS THAT LED TO A SETTLEMENT WAS THE CHIEF OPERATING OFFICER AND CHIEF LEGAL OFFICER OF THE COMPANY, MR. SCHULTZ. HE IS THE PERSON THAT DROVE ALL OF THOSE COMMUNICATIONS THAT LED TO A SETTLEMENT. HE WORKED WITH MR. LEVI TO DO IT. THAT'S WHAT HAPPENED.

AND I THINK WHEN WE STARTED THIS TUNNEY ACT PROCEEDING, THE STATES CAME IN WITH FILINGS AND SUGGESTED THAT SOMEHOW MR. WOODWARD AND MR. MIZELLE HAD DONE SOMETHING TO PERVERT JUSTICE IN THIS CASE. WHAT DID THEY DO? THERE'S BEEN NO INDICATION THAT THEY DID ANYTHING. THERE'S NO EVIDENCE THAT THEY DID ANYTHING WRONG IN THIS PROCESS. THERE'S NO INDICATION THAT ANYONE AT THE DOJ DID ANYTHING WRONG IN THIS PROCESS, YET THEY'RE SUGGESTING THAT SOMEHOW THEY SHOULDN'T GET DEFERENCE IN MAKING A DECISION TO SETTLE THE CASE.

THERE'S A COMPLETE LACK OF EVIDENCE ON THAT POINT, AND I THINK IT'S TROUBLING THAT ACCUSATIONS WERE MADE ABOUT THE PERVERSION OF JUSTICE IN THE COMPLETE ABSENCE OF EVIDENCE.

YOUR HONOR, THAT'S ALL I HAVE FOR TODAY. I APPRECIATE IT.

THE COURT: THANK YOU.

MR. BELLER: YOUR HONOR, I'D JUST LIKE TO OFFER TWO QUICK POINTS ON THE EXAMPLES THAT YOU ASKED ABOUT FOR SUCCESSFUL CONSENTS.

SO I WOULD BE REMISS NOT TO MENTION THE AT&T CONSENT IN 1956, RIGHT, THAT MANY PEOPLE ATTRIBUTE TO CREATING SILICON VALLEY, AND THAT'S ACTUALLY SOMETHING THAT MY FORMER

BOSS, ABIGAIL SLATER, POINTED TO IN A SPEECH LAST YEAR AS AN EXAMPLE OF HOW SETTLEMENTS CAN BE TOOLS TO SPUR INNOVATION.

I THINK A MORE CONCRETE EXAMPLE FROM THE DOJ AND ACTUALLY FROM THE TIME OF MR. BAER WHEN HE WAS AT THE DOJ WAS THE ABI GRUPO MODELO CONSENT, AND THAT CASE IS AN ALLEGED TWO-TO-ONE MERGER IN THE BEER INDUSTRY. AND AS PART OF THAT, THE COMPANIES HAD PROPOSED A STRUCTURAL FIX WHERE THEY WOULD SELL A PORTION OF THE JV BUSINESS. THE DOJ ACTUALLY REJECTED THAT AND THEY SAID WE ACTUALLY THINK A LICENSING COMMITMENT HERE OF THE MODELO GRANT TO A NEW ENTRANT CONSTELLATION WOULD BETTER INJECT COMPETITION INTO THE U.S. MARKETPLACE. MAYBE IT'S BECAUSE OF THE BUD LIGHT SAGA, BUT THE TRUTH IS MODELO IS NOW THE NUMBER 1 SELLING BRAND IN THE UNITED STATES, AND THAT WAS NOT THE CASE AT THE TIME OF THE MERGER.

SO THE POINT BEING REMEDIES ARE MESSY BUSINESS. EVERY CASE IS DIFFERENT. BUT THIS IDEA THAT IF THERE'S NOT A CORE STRUCTURAL BELIEF, IT CANNOT ALLEVIATE COMPETITIVE HARM IS JUST FALSE. THAT'S PRECISELY WHAT THE DOJ DURING MR. BAER'S ASSIGNMENT TODAY WOULD LOOK AT IN A MERGER, AND WE HAVE EXAMPLES THAT WE WOULD BE WILLING TO GIVE YOUR HONOR IF FURTHER BRIEFING WOULD BE HELPFUL ON THAT POINT.

THE COURT: THANK YOU.

MR. SU: YOUR HONOR, SINCE I MENTIONED -- I MENTIONED THAT I WAS THE ONE ON THE ST. ALPHONSUS CASE, I WANT TO START OFF JUST BY ANSWERING SOME MORE QUESTIONS ABOUT THE COURT'S

DECISION.

YOUR HONOR IS CORRECT THAT, YOU KNOW, ON APPEAL IT WAS ABOUT CLEAR ERROR ON FACTUAL FINDING ABOUT THE PRESUMPTION.

BUT HERE'S WHAT THE NINTH CIRCUIT SAID AS WELL, "HOWEVER, STATISTICS CONCERNING MARKET SHARE AND CONCENTRATION, WHILE OF GREAT SIGNIFICANCE, ARE NOT CONCLUSIVE INDICATORS OF ANTICOMPETITIVE EFFECTS," CITING GENERAL DYNAMICS AND WARNER COMMUNICATIONS, "THUS, PLAINTIFFS IN SECTION VII CASES GENERALLY PRESENT OTHER EVIDENCE AS PART OF THE PRIMA FACIE CASE."

AND WE IN FACT DID. IN ADDITION TO THE MARKET SHARE STATISTICS THAT WE WERE RELYING ON, WE ALSO SHOWED EVIDENCE THAT ST. ALPHONSUS AND THE SALTZER GROUP ACTUALLY COMPETED WITH ONE ANOTHER IN NEGOTIATIONS WITH INSURANCE COMPANIES.

SO THAT'S ONE THING I WANTED TO FOLLOW UP ON.

THE SECOND THING IS ON THIS ISSUE OF UNDUE INFLUENCE, AT THE END OF THE DAY, WHATEVER HPE DID ON ITS SIDE, THE QUESTION IS DID IT CAUSE THE UNITED STATES TO BREACH ITS DUTY TO THE PUBLIC? AND AGAIN, THE DUTY IS THE DUTY TO PRESERVE, SAFEGUARD COMPETITION.

AT THE END OF THE DAY, WHAT HAPPENED WAS BASICALLY A DECISION ABOUT TWO COMPETING SOLUTIONS THAT ARE BOTH -- THAT BOTH ADDRESS THE HARMS ALLEGED IN THE COMPLAINT.

SO IT'S NOT THE CASE THAT WHAT THE COURT GOT INSTEAD WAS SOMETHING THAT DOESN'T TALK ABOUT THE COMPETITION AND THE

ENTERPRISE-GRADE WLAN MARKET AT ALL. IT DOES. IT DOES. AND AGAIN, UNDER THE SBC COMMUNICATIONS STANDARD, IT IS A REASONABLY ACCEPTABLE SOLUTION.

ON THE ECONOMIST ISSUE, THE COURT IS CORRECT, WE MADE A STRATEGIC DECISION NOT TO ENGAGE AN ECONOMIST IN SUPPORT OF OUR MOTION, BUT WE HAD EVERY RIGHT TO THINK ABOUT WHETHER WE NEEDED TO COME UP WITH AN ECONOMIST FOR REBUTTAL. AND THE COURT IS CORRECT, IN THE COURT'S DECEMBER 31ST ORDER, WE ALWAYS HAD ONLY A WEEK TO RESPOND, THAT'S ALL WE HAD, AND IT WOULD HAVE BEEN VERY HELPFUL TO KNOW IN ADVANCE OF THE STATE'S OPPOSITION WHAT THEY WERE GOING TO DO WITH THAT.

THE COURT: BUT I GUESS I WAS THINKING ABOUT IT A LITTLE BIT. IT MIGHT BE, YOU KNOW, PERHAPS WHEN I WAS THINKING ABOUT HAVING EVERYONE JUST DISCLOSE THEIR EXPERTS WITH THEIR FILINGS IF TWO WEEKS SEEMED LIKE IT MIGHT HAVE BEEN A LITTLE MORE FEASIBLE.

MR. SU: YES, YOUR HONOR, THAT'S CORRECT.

AND THEN LASTLY, AGAIN, WE GO BACK TO THE COMPLAINT. THE COMPLAINT IS THERE TO ENSURE THAT THESE REMEDIES DO ADDRESS SOMETHING TO DO WITH COMPETITIVE HARM, BUT IT DOESN'T MEAN THAT EVERY DETAIL IN THE COMPLAINT MUST BE ADDRESSED BY THE REMEDIES. THE COMPLAINT IS JUST UNTIL WE GET TO TRIAL AND UNTIL WE HAVE FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM THE COURT, THESE ARE JUST ALLEGATIONS.

THE QUESTION IS DO THESE REMEDIES GO TO THE ALLEGED HARM

12:00:04 IN THIS RELEVANT MARKET? AND THEY DO.

12:00:11 THAT'S ALL I HAVE. THANK YOU.

12:00:12 **THE COURT:** THE PARTIES AND OBVIOUSLY THE INTERVENORS 12:00:14 HAVE GIVEN ME A LOT TO THINK ABOUT AND A LOT OF PAPER TO 12:00:17 REVIEW. LESS PAPER THAN I THINK I WAS SENT IN ADVANCE OF OUR 12:00:20 PLANNED PRETRIAL CONFERENCE, BUT STILL PLENTY OF TIME PAPER.

12:00:24 BUT I OBVIOUSLY KNOW THE PARTIES ARE ANXIOUS FOR A QUICK 12:00:28 DECISION, SO I AM GOING TO TAKE IT UNDER SUBMISSION, AND I WILL 12:00:31 AIM TO GET A DECISION OUT AS QUICKLY AS POSSIBLE AFTER I HAVE 12:00:34 HAD TIME TO CONSIDER EVERYTHING THAT HAS BEEN DISCUSSED TODAY 12:00:36 AND GO OVER EVERYTHING THAT WE DISCUSSED IN CONNECTION WITH THE 12:00:39 MOTION.

12:00:39 BUT I APPRECIATE THE PARTIES' EFFECTIVE ADVOCACY ON ALL 12:00:43 SIDES AND THEIR WILLINGNESS TO UNDERTAKE THIS RATHER 12:00:46 ACCELERATED AND INTENSE PROCESS TO GET TO THIS POINT.

12:00:49 SO THANK YOU. I'LL LET EVERYONE GO AND HAVE A GOOD 12:00:51 AFTERNOON.

12:00:54 **THE CLERK:** THANK YOU. COURT IS CONCLUDED.

12:00:58 (COURT CONCLUDED AT 12:00 P.M.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

Irene Rodriguez

IRENE RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

DATED: MARCH 24, 2026