Jon B. Jacobs
Joan H. Hogan
Peter J. Mucchetti
Antitrust Division
United States Department of Justice
Liberty Place Building
325 7th Street, N.W., Suite 300
Washington, D.C. 20530
(202) 616-5935

Attorneys for the United States

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. GENERAL ELECTRIC COMPANY, Defendant.	Civil Action No. CV-96-121-M-CCL RESPONSE TO PUBLIC COMMENT

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (“APPA” or "Tunney Act"), the United States hereby responds to the public comment received regarding the proposed Final Judgment in this case.

I. Background

On August 1, 1996, the United States filed the Complaint in this matter, alleging that General Electric Company (“GE”) had violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, by requiring hospitals that licensed certain diagnostic software from GE to agree not to compete with GE in unrelated service markets. On July 14, 1998, the United States filed a

proposed Final Judgment and a Stipulation signed by the parties allowing for entry of the Final Judgment following compliance with the Tunney Act. The United States also filed a Competitive Impact Statement ("CIS"), which it published, along with the proposed Final Judgment, in the Federal Register. *See* 63 Fed. Reg. 40737 (1998).

As is explained more fully in the Complaint, CIS, and various memoranda filed in this matter, GE, the world's largest manufacturer of medical imaging equipment, is also a leading provider of service for all types and brands of medical equipment. Many hospitals with in-house service departments also want to offer service to other nearby hospitals or clinics. In sparsely populated rural areas, such as Montana, these hospitals may be the only service providers other than GE that are qualified to service certain equipment. GE regularly granted these hospitals licenses that permitted them to use GE's software ("advanced service materials") to service their own medical imaging equipment, but only if the hospitals agreed not to compete with GE to service other customers, even though the hospitals would not use GE's software to provide that service. These agreements harmed competition by foreclosing actual and potential competitors from offering service. The United States alleged that these agreements not to compete were *per se* illegal.

The proposed Final Judgment prohibits certain conduct, requires GE to implement a compliance program, and provides procedures that the United States may utilize to determine and secure GE's compliance. The proposed Final Judgment enjoins GE from agreeing with any licensee that the licensee will not service third-party medical equipment. It defines "third-party service" to mean the service of any medical equipment in the United States not owned, leased, or operated by the party performing it. Section IV(A) of the Final Judgment prohibits GE from

entering into or enforcing any agreement in conjunction with the licensing of advanced service materials or related training whereby (a) the end-user represents that it has not, does not, or will not perform third-party medical equipment service or (b) the end-user is prevented or restrained from providing third-party service. Section IV(B) prohibits GE from requiring that a potential licensee give GE information regarding that person's provision of third-party service. Section IV(C) enjoins GE from representing that it has a policy or general practice of refusing to license operating or service materials for medical equipment, or of refusing to provide training thereon, because an end-user offers third-party medical equipment service. Section IV(D) prohibits GE from offering to sell or license operating or service materials on terms that vary depending on whether the end user has provided, does provide, or will provide third-party medical equipment service.

Under the Tunney Act, interested parties have 60 days from the date the proposed Final Judgment and CIS are published in the Federal Register to submit to the United States any comments they have on the Judgment. The United States then files with the court any such comments, along with its responses, and publishes them in the Federal Register. 15 U.S.C. § 16(d). Provided that nothing in the public comments alters its conclusion that the proposed Final Judgment is in the public interest, the United States files a motion with the court asking for entry of the Judgment. The court thereafter must make its own determination of whether the proposed Final Judgment is in the public interest. 15 U.S.C. § 16(e).

The 60-day period for public comments relating to this matter expired on September 28, 1998. The United States received only one comment, that of Independent Service Network International ("ISNI"). ISNI, based in Washington, D.C., is a trade association of 157

maintainers of high technology equipment, including some Independent Service Organizations ("ISOs") that service medical imaging equipment. The United States has carefully considered the views expressed in ISNI's Comment. Nothing in the Comment has altered the United States' conclusion that the proposed Final Judgment is in the public interest. Accordingly, once ISNI's Comment and this Response are published in the Federal Register, as required by the Tunney Act, the United States will file a motion with this Court seeking entry of the proposed Final Judgment.

III. Response to the Comment of Independent Service Network International

ISNI's primary concern with the proposed Final Judgment relates to Section V(g), which states: "[N]othing in this Final Judgment shall be construed . . . to prevent Defendant from agreeing with a licensee of [its advanced service materials] . . . that such materials may be used only by the licensee's full-time employees." ISNI contends that because the proposed Final Judgment does not prohibit GE from agreeing with its hospital licensees that part-time employees may not use GE's software and because, it asserts, such agreements would be *per se* violations of the Sherman Act, the proposed Final Judgment is not in the public interest. ISNI Comment at 7. ISNI believes that in the absence of such licensing restrictions, ISO's (including, presumably, some of ISNI's members) might "share" an employee with a hospital on a part-time basis, who then would use GE's software to repair the hospital's equipment. ISNI Comment at 10-11.

ISNI also contends that the United States failed to comply with the Tunney Act because in ISNI's view it did not adequately explain why the Judgment does not prohibit these

restrictions regarding use by part-time employees, and because the United States did not identify any determinative documents. ISNI Comment at 9-15. ISNI urges the Court to hold a hearing on the public interest determination and seeks to participate at that hearing.

A. The Proposed Final Judgment Adequately and Properly Remedies the Violation Alleged in the Complaint.

ISNI's principal objection to the proposed Final Judgment -- that it does not prohibit GE from entering into agreements with its licensees restricting the use of its software to certain employees -- fails to raise an appropriate issue for consideration under the Tunney Act. The agreements to which ISNI objects are not of the type that were challenged in the United States' Complaint.

The Complaint in this case challenges agreements not to compete that GE required of hospitals that wished to secure GE's advanced service materials. Complaint ¶ 31. These non-compete agreements between GE and the hospitals that are its actual or potential competitors in the third-party service business were unrelated to any legitimate interest of GE. An agreement between horizontal competitors not to compete is tantamount to an agreement to allocate markets and is the type of restraint that is so likely to have anticompetitive effects that it is deemed to be *per se* illegal under the antitrust laws. *See, e.g., Palmer v. BRG of Georgia, Inc.,* 498 U.S. 46 (1990) (per curiam). The proposed Final Judgment prohibits GE from enforcing any such existing agreements and from entering into any similar agreements in the future. It provides full and complete relief for the violations alleged in the Complaint.

ISNI is complaining about other potential provisions in GE's licensing agreements -- restrictions not challenged in the Complaint -- that do restrict the way in which the hospital

licensees may use GE's software. GE's licenses contain a number of these provisions. For example, the license requires the hospital to commit that "[n]either [the] hospital nor any of [the hospital's] employees will permit any one other than [the hospital's] service employee . . . to have access to or to use any part of the [advanced service materials]." These restrictions are similar to those found in many software licenses in order to prevent against misappropriation or to limit the license to certain categories of users. Contrary to ISNI's assertions, such provisions typically found in GE's licenses, including provisions requiring that only full-time employees use GE's software, do *not* prohibit licensee hospitals with part-time employees from competing with GE for third-party service customers. Licensee hospitals may even use their part-time employees to provide that service. The restrictions questioned by ISNI concern who within the hospital may use GE's software, not the provision of third-party service. The Complaint did not allege that such restrictions on use violate the antitrust laws, and thus the proposed Final Judgment does not prohibit them. *See* CIS at 8.

The Tunney Act does not contemplate judicial review of the government's determination of which conduct to challenge or which violations to allege in the Complaint. The government's decision not to challenge particular conduct based on the facts and law before it at a particular time, like any other decision not to prosecute, "involves a complicated balancing of a number of factors which are peculiarly within [the government's] expertise." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The United States has wide discretion within the reaches of the public interest to resolve potential litigation. *See United States v. Western Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993). Moreover, in conducting its Tunney Act evaluation, the Court must not look beyond the Complaint "to evaluate claims that the government did not make and

to inquire as to why they were not made." *United States v. Microsoft*, 56 F.3d 1448, 1459 (D.C. Cir. 1995). Last year, the United States Court of Appeals for the District of Columbia Circuit stated that courts, in making their public interest determination:

> must examine the decree in light of the violations charged in the complaint and should withhold approval only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes "a mockery of judicial power."

Massachusetts School of Law at Andover, Inc. v. United States, 118 F.3d 776, 783 (D.C. Cir. 1997), *quoting United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995).

B. The Proposed Final Judgment Does Not Authorize GE to Include Any Particular Restrictions in Its Licenses

ISNI suggests that Section V(g) of the proposed Final Judgment grants GE the right to engage in *per se* illegal conduct. ISNI Comment at 2. ISNI has misconstrued the impact of Section V of the Final Judgment. Section V is intended to clarify the meaning of Section IV, which contains the key prohibitions. Section V makes it clear that the Judgment should not be read to prohibit certain conduct. It does not, however, reach any conclusions as to whether that conduct is otherwise lawful, nor does it authorize GE to engage in any particular activity. Instead, as was stated in the CIS, the proposed Final Judgment is silent as to whether any particular restriction addressed in Section V would violate the antitrust laws. CIS at 8. Section V thus provides GE with no defense to any later allegation, made by a private party or even the United States, that the conduct described in Section V(g) violates the antitrust laws. Furthermore, entry of a proposed Final Judgment does not bar a private party from seeking and obtaining appropriate antitrust remedies, whether or not the challenged conduct is prohibited by

the Final Judgment. In short, the proposed Final Judgment does not authorize GE to include any particular restrictions in its licenses.[1]

C. The United States Has Complied with the Tunney Act

1. The CIS Adequately Explains the Relief

ISNI contends that the United States failed to comply with the Tunney Act because it did not explain why the Judgment does not prohibit GE from agreeing with its licenses that only full-time employees could use its software. ISNI mischaracterizes the CIS, which states:

> The limiting conditions are consistent with the relief sought in the Complaint. The Complaint alleged that GE had used its advanced service materials to induce hospitals with in-house service capability to agree not to compete with GE in the servicing of medical equipment. The Complaint did not allege that GE's refusal to license its intellectual property to any or all persons who might seek such licenses violated the antitrust laws, and the Final Judgment is silent as to that conduct.

CIS at 8.

[1] Although the proposed Final Judgment does not authorize GE to prevent a hospital's part-time employee from using its software, and although the United States takes no position regarding the validity of this particular restriction, ISNI's contention that this restriction is illegal *per se* is wrong. The Supreme Court has ruled that certain conduct, such as the agreements challenged in this case, is so inherently anticompetitive that it is illegal *per se* under Section 1. *See Palmer*, 498 U.S. at 48-50. However, the *per se* standard is generally not applied to restrictions on the way a licensee can use software it has licensed, provided that the restrictions do not restrain competition that would occur in the absence of the license. An owner of intellectual property is ordinarily not required to license others to use it, but may choose to do so and to subject the licensee to reasonable restrictions and conditions. Such restrictions and conditions often serve procompetitive purposes by allowing licensors to exploit their intellectual property rights and by encouraging others to make similar investments. For these reasons, restrictions on the way a licensee may use intellectual property are generally reviewed under the rule of reason standard, which takes into account market conditions and other relevant factors, rather than a *per se* standard. *See* U.S. Department of Justice and the Federal Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property*, 4 Trade Reg. Rep. (CCH) ¶13,132 at 20,735-36, 20740-41 (1995).

2. There Were No Determinative Documents

ISNI next contends that the United States failed to comply with the Tunney Act because it did not identify any determinative documents. ISNI characterizes as "incredible" the CIS's statement that there were no determinative materials or documents within the meaning of the APPA that were considered in formulating the proposed Final Judgment. ISNI Comment at 14.

The Tunney Act requires, in pertinent part, that the United States make available to the public copies of the proposed Final Judgment "and any other materials and documents which the United States considered determinative *in formulating such proposal*." 15 U.S.C. § 16(b) (emphasis added). Thus, the United States is required to disclose only those documents that it considered determinative in its decision to settle the case on the terms set forth in the proposed Final Judgment. Documents that were determinative in the decision to file the case need not be disclosed. During Senate hearings on the Tunney Act, one witness specifically urged that "as a condition precedent to . . . the entry of a consent decree in a civil case . . . the Department of Justice be required to file and make a matter of public record a detailed statement of the evidentiary facts on which the complaint . . . . was predicated."[2] Congress, however, rejected that recommendation. ISNI's broad request for the documents providing the good-faith basis for filing the Complaint is contrary to the plain language of the Tunney Act and its legislative history and therefore should be denied.

ISNI's request falls outside the scope of what courts have interpreted to be determinative documents. Just last year, the United States Court of Appeals for the District of Columbia

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[2] *The Antitrust Procedures and Penalties Act: Hearings on* S. 782 *and* S. 1088 *Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee*, 93d Cong., lst Sess. 26, 57 (1973)(prepared statement of Maxwell M. Blecher, attorney).

Circuit, in a case brought by the Antitrust Division challenging certain portions of the American Bar Association's law school accreditation activities, held that a third-party was not entitled to a wide range of documents in the government's files. *Massachusetts School of Law at Andover, Inc. v. United States*, 118 F.3d 776 (D.C. Cir. 1997). In that case, the United States asserted that the determinative documents provision referred "only to documents, such as reports to the government, 'that individually had a significant impact on the government's formulation of relief -- i.e., on its decision to propose or accept a particular settlement.'" *Id.* at 784. The court held that both the statutory language and the legislative history supported this interpretation. Indeed, the court noted that during the Senate debate on the Tunney Act, Senator Tunney himself cited a report to the government by an outside expert analyzing the economic consequences of proposed relief in an earlier case as exemplifying a "determinative document." *Id.*[3] The court also considered a broad disclosure requirement to be inappropriate because it would directly interfere with the United States' ability to negotiate settlement agreements. *Id.* at 784-85. Similarly, in another recent Antitrust Division case the Second Circuit held that "the range of materials that are 'determinative' under the Tunney Act is fairly narrow" and that only documents that were "a

[3] Congress enacted the Tunney Act in response to consent judgments entered in 1971 in three cases involving acquisitions by International Telephone and Telegraph Corporation ("ITT"), including that of the Hartford Fire Insurance Company. The consent judgments permitted ITT to retain Hartford. Subsequent Congressional hearings revealed that the Antitrust Division had employed Richard J. Ramsden, a financial consultant, to prepare a report analyzing the economic consequences of ITT's possible divestiture of Hartford. Ramsden concluded that requiring ITT to divest Hartford would have adverse consequences on ITT and on the stock market generally. Based in part on the Ramsden Report, the United States concluded that the need for the divestiture of Hartford was outweighed by the divestiture's projected adverse effects on the economy. In explaining the determinative documents provision, Senator Tunney stated, "I am thinking here of the so-called Ramsden memorandum which was important in the ITT case." 119 Cong. Rec. 24,605 (1973).

substantial inducement to the government to enter into the consent decree" should be subject to disclosure. *United States v. Bleznak*, 153 F.3d 16, 20-21 (2d Cir. 1998).[4]

ISNI has given no reason to doubt the United States' assertion that there are no determinative documents in this case. The United States did not receive any expert reports or any other document that substantially contributed to its determination to proceed with the settlement.

D. The Court Need Not Hold a Hearing in Making Its Public Interest Determination

ISNI requests that this Court convene a hearing before it makes its public interest determination. It further requests that the Court authorize ISNI to participate in the hearing. ISNI Comment at 15. The United States believes that a hearing is unnecessary because ISNI has already adequately expressed its views through the public comment procedure, as provided by statute. *See United States v. G. Heileman Brewing Co.*, 563 F. Supp. 642, 650 (D. Del. 1983) (court denies request for evidentiary hearing when "those same issues have already been raised by movants through the APPA's third-party comment procedure); *United States v. Carrols Development Corp.*, 454 F. Supp. 1215, 1221-22 (N.D.N.Y. 1978)(request for limited participation denied when "the moving parties have set forth their views in considerable detail in briefs and affidavits filed with this Court as well as in written comments submitted to the

[4] The single case cited by ISNI -- *United States v. Central Contracting Co.*, 537 F. Supp. 571 (E.D. Va. 1982) -- has not been followed by any other court. Moreover, even that opinion recognized that the Tunney Act "does not require full disclosure of Justice Department files, or grand jury files, or defendant's files, but it does require a good faith review of all pertinent documents and materials and a disclosure of" those "materials and documents that substantially contribute to the determination [by the government] to proceed by consent decree . . . . " *Id.* at 577.

Government under the APPA"). If, however, the Court determines that a hearing would be useful in making its public interest determination, the United States would not object to ISNI's appearance as an *amicus curiae*.

IV. Conclusion

After careful review of ISNI's Comment, the United States continues to believe that entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint and is therefore in the public interest. Upon the publication of this Public Comment and the Response by the United States in the Federal Register, the United States will move the Court to enter the proposed Final Judgment. Once the United States moves for entry of the proposed Final Judgment, the Tunney Act directs this Court to determine whether its entry "is in the public interest." 15 U.S.C. § 16(e). In making that determination, "the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Western Elec. Co.*, 993 F.2d at 1576 (emphasis added, internal quotation and citation omitted). This Court should evaluate the relief set forth in the proposed Final Judgment and should enter the Judgment if it falls within the government's "rather broad discretion to settle with the defendant within the reaches of the public interest." *Microsoft*, 56

F.3d at 1461; *accord United States v. Associated Milk Producers*, 534 F.2d 113, 117-18 (8th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976).

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Respectfully submitted,

/s/

Jon B. Jacobs
Joan H. Hogan
Peter J. Mucchetti
Attorneys for the United States

Bernard M. Hollander
Senior Trial Attorney

Antitrust Division
U.S. Department of Justice
325 Seventh Street, N.W., Suite 300
Washington DC 20530
(202) 616-5935

CERTIFICATE OF SERVICE

This certifies that on December 9, 1998, I caused copies of the foregoing Response to Public Comment to be served as indicated upon the parties to this action and courtesy copies to be served as indicated upon each commenter:

By facsimile & hand:

Richard L. Rosen, Esquire
Arnold & Porter
555 12th Street
Washington, D.C. 20004
Counsel for General Electric Company

By facsimile & first-class mail

Ronald S. Katz, Esquire
Coudert Brothers
4 Embarcadero Center, Suite 3300
San Francisco, CA 94111
Counsel for Independent Service Network International

/s/
Joan H. Hogan