UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

ENTERCOM COMMUNICATIONS CORP. and CBS CORPORATION,

Defendants.

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), plaintiff United States of America ("United States") files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

The United States filed a civil antitrust Complaint on November 1, 2017 seeking to enjoin Entercom Communications Corporation's ("Entercom") proposed acquisition of broadcast radio stations from CBS Corporation ("CBS"). The Complaint alleges that the acquisition's likely effect would be to increase English-language broadcast radio advertising prices in the following Designated Market Areas ("DMAs") in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18: Boston, Massachusetts; San Francisco, California; and Sacramento, California (collectively "the Divestiture Markets").

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate") and a proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the proposed acquisition in the Divestiture Markets. The proposed Final Judgment, which is explained more fully below, requires defendants to divest the following broadcast radio stations (the "Divestiture Stations") to acquirers approved by the United States in a manner that preserves competition: (1) in the Boston DMA: WBZ AM, WBZ FM, WKAF FM, WZLX FM, and WRKO AM; (2) in the San Francisco DMA: KOIT FM, KMVQ FM, KUFX FM, and KBLX FM; and (3) in the Sacramento DMA: KNCI FM, KYMX FM, KZZO FM and KHTK AM. The Hold Separate also requires defendants to take certain steps to ensure that the Divestiture Stations are operated as competitively independent, economically viable and ongoing business concerns, uninfluenced by Entercom, so that competition is maintained until the required divestitures occur.

The United States and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Acquisition

Entercom is incorporated in Pennsylvania and headquartered in Bala Cynwyd, Pennsylvania. Entercom owns and operates 126 broadcast radio stations in 28 metropolitan areas.

CBS is organized under the laws of Delaware, with headquarters in New York, New York. CBS owns and operates 116 broadcast radio stations in 26 metropolitan areas.

Pursuant to an Agreement and Plan of Merger, dated February 2, 2017, Entercom agreed to acquire all of CBS's broadcast radio stations.

Entercom and CBS compete against one another to win business from local and national advertisers that seek to purchase English-language radio advertising time that targets listeners located in certain DMAs. The proposed transaction between Entercom and CBS would eliminate that competition in the Divestiture Markets.

B. Anticompetitive Consequences of the Transaction

1. Broadcast Radio Advertising

The Complaint alleges that the sale of English-language broadcast radio advertising time to advertisers targeting listeners located in the Divestiture Markets constitutes a relevant market for analyzing this acquisition under Section 7 of the Clayton Act. Each of the Divestiture Markets constitutes a distinct DMA. A DMA is a geographical unit defined by the Nielsen Company, which surveys radio listeners in order to furnish radio stations, advertisers, and advertising agencies with data to aid in evaluating radio audiences. DMAs are widely accepted by radio stations, advertisers, and advertising agencies as the standard geographic area to use in evaluating radio audience size and demographic composition (primarily age and gender). A radio station's advertising rates typically are based on the station's ability, relative to competing radio stations, to attract listening audiences that have certain demographic characteristics that advertisers want to reach.

Entercom and CBS broadcast radio stations generate most of their revenues by selling English-language advertising time in particular DMAs to local and national advertisers. Advertising placed on radio stations in a DMA is aimed at reaching listening audiences located

in that DMA, and broadcast radio stations outside that DMA do not provide effective access to those audiences.

Many local and national advertisers purchase radio advertising time because they find such advertising valuable, either by itself or as part of a mix of media platforms, including television, digital music services, like Pandora Media, Inc. ("Pandora"), and other advertising platforms. For such advertisers, radio time (a) may be less expensive and more cost-efficient than other media in reaching the advertiser's target audience (individuals most likely to purchase the advertiser's products or services) at the desired frequency; or (b) may offer promotional and on-air endorsement opportunities to advertisers that cannot be replicated as effectively using other media. For these and other reasons, many local and national advertisers who purchase radio advertising time view radio as a necessary advertising medium for them or as an important part of advertising campaigns that include other media platforms.

Many local and national advertisers also consider English-language radio to be particularly effective or important to reach their desired customers. The advertisers that use English-language radio, either alone or as a mix with other media platforms to reach their target audience, generally do not consider other media, including non-English-language radio, such as Spanish-language radio, for example, to be a reasonable substitute.

If there were a small but significant and non-transitory increase in the price ("SSNIP") of advertising time on English-language broadcast radio stations in the Divestiture Markets, advertisers would not reduce their purchases sufficiently to render the price increase unprofitable. Advertisers would not switch enough purchases of advertising time to radio stations located outside the Divestiture Markets, to other media, including digital music services,

like Pandora, that offer advertising time, or to non-English-language stations to render the price increase unprofitable.

In addition, radio stations negotiate prices individually with advertisers; consequently, radio stations can charge different advertisers different prices. Radio stations generally can identify advertisers with strong preferences to advertise on radio in a specific language and in a specific DMA. Because of this ability to price discriminate among customers, radio stations may charge higher prices to advertisers that view radio in a specific DMA as particularly effective for their needs, while maintaining lower prices for more price-sensitive advertisers in that same DMA. As a result, Entercom and CBS could profitably raise prices to those advertisers that view broadcast radio that targets listeners in the Divestiture Markets as an important advertising medium.

2. Harm to Competition

The Complaint alleges that the proposed acquisition likely would lessen competition substantially in interstate trade and commerce, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and likely would have the following effects, among others:

a) competition in the sale of advertising time on English-language broadcast radio stations in the Divestiture Markets would be lessened substantially;

b) competition between Entercom broadcast radio stations and CBS broadcast radio stations in the sale of radio advertising time in the Divestiture Markets would be eliminated; and

c) the prices for advertising time on English-language broadcast radio stations in the Divestiture Markets likely would increase.

In the Divestiture Markets, combining the Entercom and CBS broadcast radio stations would give Entercom the following estimated percentages of advertising sales on English-language broadcast radio stations: in Boston, over 50 percent; in San Francisco, over 40 percent; and in Sacramento, over 55 percent. In addition, Entercom's acquisition of CBS's broadcast radio

stations located in the Divestiture Markets would result in each Divestiture Market becoming highly concentrated. Using the Herfindahl-Hirschman Index ("HHI"), a standard measure of market concentration,[1] the estimated post-acquisition HHIs and the changes in those HHIs in each of the Divestiture Markets based on revenues can be stated as follows: in Boston, the post-merger HHI would be over 3,600 with an increase in the HHI of over 1,200; in San Francisco, the post-merger HHI would be over 2,800 with an increase of over 800; and in Sacramento, the post-merger HHI would be over 4,300 with an increase of over 1,600. As can be seen, Entercom's proposed acquisition of CBS's broadcast radio stations in the Divestiture Markets would result in substantial increases in the HHIs of each market in excess of the 200 points presumed likely to enhance market power under the Horizontal Merger Guidelines issued by the Department of Justice and Federal Trade Commission.

The transaction also combines stations that are close substitutes and vigorous head-to-head competitors for advertisers seeking to reach audiences in the Divestiture Markets. Advertisers select radio stations to reach a large percentage of their target audience based upon a number of factors, including, *inter alia*, the size of the station's audience, the demographic characteristics of its audience, and the geographic reach of a station's broadcast signal. Many advertisers seek to reach a large percentage of their target listeners by selecting those stations whose audience best correlates to their target listeners. As stated above, radio stations have the

[1] *See* U.S. Dep't of Justice, Horizontal Merger Guidelines § 5.3 (2010), available at http://www.justice.gov/atr/public/guidelines/hmg-2010.html. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2,600$). It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches a maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

ability to charge different advertisers differing prices, but that ability is circumscribed in part by the number and attractiveness of competitive radio stations and station groups in the market that can meet a particular advertiser's audience reach and frequency needs. When such competition exists, advertisers can negotiate lower prices by "playing off" stations and station groups against each other. Entercom and CBS, each of which operates highly-rated radio stations and clusters of stations in the Divestiture Markets, are important competitors for listeners and advertisers in each of those markets. For many local and national advertisers buying radio advertising time in the Divestiture Markets, Entercom and CBS are two of a limited number of station groups whose large and diverse listenership allows advertisers to meet their reach and frequency goals with respect to their targeted audience. The transaction would end the head-to-head competition between Entercom and CBS station groups in each of the Divestiture Markets.

In addition, the loss of head-to-head competition between specific Entercom and CBS radio stations can exacerbate the harm to advertisers for whom those stations are particularly close substitutes. For example, in Boston, Entercom's WEEI FM, which broadcasts in a sports talk format, is a close substitute for CBS's WBZ FM, which also broadcasts in a sports talk format. Both stations are among the highest-rated in Boston. They share many of the same listeners and have audiences with very similar demographic characteristics that are valuable to many advertisers. Prior to the transaction, if Entercom had increased prices for advertising time on WEEI FM, it likely would have lost sufficient revenues and profits to CBS's WBZ FM to outweigh the gain from customers willing to accept the price increase. Following the transaction, however, it would recapture the revenues and profits from those advertisers switching to WBZ FM because of a WEEI FM price increase. As a consequence, the transaction would make such a price increase profitable. Entercom could also effect this strategy by

increasing WBZ FM's prices, which could be recaptured to some extent through increased WEEI FM's sales. Therefore, Entercom likely would raise advertising prices as a result of the transaction.

Post-acquisition, if Entercom raised prices to those advertisers that buy advertising time on the Entercom and CBS broadcast radio stations in the Divestiture Markets, non-Entercom stations in those markets would likely respond with higher prices of their own, rather than reposition their stations to induce Entercom's listeners and advertisers to switch. Repositioning, by changing a station's format, is costly and risky, with the potential to lose substantial numbers of existing listeners and advertisers. In addition, reformatting is unlikely to attract in a timely manner enough listeners or advertisers to make a price increase unprofitable for Entercom. Finally, the entry of new radio stations into the Divestiture Markets would not be timely, likely, or sufficient to deter the exercise of market power.

For all these reasons, the Complaint alleges that Entercom's proposed acquisition of CBS' broadcast radio stations would lessen competition substantially in the sale of radio advertising time to advertisers targeting listeners in each of the Divestiture Markets, eliminate head-to-head competition between Entercom and CBS broadcast radio stations in those three markets, and result in increased prices for radio advertisers in those markets, all in violation of Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment requires significant divestitures that will eliminate the anticompetitive effects of the transaction in the Divestiture Markets by maintaining the Divestiture Stations as independent, economically viable competitors. The proposed Final Judgment requires Entercom to divest the Boston broadcast radio stations WBZ AM, WRKO

AM, WZLX FM, and WKAF FM to iHeartMedia, and WBZ FM to Beasley Broadcasting. The proposed Final Judgment also requires Entercom to place certain broadcast radio stations into a trust to be operated independent from and in competition with Entercom: in San Francisco, KOIT FM, KMVQ FM, KUFX FM, and KBLX FM; and in Sacramento, KNCI FM, KYMX FM, KZZO FM, and KHTK AM. With respect to those stations, the proposed Final Judgment provides that Entercom can enter into local marketing agreement(s) ("LMAs") with Bonneville International. During the term of the LMAs, Bonneville will program each of those radio stations as an independent, ongoing, economically viable, competitive business, with programming and advertising sales of each station held entirely separate, distinct, and apart from those of defendants' other operations. The LMAs cannot be amended without the prior approval of the United States at its sole discretion. Each LMA will expire with respect to each LMA station upon the consummation of a final agreement to divest that station to an acquirer. The United States has approved iHeartMedia and Beasley as divestiture buyers in Boston, and has approved the LMAs with Bonneville.

The divestitures target the loss of competition between Entercom and CBS in each of the Divestiture Markets.

Because of the unique positioning of radio stations in Boston, the divestitures will strengthen the ability of each of the remaining major station groups to offer a wider range of attractive demographics to advertisers that seek to target specific demographic groups of listeners on English-language broadcast radio stations in the Boston market. Further, the divestiture of WBZ FM to Beasley Broadcasting preserves the competition for advertisers and listeners between the two important sports radio stations, WEEI FM and WBZ FM.

In San Francisco, the divestitures prevent any significant lessening of competition in the San Francisco broadcast radio market.

In Sacramento, the divestitures prevent any significant lessening of competition in the Sacramento broadcast radio market.

The "Divestiture Assets" are defined in Paragraph II.I of the proposed Final Judgment to cover all assets, tangible or intangible, necessary for the operation of the Divestiture Stations as viable, ongoing commercial broadcast radio stations. With respect to each Divestiture Station, the divestiture will include assets sufficient to satisfy the United States, in its sole discretion, that such assets can and will be used to operate each station as a viable, ongoing, commercial radio business.

To ensure that the Divestiture Stations are operated independently from Entercom after the divestiture, Section V and Section XII of the proposed Final Judgment prohibit Entercom from entering into any agreements during the term of the Final Judgment that create a long-term relationship with or any entanglements that affect competition between either Entercom and the acquirers of the Divestiture Stations concerning the Divestiture Assets after the divestiture is completed. Examples of prohibited agreements include agreements to reacquire any part of the Divestiture Assets, agreements to acquire any option to reacquire any part of the Divestiture Assets or to assign the Divestiture Assets to any other person, agreements to enter into any time brokerage agreement, local marketing agreement, joint sales agreement, other cooperative selling arrangement, shared services agreement, or agreements to conduct other business negotiations jointly with the acquirer(s) with respect to the Divestiture Assets, or providing financing or guarantees of financing with respect to the Divestiture Assets, during the term of this Final Judgment. The shared services prohibition does not preclude defendants from continuing or entering into any non-sales-related shared services agreement that is approved in advance by the United States in its sole discretion. The time brokerage agreement prohibition does not preclude

defendants from entering into an agreement pursuant to which the acquirers can begin programming the Divestiture Stations immediately after the Court's approval of the Hold Separate Stipulation and Order in this matter, so long as any agreement with an acquirer expires upon the consummation of a final agreement to divest the Divestiture Assets to the acquirer.

Defendants are required to take all steps reasonably necessary to accomplish the divestiture quickly and to cooperate with prospective purchasers. Because transferring the broadcast license for each of the Divestiture Stations requires FCC approval, defendants are specifically required to use their best efforts to obtain all necessary FCC approvals as expeditiously as possible. The divestiture of each of the Divestiture Stations must occur within ninety (90) calendar days after the filing of the Hold Separate Stipulation and Order in this matter or five (5) calendar days after notice of the entry of the Final Judgment by the Court, whichever is later, subject to extension during the pendency of any necessary FCC order pertaining to the divestiture. The United States, in its sole discretion, may agree to one or more extensions of the ninety-day time period not to exceed ninety (90) calendar days in total, and shall notify the Court in such circumstances.

In the event that defendants do not accomplish the divestitures within the periods prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court, upon application of the United States, will appoint a trustee selected by the United States to effect the divestitures. If a trustee is appointed, the proposed Final Judgment provides that Entercom will pay all costs and expenses of the trustee. The trustee's commission will be structured to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States describing his or her efforts

to accomplish the divestiture of any remaining stations. If the divestiture has not been accomplished after six (6) months, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period

will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the United States Department of Justice, Antitrust Division's Internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Owen M. Kendler
Chief, Media, Entertainment, and Professional Services Section
Antitrust Division
United States Department of Justice
450 5th Street, N.W. Suite 4000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and defendants may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Entercom's acquisition of CBS's broadcast radio stations. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the sale of broadcast radio advertising in the Boston, San Francisco, and Sacramento DMAs. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v, U.S. Airways Group, Inc.*, No. 13-cv-1236 (CKK), 2014-1 Trade Cas. (CCH) ¶ 78, 748, 2014 U.S. Dist. LEXIS 57801, at *7 (D.D.C. Apr. 25, 2014) (noting the court has broad discretion of the adequacy of the relief at issue); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11,

2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").[2]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

[2] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004) *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[3] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *16 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *8 (noting that room must be made for the government to grant concessions in the negotiation

[3] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

process for settlements (citing *Microsoft*, 56 F.3d at 1461)); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that

"[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[4] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9.

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

[4] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

Dated: November 1, 2017

Respectfully Submitted,

/s/

Bennett J. Matelson*
Mark A. Merva
Trial Attorneys
United States Department of Justice
Antitrust Division
Media, Entertainment and Professional Services Section
450 Fifth Street, NW, Suite 4000
Washington, DC 20530
Tel: (202) 616-5871
Fax: (202) 514-7308
Email: bennett.matelson@usdoj.gov

*Attorney of Record