

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL ELECTRIC CO.

and

BAKER HUGHES INCORPORATED,

Defendants.

**PLAINTIFF UNITED STATES’S UNOPPOSED
MOTION AND MEMORANDUM FOR ENTRY OF
MODIFIED PROPOSED FINAL JUDGMENT**

Plaintiff United States moves for entry of a Modified Proposed Final Judgment, attached as [Exhibit 1](#), pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (“APPA”). The Proposed Final Judgment (“PFJ”) filed with this Court on June 12, 2017—and binding on the Defendants as of June 13, 2017, when the Court signed the Hold Separate Stipulation and Order (“HSSO”)—required the divestiture of GE’s Water & Process Technologies Unit (“GE Water”) to be completed by approximately the end of September 2017, or, if the United States exercised its discretion to grant an extension, by approximately the end of 2017. Defendant General Electric Co. (“GE”) recently informed the United States that it will not complete the divestiture by the agreed-upon deadline because divestitures in certain jurisdictions may be delayed until

September 2018. Accordingly, the United States submits a Modified PFJ that would establish an incentive for Defendant GE to complete the divestiture expeditiously.¹

The Modified PFJ does not change the structure or substance of the remedy in the original PFJ or implicate the interest of any non-party. Rather, the changes simply incentivize the Defendants to come into compliance with the agreed-upon remedy in the original PFJ as quickly as possible.

During the sixty-day notice-and-comment period prescribed by the APPA, the United States received no comments on the original PFJ. The Competitive Impact Statement (“CIS”) filed with the Court on June 12, 2017, explains why the divestiture remedy contained in the Modified PFJ is in the public interest. The Certificate of Compliance with the APPA filed simultaneously with this Motion sets forth the steps taken by the parties to comply with the APPA. *See* Certificate of Compliance, attached as [Exhibit 3](#). Under the APPA, the Court may enter the Modified PFJ without further proceedings if the Court determines that entry is in the public interest. 15 U.S.C. § 16(e).

Defendants do not oppose entry of the Modified PFJ.

I. Factual Background

A. The Proposed Merger and Divestiture

On October 31, 2016, GE announced plans to acquire Baker Hughes Incorporated. At that time, GE and Baker Hughes were two of the leading competitors offering refinery process chemicals and services used to process crude oil and natural gas into finished products, such as gasoline. In apparent recognition of potential antitrust issues implicated by the proposed acquisition, GE simultaneously announced its intent to sell GE Water,

¹ The United States attaches as [Exhibit 2](#) a redline reflecting the changes in the Modified PFJ compared to the original PFJ previously filed with this Court on June 12.

the business unit that provides, among other things, refinery process chemicals and services housed within GE's broader Power business.

The United States investigated all aspects of the GE/Baker Hughes transaction and determined that the combination of Defendants' businesses would eliminate the competition between them in the market for refinery chemicals and services in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Complaint, ¶¶17, 21 [Dkt. #1].

While the United States investigated the proposed GE/Baker Hughes transaction, GE conducted a sales process to divest GE Water to another company. On March 8, 2017, GE announced that it had reached an agreement to sell GE Water to SUEZ, a French *société anonyme* and leading global water and waste management company ("Suez"). GE informed the United States of its purchase and sale agreement with Suez and presented the divestiture as a means to resolve the United States's competitive concerns with its proposed acquisition of Baker Hughes.

In general, the United States agrees to resolve the competitive concerns raised by a merger through a divestiture remedy *only* if it determines that the buyer of the divestiture assets will step seamlessly into the shoes of one of the merging parties and preserve the competition that otherwise would be lost due to the merger. As the *U.S. Department of Justice Antitrust Division Policy Guide to Merger Remedies* explains, "[T]he goal of a divestiture is to ensure that the purchaser possesses both the means and the incentive to effectively preserve competition." *Antitrust Division Policy Guide to Merger Remedies* at 7 (June 2011) (available at <https://www.justice.gov/atr/public/guidelines/272350.pdf>). The United States carefully considers (1) how a potential divestiture will be completed and (2) the identity of the prospective purchaser, seeking to

ensure that any divestiture “include all the assets, physical and intangible, necessary for the purchaser to compete effectively with the merged entity.” *Id.* Therefore, the “preference is for the divestiture of an existing business” and, in some cases, “divestiture of a world-wide business may be necessary to effectively preserve competition.” *Id.* at 9-11. Divestiture of an incomplete business, or limiting a divestiture to domestic assets alone, may deprive the buyer of economies of scale and scope, negatively affecting its ability to preserve the competition that existed previously in the market.

In presenting the GE Water divestiture to the United States, GE explained that GE Water operated as a standalone business within the company and committed that it would be divesting all of GE Water’s global assets (including all facilities, assets and equipment, and personnel across approximately eighty international jurisdictions). Based on GE’s representations and its own investigation, the United States was satisfied that Suez’s purchase of GE Water would preserve the competition in the market that otherwise would have been lost as a result of GE’s acquisition of Baker Hughes.

The United States and Defendants then agreed to the terms of the PFJ, providing for the sale of GE Water to Suez. Defendants agreed to a timetable that required a complete divestiture of GE Water within ninety days after the filing of the Complaint or five days after entry of the Final Judgment by the Court, whichever was later. *See* PFJ, Paragraph IV.A [Dkt. #2-2]. The United States retained the sole discretion to agree to one or more extensions of time, not to exceed ninety calendar days in total. *Id.* These provisions represented GE’s commitment to divest GE Water expeditiously to resolve the competitive concerns raised by the GE/Baker Hughes transaction.

The United States filed the Complaint and PFJ with this Court on June 12. Under the timeline established in the PFJ, Defendants had to complete the divestiture by no later than approximately the end of September 2017, or, if the United States exercised its discretion to grant an extension, by approximately the end of 2017. In the PFJ, Defendants represented “that the divestitures required below can and will be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below.” PFJ at 2 [Dkt. #2-2].

The United States and Defendants also agreed to the HSSO, which was filed on June 12 and entered by this Court the following day. [Dkt. ##2, 11]. Paragraph IV.B of the HSSO provides:

Defendants shall abide by and comply with the provisions of the proposed Final Judgment, pending the Judgment’s entry by the Court ... and shall, from the date of the signing of this Stipulation by the parties, comply with all the terms and provisions of the proposed Final Judgment. The United States shall have the full rights and enforcement powers in the proposed Final Judgment ... as though the same were in full force and effect as the Final order of the Court. [Dkt. #11].

This Court’s signing of the HSSO permitted GE and Baker Hughes to consummate their merger, which they promptly did on July 3.

B. Challenges in Completing the Divestiture in a Timely Fashion

On July 19, after consummating the GE/Baker Hughes merger, GE called to inform the United States about difficulties it was having divesting the assets by the agreed-upon deadline. GE subsequently explained that GE and Suez intended to close most of the transaction on September 29, with Suez to acquire assets in jurisdictions accounting for approximately 90% of GE Water’s revenues (including all those in the

United States, Canada, and Mexico). GE informed the United States that in nineteen foreign jurisdictions, there were legal and other barriers to Suez operating the assets. In those jurisdictions, GE intended to confer beneficial ownership and operational control of the assets to Suez, meaning that Suez would receive all profits generated by those assets and that employees in those jurisdictions would report directly to Suez. GE explained that GE will transfer legal title as soon as licensing and certain other conditions necessary for Suez to operate the assets are satisfied. Despite having agreed in the PFJ to complete the divestiture by the end of 2017, at the latest, GE also explained that assets in some of those jurisdictions would likely not transfer until 2018.

GE has told the United States that certain outside counsel and employees working on the transaction were aware by May of potential delays in at least some jurisdictions, and GE has recognized and apologized for the fact that this information was not brought to the United States's attention before the parties signed the HSSO on June 8.

The United States has continued to discuss the divestiture's progress with GE. The United States understands that on September 29, GE transferred to Suez assets representing 90% of GE Water's revenue, including all assets in the United States. In the remaining nineteen international jurisdictions, GE conferred beneficial ownership and operational control to Suez but did not transfer legal title because to do so would have left Suez unable to operate the business in those jurisdictions as GE had done previously. GE has represented that it intends to complete the transfer of legal title to the assets in at least eight of these international jurisdictions by the end of 2017, with assets in the remaining jurisdictions to be transferred in 2018. The transfer in each jurisdiction will occur as

soon as licensing and certain other conditions necessary for Suez to legally and effectively operate the assets are satisfied.

II. The Modified PFJ

While the United States believes that GE is continuing to work to transfer the remaining assets, it is now apparent that Defendants will not complete the divestiture of GE Water within the agreed-upon timeline in the original PFJ. They will be unable to do so despite having represented that the divestitures “can and will be made” and having agreed to be bound by the terms of the PFJ, including the timeline for the divestiture. PFJ at 2 [Dkt. #2-2]. In exchange for committing to make a prompt and complete divestiture, they obtained the benefit of being able to consummate the GE/Baker Hughes merger prior to remedying the competitive harm from the transaction. Upon the Court’s entry of the HSSO, Defendants closed their transaction on July 3, benefitting from their bargain with the United States.

Accordingly, the United States proposes to modify the PFJ to give GE more time and incentivize it to complete the divestiture in nineteen international jurisdictions where it has not yet divested the assets to Suez. The Modified PFJ directs GE to complete the divestiture in eight of these jurisdictions by the end of 2017. *See* Ex. 1 at Section IV; App. B. For the remaining eleven jurisdictions, the United States proposes to set a closing deadline for each based on GE’s representations. *See id.* at Section IV; App. C. To incentivize GE to complete these latter divestitures as quickly as possible, the United States proposes that GE make a \$1,500 per day payment to the United States for each jurisdiction beginning on the date set out in Appendix C. Payments relating to the assets in a particular jurisdiction would terminate on the date that GE confirms that the assets in

that jurisdiction have been divested fully to Suez.² The United States also reserves the right to seek civil contempt sanctions if Defendants fail to complete the divestiture by the deadlines specified in Appendices B and C, as well as to seek reasonable attorney's fees and costs incurred during investigation of further delay associated with the divestiture.

Although the original PFJ permitted the United States the option of requesting that this Court appoint a trustee to take over the divestiture process and manage it to completion,³ the United States does not believe that such an appointment is necessary at this time. Instead, the United States believes that the monetary incentive contained in the Modified PFJ is an appropriate approach under the circumstances and falls within the power of this Court, representing "such other action in the public interest as the court may deem appropriate." 15 U.S.C. § 16(f)(5).⁴

Defendants do not oppose these modifications to the PFJ.

III. Compliance with the APPA

The Court should enter the Modified PFJ at this time. None of the changes in the Modified PFJ alters the substance of the remedy outlined in the original PFJ. GE has divested most of the GE Water assets to Suez, a buyer approved by the United States, and has represented that it continues to work diligently to divest the remaining assets in all international jurisdictions. The United States received no comments questioning this remedy, and the substance of the remedy is unaffected by the changes in the Modified

² The Modified PFJ allows GE to demonstrate to the United States that unanticipated material difficulties have caused unavoidable additional delays in any specific jurisdiction. The United States would have the sole discretion to evaluate the claim and forgo any payments in that jurisdiction.

³ See PFJ, Section V. An alternative option available to the United States could have been to request that this Court appoint a monitoring trustee to ensure that the divestiture progresses in a timely manner by the agreed deadlines. See, e.g., *United States v. Anheuser-Busch*, Case 1:13-cv-00127-RWR (D.D.C.) (2013) (appointing monitoring trustee to ensure Defendants' compliance with the proposed Final Judgment).

⁴ In addition, the HSSO will remain in effect until assets in the final international jurisdiction have been transferred fully to Suez.

PFJ accompanying this Motion. Nor are the interests of any non-parties affected or implicated by the changes. Rather, the changes simply impose on Defendants payment requirements designed to incentivize the timely completion of the remedy contained in the original PFJ filed with this Court on June 12 to which the Defendants agreed to be bound.

All the requirements of the APPA have been satisfied, as described in the Certificate of Compliance filed simultaneously with this Motion. The APPA requires a sixty-day period for submission of written comments relating to the Final Judgment. 15 U.S.C. § 16(b). In compliance with the APPA, the United States filed the CIS with the Court on June 12, 2017; published the PFJ and CIS in the *Federal Register* on June 26, 2017, *see* 82 Fed. Reg. 28877; and had summaries of the terms of the PFJ and CIS, together with directions for submission of written comments relating to the PFJ, published in the *Washington Post* for seven days, beginning on June 16, 2017 and ending on June 22, 2017. The sixty-day period for public comments ended on August 25, 2017, and no comments were received. Accordingly, it is now appropriate for the Court to make the public interest determination required by 15 U.S.C. § 16(e) and to enter the Modified PFJ.

IV. Standard of Judicial Review

Before entering the Modified PFJ, the APPA requires the Court to determine whether it “is in the public interest.” 15 U.S.C. § 16 (e)(1). In making that determination, the Court may 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).

The CIS sets forth the legal standards for determining the public interest under the APPA, and the United States now incorporates those statements by reference. The public has had the opportunity to comment on the PFJ as required by the APPA. As explained in the CIS, entry of the Modified PFJ is in the public interest; accordingly, the Court can enter it at this time.

V. Conclusion

For the reasons set forth above and in the CIS, the Court should find that the Modified PFJ is in the public interest and the United States respectfully requests that the Modified PFJ be entered at this time without further proceedings.

Dated: October 13, 2017

Respectfully submitted,

/s Tracy Fisher
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CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2017, I caused a copy of the foregoing Plaintiff United States's Unopposed Motion and Memorandum for Entry of Modified Proposed Final Judgment to be served on counsel for Defendants in this matter in the manner set forth below:

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