UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. CRH PLC, CRH AMERICAS MATERIALS, INC., and POUNDING MILL QUARRY CORPORATION, Defendants.	CASE NO. 18-cv-1473-DLF JUDGE: Dabney L. Friedrich

RESPONSE OF PLAINTIFF UNITED STATES TO
PUBLIC COMMENT ON THE PROPOSED FINAL JUDGMENT

Pursuant to the requirements of the Antitrust Procedures and Penalties Act (the "APPA" or "Tunney Act"), 15 U.S.C. §§ 16(b)-(h), the United States hereby responds to the public comment received regarding the proposed Final Judgment in this case. After careful consideration of the submitted comment, the United States continues to believe that the divestiture required by the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violation alleged in the Complaint. In addition, the divestiture has the effect of increasing competitive choices for some customers. As a result of the divestiture, two quarries that previously did not compete—because they were under common ownership—now do. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this response have been published pursuant to 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

Defendants CRH plc and CRH Americas Materials, Inc. (collectively, "CRH") agreed to acquire the assets of Defendant Pounding Mill Quarry Corporation ("Pounding Mill"), which primarily consisted of four aggregate quarries located in West Virginia and Virginia. The United States filed a civil antitrust Complaint on June 22, 2018, seeking to enjoin the proposed acquisition. The Complaint alleged that the likely effect of this acquisition would be to lessen competition substantially in the markets for aggregate and asphalt concrete that are used in West Virginia Department of Transportation ("WVDOT") road projects in southern West Virginia. This loss of competition likely would result in increased prices and decreased service in these markets. Therefore, the Complaint alleged that the proposed acquisition violates Section 7 of the Clayton Act, 15 U.S.C. § 18, and should be enjoined.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment, a Stipulation signed by Plaintiff and Defendants consenting to entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act, 16 U.S.C. § 16, and a Competitive Impact Statement ("CIS") describing the transaction and the proposed Final Judgment. The United States published the proposed Final Judgment and the CIS in the Federal Register on July 2, 2018, *see* 83 Fed. Reg. 30956 (July 2, 2018), and caused summaries of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, to be published in the *Washington Post* and *Bluefield Daily Telegraph* from July 2, 2018, through July 10, 2018. The 60-day public comment period ended on September 10, 2018. The United States received one public comment.

See Tunney Act Comments of the State of West Virginia on the Proposed Final Judgment ("WV Comment"), attached hereto as Exhibit A.

II. 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 60-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
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> (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.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965

(JR), 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 mechanisms to enforce the final judgment are clear and manageable").

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 in the government's complaint, whether the decree is sufficiently clear, whether its 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. Instead:

> [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.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[1]

[1] *See also BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the

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*, 38 F. Supp. 3d at 74-75 (noting that a court should not reject the proposed remedies because it believes others are preferable and that room must be made for the government to grant concessions in the negotiation process for settlements); *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 government's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case"). The ultimate question is 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.'" *Microsoft*, 56 F.3d at 1461 (*quoting United States v. Western Elec. Co.*, 900 F.2d 283, 309 (D.C. Cir. 1990)). 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

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[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").

that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (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 a court in this district 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,[2] 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*, 38 F. Supp. 3d at 76 (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). This language

[2] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a 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).

explicitly wrote into the statute what Congress intended when it first 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 Sen. 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. A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 76. *See also 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"); 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.").

III. THE INVESTIGATION AND PROPOSED FINAL JUDGMENT

The Department of Justice conducted an extensive investigation into the proposed acquisition and the proposed divestiture. The Department reviewed business documents, conducted economic analysis, and interviewed a substantial number of customers and actual and potential competitors in the aggregate and asphalt-concrete markets to ascertain whether the acquisition would be anticompetitive. The Department also worked extensively with the State of West Virginia and, in particular, the agency most familiar with the markets at issue, WVDOT, which sets quality standards for aggregate used in road construction and repair and qualifies

suppliers of aggregate to bid on WVDOT road projects. Later, the Department thoroughly vetted the potential divestiture over the course of several months, a process that included re-interviewing customers, competitors, and the proposed divestiture buyer, document and data requests, and the retention of an expert geologist. Throughout this process, the Department worked in cooperation with the WVDOT to ensure it was satisfied that the divestiture would eliminate any concerns about the acquisition.[3]

In the Complaint, the United States alleged that CRH supplies aggregate in Wyoming, Raleigh, Mercer, and Summers Counties in West Virginia (these counties are referred to in the Complaint as "Southern West Virginia"). Before being acquired by CRH, Pounding Mill owned two quarries that also supplied aggregate in Southern West Virginia. Without the divestiture, the proposed acquisition would have resulted in CRH owning nearly all of the aggregate quarries that supply Southern West Virginia and would have eliminated the horizontal, head-to-head competition between CRH and Pounding Mill in the supply of aggregate.

The Complaint also alleged that the acquisition would raise vertical competition concerns. In addition to aggregate, CRH produces and sells asphalt concrete. Aggregate is an essential input in asphalt concrete. AAA Paving and Sealing, Inc. ("AAA Paving"), a recent entrant, is the only company that competes with CRH to supply asphalt concrete in Southern West Virginia. Before the acquisition, AAA Paving relied on Pounding Mill to supply the aggregate it needs to manufacture asphalt concrete. The acquisition therefore would have put the quarries that are AAA Paving's only economically viable sources of aggregate under the

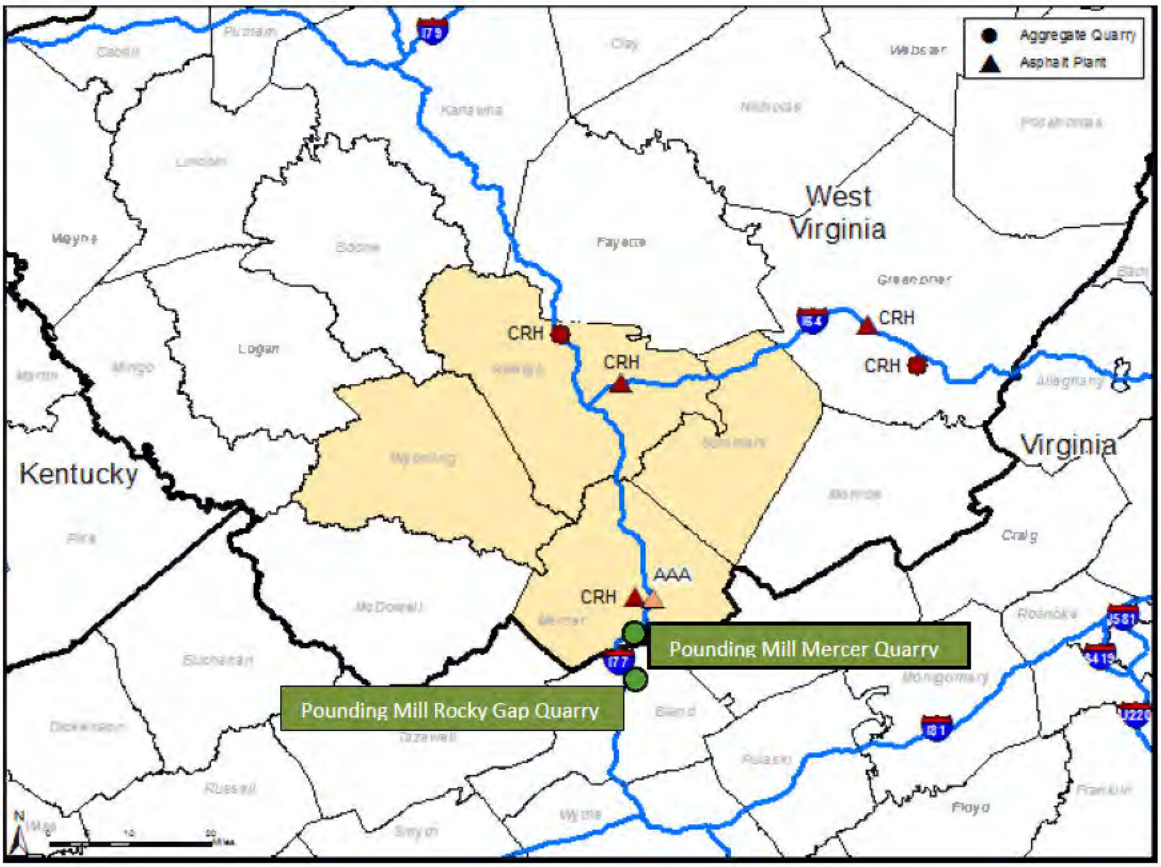
[3] The Department's cooperation with WVDOT included seeking and obtaining comments and revisions to the proposed Final Judgment.

ownership of CRH, its competitor in the sale of asphalt concrete. According to the Complaint, if CRH were to acquire its rival's only economically viable source of aggregate, it would have the incentive and ability to disadvantage AAA Paving by withholding this essential input or supplying it on less favorable terms, resulting in higher prices for the sale of asphalt concrete in Southern West Virginia.

Under the proposed Final Judgment, CRH is required to divest Pounding Mill's Rocky Gap quarry located in Rocky Gap, Virginia (hereinafter, the "Rocky Gap Quarry") and related assets to Salem Stone Corporation ("Salem Stone"). *See* Figure 1, below. After a thorough evaluation of Salem Stone, the United States approved Salem Stone as the buyer. Salem Stone is a strong aggregate competitor in markets near Southern West Virginia. Salem Stone has extensive experience producing and selling aggregate, and is familiar with both WVDOT's approval process and with the surrounding area. As a result, Salem Stone is well-positioned to operate the divestiture assets and provide meaningful competition.

The divestiture required by the proposed Final Judgment therefore will preserve, and indeed in some respects increase, competition in the markets for WVDOT aggregate and WVDOT asphalt concrete by establishing a new, independent, and economically viable WVDOT aggregate supplier in Southern West Virginia. The divestiture also will ensure that AAA Paving, CRH's sole competitor in the supply of asphalt concrete, has an independent aggregate supplier to which it could economically turn.

Figure 1: Asphalt-Concrete Plants and Aggregate Quarries



IV. SUMMARY OF COMMENT AND THE UNITED STATES' RESPONSE

A. Summary of WVAGO Comment

The State of West Virginia through its Office of the Attorney General ("WVAGO") submitted the only comment received in this matter. The comment contends that the proposed settlement will not resolve the competitive concerns the United States alleged in its Complaint because the settlement will not preserve AAA Paving's ability to compete in the sale of asphalt concrete.[4] The comment contends that two companies—CRH and AAA Paving—supply asphalt

[4] The State of West Virginia currently is litigating an antitrust action against CRH and others in the Circuit Court of Kanawha County, West Virginia. That lawsuit alleged, across the

concrete in the southern part of West Virginia and that if CRH were to acquire Pounding Mill's quarries, AAA Paving would not have an independent source of supply for the aggregate it needs to manufacture asphalt concrete. (WV Comment, ¶ 1.) The comment also contends that the Mercer Quarry, which CRH acquired from Pounding Mill, is the closest source of aggregate to the southern part of West Virginia.[5] (*Id.* at ¶ 2.) The comment claims that AAA Paving's next-closest alternative, the Rocky Gap Quarry, is not a viable option for AAA Paving because that quarry is 17 miles away from AAA Paving. (*Id.* at ¶¶ 5, 10.) The comment further claims that purchasing from the Rocky Gap Quarry would require AAA Paving to incur higher costs for its aggregate, which would make AAA Paving's asphalt concrete less competitive. (*Id.* at ¶ 7.)

WVAGO's comment also expresses the following concerns. First, the comment contends that CRH has refused to supply AAA Paving with aggregate on several occasions since it acquired the Mercer Quarry. (*Id.* at ¶ 4.) Second, the comment claims that when CRH refused to supply AAA Paving with aggregate from the Mercer Quarry, CRH provided AAA Paving with monetary credits to account for the additional trucking costs AAA Paving would incur by having to purchase aggregate from the Rocky Gap Quarry, but that "CRH will not provide those trucking credits forever." (*Id.* at ¶ 6.) Finally, the comment contends that AAA Paving's costs for aggregate have already increased since CRH acquired Pounding Mill. (*Id.* at ¶ 10.)

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entire state of West Virginia, "monopolization of the markets for aggregates, asphalt, and asphalt paving as well as unreasonable restraints of trade in those markets." (WV Comment, p. 1.) The United States' proposed Final Judgment is not intended to resolve these much broader claims, but instead is designed to remedy the anticompetitive effects in a four-county area that would otherwise result from the combination of CRH and Pounding Mill.

[5] The comment does not define the geographic area it refers to as the "southern part of the State of West Virginia." The geographic area described in the comment may differ from the four-county area defined in the United States' Complaint as "Southern West Virginia."

B. The United States' Response

The United States evaluated WVAGO's comment, investigated the basis for the claims in the comment, and continues to believe that the divestiture of the Rocky Gap Quarry completely remedies the anticompetitive harm alleged in the Complaint. The proposed Final Judgment secures a structural remedy that fully addresses both the horizontal harm alleged in the aggregate market and the vertical harm alleged in the asphalt-concrete market. The divestiture of Pounding Mill's Rocky Gap Quarry to Salem Stone creates a new competitor in Southern West Virginia and therefore preserves the competition that would have been lost absent the divestiture. Indeed, as discussed in more detail below, AAA Paving views the divestiture as leaving it with more alternative sources of aggregate than it had before the acquisition, because the Rocky Gap Quarry now is a nearby alternative to CRH's Mercer Quarry.

Terry Parks, Vice President of AAA Paving, believes that the Rocky Gap Quarry is a viable alternative to the Mercer Quarry for AAA Paving's aggregate needs. *See* Declaration of Terry Parks ("Parks Decl."), attached hereto as Exhibit B, at ¶ 6. The comment incorrectly claims that AAA Paving would need to truck aggregate 17 miles from the Rocky Gap Quarry. The Rocky Gap Quarry is 14 miles away from AAA Paving, and only 7.5 miles further away from AAA Paving than the Mercer Quarry. (*Id.*) Mr. Parks' declaration directly refutes WVAGO's claim that AAA Paving would not be competitive in the asphalt-concrete market if it had to purchase aggregate from the Rocky Gap Quarry. (*Id.* at ¶ 8 ("The Rocky Gap Quarry is a viable alternative to the Mercer Quarry for AAA Paving's aggregate requirements. To obtain aggregate from the Rocky Gap Quarry, AAA Paving would need to truck aggregate an additional 7.5 miles beyond the distance from AAA Paving's plant to the Mercer Quarry. I do not

anticipate that that additional distance would significantly raise my costs.").)

Moreover, the allegations upon which WVAGO bases its comment are unsupported and factually incorrect. For example, the comment states that CRH refused to supply AAA Paving with aggregate on several occasions since CRH acquired the Mercer Quarry. (WV Comment, ¶ 4). Mr. Parks, however, confirmed that CRH has never refused to provide AAA Paving with aggregate. (Parks Decl., ¶ 7.) Indeed, according to Mr. Parks, AAA Paving continues to purchase aggregate from the Mercer Quarry and the prices CRH charges AAA Paving have not increased since CRH acquired the quarry. (*Id.*) Further, while WVAGO alleged that AAA Paving's costs for aggregate have increased since CRH acquired Pounding Mill, Mr. Parks states that AAA Paving's costs for aggregate have not in fact increased. (*Id.*)

In addition, the comment states that CRH provided AAA Paving with credits when it refused to supply AAA Paving with aggregate from the Mercer Quarry to account for the additional trucking costs that AAA Paving would incur by having to purchase from the Rocky Gap Quarry, but "CRH will not provide those trucking credits forever." (WV Comment, ¶ 6.) Mr. Parks, however, explained that while CRH has supplied AAA Paving with discounts (or credits), it was not because CRH refused to supply AAA Paving with aggregate. (Parks Decl., ¶ 10.) Rather, the discounts were a goodwill gesture by CRH, because a major road construction project near the Mercer Quarry was causing significant traffic delays. (*Id.*) CRH offered to supply AAA Paving from a CRH quarry that is further away and provide AAA Paving with discounts to make up for the additional trucking costs. (*Id.*) At this point, AAA Paving has not purchased any aggregate from the Rocky Gap Quarry. (*Id.* at ¶ 9.)

Further, AAA Paving and other aggregate customers stand to benefit from the divestiture of the Rocky Gap Quarry to Salem Stone. The divestiture creates competition between the Rocky Gap Quarry and the Mercer Quarry, which previously did not compete because both were owned by Pounding Mill. Prior to the acquisition, the closest competing aggregate suppliers for customers near the Mercer Quarry were located in Lewisburg, West Virginia—over 60 miles to the northeast. Due to the high cost of trucking aggregate, prices for aggregate are often disciplined by the total cost to the purchaser of obtaining aggregate from the *next* closest quarry, which includes the additional trucking costs of transporting aggregate from a farther quarry. The closer quarry can price aggregate just below the amount the customer would pay to obtain aggregate from the next closest quarry. So, prior to the acquisition, the Mercer Quarry should have set its prices to AAA Paving just below what the Lewisburg, West Virginia quarries would charge, based on their likely transportation costs. After the divestiture, the next closest competitor to the Mercer Quarry is now the Rocky Gap Quarry, which is over 50 miles closer; AAA Paving will need to travel only about 7.5 additional miles to obtain aggregate from the Rocky Gap Quarry. (*Id.* at ¶ 6). Consequently, the price of aggregate quoted to AAA Paving and other customers from the Rocky Gap Quarry is likely to be lower following the divestiture than it would have been prior to the acquisition. In sum, the divestiture ensures that CRH's acquisition of Pounding Mill will not result in less competition or fewer alternatives for AAA Paving or other nearby customers.

V. CONCLUSION

After careful consideration of the public comment, the Department continues to believe that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The Department will move this Court to enter the proposed Final Judgment after the comment and this response are published pursuant to 15 U.S.C. § 16(d).

Dated: November 16, 2018

Respectfully submitted,

FOR PLAINTIFF
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/s/

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