UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. CUMULUS MEDIA INC., and CITADEL BROADCASTING CORPORATION, *Defendants.*	Case: 1:11-cv-01619 Assigned To : Sullivan, Emmet G. Assign. Date : 9/8/2011 Description: Antitrust

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), 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 September __, 2011, seeking to enjoin Cumulus Media Inc.'s ("Cumulus") proposed acquisition of Citadel Broadcasting Corporation ("Citadel"), alleging that the acquisition would substantially lessen competition for radio advertising in Flint, Michigan and Harrisburg-Lebanon-Carlisle, Pennsylvania in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. At the same time the Complaint was filed, the United States also filed a Preservation of Assets Stipulation and Order and a proposed Final Judgment, which, as described below, are designed to eliminate the anticompetitive effects of the proposed acquisition.

Under the terms of the proposed Final Judgment, Cumulus must divest three broadcast radio stations – WRSR (FM) licensed to Owosso, Michigan and owned by Cumulus ("WRSR"); WCAT-FM licensed to Carlisle, Pennsylvania and owned by Citadel ("WCAT"); and the assets used in the operation of WWKL (FM) licensed to Palmyra, Pennsylvania and owned by Cumulus ("WWKL") (other than the station intellectual property), and the station intellectual property used in the operation of WTPA (FM) licensed to Mechanicsburg, Pennsylvania and owned by Cumulus ("WTPA"), including all programming contracts and rights (collectively the "Radio Assets"). The Preservation of Assets Stipulation and Order requires that Cumulus and Citadel take steps to ensure that the Radio Assets will remain independent of and uninfluenced by Cumulus and Citadel prior to the Court's approval of the proposed Final Judgment. To ensure that competition is preserved during this time period, the Stipulation requires that the Court appoint a management trustee to serve as manager of the Radio Assets. The duties and responsibilities of the management trustee are set forth in the Stipulation. The management trustee will have the power to operate the Radio Assets in the ordinary course of business, so that they will remain independent and uninfluenced by defendants and so that the Radio Assets are preserved and operated as an ongoing and economically viable competitor to defendants and to other broadcast radio companies.

At the time the Court approves the proposed Final Judgment, pursuant to Section IV of that proposed Final Judgment, the Court will appoint a divestiture trustee who will be responsible for divesting the Radio Assets. The United States contemplates that the Court will appoint the management trustee as the divestiture trustee upon the Court's approval of the proposed Final Judgment. Unless the United States grants an extension, it

is contemplated that the divestiture trustee will divest the Radio Assets to a buyer or buyers that the Department, in its sole discretion, has approved within four (4) months of the date of entry of the proposed Final Judgment. After the Radio Assets are transferred to the divestiture trustee, the divestiture trustee will continue to operate the stations independently of Cumulus and Citadel as viable ongoing businesses.

The United States and defendants have stipulated that the proposed Final Judgment may be entered after compliance with 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. THE ALLEGED VIOLATION

A. The Defendants

Cumulus, organized under the laws of Delaware, with headquarters in Atlanta, Georgia, is one of the four largest radio broadcast companies in the United States in terms of revenue. In 2010, Cumulus reported radio broadcast revenues of approximately $259 million.

Citadel, organized under the laws of Delaware, with headquarters in Las Vegas, Nevada, is one of the three largest radio broadcast companies in the United States in terms of revenue. For the period June 1, 2010 through December 31, 2010, Citadel reported net revenues of approximately $444 million.

B. Description of the Events Giving Rise to the Alleged Violation

On March 10, 2011, Cumulus agreed to acquire Citadel (by acquiring all of the shares of Citadel) in a cash-and-stock deal that values Citadel at about $2.5 billion. The

proposed acquisition would make Cumulus the third largest operator of broadcast radio stations in the United States. Cumulus' and Citadel's radio stations compete head-to-head against one another for the business of local and national companies that seek to purchase radio advertising time that targets listeners that are present in the Flint and Harrisburg MSAs. The proposed acquisition would eliminate that competition.

C. Anticompetitive Consequences of the Proposed Acquisition

1. Radio Advertising

The Complaint alleges that the provision of radio advertising time to advertisers targeting listeners in two separate MSAs (the Flint MSA and the Harrisburg MSA) by radio stations in those MSAs are two relevant markets for purposes of Section 7 of the Clayton Act. Advertisers buy radio advertising time on Cumulus and Citadel radio stations within geographic areas defined by an MSA. An MSA is the geographical unit that is widely accepted by radio stations, advertisers and advertising agencies as the standard geographic area to use in evaluating radio audience size and composition.

Cumulus and Citadel radio stations in the Harrisburg and Flint MSAs generate almost all of their revenues by selling advertising time to local and national advertisers who want to reach listeners present in each of those MSAs. Typically, a radio station's advertising rates 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.

Many local and national advertisers purchase radio advertising time because they find such advertising preferable to advertising in other media for their specific needs. 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); or (b) may offer promotional opportunities to advertisers that they cannot exploit as effectively using other media. For these and other reasons, many local and national advertisers who purchase radio advertising time view radio either as a necessary advertising medium for them or as a necessary advertising complement to other media.

Local and national advertising placed on Flint and Harrisburg radio stations is aimed at reaching listening audiences in the Flint and Harrisburg MSAs. Radio stations that primarily broadcast into other MSAs do not provide effective access to audiences in the Flint and Harrisburg MSAs. If there were a small but significant increase in the price that Flint and Harrisburg radio stations sold radio advertising time to advertisers targeting listeners in the Flint and Harrisburg MSAs, advertisers would not switch enough purchases to other radio stations or forms of advertising to render the price increase unprofitable.

Although some local and national advertisers may switch some of their advertising to other radio stations or media rather than absorb a price increase for radio advertising time in the Harrisburg or Flint MSAs, the existence of such alternatives would not prevent the Harrisburg or Flint radio stations from profitably raising their prices a small but significant amount. At a minimum, Harrisburg or Flint radio stations could profitably raise prices to those advertisers that view radio targeting listeners present in Harrisburg or Flint as a necessary advertising medium, or as a necessary advertising complement to other media. 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 their MSAs. Because of this ability to price discriminate among customers, radio stations may charge higher prices to advertisers that view radio in their MSA as particularly effective for their needs, while maintaining lower prices for other advertisers.

2. Harm To Competition

The Complaint alleges that Cumulus' proposed acquisition of Citadel would lessen competition substantially in the sale of radio advertising time in the Flint and Harrisburg MSAs. In particular, the merger would further concentrate markets that are already highly concentrated. The Complaint alleges that Cumulus' market share in each of the Flint and Harrisburg MSAs would exceed 40 percent after the merger. Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI"), which is explained in Appendix A to the Complaint, the merger would result in concentration in each of these markets in excess of 3,900 points, well above the 2,500 threshold at which the United States normally considers a market to be highly concentrated.

Furthermore, the Complaint alleges that the merger would eliminate substantial head-to-head competition between Cumulus and Citadel for advertisers seeking to reach specific audiences present in the Flint and Harrisburg MSAs. 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 characteristics of its audience, and the geographic reach of a station's 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. Today, Cumulus and Citadel each have stations in the Flint and Harrisburg MSAs that substantially compete head-to-head to reach the same

target audiences. For many local and national advertisers buying time in each of those markets, the Cumulus and Citadel stations are close substitutes for each other based on their specific audience characteristics. During individual price negotiations between advertisers and radio stations, advertisers often provide the stations with information about their advertising needs, including their target audience and the desired frequency and timing of ads. Radio stations have the ability to charge advertisers differing rates based in part on the number and attractiveness of competitive radio stations that can meet a particular advertiser's specific target needs. During these negotiations, advertisers that desire to reach a certain target audience can gain more competitive rates by "playing off" Cumulus stations against Citadel stations in the Flint and Harrisburg MSAs. The proposed acquisition would end this competition.

Format changes are unlikely to deter the anticompetitive consequences of this transaction. Successful radio stations are unlikely to undertake a format change solely in response to small but significant increases in price being charged to advertisers by a multi-station firm such as Cumulus because they likely would lose a substantial portion of their existing audiences. Even if less successful stations did change format, they still would be unlikely to attract in a timely manner enough listeners to provide suitable alternatives to the Cumulus stations in their markets.

For all of these reasons, the Complaint alleges that Cumulus' proposed acquisition of Citadel would lessen competition substantially in the sale of radio advertising time to advertisers targeting listeners present in the Flint and Harrisburg MSAs, eliminate head-to-head competition between Cumulus and Citadel in the Flint and Harrisburg MSAs, and

result in increased prices and reduced quality of service for radio advertisers in those MSAs, all in violation of Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment will preserve competition in the sale of radio advertising time to advertisers targeting listeners in the Flint and Harrisburg MSAs by requiring substantial radio station divestitures.

A. Radio Divestitures

The proposed Final Judgment requires Cumulus to divest three broadcast radio stations – one in the Flint MSA and two in the Harrisburg MSA. The divestitures will reduce Cumulus' share in advertising revenues in the Flint and Harrisburg MSAs to less than 40 percent. The divestitures will preserve choices for advertisers and will ensure that radio advertising prices do not increase and services do not decline as a result of the transaction.

Cumulus must divest: WRSR, WCAT, and the Federal Communications Commission ("FCC") license and broadcast signal associated with WWKL along with the intellectual property and broadcast radio programming associated with WTPA. The divestitures must be to a purchaser or purchasers acceptable to the United States in its sole discretion. Except in the case of WWKL, and unless the United States otherwise consents in writing, the divestitures will include all the assets of the stations being divested, and will be accomplished in a way that will satisfy the United States, in its sole discretion, that such assets can and will be used as viable, ongoing commercial radio businesses. With respect to WWKL and WTPA, 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 WWKL as a

viable, ongoing, commercial radio business. The signal strength of that station will be 1,500 watts and the format of the station attracts listeners in the key demographic categories that advertisers desire. Thus, the WWKL/WTPA divestiture will help maintain an economically viable competitor in the Harrisburg MSA.

The relief in the proposed Final Judgment is intended to remedy the likely anticompetitive effects of Cumulus' proposed acquisition of Citadel in the Flint and Harrisburg MSAs. Nothing in the proposed Final Judgment is intended to limit the United States' ability to investigate other past or future activities of Cumulus or Citadel in the Flint and Harrisburg MSAs, or any other MSAs.

1. The Management Trustee

The Preservation of Assets Stipulation and Order, filed at the same time as the Complaint, provides for the appointment of a management trustee to oversee the operations of the Radio Assets prior to the Court's approval of the proposed Final Judgment. The United States contemplates that the Court also will appoint the management trustee as the divestiture trustee pursuant to Section IV of the proposed Final Judgment upon the Court's approval of the proposed Final Judgment.

Unless properly maintained, the value of the Radio Assets may diminish. As a result, the appointment of a management trustee is appropriate to ensure that the Radio Assets maintain their competitive viability and economic value prior to the Court's approval of the proposed Final Judgment. The management trustee will have the power to operate the Radio Assets in the ordinary course of business, so that they will remain independent and uninfluenced by defendants, and so that the Radio Assets are preserved and the related radio stations are operated as an ongoing and economically viable

competitor to defendants and to other broadcast radio companies. The management trustee will preserve the confidentiality of competitively sensitive marketing, pricing, and sales information; ensure defendants' compliance with the Stipulation and the proposed Final Judgment; and maximize the value of the Radio Assets so as to permit expeditious divestiture in a manner consistent with the proposed Final Judgment.

The Stipulation provides that defendants will pay all costs and expenses of the management trustee, including the cost of consultants, accountants, attorneys, and other representatives and assistants hired by the management trustee as are reasonably necessary to carry out his or her duties and responsibilities. After the management trustee's appointment becomes effective, the management trustee will file monthly reports with the United States setting forth efforts taken to accomplish the goals of the Stipulation and the proposed Final Judgment and the extent to which defendants are fulfilling their responsibilities.

2. The Divestiture Trustee

The proposed Final Judgment provides that the Court will appoint a divestiture trustee, selected by the United States upon consultation with the FCC, to effect the divestitures of the Radio Assets and to serve until the Radio Assets are sold to one or more acquirers. Cumulus must divest WCAT and WWKL to an FCC trust in order to comply with FCC local ownership rules. The United States, having consulted with the FCC, will nominate a divestiture trustee. As part of the divestiture, defendants must relinquish any direct or indirect financial control and any direct or indirect role in management of the Radio Assets. Pursuant to Section IV of the proposed Final Judgment, the divestiture trustee will have the legal right to control the Radio Assets until

they are sold to a final purchaser, subject to safeguards to prevent defendants from influencing their operation.

Section IV of the proposed Final Judgment details the requirements for the establishment of the divestiture trust, the selection and compensation of the divestiture trustee, and the responsibilities of the divestiture trustee in connection with the divestiture and operation of the Radio Assets. The divestiture trustee has the authority to accomplish divestitures at the earliest possible time and "at such price and on such terms as are then obtainable upon reasonable effort by the trustee."

The proposed Final Judgment provides that defendants will pay all costs and expenses of the divestiture trustee. After the divestiture trustee's appointment becomes effective, the divestiture trustee will file monthly reports with the Court and the United States setting forth the divestiture trustee's efforts to accomplish the divestitures. Section IV (H) requires the divestiture trustee to divest the Radio Assets to an acceptable purchaser or purchasers no later than four months after the assets are transferred to the divestiture trustee, unless extended by the United States. At the end of that time, if all divestitures have not been accomplished, the divestiture trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the Final Judgment, including extending the trust or term of the divestiture trustee's appointment.

The proposed Final Judgment also requires the defendants to maintain the independence of the Radio Assets, and requires those stations to be kept separate and apart from the defendants' other radio stations. The proposed Final Judgment also

contains provisions intended to ensure that these stations will remain viable and aggressive competitors after divestiture.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the transaction. The divestitures of the Radio Assets will preserve competition to sell radio advertising time to advertisers targeting listeners present in the Flint and Harrisburg MSAs by maintaining an independent and economically viable competitor in the Flint and Harrisburg MSAs.

B. Ban on Reacquisition

The defendants may not reacquire any of the assets divested pursuant to the terms of the proposed Final Judgment during the term of the consent decree, which is for ten years unless extended by the Court. Reacquisition of any of those assets would undermine, if not negate, the benefits of the relief obtained in these markets. Accordingly, this provision is necessary to protect the integrity of the relief.

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 the 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, 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 and published in the Federal Register.

Written comments should be submitted to:

John R. Read
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
U.S. Department of Justice
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The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the proposed 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 the defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Cumulus' proposed acquisition of Citadel. The United States is satisfied, however, that the radio station divestitures described in the proposed Final Judgment will preserve competition in the sale of radio advertising in the Flint and Harrisburg MSAs, the markets described in the Complaint. 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 APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (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

> (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. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), 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.").[1]

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

[1] 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).

"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) (citing *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.

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

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[2] *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'").

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 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 *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 to the APPA, 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). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "The 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.[3]

[3] *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.").

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.

Dated: September 8, 2011

Respectfully submitted,

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