IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civ. No. 94-208
	)	
ELECTRONIC PAYMENT SERVICES, INC.,	)	4/21/94
	)	
Defendant.	)	

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), 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 PROCEEDINGS

On April 21, 1994, the United States filed a civil antitrust complaint pursuant to Section 4 of the Sherman Act, as amended, 15 U.S.C. § 4, against defendant Electronic Payment Services, Inc. ("EPS"), owner of the Money Access Service ("MAC") regional automatic teller machine ("ATM") network.[1] The

[1] EPS is a Delaware corporation owned by four bank holding companies: CoreStates Financial Corporation, Philadelphia, Pennsylvania; PNC Financial Corporation, Pittsburgh, Pennsylvania; Banc One Corporation, Columbus, Ohio; and KeyCorp, Albany, New York (successor to Society Corporation, Cleveland, Ohio). These four bank holding companies consolidated their various ATM networks (MAC, Owl, Jubilee and Green Machine) into EPS. MAC had previously been owned entirely by CoreStates. EPS plans

complaint alleges that EPS's refusal to allow the MAC network's bank customers[2] to obtain ATM processing services from providers other than EPS violates the antitrust laws.

The complaint's two counts allege (1) that a business practice of EPS is a tying arrangement that is *per se* unlawful under Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, and (2) that this tying arrangement is a means by which EPS has maintained a monopoly in regional ATM network access in the States of Pennsylvania, New Jersey, Delaware, West Virginia and New Hampshire, and in substantial portions of the State of Ohio (the "affected states"), in violation of Section 2 of the Sherman Act, as amended, 15 U.S.C. § 2.

The effect of this practice is to foreclose competition from competing data processing companies in the affected states. Furthermore, because those competing data processing companies would otherwise provide means by which MAC member banks could access competing regional ATM networks, this practice has the effect of excluding those networks and maintaining EPS's monopoly in regional ATM network access in the affected states. The complaint seeks an injunction prohibiting EPS from continuing the tying arrangement, and other relief.

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to add two other equity owners: Mellon Bank Corporation and National City Corporation.

[2] The customers of an ATM network are the depository institutions (banks, savings banks, savings and loan associations and credit unions) that seek to give their depositors access to an ATM network. These depository institutions are referred to collectively as "banks" in this Competitive Impact Statement.

On April 21, 1994, the United States and EPS filed a Stipulation by which the parties consented to entry of the attached proposed Final Judgment. This Final Judgment, as explained more fully below, enjoins EPS from requiring any of its regional ATM network customers to purchase ATM processing from EPS.

The United States and EPS have stipulated that the proposed Final Judgment may be entered after compliance with the Tunney Act, unless the government withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, and enforce the proposed Final Judgment and to punish violations thereof.

II.

FACTS GIVING RISE TO THE ALLEGED VIOLATION

The Antitrust Division of the United States Department of Justice has conducted an extensive investigation of EPS's business practices. That investigation shows the following:

A. Background

1. ATMs and ATM Networks

ATMs are machines typically owned and deployed by banks and used by their depositors with ATM cards most frequently to withdraw cash, but also to accomplish balance inquiries, deposits, payment authorizations, and transfers. An ATM network is an electronic telecommunications system connecting various

banks, their ATMs, and data processing companies, which allows an account holder of one bank to accomplish transactions at ATMs not owned by that bank.[3]

Most ATM networks are "regional," operating in areas encompassing a state or several contiguous states. ATMs and ATM cards within the regional ATM network display a mark or brand identifying the network, so that depositors can identify the ATMs from which they may access their accounts. National ATM networks exist, but these are by design networks of last resort, used only where the two banks involved in a transaction do not both belong to any one regional ATM network. National ATM network transactions are typically more expensive, and those networks provide only a subset of the transactions available through regional ATM networks.

An ATM network allows banks to provide their depositors with ubiquitous, 24-hour access to their accounts. A bank that becomes a member of a regional ATM network can offer its depositors access to their accounts not just at the bank's own ATMs, but also at other banks' ATMs. Bankers believe that the ability to offer depositors the convenience of access to their accounts at other banks' ATMs is necessary to attract and retain deposits. A bank -- especially a small bank, thrift or credit union with one or only a few offices, and that deploys few, if any, ATMs -- would be at a significant competitive disadvantage without

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[3] Some banks and bank holding companies operate switches connecting only the ATMs deployed by branches of their own bank or their subsidiary banks, rather than connecting to non-affiliated banks. These networks are also generally referred to as ATM networks. However, in this Competitive Impact Statement, the term "network" is used to refer to what is sometimes called a "shared network," in that it connects multiple non-affiliated banks.

the ability to offer its depositors access to many conveniently located ATMs. No other service is a close substitute for regional ATM network access, and regional ATM network access constitutes a product market within the meaning of the antitrust laws.

2. ATM Processing

"ATM processing" consists of the data processing services and telecommunications facilities and services used to operate, monitor and support the operation of ATMs deployed by a bank. ATM processing also involves the connection of the ATMs deployed by a bank to that bank's deposit records, for authorization and confirmation of that bank's depositors' transactions, and the connection of the ATMs deployed by a bank to one or more ATM networks for authorization and confirmation of other banks' depositors' transactions. Finally, ATM processing connects ATMs to an ATM network or to several ATM networks.

A bank can purchase this ATM processing service from a regional ATM network or from an independent data processing company ("third party processor"), or can provide this processing service to itself (as an "intercept processor"). However, a bank must deploy a large number of ATMs before it becomes economical to provide ATM processing internally. Accordingly, small banks, thrifts, and credit unions very rarely act as intercept processors.

3. Competitive Effects of Third Party Processors

Third party processors provide banks, especially smaller ones, with a competitive source for ATM processing. Equally important, third party processors

offer a channel for the entry of competing regional ATM networks. Third party processors typically maintain connections to several regional ATM networks, and those networks therefore can reach all of the banks connected to a third party processor. Accordingly, the cost of and barriers to entry of regional ATM networks fall dramatically.

In addition, third party processors themselves are potential entrants. Because a third party processor could switch transactions among its customer banks itself (a process known as "subswitching") rather than passing those transactions to the network switch, it is a potential "unbranded" ATM network. To become a competitor to the existing branded regional ATM networks, the third party processor need only put its brand on the ATMs and ATM cards of its customer banks and begin switching transactions.

B. EPS and its Actions

The complaint alleges that EPS has monopoly power in ATM network access in the affected states, and that EPS has illegally tied the sale of access to its MAC regional ATM network to the sale of ATM processing for many of EPS's bank customers. The complaint also alleges that this illegal tying arrangement has worked to maintain EPS's monopoly power in the market for regional ATM network access in the affected states. This section discusses EPS's actions and their anticompetitive effects in more detail.

1. Elimination of ATM Processing Competition

EPS requires its member banks to purchase ATM processing services from EPS or provide it themselves as intercept processors.[4] The effect of this rule is that small banks, thrifts, and credit unions -- banks that cannot economically become intercept processors -- are forced to purchase ATM processing from EPS. This rule has foreclosed third party processors from competing for banks' ATM processing business within the MAC regional ATM network.

EPS's exclusion of third party processor competition from the MAC network has allowed EPS to exact very high profits from small banks, thrifts and credit unions. EPS has done so via two sorts of fees. *First*, and most directly, EPS charges much more per ATM for ATM processing than third party processors typically charge. *Second*, EPS increases its own switching volume and revenues by prohibiting third party processing. Where EPS drives a bank's ATMs, every transaction at those ATMs passes through the MAC switch and is charged to the bank as a switched transaction, including those transactions by the bank's own depositors (its "on-us" transactions). In contrast, intercept processors and banks that use third party processors do not send on-us transactions to a network switch. If banks could use third party processors, MAC would not process, or collect switch fees, for those on-us transactions. Without third party processors, EPS's switch volume and switch fee revenues are commensurately higher.

[4] Under MAC's rules, only those banks which have previously been intercept processors can obtain ATM processing from third party processors.

EPS's switch fees hit hardest those MAC banks with the fewest ATM processing options. EPS banks large enough to be intercept processors escape the EPS charge for "on-us" transactions, and only pay MAC switch fees when their depositors use other banks' ATMs. The smaller banks that cannot afford to be intercept processors pay switch fees for a much higher proportion of their depositors' transactions. EPS takes advantage of this by imposing on its membership the steepest switch fee schedule in the industry.[5] The result is that the small banks that are forced -- by EPS's third party processing restriction -- to send all their ATM transactions to the MAC switch must also pay very high fees for the switching of those transactions.

2. Deterrence of Entry by Competitor Regional ATM Networks

The complaint alleges that a further anticompetitive effect of the illegal tying arrangement is to maintain EPS's market power in the market for regional ATM network access in the affected states. EPS's third party processor prohibition has insulated the MAC regional ATM network from the competitive influences of third party processors. This subsection gives a history of the MAC network's largely successful efforts to keep competitors out of its core areas, and

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[5] MAC switch fees range from a low of 5¢ (what large member banks with a large number of ATMs and transactions pay) to a high of 25¢ (what the smaller banks with fewer ATMs and transactions -- the ones effected by EPS's third party processing restriction -- usually must pay). No other major regional ATM network excludes third party processors, and all have much flatter switch fee schedules: e.g. Star, 3.5¢ to 8¢; NYCE, 6¢ to 13¢; Honor, 2¢ to 10¢; Most, 3.5¢ to 14¢; Pulse, 6¢; Accel/Exchange, 12¢; Yankee 24, 12¢; and Magic Line, 12¢. "EFT Switch Fee Slide May Be Nearing Its End," *Bank Network News* (Jan. 27, 1993).

explains how EPS's current practice of excluding third party processors from the MAC network deters entry today.

a. A History of Anticompetitive Practices

For most of its existence and until 1992, the MAC network explicitly prohibited its bank customers from belonging to other regional ATM networks. MAC combined this practice with a number of strategic purchases of adjacent regional ATM networks. These acquisitions, the prohibition on multiple regional ATM network affiliation, and the third party processor prohibition together proved to be a formidable force for keeping the affected states free from competition.

b. Effect of the Third Party Processor Prohibition

EPS's third party processing prohibition forces small banks that cannot economically provide their own ATM processing to purchase the service from EPS. Because EPS effectively controls the communications links of their ATMs, these banks cannot connect their ATMs to other regional ATM networks without the assistance -- and approval -- of EPS. EPS therefore exercises an effective veto over these banks' access to other networks in the affected states, and conversely, other networks' access to these banks. Third party processors, on the other hand, often offer access to several regional ATM networks. If these banks were able to utilize third party processors, other regional networks would be much more likely

to seek and obtain their business. EPS's control over access to other regional ATM networks prevents these networks from entering the affected states.[6]

EPS's exclusion of third party processors also prevents the establishment of new networks. As discussed above, if third party processing were allowed in the affected states, a third party processor could almost instantly form a new network simply by placing a new "brand" on the ATMs and cards of its customer banks. The third party processor would then switch these banks' transactions itself. The MAC network would switch transactions in only two cases: (1) when a depositor of a bank connected to the third party processor used an ATM owned by a bank not connected to the third party processor; or (2) when a depositor of a bank not connected to the third party processor used an ATM owned by a bank connected to the third party processor.

While EPS excludes third party processors from the MAC network, would-be entrant regional ATM networks are substantially unable to enter. The small banks that wish to join another network (which might offer ATM network access at lower prices) will not be able to do so unless the other network has enough of a presence to provide small banks' depositors with sufficient ubiquity and convenience. The entrant network, of course, cannot achieve the critical mass necessary to attract banks. Accordingly, EPS's third party processing restriction

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[6] EPS offers its members "gateways" through MAC to a few regional ATM networks, but controls the price and terms of this route of access. EPS does not offer gateways to most regional ATM networks operating in areas adjacent to the affected states, which would offer the greatest competition to MAC. Gateways therefore do not remove the entry barrier to regional ATM networks created by EPS's restrictions on third party processing.

creates what economists call a "collective action problem," and EPS's monopoly persists.

C. The Alleged Violations

1. First Claim for Relief - Tying

The actions and policies of EPS described above constitute a tying arrangement that is per se unlawful under Section 1 of the Sherman Act. An unlawful tying arrangement is one in which two separate products are sold together, the seller forces buyers to purchase these products together, the seller has market power in the tying product, and the tying arrangement prevents what would otherwise be a substantial amount of commerce in the tied product. Eastman Kodak Co. v. Image Technical Services, Inc., 112 S.Ct. 2072 (1992); Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984).

The two products in this case are regional ATM network access and ATM processing, which outside of MAC can be, and often are, purchased separately. As described above, however, EPS's practices force banks wishing to obtain membership in MAC, and thereby access to its regional ATM network, to also purchase ATM processing from MAC. Because MAC is the only ubiquitous regional ATM network in the affected states and banks will not forego access to such a network, EPS has market power in this tying product. Evidence gathered in the investigation indicates that there is substantial commerce in the tied product.

2. Second Claim for Relief - Monopolization

EPS's actions and practices also constitute monopolization in violation of Section 2 of the Sherman Act. An unlawful monopoly involves both the possession of monopoly power in the relevant market and the willful acquisition or maintenance of that power. Willful acquisition or maintenance of a monopoly is shown by conduct that excludes rivals on some basis other than efficiency, superior skill, foresight or industry. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); United States v. Grinnell Corp., 384 U.S. 563 (1966).

As described above, EPS's MAC network is the only ubiquitous regional ATM network available to banks in the affected states, and banks cannot forego access to such a network. EPS's prohibition of third party processing and other practices prevents many banks from using competing regional ATM networks, and results in the exclusion of those networks. EPS's conduct therefore constitutes unlawful monopolization.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENTS

The proposed Final Judgment will end unlawful practices that substantially reduce competition in the markets for regional ATM network access and ATM processing. The injunctions of the proposed Final Judgment do so by removing substantial barriers to the entry of competition in the affected states. Removal of these barriers is the most effective means of providing current and future MAC member banks with additional options for the purchase of these services.

These practices are enjoined, and these barriers are removed, by the injunctions of Section IV of the proposed Final Judgment, which require EPS to terminate its restrictions on the use of third party processors by MAC members, to ensure that qualified third party processors can obtain access to the MAC network, and to enable MAC members to join other regional ATM networks.

Paragraphs A through D of Section IV require EPS to terminate its restrictions on the use of third party processors by MAC members. EPS is enjoined from requiring its members to purchase ATM processing from MAC, from forbidding the use of third party processors, from conditioning the price or other terms of MAC membership on the use or non-use of third party processors, and from restricting the ability of MAC members to obtain third party processing. EPS is also enjoined from charging any additional fees to MAC members for the use of third party processors.[7]

Paragraphs E and F of Section IV ensure that qualified third party processors will be able to access the MAC network in order to forward network transactions of their MAC member customers. To ensure that qualified third party processors will obtain adequate communications links to MAC, the links provided to third party processors must be provided on the same terms as the

[7] The proposed Final Judgment permits EPS to charge an hourly fee for reasonably necessary work performed by its personnel in connection with a bank becoming the customer of a third party processor. The total charge may not exceed $1000 unless significant difficulties arise at the processor's or bank customer's end.

links MAC provides to its intercept processor customers.[8] So that qualified third party processors can operate in the most efficient manner, EPS must, to the extent feasible, permit transactions from multiple banks to pass over a single communications link rather than requiring a separate link for each bank. Except under specified circumstances where immediate termination would be appropriate, EPS may not terminate a third party processor without providing 30 days notice, and it must provide a copy of the notice to the United States. This will give the United States an opportunity to examine the competitive consequences of any such termination.

To allow EPS to ensure the quality of the MAC network, the proposed Final Judgment requires EPS to provide MAC network access only to qualified third party processors. As with the quality of communications links, the standards for qualification of third party processors are tied to MAC's qualification standards for intercept processors. A third party processor is qualified if it meets MAC's technical, financial and operating criteria for intercept processors and third party processors providing services to only one bank, and whatever additional technical criteria concerning the format and content of transmissions are appropriate for

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[8] As explained in Section II.A.2 of this Competitive Impact Statement, intercept processors are generally the larger banks and therefore those that have the largest ATM transaction volumes. Accordingly, they provide the most revenue per bank to EPS, giving EPS a strong incentive to provide them adequate services, including communications links. Because EPS has an incentive to deal fairly with its intercept processor customers, several provisions of the decree concerning treatment by EPS of third party processors (and MAC members that use third party processors) are tied to EPS's treatment of intercept processors in similar circumstances. By using the treatment of intercept processors as a benchmark, the proposed Final Judgment avoids a detailed regulatory approach to these issues.

third party processors processing for multiple banks. These criteria may not discriminate between intercept and third party processors, nor may EPS charge additional fees to third party processors for certification.[9]

Paragraph G of Section IV prevents EPS from discriminating in the price of ATM network access against MAC members that choose to utilize third party processors. The volume discounts available to members using third party processors must be the same as the volume discounts available to intercept processors. Also, EPS must use a single price schedule for banks in Pennsylvania, New Jersey and Delaware, the areas in which the MAC network has historically had the greatest monopoly power, and in which two of its principal owners (CoreStates and PNC) are located. By drawing this larger area, EPS may not favor its own stockholders in Pennsylvania without giving similar volume discounts to large banks in New Jersey and Delaware. EPS may use different price schedules in other states.

The preceding injunctions will remove the restrictions EPS has imposed on MAC member banks in their choice of ATM processors, and thereby break the unlawful tie EPS has established between purchase of MAC ATM network services and purchase of ATM processing. The direct consequence will be to make the purchase of third party processing a realistic option for MAC members. This should bring about the entry of competitors to MAC for ATM processing. As

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[9] As discussed in footnote 7, EPS may charge a one-time fee for reasonably necessary work it performs when a third party processor adds another bank. This charge, whether directed to the bank or the third party processor, may not exceed $1000.

discussed in Section II.A.3 of this Competitive Impact Statement, third party processors often have links to many regional ATM networks, and so use of a third party processor by a bank can facilitate its joining of multiple ATM networks. Therefore, an indirect consequence of breaking the unlawful tie between MAC ATM network services and processing services will likely be an increase in competition in the markets for regional ATM network access in the affected states.

To ensure that competition for ATM network services is in fact enhanced, Paragraph H of Section IV of the proposed Final Judgment enjoins EPS from restricting the ability of MAC members to access other networks through their own facilities or those of third party processors. While MAC itself is not required to establish gateways to competing networks, it may not hinder its members from joining other networks. EPS also may not condition the price or terms of MAC membership upon not joining another network. EPS must permit MAC members to display multiple network marks on ATMs and ATM cards, except for electronic stored value cards.[10] The injunction against prohibiting multiple branding of ATMs applies in all areas where MAC operates; the injunction against prohibiting multiple branding of ATM cards applies only in the States of Pennsylvania, New Jersey, Delaware, Ohio and Indiana, areas in which MAC historically had

[10] Permitting EPS to restrict the multiple branding of electronic stored value cards will not lessen the procompetitive impact of the proposed Final Judgment, because the branding of ordinary ATM cards, which are by far more common, is not restricted. EPS maintains that allowing restrictive branding of electronic stored value cards will encourage innovation and competition in services among firms marketing such cards.

monopoly power, or in which there is a dangerous probability that MAC might soon gain monopoly power.[11]

Portions of the proposed Final Judgment, including the section lifting EPS restrictions on the participation of MAC members in competing ATM networks, will take effect immediately upon entry. Paragraphs A through E of Section IV, which lift EPS restrictions concerning the use of third party processors, will take effect in two stages. On October 1, 1994, EPS must begin the certification process for third party processors in the MAC Midwest Platform. It must allow third party processors to complete certification in a reasonably prompt manner, after which these processors will be able to act as third party processors for banks in MAC's midwest region. On January 1, 1995, EPS must allow certified third party processors to act as third party processors for all banks in the MAC network, and it must begin the process of certifying third party processors in any remaining region. The delay between entry of the proposed Final Judgment and the effective dates of the injunctions provides EPS sufficient time to undertake the technical steps necessary to ensure that all regions of the MAC network will be able to accommodate third party processors.

These provisions take effect immediately in any area where banks were permitted to use third party processors as of January 1, 1993. This prevents EPS

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[11] The United States believes that MAC also has monopoly power in New Hampshire and West Virginia. However, the United States believes that the proposed Final Judgment contains sufficient guarantees to open up those States to competition since there is substantial commerce between those States (or portions of them) and other regions in which MAC is not a significant competitor.

from banning third party processing in recently acquired or soon to be acquired networks where third party processing has not been restricted. Also, EPS may not discontinue existing arrangements whereby MAC members use third party processors.

The United States and EPS have stipulated that the proposed Final Judgment may be entered by the Court at any time after compliance with the APPA. The proposed Final Judgment constitutes no admission by either party as to any issue of fact or law. Under the provisions of Section 2(e) of the APPA, entry of the proposed Final Judgment is conditioned upon a determination by the Court that the proposed Final Judgment is in the public interest.

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 action under the Clayton Act. 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 private lawsuit that may be brought against the defendant.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgments 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. The United States will evaluate the comments, determine whether it should withdraw its consent, and respond to the comments. The comments and response(s) of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to Richard Liebeskind, Assistant Chief, Communications and Finance Section, Antitrust Division, U.S. Department of Justice, 555 Fourth Street, N.W., Room 8104, Washington, D.C. 20001.

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

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered litigation seeking structural relief, including division of the MAC network. The United States rejected that alternative because the termination of MAC's restrictive practices concerning use of third party processors and membership in multiple regional ATM networks will effectively break the unlawful tie established by EPS between ATM network access and ATM processing. Breaking this tie will encourage the entry of competitors in the affected states in the markets for ATM network services and ATM processing more efficiently than division of the MAC network. In addition, division of the MAC network was likely to involve the Court and the parties in a complex and time-consuming process of reorganizing the network, delaying the desired improvement in competition.

The United States also recognized that such litigation would require determination of several disputed issues of law and fact, and that there could be no assurance that the position of the United States would prevail.

VII.

STANDARD OF REVIEW UNDER THE TUNNEY ACT FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States are 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." In making that determination,

> the court may consider--
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> > (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
> >
> > (2) the impact of entry of such judgment 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) (emphasis added). The courts have recognized that the term "public interest" "take[s] meaning from the purposes of the regulatory legislation." NAACP v. Federal Power Comm'n, 425 U.S. 662, 669 (1976). Since the purpose of the antitrust laws is to "preserv[e] free and unfettered competition as the rule of trade," Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958), the focus of the"public interest" inquiry under the Tunney Act is whether the proposed final judgment would serve the public interest in free and unfettered competition. United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983), cert. denied, 465 U.S. 1101 (1984); United States v. Waste Management, Inc., 1985-2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C. 1985). In conducting this inquiry, "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."[12] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making the 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.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

It is also unnecessary for the district court to "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.), cert. denied, 454 U.S. 1083 (1981). Precedent requires that

> the 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

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[12] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

> requirements might undermine the effectiveness of antitrust enforcement by consent decree.[13]

A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

> waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

The proposed consent decree, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[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.' (citations omitted)."[14]

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[13]United States v. Bechtel, 648 F.2d at 666 (citations omitted); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F.2d at 565.

[14]United States v. American Tel. and Tel Co., 552 F. Supp. 131, 150 (D.D.C.), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1982) quoting United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky 1985).

VIII.

DETERMINATIVE DOCUMENTS

No documents were determinative in the formulation of the proposed Final Judgments. Consequently, the United States has not attached any such documents to the proposed Final Judgment.

Respectfully submitted,

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