UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States of America	)	
	)	Civil Action No. 1:98cv01744 RCL
Plaintiff,	)	
	)	
v.	)	Filed: July 14, 1998
	)	
General Electric Company, and **InnoServ Technologies, Inc.,**	)	
	)	
Defendants.	)	

COMPETITIVE IMPACT STATEMENT

Plaintiff, the United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 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 July 14, 1998, alleging that General Electric Company's ("GE") proposed acquisition of InnoServ Technologies, Inc. ("InnoServ") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that GE and InnoServ compete in servicing individual pieces of GE medical imaging equipment and in the sale of comprehensive multi-vendor or asset-management services ("multi-vendor service"). Multi-vendor service involves contracting to service all or a significant portion of a hospital's medical equipment.

The proposed combination would substantially lessen competition and tend to create a monopoly in the markets for servicing certain models of GE imaging equipment, especially GE CT scanners and magnetic resonance imagers (MRIs), and in multi-vendor service. InnoServ is an effective competitor of GE in part because InnoServ is one of very few companies that has developed proprietary diagnostic software for servicing certain models of GE imaging equipment. The prayer for relief in the Complaint seeks: (a) an adjudication that the proposed merger would violate Section 7 of the Clayton Act; (b) a permanent injunction preventing the transaction's consummation; (c) plaintiff's costs of this action; and (d) such other relief as is just and proper.

Prior to filing this suit, the parties reached a proposed settlement that permits GE to acquire InnoServ, yet preserves competition in the markets in which the transaction would raise significant competitive concerns. Along with the Complaint, the parties filed a Stipulation and proposed Final Judgment setting out the settlement terms.

The proposed Final Judgment orders GE to divest InnoServ's proprietary diagnostic service software and related materials, which are collectively known as the PREVU diagnostic package, to an acquirer acceptable to the United States. Unless the United States agrees to a time extension, GE must complete the divestiture within 180 calendar days after the filing of the Complaint or five days after notice of the entry of this Final Judgment by the Court, whichever is later.

If GE does not complete the divestiture within the divestiture period, the Court, upon application of the United States, is to appoint a trustee selected by the United States to sell the PREVU diagnostic package. The proposed Final Judgment also requires that, until the divestiture mandated by the Final Judgment has been accomplished, GE must continue to

license, on reasonable terms, the PREVU diagnostic package to persons who were PREVU licensees on the date GE acquires InnoServ.

If the trustee has not sold the PREVU diagnostic package within six months of its appointment, it will, for one year, license the package at a reasonable royalty rate to any service provider unless the Court grants the trustee additional time to complete a sale. The licenses will be perpetual, fully paid-up, and non-exclusive and include the perpetual right to use, copy, and sublicense the package and to make and copyright derivative works.

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

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

A. The Defendants and the Proposed Transaction

GE is a New York corporation headquartered in Fairfield, Connecticut. GE is a diversified technology, manufacturing, and services company. In 1997, GE's total revenues exceeded $90 billion. Its wholly owned subsidiary General Electric Medical Systems ("GEMS"), located in Waukesha, Wisconsin, manufactures medical-imaging equipment such as CT scanners, MRIs, X-ray units, and nuclear-medicine cameras. GEMS is the leading servicer of GE imaging equipment in the United States. GEMS also services imaging equipment manufactured by other companies through GE HealthCare Services, GE's wholly owned multi-vendor and asset-management service group.

InnoServ, a California corporation headquartered in Arlington, Texas, is one of the nation's largest independent service organizations ("ISOs"). InnoServ services individual pieces

of medical equipment and provides comprehensive asset management, multi-vendor maintenance and repair, and other specialized services for radiology, cardiology, biomedical, and laboratory equipment. For the fiscal year ending April 30, 1997, InnoServ's service revenues exceeded $37 million. It has struggled financially for the past two years, however, losing over $1.5 million for the nine months ending January 31, 1998. In March 1998, InnoServ publicly expressed concern about its ability to continue to meet its working capital requirements. For some time, InnoServ has been seeking potential buyers of the company, but only GE has made such an offer.

On May 19, 1998, the defendants signed a merger agreement providing that GE would acquire InnoServ's common stock for a purchase price of $16 million. The United States filed this suit because the proposed merger threatened to decrease competition.

B. Anticompetitive Consequences of the Proposed Transaction

Competition between original equipment manufacturers such as GE and ISOs such as InnoServ has benefited hospitals and other owners of medical imaging equipment by driving down the cost of servicing their equipment. GE and InnoServ have been competitors in the market for servicing certain models of GE imaging equipment on a discrete basis and in the multi-vendor service market.

InnoServ is one of the few competitors of GE that has developed proprietary diagnostic software for servicing certain models of GE imaging equipment. Advanced diagnostic software enables a service engineer to more quickly service and maintain imaging equipment. GE also has developed and uses its own advanced diagnostic software for servicing imaging equipment.

GE's proposed acquisition of InnoServ would eliminate InnoServ as an independent competitor in the market for servicing certain models of GE imaging equipment on a discrete

basis and in the multi-vendor service market. It would also give GE exclusive control over InnoServ's advanced service software. GE does not license its own advanced diagnostic software to competing service providers and likely would not license PREVU to its service competitors. Because InnoServ is an experienced service provider with access to advanced diagnostic software, GE's proposed acquisition of InnoServ would decrease competition and likely increase prices for imaging equipment service. Given InnoServ's financial difficulties, however, it is not clear whether it can continue as an independent competitor in these markets.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would promote additional competition in servicing certain models of GE imaging equipment and in multi-vendor service by requiring GE to divest InnoServ's proprietary diagnostic service software and related materials to an acquirer acceptable to the United States. These service materials, which are collectively known as the PREVU diagnostic package, give InnoServ a competitive advantage in servicing certain models of imaging equipment and in multi-vendor service. Unless the United States agrees to a time extension, GE must complete the divestiture within 180 calendar days after the filing of the Complaint in this matter or five days after notice of the entry of this Final Judgment by the Court, whichever is later.

If GE does not complete the divestiture within the divestiture period, the Court, upon application of the United States, is to appoint a trustee selected by the United States to sell the assets. The proposed Final Judgment also requires that, until the divestiture mandated by the Final Judgment has been accomplished, GE must continue to license, on reasonable terms, the PREVU diagnostic package to persons who were PREVU licensees on the date GE acquires InnoServ.

If the trustee has not accomplished the divestiture within six months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the sale, (2) the reasons, in the trustee's judgment, why the sale has not been accomplished, and (3) the trustee's recommendations. At the same time, the trustee will furnish such report to the plaintiff and defendants, who will each have the right to be heard and to make additional recommendations.

The Court will then either give the trustee additional time to accomplish a sale, depending on the trustee's earlier efforts and any additional efforts that the Court believes can reasonably be made to the accomplish the sale, or direct the trustee, for one year, to license the PREVU diagnostic package at a reasonable royalty rate to any service provider. The licenses will be perpetual, fully paid-up, and non-exclusive and include the perpetual right to use, copy, and sublicense the package and to make and copyright derivative works.

At the end of the one-year licensing period, the trustee shall promptly file with the Court a report setting forth: (1) the trustee's efforts to license the PREVU diagnostic package and (2) the trustee's recommendations as to whether the trustee's continuing to license the PREVU diagnostic package would serve the public interest. The trustee shall at the same time furnish such report to the parties, who shall each have the right to be heard and to make additional recommendations. The Court will then either: (1) have the trustee continue to license the PREVU diagnostic package for a period that is reasonable in light of the trustee's earlier efforts and any additional benefits to the public interest that would result from continuing attempts to license the package, or (2) terminate the trust.

If a trustee is appointed, the proposed Final Judgment provides that GE will pay all reasonable costs and expenses of the trustee and any professionals and agents retained by the

trustee. After appointment, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to divest or license the PREVU diagnostic package as ordered under the proposed Final Judgment.

The divestiture of the PREVU diagnostic package will allow one or more third parties to use the software, which in turn will enable them to service more efficiently certain models of imaging equipment and better compete in the markets for servicing individual pieces of imaging equipment and providing multi-vendor service. In addition to using the package in its service business, a buyer of PREVU could resell or license PREVU to other parties. Similarly, PREVU licensees could also use the package for servicing imaging equipment and/or sublicense PREVU to other parties. Both a buyer and licensees would be free to make and copyright derivative works. The ability to improve upon PREVU will encourage investment in developing advanced service software, which would further improve an entity's ability to compete with GE.

In conjunction with this settlement, GE has also agreed to consent to all of the relief that the government was seeking in another case, United States v. General Electric Company, No. CV-96-121-M-CCL (D. Mont. Filed Aug. 1, 1996) (hereinafter "Montana case"). The settlement of the Montana case should help to alleviate some of the competitive concerns raised by this transaction, by eliminating agreements that prevented numerous hospitals around the country from competing with GE in some of the markets affected by this transaction. The United States considered whether obtaining full relief in the Montana case, by itself, would be a sufficient remedy for this case, but concluded that the Montana settlement would not fully address the competitive problems raised by the InnoServ transaction. The United States therefore required GE to divest PREVU in addition to settling the Montana litigation. The United States evaluated the merits of the settlement proposals in each case independently,

concluding that the proposed settlement of this case is in the public interest for the reasons stated herein, and that the proposed settlement of the Montana case is in the public interest for reasons stated in the Competitive Impact Statement filed in that case today.

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 that 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 parties have stipulated that the Court may enter the proposed Final Judgment after compliance with the APPA, provided that the United States has not withdrawn its consent. The APPA conditions that entry upon the Court's prior 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. The United States will give all comments due consideration and respond to each of them. The United States remains free to withdraw its consent to the proposed Final

Judgment at any time prior to entry. The comments and responses will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Mary Jean Moltenbrey
Chief, Civil Task Force
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United States Department of Justice
325 7th Street, N.W., Suite 300
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The proposed Final Judgment provides that the Court retains jurisdiction over this action and that the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint to enjoin GE's acquisition of InnoServ. The United States is satisfied, however, that the divestiture of the PREVU diagnostic package will promote competition in the relevant markets, particularly given that InnoServ's poor financial condition threatens its ability to continue operations. Incurring the substantial costs and uncertainty of a full trial on the merits of the Complaint is therefore unnecessary.

VII. STANDARD OF REVIEW UNDER THE APPA FOR 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." In making that determination, the Court may consider:

(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.[1]

The United States Court of Appeals for the D.C. Circuit has held that this statute permits a court to consider, 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.[2] In conducting this inquiry, "[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."[3] Rather,

> [a]bsent 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.[4]

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[1] 15 U.S.C. § 16(e).

[2] See United States v. Microsoft, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

[3] 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 (1974), reprinted in U.S.C.C.A.N. 6535, 6538.

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

Accordingly, with respect to the adequacy of the relief secured by the decree, a court should not engage "in an unrestricted evaluation of what relief would best serve the public."[5] 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. [citations omitted] 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." [citations omitted] More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[6]

The proposed Final Judgment, 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.' "[7]

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[5] 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.

[6] Bechtel, 648 F.2d at 666; see BNS, 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716. See also Microsoft, 56 F.3d at 1461 (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'") (citations omitted).

[7] United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd. sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting Gillette Co., 406 F. Supp. at 716 (citations omitted); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

VIII. DETERMINATIVE DOCUMENTS

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

Dated: July 14, 1998

Respectfully submitted,

_____/s/_____

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