UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA *Plaintiff,* v. GENERAL ELECTRIC COMPANY, and CVT HOLDING SAS, FINANCIÈRE CVT SAS, and CONVERTEAM GROUP SAS, *Defendants.*	CASE NO.: JUDGE: Case: 1:11-cv-01549 Assigned To : Boasberg, James E. Assign. Date : 8/29/2011 Description: Antitrust

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("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

Pursuant to a share purchase agreement dated March 28, 2011, defendant General Electric Company ("GE") intends to acquire control of defendant Converteam Group SAS by purchasing approximately 90 percent of the shares of CVT Holding SAS and all of the shares of Financière CVT SAS (collectively "Converteam") for approximately $3.2 billion.

The United States filed a civil antitrust Complaint on August 29, 2011, seeking to enjoin the proposed acquisition. The Complaint alleges that the acquisition likely would substantially

lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, in North America for the development, manufacture, and sale of low-speed synchronous electric motors used in reciprocating compressors in the oil and gas industry (hereafter "LSSMs"). That loss of competition likely would result in higher prices and decreased quality of service in the North American market for LSSMs.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of GE's acquisition of Converteam. Under the proposed Final Judgment, which is explained more fully below, the defendants are required to divest the Converteam Electric Machinery Holding Company ("Electric Machinery") business, which includes its Minneapolis, Minnesota manufacturing facility that produces all of its LSSMs, all of the tangible assets necessary to operate the facility, and all of the intangible assets (*i.e.*, intellectual property and know-how) related to the facility. Under the terms of the Hold Separate Stipulation and Order, defendants will take certain steps to ensure that the Converteam Electric Machinery business is operated as a competitively independent, economically viable and ongoing business concern; that it will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestiture.

The United States and defendants have stipulated that the proposed Final Judgment may be entered 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 the provisions of the Final Judgment and to punish violations thereof.

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

A. The Defendants

Defendant General Electric Company is a New York corporation with its principal offices in Fairfield, Connecticut. GE is a global manufacturing, technology and services company. GE's subsidiary, GE Energy, provides power generation and energy delivery technologies in a number of areas in the energy industry, including coal, oil, natural gas, and nuclear energy, as well as in renewable resources such as water, wind, solar and alternative fuels. GE Energy also manufactures a full range of electric motors, including LSSMs. GE's facility in Peterborough, Canada manufactures LSSMs sold in North America. In 2010, GE's worldwide revenues were $150 billion and revenues from its Peterborough large motor and generator facility were $139.1 million.

Defendant Converteam Group SAS, headquarted in Massy Cedex, France, is a wholly and directly owned subsidiary of Financière CVT SAS, a French corporation, which is itself owned by CVT Holding SAS, a French corporation. CVT Holding SAS's equity is held by Barclays Private Equity France, LBO France, and Converteam Group SAS management. Converteam is a power conversion engineering company focusing on motors, generators, drives, converters and automation controls. Converteam manufactures and assembles medium-voltage large electric motors in facilities located in France, the United Kingdom, and the United States. Converteam's indirectly held United States subsidiary, Electric Machinery Holding Company, manufactures LSSMs in Minneapolis, Minnesota. In 2010, Converteam's worldwide revenues were $1.5 billion and revenues from its Minneapolis facility were $47.7 million.

B. Anticompetitive Effects in the North American Market for Low-Speed Synchronous Electric Motors for Reciprocating Compressors

(1) Electric Motors in the Oil and Gas Industry

Oil and gas refineries and certain other petrochemical operations utilize reciprocating compressors for processes requiring high-pressure delivery of gases. A reciprocating compressor uses mechanical drivers (motors) to turn its crankshafts and move its pistons, thereby compressing low-pressure gas and making it higher-pressure. Compressor drivers fall into three categories—electric, steam, and gas. The production facility requiring a reciprocating compressor will choose the type of driver based on the facility's available energy or waste supply.

Due to the availability of a steady supply of electricity, North American oil refineries generally require an electric driver—a large electric motor—for their reciprocating compressors. Large electric motors consist of a stator and a rotor, with the speed (rotation per minute) of the motor dependent upon the number of rotor poles. Motors that contain more poles operate at slower speeds.

Electric motors are either synchronous or induction (also known as asynchronous). Induction motors are easier to manufacture and cheaper to purchase and maintain than synchronous motors. Synchronous motors are more expensive and involve a sophisticated engineering process. They are used in applications that require precise speed regulation; the motor rotates at a speed proportional to and accurately synchronized with the frequency of the power supply. An induction motor may run slightly slower or faster than the power supply frequency, and will slip as the load increases. Synchronous motors are more efficient than induction motors, will operate at a fixed speed, without any slippage, and provide higher performance at higher power ratings.

In processing and refining crude oil into petroleum products, oil refineries use low-speed reciprocating compressors for hydrogen compression to support different refinery operations. For optimal performance and reliability, this application requires a LSSM to drive the compressor. Each LSSM is custom-designed to meet technical performance requirements related to specific facility characteristics. These LSSMs generally operate between 277 to 400 revolutions per minute, meaning they have between 18 to 26 poles, are typically operating at medium voltage, and generate horsepower in the range of 1,500 to 15,000.

LSSMs are sold pursuant to bids, which are based on technical specifications from the customer. Suppliers of LSSMs use patented or proprietary technology and know-how—including expertise gained through years or decades of trial and error and expertise with prior installations—to custom design LSSMs that satisfy the customers' technical specifications. LSSMs for use in North America must meet specific National Electrical Manufacturers Association ("NEMA") regulatory standards, as opposed to the International Electrotechnical Commission ("IEC") standards applicable to the rest of the world.

Customers (in conjunction with the engineering firms that consult for them) evaluate competing bids based on their compliance with technical specifications and on commercial considerations such as price, delivery schedule, and terms of sale. The combined technical and commercial needs of the customer differ for each LSSM project.

LSSMs have a useful life ranging from 30 to 40 years. New construction of refineries is uncommon in North America. Purchases of new LSSMs in North America are therefore infrequent; customers typically purchase new reciprocating compressors only when a refinery is expanded or overhauled.

(2) The North American Market for Low-Speed Synchronous Motors Used in Reciprocating Compressors in the Oil and Gas Industry

Oil refineries rely on heavy equipment that consumes large amounts of electricity twenty-four hours per day. To operate effectively, refineries generally are connected directly to the electricity grid, in lieu of receiving power through distribution lines, which are less efficient. This direct connection to the grid means that equipment in the refinery usually operates at a much higher power level than equipment not so connected. In order to minimize energy costs, refineries require a LSSM, which uses electrical energy more efficiently than other types of motors. Use of a LSSM guarantees that the motor always will operate at precisely the power factor of the refinery and that the refinery's reciprocating compressor will be driven at a fixed speed, reducing energy losses. By comparison, an induction motor would require significantly larger amounts of electricity to perform the same amount of work.

A small but significant increase in the price of LSSMs would not cause a sufficient number of customers to substitute another type of motor or to a motor built to IEC standards so as to make such a price increase unprofitable. Accordingly, the development, manufacture, and sale of LSSMs is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act.

GE and Converteam compete on bids to customers for LSSMs in North America. GE manufactures LSSMs at facilities in Peterborough, Ontario, Canada for sale in North America. Converteam manufactures LSSMs in Minneapolis, Minnesota for sale in North America. Virtually all LSSMs purchased by oil and gas customers in North America are manufactured in facilities located in North America.

Those competitors that could constrain GE from raising prices to customers on bids for LSSMs in North America typically are suppliers with a physical presence in North America,

including manufacturing, sales, technical and support personnel, and parts distribution. These competitors are most familiar with NEMA regulatory standards.

Refineries prefer such suppliers because, during the bid, design, assembly, and installation phases of a LSSM project, customers interact with suppliers to address design recommendations and changes, track assembly progress, and ensure successful installation. Further, customers purchasing LSSMs can avoid costly delays or down time in refinery operations by selecting a LSSM supplier that is able to respond quickly to requests for service or replacement parts during the operating life of the LSSM.

A small but significant increase in the price of LSSMs would not cause a significant number of customers in North America to turn to manufacturers of LSSMs that do not conform to North American standards so as to make such a price increase unprofitable. Accordingly, sales to customers in North America is a relevant geographic market within the meaning of Section 7 of the Clayton Act.

(3) Anticompetitive Effects

GE's acquisition of Converteam likely would substantially lessen competition in the North American LSSM market. GE and Converteam have consistently bid against each other on nearly all LSSM projects since 2007. The competition between GE and Converteam in the development, production, and sale of LSSMs has benefited customers. GE and Converteam compete directly on price, terms of sale, and service. For many oil refineries, Converteam is the preferred alternative to GE. The proposed acquisition would eliminate GE's most significant competitor in the sale of LSSMs to customers in North America.

Only three competitors, including GE and Converteam, have sold LSSMs in North America since 2007. The third company often does not submit bids on North American LSSM

projects, and has failed to achieve a significant share of the market. The fact that the third company rarely wins against GE and Converteam suggests that customers find GE and Converteam's products more attractive relative to the third provider.

GE's acquisition of Converteam would eliminate many customers' preferred alternative to GE and reduce from three to two—or for some bids, reduce from two to one—the number of bidders. Post-acquisition, GE would gain the incentive and ability to profitably raise its bid prices significantly above pre-acquisition levels.

The response of the remaining LSSM manufacturer would not be sufficient to constrain a unilateral exercise of market power by GE after the acquisition. GE would be aware that many customers strongly prefer it as a supplier, allowing it to raise prices above pre-acquisition levels. No longer constrained by Converteam's price, post-acquisition, GE would raise its prices to the monopoly level for customers that require either GE or Converteam. For customers that can consider an option other than the parties, prices would rise to the level of the third bidder. Thus, the acquisition of Converteam by GE creates an incentive for GE to bid a higher amount than it would if Converteam were still a competitor. Elimination of Converteam as a competitor also would reduce the remaining bidders' incentives to offer quick delivery or other terms of sale favorable to customers and to invest in service, quality and technology improvements.

Therefore, the acquisition would substantially lessen competition in the development, manufacture, and sale of LSSMs to customers in North America and lead to higher prices, less favorable terms of sale, and decreased quality of service in the LSSM market, in violation of Section 7 of the Clayton Act.

(4) Entry

Substantial, timely entry of additional competitors is unlikely and, therefore, will not prevent the harm to competition caused by the elimination of Converteam as a bidder.

A small number of companies have sold LSSMs outside North America, but these companies have no relevant, substantial North American presence. Given the small size of the North American LSSM market, they are unlikely to invest in the capital infrastructure required to compete effectively in North America.

Firms attempting to enter the development, manufacture, and sale of LSSMs to customers in North America face barriers to entry. Establishing a reputation for successful performance and gaining customer confidence in a specific firm's LSSM are significant barriers to entry. North American customers require equipment built to NEMA standards. Many suppliers that operate globally do not have familiarity with these standards. North American oil and gas refineries are reluctant to purchase a LSSM from a supplier that does not have a reputation and track record of successful performance on reciprocating compressors operating in North America. Establishing a reputation for successful performance and/or gaining customer confidence can take years and the expenditure of substantial sunk costs.

Financial scale is an additional barrier to entry. Customers prefer suppliers able to stand financially behind the LSSM order, to respond quickly and effectively to a request for service or parts, and to meet warranty obligations years after the initial sale. A supplier of LSSMs therefore must be able to prove that it is financially sound.

For these reasons, entry or expansion by other firms into the North American market for the development, manufacture, and sale of LSSMs would not be timely, likely or sufficient to

defeat the substantial lessening of competition that likely would result if GE acquires Converteam.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture required by the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the North American market for LSSMs by establishing a new, independent, and economically viable competitor. The proposed Final Judgment requires defendants, within sixty (60) days after the filing of the complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest the Converteam Electric Machinery Business, which includes the one plant currently producing LSSMs, as well as all of the tangible and intangible assets associated with the business. The assets must be divested in such a way as to satisfy the United States in its sole discretion that the Converteam Electric Machinery Business can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market.

In the event that defendants do not accomplish the divestiture within the periods prescribed in the proposed Final Judgment, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that GE will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six (6) months, if the divestiture has not been accomplished, the 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 trust, including extending the trust or the term of the trustee's appointment.

The divestiture required by the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the North American market for LSSMs. To that end, the Divestiture Assets include the entire Converteam Electric Machinery Business, including its production facility located at 800 Central Avenue, Minneapolis, Minnesota 55413 ("Minneapolis Facility"). This facility produces Converteam LSSMs sold to customers in North America. In addition, the facility has an established record as a high-quality, efficient production facility with product offerings that have been qualified by its customers and sufficient capacity to meet current and future demand for its products.

The Converteam Electric Machinery Business produces other products at its Minneapolis Facility, including other types of synchronous motors, induction motors, brushless exciters, turbo generators, and synchronous generators; it also provides services and parts associated with these products. Although these products are not areas of concern, their divestiture was necessary to create a viable competitor, and their inclusion as Divestiture Assets will ensure that the Converteam Electric Machinery Business will remain a profitable, stand-alone entity with a broad range of products and services.

The proposed Final Judgment also requires divestiture of tangible and intangible assets associated with the Converteam Electric Machinery Business. These assets will provide the acquirer with the physical tools (*e.g.*, equipment, inventory, business records, and the like), and the bank of knowledge and rights (*e.g.*, manufacturing know-how, contractual rights, and the like) needed to create an independent producer of LSSMs equivalent to Converteam's current operations. The Divestiture Assets also include all intangible assets owned, controlled, or maintained by the Converteam Electric Machinery Business used in the design, development,

production, marketing, servicing, distribution or sale of any product produced by the Converteam Electric Machinery Business. In addition, the Divestiture Assets include a non-exclusive, non-transferable license for any intangible assets not owned, controlled, or maintained by the Converteam Electric Machinery Business, but that prior to the filing of the Complaint in this matter were used in connection with the design, development, production, marketing, servicing, or sale of any product produced by the Converteam Electric Machinery Business; this license is transferable to any future purchaser of all or substantially all of the Converteam Electric Machinery Business.

The Converteam Electric Machinery Business, in addition to manufacturing LSSMs, manufactures several other products for which competition will not be reduced by GE's acquisition of Converteam. So that GE can enter these markets and compete, the Final Judgment requires that the acquirer of the Converteam Electric Machinery Business grant to GE a non-exclusive, non-transferable license for any intangible assets that, prior to the filing of the Complaint, were used in the design, development, manufacture, marketing, servicing, or sale of induction motors, brushless exciters, turbo generators, and synchronous generators designed, developed, produced, or sold by the Converteam Electric Machinery Business. This license is transferable to any future purchaser of all or substantially all of the GE business unit using this license, and does not include LSSMs or any other type of synchronous motors.

Lastly, the Final Judgment permits GE to retain Converteam's SAP business management server, which is used by both the Converteam Electric Machinery Business and Converteam's other businesses. To ensure a smooth transition of the Converteam Electric Machinery Business's information to the acquirer, at the option of the acquirer, and for a period not to exceed one (1) year, the Final Judgment requires that GE grant access and use rights to the SAP

business management server and provide transition services and technical assistance to the acquirer of the Converteam Electric Machinery Business. In addition, the Final Judgment requires that GE prevent GE or Converteam employees from accessing Converteam Electric Machinery Business information, except for the purpose of providing transition services or technical assistance to the acquirer. Finally, upon termination of the agreements, GE is required to take all steps necessary to purge information related to the Converteam Electric Machinery Business from the SAP business management server.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects that likely would result if GE acquired Converteam because the acquirer will have the ability to develop, produce, and sell LSSMs to customers in North America in competition with GE.

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 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 Department of Justice, 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:

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 8700
Washington, DC 20530

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 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 Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against GE's acquisition of Converteam. The United States is satisfied, however, that the divestiture of assets described in the proposed Final

Judgment will preserve competition for the development, manufacture and sale of LSSMs in the United States. 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 Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be 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." 15 U.S.C. § 16(e)(1). In making that determination in accordance with the statute, the court is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A)-(B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. 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 mechanisms to enforce the final judgment are clear and manageable.").

As the United States Court of Appeals for the District of Columbia 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 "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).[1] In determining whether a proposed settlement is in the public interest, the court "must accord deference to the

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[1] *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").

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's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case); *United States v. Republic Serv., Inc.*, 2010-2 Trade Cas. (CCH) ¶ 77,097, 2010 U.S. Dist. LEXIS 70895, No. 08-2076 (RWR), at *10 (D.D.C. July 15, 2010) (finding that "[i]n light of the deferential review to which the government's proposed remedy is accorded, [amicus curiae's] argument that an alternative remedy may be comparably superior, even if true, is not a sufficient basis for finding that the proposed final judgment is not in 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). Therefore, the United States "need only provide a factual basis

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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'").

for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *Republic Serv.*, 2010 U.S. Dist. LEXIS 70895, at *2-3 (entering final judgment "[b]ecause there is an adequate factual foundation upon which to conclude that the government's proposed divestitures will remedy the antitrust violations alleged in the complaint.").

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 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." 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act,[2] Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, stating: "[n]othing in

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[2] The 2004 amendments substituted the word "shall" for "may" when directing the courts to consider the enumerated factors and amended the list of factors to focus on competitive considerations and 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).

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: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of 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]

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.

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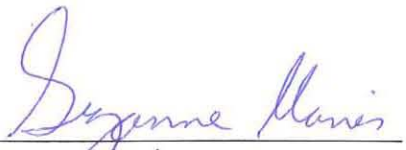
[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 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.").

Dated: August 29, 2011

Respectfully submitted,



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