UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. GRAFTECH INTERNATIONAL LTD. and SEADRIFT COKE L.P., *Defendants.*	CASE NO.: Case: 1:10-cv-02039 Assigned To : Collyer, Rosemary M. JUDGE: Assign. Date : 11/29/2010 Description: Antitrust DECK TYPE: Antitrust DATE STAMP:

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

Defendants GrafTech International Ltd. ("GrafTech") and Seadrift Coke L.P. ("Seadrift") entered into an Agreement and Plan of Merger, dated April 1, 2010, pursuant to which GrafTech agreed to acquire the 81.1 percent of Seadrift stock it does not already own for about $308.1 million.

The United States filed a civil antitrust Complaint on November 29, 2010, seeking to enjoin GrafTech's proposed acquisition of Seadrift. The Complaint alleges that the acquisition likely will substantially lessen competition in the worldwide sale of petroleum needle coke used to manufacture graphite electrodes, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

That loss of competition likely would result in higher prices, reduced output and less favorable terms of sale in the global petroleum needle coke market.

At the same time the Complaint was filed, the United States filed a proposed Final Judgment, which is designed to remedy the expected anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, GrafTech and Seadrift are required to modify the long-term petroleum needle coke supply agreements ("Supply Agreement") between GrafTech and ConocoPhillips Company ("Conoco"), a competitor of Seadrift, and provides for ongoing reports regarding petroleum needle coke demand, capacity utilization and the imposition of firewalls. After the proposed acquisition, GrafTech would control Seadrift's capacity utilization for petroleum needle coke. Seadrift effectively would also have direct access to all of the information it collects from its customers as well as the information GrafTech collects via the Supply Agreement. The Supply Agreement would include the ability to verify Conoco's customer-specific pricing, volume of production and other commercially sensitive information, via the audit rights and most-favored-nation ("MFN") pricing clauses included therein.[1] Future supply arrangements also could provide similar opportunities to access commercially sensitive information, as well as other sensitive information from Seadrift's own customers. The ability of a vendor to verify current commercial terms granted by a competitor could facilitate a tacit understanding on price or output and provide a means to detect cheating on such an understanding, increasing the likelihood of coordination. Accordingly, as the merger would remove a significant barrier to collusion, it likely would lead to anticompetitive effects.

[1] GrafTech has not received MFN pricing from Conoco under this clause to date. Conoco's September 2010 termination of the Supply Agreement activated this dormant provision, which would have applied to sales beginning in 2011.

Under the proposed Final Judgment, the Defendants are permitted only to engage in ongoing and future purchases of petroleum needle coke from Conoco pursuant to a revised supply agreement, one that does not provide Seadrift the means to verify customer-specific competitor pricing or production. The proposed Final Judgment also bars GrafTech from negotiating any future agreement with Conoco that would confer any such rights to Seadrift, for a period of ten years from entry of the proposed Final Judgment. In order to ensure compliance with these provisions, all future agreements for the provision of petroleum needle coke from Conoco to GrafTech and Seadrift must be provided to the United States within two business days of execution. GrafTech also must produce documents prepared in the ordinary course of business that demonstrate Seadrift's production, capacity and sales. The proposed Final Judgment also restricts the flow of competitively sensitive information between GrafTech personnel who negotiate GrafTech's supply of petroleum needle coke from Conoco, and Seadrift personnel who make decisions about Seadrift's production and prices.

The United States believes the provisions in the proposed Final Judgment will remove the potential for competitors to verify customer-specific pricing, production and other commercial terms. At the same time, the proposed Final Judgment preserves the quality improvements likely after the merger, and would not impede the potential cost savings that the parties claim will result from the merger, and that may incentivize discounting in the downstream market for graphite electrodes.

The United States and the 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 for a period of ten years after entry of the Final Judgment.

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

A. The Defendants

GrafTech, headquartered in Parma, Ohio, through its graphite power systems division, is the largest manufacturer of graphite electrodes sold in the United States, and one of the two leading providers of graphite electrodes worldwide. GrafTech produces graphite electrodes at facilities in Mexico, Brazil, Africa, France and Spain. GrafTech realized revenue of approximately $483 million from the sale of graphite electrodes in 2009.

Seadrift, headquartered in Port Lavaca, Texas, is one of two U.S. manufacturers of petroleum needle coke, the key input in the manufacture of graphite electrodes in North America. Seadrift operates a single manufacturing plant, which has a current annual production capacity of approximately 150,000 metric tons of petroleum needle coke, representing approximately 19 percent of worldwide petroleum needle coke capacity, and Seadrift realized revenue of $62 million in 2009. Post-acquisition, GrafTech would control Seadrift's capacity and utilization rates.

B. The Competitive Effects of the Acquisition on the Market for Petroleum Needle Coke

1. Relevant Market

Petroleum needle coke is used exclusively in the production of graphite electrodes. Graphite electrodes are large columns of virtually pure graphite used in the production of steel from scrap in electric arc furnaces, ladle metallurgy furnaces, and foundries. As graphite electrodes heat the steel, they are consumed through oxidation, and are replaced by connecting

the end of the new graphite electrode with the end of the chain of graphite electrodes in the furnace. The highest-intensity electric arc furnaces require large-diameter graphite electrodes, which range in size between 18 inches in diameter to 32 inches in diameter.

Petroleum needle coke is the key material input into large-diameter graphite electrodes used in electric arc furnaces in the United States. All sizes of graphite electrodes are manufactured out of needle coke, but some small-diameter graphite electrode manufacturers blend a percentage of anode coke with the needle coke during the production process. Large-diameter graphite electrodes require approximately one metric ton of raw needle coke to produce one metric ton of finished graphite electrode.

Needle coke is a nearly pure form of carbon that can be derived either from petroleum ("petroleum needle coke") or coal tar pitch ("pitch coke"). Petroleum needle coke is manufactured from decant oil, a byproduct from the catalytic cracking process of refining crude oil. Petroleum needle coke's structure differs from that of anode coke, also derived from decant oil, in that it is crystalline with needle-like particles. This structure provides a low coefficient of thermal expansion, which allows it to maintain its shape in high-temperature settings, and a low electrical resistivity, permitting efficient conduction of electricity. Additionally, petroleum needle coke has a lower content of sulfur and nitrogen than does pitch coke, which minimizes changes in shape caused when coke over-expands during graphite electrode manufacturing, creating cracks or voids within the graphite electrode, drastically altering both its strength and density.

Graphite electrode producers obtain their supply of petroleum needle coke from one or more of four firms: Seadrift, Conoco, and two vendors located in Japan. Historically, the Japanese suppliers have not substantially increased the volume of petroleum needle coke that

they ship into the United States from year to year. Conoco is the only manufacturer with two petroleum needle coke production facilities, one in Lake Charles, Louisiana and one in South Killinghorne, England. Conoco, Seadrift, and the Japanese producers all have worldwide customers and ship internationally. There have been instances of supply constraint in the manufacture of petroleum needle coke. Transportation costs make up a small fraction of the cost of petroleum needle coke, and customers typically pay the same price for petroleum needle coke regardless of the location of the production facility or the destination.

Manufacturers of large-diameter graphite electrodes worldwide typically use petroleum needle coke to produce their graphite electrodes and would not, in response to a small but significant increase in price of petroleum needle coke, switch to pitch or anode cokes in sufficient volumes such that the attempted price increase would be defeated or deterred. Thus, worldwide production and sale of petroleum needle coke is a relevant market for purposes of antitrust analysis of the proposed transaction.

2. Anticompetitive Effects

The proposed acquisition of Seadrift by GrafTech could substantially lessen competition in the international petroleum needle coke market because it would allow GrafTech to control Seadrift's capacity and utilization rates for the manufacture of petroleum needle coke, and also provide Seadrift direct access to verified, customer-specific competitor pricing and production information. The basis for the Complaint, and the essence of the expected anticompetitive effect of this acquisition, is that GrafTech's acquisition of Seadrift, Conoco's largest petroleum needle coke competitor, would draw Seadrift into GrafTech's current Supply Agreement and future supply arrangements with Conoco, while also allowing GrafTech to control Seadrift's output. It is GrafTech's control of Seadrift and its addition to the Conoco alliance, by and through the

proposed acquisition, which has triggered a violation of the Clayton Act. It is the consequent agreement between competitors that the proposed Final Judgment is designed to address, by removing the opportunity and means for Seadrift and Conoco to engage in anticompetitive activity under cover of the Supply Agreement, and possibly future supply arrangements.

On September 27, 2010, in response to the proposed merger, the termination clause of the Supply Agreement was activated. The activation of the termination clause has initiated a three-year wind-down period during which GrafTech is obligated to buy specified volumes in each year and Conoco must provide that volume with pricing on an MFN basis. The MFN requires that prices to GrafTech shall be no higher than the lowest price charged by Conoco for the relevant grade of coke among all of its coke customers other than GrafTech. Included among the clauses in the Supply Agreement that remain in place during the wind-down period is the mutual right for GrafTech and Conoco, in order to ensure compliance with the Supply Agreement, to audit each other's books, records and documents, which likely would include current cost information, production schedules, invoices that contain third-party pricing and volume information, records that reveal credit terms, and similar competitively sensitive information. By operation of the merger, the audit clause would extend to Seadrift the information provided to GrafTech, allowing Seadrift to verify the real-time, customer-specific pricing its main competitor charges and the volume of petroleum needle coke sold to nearly every electrode manufacturer in the world.

The legacy audit right included in the Supply Agreement would provide Seadrift with the means to verify a key rival's contemporaneous prices, which could facilitate an understanding between Seadrift and Conoco about the prices to be charged to each customer, and could be used to enforce that understanding by deterring cheating. At the same time, the MFN effectively

could have a chilling effect on Conoco's willingness to offer discounts to other graphite electrode customers, because it would have to provide the same discount for the large volume of petroleum needle coke it sells to GrafTech.

Even after the three-year extension of the Supply Agreement expires, however, GrafTech intends to purchase substantial quantities of petroleum needle coke from Conoco via other supply arrangements; combined with its ownership of Seadrift, this could provide the conditions for output coordination.

Exchanges of current price information have the potential to generate anticompetitive effects and, although not *per se* unlawful under the antitrust laws, have consistently been held to violate the Sherman Act. Moreover, the residual audit right in the Supply Agreement provides that GrafTech and Conoco may audit each other's contemporaneous books, records and documents. Post-merger, GrafTech's cost structure would include the production of Seadrift petroleum needle coke. This clause, if left unchecked, would allow Conoco to know Seadrift's volume and cost of production, and would allow GrafTech to review all of Conoco's production volume and costs. Moreover, should the audit clause be used in conjunction with the MFN, to verify that GrafTech was, in fact, receiving the lowest price, for example, Seadrift potentially would have access to its largest competitor's pricing and production to all other customers. Ongoing supply arrangements also have the potential to provide Seadrift, through GrafTech, with competitively sensitive information.

Therefore, GrafTech's acquisition of Seadrift likely will substantially lessen competition in the development, production and sale of petroleum needle coke in the United States, likely leading to higher prices, reduced output and less favorable terms of sale in the worldwide petroleum needle coke market, in violation of Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment will eliminate the anticompetitive effects that otherwise would result from GrafTech's acquisition of Seadrift. Conoco, having activated the termination clause of the Supply Agreement, has initiated the three-year wind-down period during which GrafTech must buy specified volumes each year, and Conoco must provide that volume with pricing on an MFN basis. The audit rights, also included in the Supply Agreement, give GrafTech and Seadrift access to Conoco's pricing and commercial terms to all of its customers, for the purpose of enforcing MFN pricing. The proposed Final Judgment requires GrafTech and Seadrift immediately to abrogate, amend or otherwise alter the current petroleum needle coke Supply Agreement between GrafTech and Conoco to remove the terms related to the ongoing audit rights, sharing of non-public or proprietary information, and MFN pricing.

The proposed Final Judgment also provides that the Department of Justice's Antitrust Division must receive copies of any and all agreements regarding the provision of petroleum needle coke between the defendants and Conoco for the term of the Final Judgment, as well as ordinary course business documents that illuminate Seadrift's output and sales decisions. These provisions ensure that Defendants comply with the proposed Final Judgment and also will serve to deter them from entering into any agreement that may have the effect of enhancing coordination among competing suppliers of petroleum needle coke. Production of contracts between GrafTech and Conoco will allow the Division to monitor future agreements for audit rights or other provisions that facilitate the exchange of proprietary pricing and output information. Production of ordinary course business documents will allow the Division to monitor changes in production in relation to capacity that may suggest output coordination. As an additional safeguard, the proposed Final Judgment requires that GrafTech strictly segregate

employees who negotiate terms with Conoco from those who make decisions about pricing and production at Seadrift. Similarly, Seadrift employees who negotiate arrangements with competitors of GrafTech will be prevented from sharing any competitively sensitive information thereby obtained.

Further, striking the audit clause and MFN provision of the Supply Agreement will not imperil the potential efficiencies that GrafTech expects will result from the merger. GrafTech anticipates substantial, merger-specific efficiencies by internal consumption of Seadrift petroleum needle coke, which would allow the elimination of double margins. Should this result in lower GrafTech prices for graphite electrodes downstream, it likely would incentivize other graphite electrode competitors to reduce prices in response to that competition. Verified plans to improve the quality of Seadrift petroleum needle coke likely will benefit Seadrift's graphite electrode customers, as well as the downstream consumers of finished graphite electrodes, in the future. Thus, by removing the audit rights and MFN provisions from the Supply Agreement, and providing other protections in connection with the future supply arrangements, that source of potential harm is eliminated without threatening to deprive consumers of the pro-competitive efficiencies that GrafTech and Seadrift expect their merger to generate.

As a result of the proposed Final Judgment, Seadrift and Conoco will remain independent, competitive suppliers of petroleum needle coke, while GrafTech will be free to realize the efficiencies it expects to result from the Seadrift acquisition. Finally, in the future, any new agreement between Seadrift and Conoco that might facilitate collusion by incorporating terms such as those required to be abrogated by the proposed Final Judgment will be deterred.

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 Defendant.

V. PROCEDURES APPLICABLE FOR APPROVAL OR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendant 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
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The proposed Final Judgment provides that the Court retains jurisdiction over this action and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the 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 litigated and sought preliminary and permanent injunctions against Defendant GrafTech's acquisition of Seadrift, in order to avoid providing Seadrift access to competitively sensitive information available under the Supply Agreement. The United States is satisfied, however, that the proposed Final Judgment will preserve competition for the provision of petroleum needle coke without the time or expense of litigation. The proposed Final Judgment will 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

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A)-(B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").

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 government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case); *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

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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"). *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'").

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 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 divestiture 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 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]

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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).

[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

VIII. DETERMINATIVE DOCUMENTS

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

Dated: November 29, 2010

Respectfully submitted,

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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.").

CERTIFICATE OF SERVICE

I, Stephanie A. Fleming, hereby certify that on November 29, 2010, I caused a copy of the foregoing Competitive Impact Statement to be served upon defendants GrafTech International Ltd. and Seadrift Coke L.P. by mailing the documents electronically to the duly authorized legal representatives of defendants as follows:

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