UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. **THE MANITOWOC COMPANY, INC., ENODIS PLC, and ENODIS CORPORATION,** *Defendants.*	**Civil Action No.:** **Description: Antitrust** **Judge:** Case: 1:08-cv-01704 Assigned To : Kennedy, Henry H. Assign. Date : 10/6/2008 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

Defendant The Manitowoc Company, Inc. ("Manitowoc") and Defendant Enodis plc entered into an agreement, dated April 14, 2008, and amended May 27, 2008, pursuant to which Manitowoc agreed to acquire the entire issued and to be issued ordinary share capital of Enodis plc. Manitowoc's final revised offer price was determined on June 30, 2008, when Manitowoc outbid a competing offeror during an auction process implemented by the Panel on Takeovers and Mergers of the United Kingdom.

The United States filed a civil antitrust Complaint on October 6, 2008, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to lessen competition substantially in the development, production, distribution, and sale of commercial cube ice machines in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would result in higher prices, lower quality, and less innovation in the commercial cube ice machine market.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the acquisition. Under the proposed Final Judgment, which is explained more fully below, defendants Manitowoc, Enodis plc, and Enodis Corporation (Enodis plc and Enodis Corporation will hereinafter be collectively referred to as "Enodis") are required to divest Enodis's entire business engaged in the development, production, distribution, and sale of ice machines, ice machine parts, and related equipment in the United States (hereafter, the "Divestiture Business"). Under the terms of the Hold Separate, defendants will take certain steps to ensure that the Divestiture Business is operated as a competitively independent, economically viable and ongoing business that 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 proposed 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

Defendant Manitowoc is a Wisconsin corporation with its principal place of business in Manitowoc, Wisconsin. It is a global industrial equipment company that manufacturers commercial ice machines and related equipment, refrigeration equipment, cranes, and ships and other water vessels. In 2007, Manitowoc reported total sales of approximately $4 billion. Manitowoc's sales of commercial ice machines and related equipment in the United States were approximately $152 million in 2007.

Enodis plc is a corporation registered in the United Kingdom and Wales with its principal place of business in London, England. Enodis Corporation, a wholly owned subsidiary of Enodis plc, is a Delaware corporation with its headquarters in New Port Richey, Florida. Through its global food service equipment group, Enodis designs, manufactures, and sells cooking, food storage and preparation equipment, and ice machines and related equipment. Enodis plc's revenues for its 2007 fiscal year were $1.6 billion. In its fiscal year 2007, Enodis plc's sales of commercial ice machines and related equipment in the United States were approximately $153 million.

On June 30, 2008, Manitowoc offered to acquire Enodis plc for 328 pence in cash per share, in a transaction valued at $2.7 billion (including assumed debt). The proposed transaction, as initially agreed to by defendants, would substantially lessen competition in the development, production, distribution, and sale of commercial cube ice machines in the United States. This transaction is the subject of the Complaint and proposed Final Judgment filed by the United

States on October 6, 2008.

B. The Competitive Effects of the Transaction

1. Commercial Ice Machines Generally

Restaurants, convenience stores, hotels, and other businesses need significant volumes of ice. These businesses usually meet their needs by using commercial ice-making machines located at their places of business. These machines make ice by a continuous cycle of condensation and expansion of a refrigerant through a network of tubing. As the refrigerant converts from a compressed liquid state to become a gas, heat is drawn from a component called an evaporator. Water running over the evaporator surface freezes to form ice that is then harvested by processes specific to the type of ice produced by the machine.

2. Relevant Product Market

The type of ice machine purchased by a customer depends on the type and volume of ice needed. Commercial ice machines are designed to produce either hard ice or soft ice. Hard ice melts slowly and has a higher density and less surface area than soft ice. Hard ice is most often shaped as cubes or dice, half-cubes or half-dice, octagons, or crescent cubes, and is commonly referred to as cube ice. Most customers that serve ice in beverages prefer cube ice because it melts slowly and thus minimizes deterioration in the flavor of the beverage.

Soft ice refers to small nuggets or flakes of ice that have a lower density and more surface area than cube ice and, therefore, melt more quickly than cube ice. Soft ice is used in hospitals, which demand a safe, chewable ice for their patients, by grocery stores or other establishments to display seafood, produce, and other perishable food, and for industrial cooling applications. The

prices of commercial ice machines producing soft ice are often 15 to 20 percent higher than prices of ice machines that produce comparable quantities of cube ice per day.

The Complaint alleges that in response to a small but significant post-acquisition increase in the price of commercial machines producing cube ice, customers would not switch to machines that make soft ice in sufficient numbers so as to make such a price increase unprofitable.

Customers vary greatly with respect to their daily needs of cubed ice, and they require machines having an appropriate range of capacity to meet those needs. A significant and distinct segment of cube ice machine customers, including sit-down and fast-food restaurants, bars, and convenience stores, purchase commercial machines capable of producing between approximately 300 pounds to 2,000 pounds of cube ice per day (hereinafter, "commercial cube ice machines"). Although customers can purchase units that produce between approximately 50 and 300 pounds of ice per day, these machines are not able to meet the needs of the large majority of commercial cube ice machine customers. Few customers are likely to meet their needs by purchasing two or more smaller machines because it would be cost-prohibitive to do so. Similarly, large units that produce over 2,000 pounds of ice per day are not substitutes for commercial cube ice machines and are used by customers that need extremely large volumes of ice, such as convention centers, sports arenas, or bagged-ice producers.

The Complaint alleges that because of the attributes of commercial cube ice machines, a small but significant post-acquisition increase in the prices of commercial cube ice machines would not cause customers to switch to other ice machines in sufficient numbers so as to make such a price increase unprofitable, and, accordingly, the development, production, distribution,

and sale of commercial cube ice machines is a line of commerce and a relevant product market.

3. Relevant Geographic Market

Commercial ice machines are complex and break down more frequently than other types of food service equipment, and customers often need quick access to replacement machines, parts, and service. Sales of commercial cube ice machines in the United States by manufacturers are primarily made to distributors that supply equipment dealers and repair companies who sell to end-users. In addition, these distributors typically train service representatives regarding repair and maintenance of the commercial ice machines, as well as manage warranty claims. In order to be a competitive supplier of commercial cube ice machines within the United States, manufacturers must have an established network of local distribution, service, and support.

The Complaint alleges that a small but significant increase in the prices of commercial cube ice machines would not cause a sufficient number of customers in the United States to turn to manufacturers of commercial cube ice machines that do not have an established a network of local distribution, service, and support in the United States. As a result, such manufacturers would not be able to constrain such an increase. Accordingly, the United States is a relevant geographic market.

4. Competitive Effects

The market for commercial cube ice machines is highly concentrated, and would become substantially more so if Manitowoc were to acquire Enodis. Manitowoc and Enodis are the two largest manufacturers of commercial cube ice machines in the United States. Manitowoc accounts for approximately 40 percent of the sales of commercial cube ice machines in the

United States, and Enodis accounts for approximately 30 percent of such sales. Only one other company has demonstrated the ability to produce commercial cube ice machines of the same quality and with similar features as the Manitowoc and Enodis machines and has an established a network of local distribution, service, and support in the United States.

Combined, Manitowoc and Enodis would account for approximately 70 percent of the sales of commercial cube ice machines in the United States. Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI"), the proposed transaction would increase the HHI in the market for commercial cube ice machines by approximately 2,400 points to a post-acquisition level of approximately 5,800. This is well in excess of levels that raise significant antitrust concerns.

The vigorous and aggressive competition between Manitowoc and Enodis in the development, production, distribution, and sale of commercial cube ice machines has benefitted customers. Manitowoc and Enodis compete directly on price, quality, and innovation. Although commercial cube ice machine offerings are differentiated, many commercial cube ice machine customers view the Manitowoc and Scotsman brands as close substitutes for one another.

The proposed acquisition would eliminate the competition between Manitowoc and Enodis and reduce the number of significant manufacturers of commercial cube ice machines in the United States from three to two. The Complaint alleges that post-merger, Manitowoc would profit by unilaterally raising the price (or reducing quality and innovation) of one or more of the brands it would own. Although Manitowoc could lose some sales in that brand or brands as a result of such a price increase (or decline in quality and innovation), many sales would be diverted to one of the other brands under its ownership. Capturing such diverted sales would

make a post-merger price increase (or reduction in quality and innovation) profitable, when it would not have been profitable before the merger. The response of other commercial cube ice machines manufacturers in the United States would not be sufficient to constrain a unilateral exercise of market power by Manitowoc after the acquisition because they do not have the incentive or the ability, individually or collectively, to do so. Therefore, the Complaint alleges, the proposed acquisition would enable Manitowoc to exercise market power unilaterally, lessen competition in the development, production, distribution, and sale of commercial cube ice machines in the United States, and lead to higher prices, lower quality, and less innovation for the ultimate consumers of commercial cube ice machines.

Further, successful entry or expansion into the development, production, distribution, and sale of commercial cube ice machines would be difficult, time-consuming, and costly. Firms attempting to enter or expand into the commercial cube ice machine market face a combination of distribution, reputation, and technology-related barriers to entry.

As noted above, customers need quick access to replacement ice machines and parts, and, as a result, the three significant commercial cube ice machine competitors each have a nationwide network of local distributors. These distributors maintain sizeable inventories at locations across the United States so as meet individual customer demands. The Complaint alleges that developing a nationwide distribution network would be difficult and time-consuming. Finding good distributors would be difficult because each of the current three commercial cube ice machine competitors has contracted exclusively with a large majority of the sizeable and reputable distributors across the United States, and an existing or potential distributor likely would not agree to distribute a commercial ice machine unless it could be

assured of a sufficient volume of sales of machines and parts to make a profit on the inventory and other investments it must make. Further, distributors must build relationships with the food service equipment dealers, air-conditioning and refrigeration repair companies, and others that sell commercial ice machines to end-users. Building such relationships would take a significant amount of time and effort.

The Complaint alleges that reputation or brand recognition is another barrier to entry. Because commercial cube ice machines are so important to customers' operations, customers are reluctant to purchase machines from a company that has not established a reputation for making high-quality, durable machines. Establishing a track record of reliable performance takes years.

The Complaint alleges that the technology involved in developing and manufacturing a commercial cube ice machine is a third significant entry barrier. The three current competitors produce—and customers expect and demand—commercial cube ice machines that last seven to ten years, that consistently produce ice that is clear and pure under conditions of varying water chemistries and air and water temperatures, and that meet federal and state energy regulations. Designing and manufacturing commercial cube ice machines that have these characteristics and are comparable in quality to the machines of the three current competitors would take years, even for firms that already produce other types of ice machines.

The Complaint alleges that as a result of these barriers to entry, entry or expansion by any other firm into the commercial cube ice machine market would not be timely, likely, or sufficient to defeat an anticompetitive price increase in the event that Manitowoc acquires Enodis.

III. Explanation of the Proposed Final Judgment

The divestiture requirement of the proposed Final Judgment will eliminate the likely anticompetitive effects of the acquisition in the development, production, distribution, and sale of commercial cube ice machines in the United States by establishing a new, independent, and economically viable competitor. The proposed Final Judgment requires defendants, within 150 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, as a viable ongoing business, the Divestiture Business, which comprises Enodis's entire business engaged in the development, production, distribution, and sale of ice machines, ice machine parts, and related equipment in the United States. The assets must be divested in such a way as to satisfy the United States in its sole discretion that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

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 defendants 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

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.

Described below are select provisions that have been included in the proposed Final Judgment to address special circumstances that exist in this case. Some provisions address complications arising from certain overlaps in divestitures required by the United States and the European Commission. Others address the fact that certain parts of the Divestiture Business must be severed from Enodis's other operations.

Selected Provisions of the Proposed Final Judgment

Enodis has information technology assets located at a data center within its Vernon Hills, Illinois facility that supports various Enodis businesses, including the Divestiture Business. Definition II(D) of the proposed Final Judgment addresses the need to sever these joint information technology assets, excluding from the list of assets that form the Divestiture Business all hardware, software, and related documentation ("IT assets") at this data center that is shared between the Divestiture Business and the other Enodis businesses. Defendants are required to divest IT assets used only by the Divestiture Business, and to purchase replacement IT assets for installation at Vernon Hills so that all information technology operations used by the Divestiture Business will be maintained at levels of functionality equivalent or superior to those which exist as of the filing of the Complaint. Definition II(D) also requires that any data or information related to the Divestiture Business will be purged from hardware and backup media that will not be divested. Section IV, Paragraph C of the proposed Final Judgment addresses the Acquirer's right to offer employment to three Enodis employees who provide information

technology services and support to various Enodis businesses (including the Divestiture Business) from the Vernon Hills data center, but whose responsibilities do not relate primarily to the Divestiture Business as of the filing of the Complaint. These three employees are qualified to provide services and support that will enable the Acquirer to successfully operate the Vernon Hills data center post-divestiture.

The European Commission has required defendants to divest most of Enodis's worldwide ice machine assets, including the Divestiture Business. As a result of the practical difficulties of splitting between two acquirers rights to certain intellectual property shared by the Divestiture Business and Enodis plc's European Frimont Business, Section IV, Paragraph K of the proposed Final Judgment requires defendants to sell the Divestiture Business to the acquirer of the Frimont Business. Because the United States and the European Commission must approve the same acquirer, Section IV, Paragraph A of the proposed Final Judgment provides that the United States will consult with the European Commission in exercising its review of defendants' sale of the Divestiture Business in a manner consistent with the proposed Final Judgment, to an acquirer acceptable to the United States in its sole discretion. As noted above, if the defendants do not divest the Divestiture Business within the required time period, the Court, upon application of the United States, is to appoint a trustee to complete the divestiture. Because the European Commission also requires selection of a trustee if the divestiture is not completed within a certain time, Section V, Paragraph A of the proposed Final Judgment provides that the United States shall select a trustee after consultation with the European Commission to ensure selection of a trustee acceptable to both the United States and the European Commission.

The United States has agreed to a longer-than-usual divestiture period also because of

the overlapping divestitures required by the European Commission. Not only must an Acquirer be approved by the Division and the European Commission, but any potential Acquirer likely must file notices with, and obtain antitrust clearances from, multiple European Union member countries (or file an application seeking the jurisdiction of the European Commission) in connection with the Acquirer's purchase of the Divestiture Business and other Enodis ice machine business assets worldwide. Section IV, Paragraph A of the proposed Final Judgment thus requires defendants to divest the Divestiture Business within 150 calendar days after the filing of the Complaint, or five (5) calendar days after notice of the entry of the final judgment by the court, whichever is later.[1]

Although contracts used in the Divestiture Business generally must be divested, certain contracts that are unassignable or are not primarily used by the Divestiture Businesses are not required to be divested. Section IV, Paragraph J of the proposed Final Judgment addresses the Acquirer's need to find a source for certain input components typically purchased under such contracts. Subsection (1) requires that defendants provide the Acquirer information or documents relating to any product that is customized for the Divestiture Business and purchased under any such contract so the Acquirer has the information it may need to negotiate its own supply contract. Subsection (2) addresses the possibility that the Acquirer may be unable to negotiate its own contracts to purchase at commercially reasonable terms certain products for

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[1] Quick divestitures have the clear benefits of restoring premerger competition to the marketplace as soon as possible, and of mitigating the potential dissipation of asset value associated with a lengthy divestiture process. Achieving these benefits are of as much importance in this matter as in any other, and Section IV, Paragraph A of the proposed Final Judgment requires defendants to use their best efforts to divest the Divestiture Business as expeditiously as possible. In this matter, and in most other matters, the United States, in its sole discretion, may agree to one or more extensions of the divestiture period not to exceed 60 calendar days in total.

which alternative suppliers are not available as of the time of the divestiture. Subsection (2) requires defendants for a prescribed period to purchase and resell any such product to the Acquirer at the price specified in defendants' current supply contract. To prevent the sharing of information that could foster coordination, defendants are prohibited from disclosing, directly or indirectly, information concerning such purchases and resales to defendant personnel involved in production, marketing, distribution, or sales of commercial cube ice machines.

The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the development, production, distribution, and sale of commercial cube ice machines in the United States.

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
1401 H St. N.W., Suite 3000
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 Manitowoc's acquisition of Enodis plc.

The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition in the development, production, distribution, and sale of commercial cube ice machines 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, while allowing the non-problematic aspects of the transaction to go forward.

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, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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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).[2]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "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). 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.

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[2] The 2004 amendments substituted "shall" for "may" in directing relevant factors for court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[3] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

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

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[3] *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'").

have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. 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. *Id.* at 1459-60. As this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[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.[4]

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: October 6, 2008

Respectfully submitted,

Helena M. Gardner, Esquire
Christine Hill, Esquire (D.C. Bar #461048)
United States Department of Justice
Antitrust Division, Litigation II Section
1401 H Street N.W., Suite 3000
Washington, D.C. 20530
(202) 514-8518

[4] *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.").