UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff,* v. MEDIA GENERAL, INC., and LIN MEDIA LLC, *Defendants.*	**CASE NO.** **JUDGE:** **FILED:**

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), plaintiff United States of America ("United States") 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 Media General, Inc. ("Media General") and LIN Media LLC ("LIN") entered into a Purchase Agreement, dated March 21, 2014, pursuant to which Media General would acquire LIN. Under the Purchase Agreement, LIN shareholders would receive approximately $1.5 billion in a combination of stock and cash. Defendants compete head-to-head in the sale of broadcast television spot advertising in the following Designated Market Areas ("DMAs"): Mobile, Alabama/Pensacola, Florida; Birmingham, Alabama; Savannah, Georgia; Providence, Rhode Island/New Bedford, Massachusetts; and Green Bay/Appleton, Wisconsin (collectively "the DMA Markets").

The United States filed a civil antitrust Complaint on October 30, 2014, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of the acquisition would be to lessen competition substantially and increase broadcast television spot advertising prices in each of the DMA Markets in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

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 proposed acquisition. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest the Divestiture Assets (collectively, the "Divestiture Stations") to Acquirers approved by the United States in a manner that preserves competition in each of the DMA Markets: WVTM-TV, located in the Birmingham, Alabama DMA; WJCL and WTGS, both located in the Savannah, Georgia DMA; WALA-TV, located in the Mobile, Alabama/Pensacola, Florida DMA; WJAR, located in the Providence, Rhode Island/New Bedford, Massachusetts DMA; and WLUK-TV and WCWF, both located in the Green Bay/Appleton, Wisconsin DMA. The Hold Separate requires Defendants to take certain steps to ensure that the Divestiture Stations are operated as competitively independent, economically viable, and ongoing businesses that will remain independent and uninfluenced by the consummation of the acquisition that competition is maintained during the pendency of the ordered divestitures.

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 Acquisition

Media General is incorporated in the Commonwealth of Virginia, with its headquarters in Richmond, Virginia. Media General owns and operates 31 broadcast television stations in 29 metropolitan areas. It owns and operates broadcast television stations in each of the DMA Markets.

LIN is a Delaware corporation, with its headquarters in Austin, Texas. LIN owns and operates, or provides programming, operating, or sales services to more than 50 stations in 23 metropolitan areas. It also owns and operates, or provides programming, operating, or sales services to broadcast television stations in each of the DMA Markets.

The proposed acquisition would lessen competition substantially in the sale of broadcast television spot advertising in each of the DMA Markets. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on October 30, 2014.

B. Anticompetitive Consequences of the Transaction

1. The Relevant Product

The Complaint alleges that the sale of broadcast television spot advertising constitutes a relevant product market for analyzing this acquisition under Section 7 of the Clayton Act. Television stations attract viewers through their programming and then sell advertising time to businesses wanting to advertise their products to those television viewers. Advertisers purchase broadcast television spot advertising to target potential customers in specific DMAs. Spot advertising differs from network and syndicated television advertising, which are sold on a nationwide basis by major television networks and by producers of syndicated programs and are broadcast in every market area in which the network or syndicated program is aired.

Broadcast television spot advertising possesses a unique combination of attributes that sets it apart from advertising using other types of media. Television combines sight, sound, and motion, thereby creating a more memorable advertisement. Broadcast television spot advertising generally reaches the largest percentage of potential customers in a targeted geographic area and is therefore especially effective in introducing, establishing, and maintaining a product's image.

Because of this unique combination of attributes, broadcast television spot advertising has no close substitute for a significant number of advertisers. Spot advertising on subscription television channels and internet-based video advertising lack the same reach; radio spots lack the visual impact; and newspaper and billboard ads lack sound and motion, as do many internet search engine and website banner ads. Through information provided during individualized price negotiations, stations can readily identify advertisers with strong preferences for using broadcast television spot advertising and ultimately can charge different advertisers different prices. Consequently, a small but significant price increase in broadcast television spot advertising is unlikely to cause enough advertising customers to switch advertising purchases to other media to make the price increase unprofitable.

2. The Relevant Markets

The Complaint alleges that each of the DMA Markets constitutes a relevant geographic market for purposes of analyzing this acquisition under Section 7 of the Clayton Act. A.C. Nielsen Company defines DMAs as specific geographic units for advertising purposes. Signals from full-powered television stations in each of the DMA Markets reach viewers throughout that DMA, so advertisers can use television stations in each of the DMA Markets to target the largest possible number of viewers within each of those markets. Some of these advertisers are located in each of the DMA Markets and are trying to reach consumers that live in that specific market;

others are regional or national businesses wanting to target consumers in a specific area. Advertising on television stations outside each of the DMA Markets is not an alternative for either local, regional, or national advertisers, because signals from television stations outside each of the DMA Markets reach relatively few viewers within each of those DMAs. Thus, advertising on those stations outside a DMA does not reach a significant number of potential customers within the DMA.

3. Harm to Competition in Each of the DMA Markets

The Complaint alleges that the proposed acquisition likely would lessen competition substantially in interstate trade and commerce, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and likely would have the following effects, among others:

a) competition in the sale of broadcast television spot advertising in each of the DMA Markets would be lessened substantially;

b) competition between Media General broadcast television stations and LIN broadcast television stations in the sale of broadcast television spot advertising in each of the DMA Markets would be eliminated; and

c) the prices for spot advertising time on broadcast television stations in each of the DMA Markets likely would increase.

Both Defendants own and operate network-affiliated broadcast television stations in each of the DMA Markets. The acquisition, by eliminating LIN as a separate competitor and combining its operations with Media General, would allow the combined entity to increase its market share of the broadcast television spot advertising and revenues in each of the DMA Markets. In the Mobile, Alabama/Pensacola, Florida DMA, combining the three stations that Defendants operate would give Media General approximately 54 percent of all television station gross advertising revenues in that DMA. In the Birmingham, Alabama DMA, combining the two stations that Defendants operate would give Media General approximately 34 percent of all

television station gross advertising revenues in that DMA. In the Savannah, Georgia DMA, combining the three stations that Defendants operate would give Media General approximately 55 percent of all television station gross advertising revenues in that DMA. In the Providence, Rhode Island/New Bedford, Massachusetts DMA, combining the three stations that Defendants operate would give Media General approximately 83 percent of all television station gross advertising revenues in that DMA. Finally, in the Green Bay/Appleton, Wisconsin DMA, combining the three stations that Defendants operate would give Media General approximately 59 percent of all television station gross advertising revenues in that DMA. In addition to increasing Media General's share of broadcast television spot advertising revenue in each of the DMA Markets, the proposed acquisition would increase substantially its concentration in each of the DMA Markets.

Using the Herfindahl-Hirschman Index ("HHI"), a standard measure of market concentration (defined and explained in Appendix A to the Complaint), the post-acquisition HHI in each of the DMA Markets would be over 2500 with an increase in the HHI of more than 500 points in each of those markets. Under the Horizontal Merger Guidelines issued by the Department of Justice and Federal Trade Commission, mergers resulting in highly concentrated markets (with an HHI in excess of 2500) with an increase in the HHI of more than 200 points are presumed to be likely to enhance market power.

The transaction also combines stations that are close substitutes and vigorous competitors in a product market with limited alternatives. In each of the DMA Markets, Defendants have broadcast stations that are affiliated with the major national television networks, ABC, CBS, NBC, and FOX. Their respective affiliations with those networks, and their local news

operations, provide Defendants' stations with a variety of competing programming options that are often each other's next-best or second-best substitutes for viewers and advertisers.

Currently, Defendants' stations that overlap in the same DMA Market compete for the business of local, regional, and national firms seeking to advertise on broadcast television stations. Advertisers benefit from this competition. Thus, the proposed acquisition is likely to eliminate this head-to-head competition and therefore, could enable Defendants to raise prices for broadcast spot advertising.

4. Lack of Countervailing Factors

The Complaint alleges that entry or expansion in each of the DMA Markets' television spot advertising market would not be timely, likely, or sufficient to prevent any anticompetitive effects. New entry is unlikely since any new station would require an FCC license, which is difficult to obtain. Even if a new station became operational, commercial success would come over a period of many years. The number of 30-second spots available at a station is generally fixed, and additional slots cannot be created. Adjusting programming in response to a pricing change is difficult and time-consuming. Programming schedules are complex and carefully constructed, and television stations often have multi-year contractual commitments for individual shows or are otherwise committed to programming provided by their affiliated network. Accordingly, other television stations in each of the DMA Markets could not readily increase their advertising capacity or change their programming in response to a small but significant price increase by Media General.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the transaction in each of the DMA Markets by maintaining the

Divestiture Stations as independent, economically viable competitors.[1] The proposed Final Judgment requires Defendants to make the following divestitures: To Hearst Television: WVTM-TV, located in Birmingham, Alabama and WJCL, located in Savannah, Georgia; to Meredith Corporation: WALA-TV, located in Mobile, Alabama; and to Sinclair Broadcast Group: WJAR, located in Providence, Rhode Island, WLUK-TV and WCWF, both located in Green Bay, Wisconsin, and WTGS, located in Savannah, Georgia.[2] The United States has approved each of these divestitures in order to provide greater certainty and efficiency in the divestiture process. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly. If Defendants do not sell the assets to the approved buyers, they shall cooperate with prospective purchasers to accomplish the divestiture expeditiously to other Acquirers in such a way as to satisfy the United States in its sole discretion that the Divestiture Stations can and will be operated by a purchaser as a viable, ongoing business that can compete effectively in the relevant market.

[1] The United States' evaluation of the merger of Media General and LIN concerned the likely competitive effects of the merger, and did not consider whether pre-existing agreements among participants in the DMA Markets might restrain competition. For instance, the United States is aware that, before Defendants entered their agreement to merge, LIN had a pre-existing local marketing agreement (LMA) in Providence with the owner of the Fox affiliate. Following the divestitures required under the proposed Final Judgment, Media General will replace LIN under the LMA. Because the United States has not investigated the competitive effects of these agreements as part of its evaluation of the merger, the proposed Final Judgment does not address them. We understand, however, that LMAs or other agreements in these markets may be subject to the requirements established in the Federal Communications Commission's Report and Order in its *2014 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50, FCC 14-28 (Apr. 15, 2014).

[2] Vaughan Acquisition LLC owns certain equity interests in WTGS, and Defendant LIN holds an option to purchase Vaughan's equity interests in WTGS. LIN and Vaughan have entered into an Option Exercise Agreement pursuant to which LIN will exercise its option for Sinclair's benefit upon consummation of Media General's merger with LIN.

The "Divestiture Assets" are defined in Paragraph II.O of the proposed Final Judgment to include all assets principally devoted to and necessary for the operation of the Divestiture Stations. These Divestiture Assets are essentially the same assets that Defendants would have operated under the Asset Purchase Agreement. The assets include real property, equipment, FCC licenses, contracts, intellectual property rights, programming materials, and customer lists maintained by Media General or LIN in connection with each of the Divestiture Stations. These do not include assets that are not principally devoted to or necessary for the operation of each of the Divestiture Stations, but are used to support multiple stations. Thus, Media General will be able to retain back-office systems or other assets and contracts used to support multiple broadcast television stations, and which an Acquirer with experience operating broadcast television stations can supply for itself.

To ensure that each of the Divestiture Stations is operated as an independent, economically viable competitor after the divestitures, Section XI of the proposed Final Judgment prohibit Defendants from entering into any agreements during the term of the Final Judgment that create a long-term relationship with any of the Acquirers of the Divestiture Stations after the divestitures are completed. Examples of prohibited agreements include options to repurchase or assign interests in any of the Divestiture Stations; agreements to provide financing or guarantees for financing; local marketing agreements, joint sales agreements, or any other cooperative selling arrangements; shared services agreements; and agreements to jointly conduct any business negotiations with the Acquirers with respect to any of the Divestiture Stations. This shared services prohibition does not preclude agreements limited to helicopter sharing and stock video pooling in the forms that are customary in the industry. It also does not preclude other non-sales-related agreements approved in advance by the United States in its sole discretion.

These limited exceptions do not permit Defendants to enter into broad news-sharing agreements with respect to any of the Divestiture Stations. The United States in its sole discretion may approve in writing of any transition services agreement that may be necessary to facilitate the continuous operations of the Divestiture Assets until the Acquirers can provide such capabilities independently. The terms and conditions of any such transition services agreement shall be subject to the approval of the United States, in its sole discretion. These transition services agreements will allow each of the Divestiture Stations to continue its operations as an independent, ongoing, economically viable, and active competitor in the broadcast television spot advertising business.

Defendants are required to take all steps reasonably necessary to accomplish the divestitures quickly and to cooperate with prospective purchasers. Because transferring the broadcast license for each of the Divestiture Stations requires FCC approval, Defendants are specifically required to use their best efforts to obtain all necessary FCC approvals as expeditiously as possible. The divestiture of each of the Divestiture Stations must occur within ninety (90) calendar days after the filing of the Hold Separate in this matter or five (5) calendar days after notice that the Court has entered the Final Judgment, whichever is later, subject to Defendants' receipt of any necessary FCC order pertaining to the divestiture. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total, and shall notify the Court in such circumstances. If FCC applications to assign or transfer licenses to the Acquirers of the Divestiture Stations have been filed within the period permitted for divestiture, but an order or other dispositive action by FCC on such applications has not been issued before the end of the period permitted for divestiture, the period

shall be extended with respect to divestiture of the Divestiture Stations for which no FCC order has issued until five (5) days after such order is issued.

If the divestitures do not occur within the prescribed timeframe in Section VI (A) of the proposed Final Judgment, the proposed Final Judgment provides that the Court, upon application of the United States, will appoint a Divestiture Trustee selected by the United States to sell any of the Divestiture Stations that have not been divested. The Defendants will pay all costs and expenses of the Divestiture Trustee. The Divestiture Trustee's commission will be structured to provide an incentive for the Divestiture Trustee based on the price obtained and the speed with which the divestiture is accomplished. The Divestiture Trustee would file monthly reports with the Court and the United States describing efforts to divest the remaining stations. If the divestiture has not been accomplished after six (6) months, the Divestiture Trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, to carry out the purpose of the trust.

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 U.S. 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. In addition, comments will be posted on the United States Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

David C. Kully
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
450 5th Street, N.W. Suite 4000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and Defendants 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 Media General's acquisition of LIN. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the sale of broadcast television spot advertising in each of the DMA Markets. 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, 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

> (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, *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.").[3]

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

[3] 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).

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) (quoting *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).[4] 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 U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *16 (noting that a court should not reject the proposed remedies because it believes others are preferable); *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

[4] *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'").

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 U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *8 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461); *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). 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; *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable; *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 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); *see also U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). 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 Sen. 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.[5] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9.

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.

[5] *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: October 30, 2014

Respectfully submitted,

Mark A. Merva* (D.C. Bar #451743)
Anupama Sawkar
Trial Attorneys
United States Department of Justice
Antitrust Division
Litigation III Section
450 Fifth Street, N.W., Suite 4000
Washington, D.C. 20530
Phone: 202-616-1398
Facsimile: 202-514-7308
E-mail: Mark.Merva@usdoj.gov

*Attorney of Record