UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	
Plaintiff,	
v.	**Civil Action No.:**
STAR ATLANTIC WASTE HOLDINGS, L.P.,	**Description: Antitrust**
	Judge:
VEOLIA ENVIRONNEMENT S.A.	**Date Stamp:**
and	
VEOLIA ES SOLID WASTE, INC.,	
Defendants	

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 Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

Pursuant to a share purchase agreement dated July 18, 2012, Star Atlantic Waste Holdings, L.P. ("Star Atlantic") proposes to acquire all of the outstanding shares of common stock of Veolia Environnement S.A.'s U.S. subsidiary, Veolia ES Solid Waste, Inc. ("Veolia") in a transaction valued at approximately $1.9 billion.

The United States filed a civil antitrust Complaint on November 15, 2012, seeking to enjoin the proposed acquisition. The Complaint alleges that the proposed acquisition likely would substantially lessen competition for small container commercial waste collection service in the area of Macon, Georgia and for municipal solid waste ("MSW") disposal service in Northern New Jersey and Central Georgia in violation of Section 7 of the Clayton Act. This loss of competition would result in consumers paying higher prices and receiving fewer services for the collection and disposal of MSW.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order 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 are required to divest specified small container commercial waste collection and MSW disposal assets. Under the terms of the Hold Separate Stipulation and Order, Star Atlantic and Veolia are required to take certain steps to ensure that the assets to be divested will be preserved and held separate from other assets and businesses.

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.

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

A. The Defendants

Star Atlantic is a Delaware limited partnership with its headquarters in New York, New York. Star Atlantic provides collection, transfer, recycling, and disposal services in Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina and Tennessee through its subsidiary Advanced Disposal Services, Inc., and in Massachusetts, Vermont, New York, New Jersey, Pennsylvania, Maryland, and West Virginia through its subsidiary, Interstate Waste Services, Inc. In 2011, Star Atlantic had estimated total revenues of $563 million.

Veolia Environnement S.A. is a French corporation, with a wholly-owned subsidiary, Veolia ES Solid Waste, Inc., that offers collection, transfer, recycling, and disposal services in Florida, Georgia, Alabama, Kentucky, Missouri, Illinois, Minnesota, Wisconsin, Michigan, Indiana, Pennsylvania, and New Jersey. In 2011, Veolia ES Solid Waste, Inc. had estimated total revenues of $818 million.

B. The Competitive Effects of the Transaction

MSW is solid, putrescible waste generated by households and commercial establishments. Waste collection firms, or haulers, contract to collect MSW from residential and commercial customers and transport the waste to private and public MSW disposal facilities (*e.g.*, transfer stations and landfills), which, for a fee, process and legally dispose of the waste. Small container commercial waste collection is one component of MSW collection, which also includes residential and other waste collection. Star Atlantic and Veolia compete in the collection of small container commercial waste and the disposal of MSW.

1. The Effect of the Transaction on Competition in Small Container Commercial Waste Collection in the Macon Metropolitan Area

Small container commercial waste collection service is the collection of MSW from commercial businesses such as office and apartment buildings and retail establishments (*e.g.*, stores and restaurants) for shipment to, and disposal at, an approved disposal facility. Because of the type and volume of waste generated by commercial accounts and the frequency of service required, haulers organize commercial accounts into routes, and generally use specialized equipment to store, collect, and transport MSW from these accounts to approved MSW disposal sites. This equipment (*e.g.*, one to ten-cubic-yard containers for MSW storage, and front-end load vehicles commonly used for collection and transportation of MSW) is uniquely well-suited for providing small container commercial waste collection service. Providers of other types of waste collection services (*e.g.*, residential and roll-off services) are not good substitutes for small container commercial waste collection firms. In these types of waste collection efforts, firms use different waste storage equipment (*e.g.*, garbage cans or semi-stationary roll-off containers) and different vehicles (*e.g.*, rear-load, side-load, or roll-off trucks), which, for a variety of reasons, cannot be conveniently or efficiently used to store, collect, or transport MSW generated by commercial accounts and, hence, are rarely used on small container commercial waste collection routes. In the event of a small but significant increase in price for small container commercial waste collection services, customers would not switch to any other alternative. Thus, the Complaint alleges that the provision of small container commercial waste collection services constitutes a line of commerce, or relevant service, for purposes of analyzing the effects of the transaction.

The Complaint alleges that the provision of small container commercial waste collection service takes place in compact, highly localized geographic markets. It is expensive to transport MSW long distances between collection customers or to disposal sites. To minimize transportation costs and maximize the scale, density, and efficiency of their MSW collection operations, small container commercial waste collection firms concentrate their customers and collection routes in small areas. Firms with operations concentrated in a distant area cannot easily compete against firms whose routes and customers are locally based. Distance may significantly limit a remote firm's ability to provide commercial waste collection service as frequently or conveniently as that offered by local firms with nearby routes. Also, local small container commercial waste collection firms have significant cost advantages over other firms, and can profitably increase their charges to local small container commercial waste collection customers without losing significant sales to firms outside the area.

Applying this analysis, the Complaint alleges that in Bibb, Jones, Peach, Monroe and Crawford Counties in Georgia (the "Macon Metropolitan Area"), a local small container commercial waste collection monopolist, absent competition from other small container commercial waste collection firms, profitably could increase charges to local customers without losing significant sales to more distant competitors. Accordingly, the Macon Metropolitan Area is a section of the country or a relevant geographic market for the purpose of assessing the competitive effects of a combination of Star Atlantic and Veolia in the provision of small container commercial waste collection services.

There are significant entry barriers into small container commercial waste collection. A new entrant into small container commercial waste collection services must

achieve a minimum efficient scale and operating efficiencies comparable to those of existing firms in order to provide a significant competitive constraint on the prices charged by market incumbents. In order to obtain comparable operating efficiencies, a new firm must achieve route density similar to existing firms. However, the incumbent's ability to price discriminate and to enter into long-term contracts with existing small container commercial waste collection firms can leave too few customers available to the entrant to create an efficient route in a sufficiently confined geographic area. The incumbent firm can selectively and temporarily charge an unbeatably low price to specified customers targeted by new entrants. Long-term contracts often run for three to five years and may automatically renew or contain large liquidated damage provisions for contract termination. Such terms make it more costly or difficult for a customer to switch to a new small container commercial waste collection firm and obtain lower prices for its collection service. Because of these factors, a new entrant may find it difficult to compete by offering its services at pre-entry price levels comparable to the incumbent and may find an increase in the cost and time required to form an efficient route, thereby limiting a new entrant's ability to build an efficient route and reducing the likelihood that the entrant will ultimately succeed.

The need for route density, the use of long-term contracts with restrictive terms, and the ability of existing firms to price discriminate raise significant barriers to entry by new firms, which likely will be forced to compete at lower than pre-entry price levels. In the past, such barriers have made entry and expansion difficult by new or smaller-sized competitors in small container commercial waste collection markets.

In the Macon Metropolitan Area, the proposed acquisition would reduce from four to three the number of significant competitors in the collection of small container commercial waste. Annual revenue from small container commercial waste collection in the Macon Metropolitan Area is approximately $7.1 million. After the acquisition, Star Atlantic would have approximately 80 percent of the total number of small container commercial waste collection routes in the market.

2. *The Effects of the Transaction on Competition in the Disposal of Municipal Solid Waste in Northern New Jersey and Central Georgia*

A number of federal, state, and local safety, environmental, zoning, and permit laws and regulations dictate critical aspects of storage, handling, transportation, processing and disposal of MSW. In order to be disposed of lawfully, MSW must be disposed in a landfill or an incinerator permitted to accept MSW, and such facilities must be located on approved sites and operated under prescribed procedures. Federal, state, and local safety, environmental, zoning, and permit laws and regulations dictate critical aspects of storage, handling, transportation, processing, and disposal of MSW in each market. In less densely populated areas of the country, MSW often is disposed of directly into landfills that are permitted and regulated by the state. Landfill permit restrictions often impose limitations on the type and amount of waste that can be deposited. In many urban and suburban areas, landfills are scarce due to high population density and the limited availability of suitable land. Accordingly, MSW generated in such areas often is burned in an incinerator or taken to a transfer station. A transfer station is an intermediate disposal site for the processing and temporary storage of MSW before transfer, in bulk, to more distant landfills or incinerators for final disposal.

Anyone who fails to dispose of MSW in a lawful manner can be subject to severe civil and criminal penalties.

Because of the strict laws and regulations that govern the disposal of MSW, there are no good substitutes for MSW disposal in landfills or incinerators, or at transfer stations located near the source of the waste. A local monopolist providing MSW disposal services, absent competition from other providers of MSW disposal services, profitably could increase its charges to haulers of MSW by a small but significant amount without losing significant sales to any other firm. Thus the disposal of MSW constitutes a line of commerce, or relevant service, for purposes of analyzing the effects of the acquisition. MSW is transported by collection trucks to landfills and transfer stations, and the price and availability of disposal sites close to a hauler's routes is a major factor that determines a hauler's competitiveness and profitability. The cost of transporting MSW to a disposal site often is a substantial component of the cost of disposal. The cost advantage of local disposal sites limits the areas where MSW can be transported economically and disposed of by haulers and creates localized markets for MSW disposal services.

In Bergen and Passaic Counties in New Jersey ("Northern New Jersey") and in Bibb, Jones, Peach, Monroe, Crawford, Twiggs, Taylor, Macon, and Houston Counties in Georgia ("Central Georgia"), the high costs of transporting MSW, and the substantial travel time to other disposal facilities based on distance, natural barriers, and congested roadways, limit the distance that haulers of MSW generated in those areas can travel economically to dispose of their waste. The firms that compete for the disposal of MSW generated in each of those areas own landfills or transfer stations located within the area.

In the event that all of the owners of those local disposal facilities imposed a small but significant increase in the price of MSW disposal, haulers of MSW generated in each area could not profitably turn to more distant disposal facilities. Firms that compete for the disposal of MSW generated in each area, absent competition from other local MSW disposal operators, profitably could increase their charges for disposal of MSW generated in the area without losing significant sales to more distant disposal sites. Accordingly, Northern New Jersey and Central Georgia are relevant geographic markets for purposes of analyzing the competitive effects of the acquisition under Section 7 of the Clayton Act, 18 U.S.C, § 15.

There are significant barriers to entry in MSW disposal. Obtaining a permit to construct a new disposal facility or to expand an existing one is a costly and time-consuming process that typically takes many years to conclude. Local public opposition often increases the time and uncertainty of successfully permitting a facility. It is also difficult to overcome environmental concerns and satisfy other governmental requirements. Likewise, many of the problems associated with the permitting and construction of a landfill make it difficult to permit and construct a transfer station. In Northern New Jersey and Central Georgia, entry by a new MSW disposal facility would be costly and time-consuming, and unlikely to prevent market incumbents from significantly raising prices for the disposal of MSW following the acquisition.

In Northern New Jersey, the proposed acquisition would reduce from four to three the number of significant competitors for the disposal of MSW. Annual revenue from MSW disposal in this market is approximately $65 million. After the acquisition, defendants would have approximately 40 percent of the MSW disposal market. In

Central Georgia, the proposed acquisition would reduce from four to three the number of significant competitors for the disposal of MSW. After the acquisition, defendants would have approximately 77 percent of the MSW disposal market based on waste tonnages accepted by the landfills in 2011.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirements of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in small container commercial waste collection service in the Macon Metropolitan Area and MSW disposal service in Northern New Jersey and Central Georgia. The requirements will remove sufficient small container commercial waste collection and/or MSW disposal assets from the merged firm's control and place them in the hands of a firm that is independent of the merged firm and capable of preserving the competition that otherwise would have been lost as a result of the acquisition.

The proposed Final Judgment requires defendants, within 90 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 or businesses: (a) small container commercial waste collection assets (routes, trucks, containers, and customer lists) in the Macon Metropolitan Area; and (b) MSW disposal assets (landfills, transfer stations, material recovery facilities,[1] leasehold rights, garages and offices, trucks and vehicles, scales, permits and intangible assets such as customer lists and contracts) in Northern New Jersey and in Central Georgia. The assets must be divested to purchasers

[1] A material recovery facility is a facility permitted to accept and recover those recyclable portions of a commercial waste stream, such as paper, plastic, and glass.

approved by the United States and in such a way as to satisfy the United States that they can and will be operated by the purchaser or purchasers as part of a viable, ongoing business or businesses that can compete effectively in each relevant market. Defendants must take all reasonable steps necessary to accomplish the divestitures quickly and shall cooperate with prospective purchasers.

In the event that defendants do not accomplish the divestitures within the period 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 divestitures. 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 divestitures are 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 divestitures. At the end of six months, if the divestitures have 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.

To eliminate the anticompetitive effects of the acquisition in the market for small container commercial waste collection service in the Macon Metropolitan Area, defendants must divest: (1) Veolia's small container commercial waste collection routes 801 and 802 and, at the acquirer's option, the Veolia hauling facility in Byron, Georgia

and (2) Veolia's small container commercial waste collection route 710 and, at the acquirer's option, the Veolia hauling facility in Thomaston, Georgia.

To eliminate the anticompetitive effects of the acquisition in the market for MSW disposal service in Northern New Jersey and Central Georgia, defendants must divest: (1) Veolia's two transfer stations in Paterson, New Jersey and its transfer station in Totowa, New Jersey, and (2) Veolia's two transfer stations in Byron, Georgia and Thomaston, Georgia and the Veolia landfill in Mauk, Georgia.

The proposed Final Judgment provides that divestiture of the divestiture assets may be made to one or more acquirers, so long as the Northern New Jersey disposal assets are divested to a single acquirer and the Central Georgia disposal assets and the Macon Metropolitan Area waste collection assets are divested to a single acquirer. In Central Georgia and the Macon Metropolitan Area, this provision is intended to encourage the continued operation of an efficient, vertically integrated competitor whose participation in each market would replicate closely the competition existing prior to the acquisition. In Northern New Jersey, buyers of MSW disposal and recycling services generally prefer to have a single supplier of both, and owners of transfer stations that also can recycle have an advantage over those that cannot. The single acquirer provision for the Northern New Jersey disposal assets ensures that the acquirer will be able to offer customers MSW disposal services through each of the three divested transfer stations, as well as recycling services through the material recovery facility associated with the Veolia River Street transfer station, one of the three stations to be divested. The ability of the acquirer to offer customers both MSW disposal and recycling services will allow it to

operate more effectively and replicate closely the competition existing in Northern New Jersey prior to the acquisition.

In addition, Star Atlantic, for the duration of its contracts with any of its current small container commercial waste collection service customers in the Macon Metropolitan Area, shall not initiate new contracts or lengthen or alter any material term of such contracts, except when a customer seeks a contractual change without prompting or encouragement from Star Atlantic. This provision is intended to prevent Star Atlantic from using its acquisition of Veolia as a justification for extending the contracts of its small container commercial waste customers in the Macon Metropolitan Area, thereby precluding competition in a large segment of this market.

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

Maribeth Petrizzi
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 8700
Washington, D.C. 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 preventing Star Atlantic's acquisition of Veolia. The United States is satisfied, however, that the divestiture of the assets described in the proposed Final Judgment will preserve competition for small container commercial waste collection service in the Macon Metropolitan Area and for MSW disposal service in Northern New Jersey and Central Georgia. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but would avoid 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 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable.").[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,

[2] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a 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).

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).[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

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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'").

should grant due respect to the United States's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

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). 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 *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") (citations omitted). 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). 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]

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[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

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 15, 2012

Respectfully submitted,

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public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").