UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA Plaintiff v. UNITED TECHNOLOGIES CORPORATION and GOODRICH CORPORATION Defendants	CASE NO.: 1:12-CV-01230-RC

RESPONSE OF PLAINTIFF UNITED STATES TO
PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), the United States hereby responds to the public comments received regarding the Proposed Final Judgment in this case. After careful consideration of the comments submitted, the United States continues to believe that the Proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the Final Judgment after the public comments and this response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

The United States filed a civil antitrust Complaint on July 26, 2012, seeking to enjoin United Technologies Corporation's ("UTC") proposed acquisition of Goodrich Corporation ("Goodrich"). The Complaint alleged that the proposed acquisition likely would substantially lessen competition in violation of Section 7 of the Clayton Act, 15

U.S.C. § 18, in the worldwide markets for the development, manufacture, and sale of large main engine generators, aircraft turbine engines, and engine control systems for large aircraft turbine engines. That loss of competition likely would result in increased prices, less favorable contractual terms, and decreased innovation in the markets for these products.

Simultaneously with the filing of the Complaint, the United States filed a Proposed Final Judgment, which is designed to remedy the expected anticompetitive effects of the acquisition, and a Hold Separate Stipulation and Order signed by the plaintiffs and the defendants, consenting to the entry of the Proposed Final Judgment after compliance with the requirements of the Tunney Act, 15 U.S.C. § 16. Pursuant to those requirements, the United States filed its Competitive Impact Statement ("CIS") with the Court on July 26, 2012; the Proposed Final Judgment and CIS were published in the *Federal Register* on August 2, 2012, *see United States v. United Technologies Corp., et al.*, 77 Fed. Reg. 46186; and summaries of the terms of the Proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the Proposed Final Judgment, were published in *The Washington Post* for seven days beginning on July 31, 2012 and ending on August 6, 2012. The sixty-day period for public comment ended on October 5, 2012; two comments were received, as described below and attached hereto.

II. THE INVESTIGATION AND THE PROPOSED RESOLUTION

On September 21, 2011, UTC and Goodrich entered into a purchase agreement pursuant to which UTC would purchase all of the shares of Goodrich, a transaction that was valued at approximately $18.4 billion. Immediately following the announcement of

the merger, the United States Department of Justice (the "Department") opened an investigation into the likely competitive effects of the transaction that spanned about ten months. As part of this detailed investigation, the Department issued Second Requests to the merging parties and twenty-four Civil Investigative Demands ("CIDs") to third parties. The Department considered more than half a million documents submitted by the merging parties in response the Second Requests and by third parties in response to CIDs. The Department also took oral testimony from nine executives of the merging parties, and conducted approximately one hundred interviews with customers, competitors, and other market participants. The investigative staff carefully analyzed the information provided and thoroughly considered all of the issues presented.

As part of its investigation, the Department considered the potential competitive effects of the merger on the markets for numerous products and services and on a variety of customer groups. The Department concluded, as explained more fully in the Complaint and CIS, that the acquisition of Goodrich by UTC likely would have substantially lessened competition in the worldwide markets for the development, manufacture and sale of large main engine generators, aircraft turbine engines, and engine control systems for large aircraft turbine engines.

A. Large Main Engine Generators

As explained more fully in the Complaint and CIS, the acquisition of Goodrich by UTC likely would have lessened competition substantially in the market for the development, manufacture, and sale of large main engine generators, because UTC and Goodrich were the only significant competitors for those generators. As a result of the

acquisition, customers likely would face higher prices, less favorable contractual terms, and less innovation, in violation of Section 7 of the Clayton Act.

The Proposed Final Judgment will preserve competition by requiring UTC to divest the Electrical Power Divestiture Assets, i.e., all the Goodrich assets used to design, develop, manufacture, market, service, distribute, repair and/or sell aircraft electrical generation and electrical distribution systems. The tangible assets to be divested include Goodrich's facilities in Pitstone, United Kingdom, and Twinsburg, Ohio, as well as other tangible and intangible assets such as manufacturing equipment, fixed and personal property, contracts, and patents, licenses, know-how, trade secrets, designs, and other intellectual property. In addition, the Proposed Final Judgment provides for transition services agreements and supply agreements that will make the divestiture as seamless as possible and enhance the ability of the acquirer of the divestiture assets to operate those assets as a successful and competitive business.

The Proposed Final Judgment also requires that UTC divest all of the Goodrich shares in the Aerolec joint venture between Goodrich and Thales Avionics Electrical Systems SA. The Proposed Final Judgment requires that the Electrical Power Divestiture Assets and Goodrich's Aerolec shares be divested to the same acquirer. This provision ensures that the interests of the acquirer of the Aerolec shares are aligned with the interests of the acquirer of the Electrical Power Divestiture Assets, which is necessary because the acquirer of the Electrical Power Divestiture Assets will perform the majority of the work within the Aerolec joint venture. In the view of the United States, the divestiture of the Electrical Power Divestiture Assets and the sale of the Goodrich shares

in the Aerolec joint venture is sufficient to remedy the anticompetitive effects in the market for large main engine generators that were alleged in the Complaint.

B. Aircraft Turbine Engines

As described more fully in the Complaint and CIS, the acquisition of Goodrich by UTC likely would have lessened competition substantially in both the large aircraft turbine engine market and the small aircraft turbine engine market.

1. Large aircraft turbine engines

UTC, through its Pratt & Whitney subsidiary, and Rolls-Royce are two of only three primary competitors for the development, manufacture, and sale of large aircraft turbine engines. Goodrich was a partner with Rolls-Royce in a joint venture called Aero Engine Controls ("AEC"), from which Rolls-Royce is required to purchase the engine control systems ("ECSs") for most of its engines. Thus, after the acquisition of Goodrich, UTC would have been both a producer of large aircraft turbine engines and the sole-source supplier of ECSs to one of its leading engine competitors. In this position, UTC would have had the ability to adversely affect the delivery and cost of the ECSs for Rolls-Royce, and thus the competitiveness of Rolls-Royce's engines. Moreover, UTC would have had the incentive to do so, as the potential resulting additional engine sales for Pratt & Whitney would have produced much higher revenues and profits for UTC than UTC would have lost from the lower sales of ECSs to Rolls-Royce. In addition, UTC would have had access to Rolls-Royce's competitively sensitive information, which could have been used to advantage UTC when competing against Rolls-Royce. If UTC were to reduce the competitiveness of Rolls-Royce as a supplier of large aircraft turbine

engines, customers would have had significantly fewer choices, and competition thus would have been lessened substantially.

The Proposed Final Judgment preserves competition by requiring UTC to divest Goodrich's shares of AEC to Rolls-Royce, thus giving Rolls-Royce complete ownership of AEC and preventing UTC from disadvantaging Rolls-Royce in future competitions for large aircraft turbine engines. The United States believes that the divestiture of Goodrich's AEC shares, along with the other requirements in the Proposed Final Judgment, is sufficient to remedy the anticompetitive effects in the market for large aircraft turbine engines, as alleged in the Complaint.

2. Small aircraft turbine engines

UTC, through its Pratt & Whitney subsidiary, is one of only a few significant competitors in the market for the development, manufacture, and sale of small aircraft turbine engines. Several of UTC's competitors purchased from Goodrich the ECSs for certain of their small aircraft turbine engines. Therefore, after the acquisition, UTC would have been both a producer of small aircraft turbine engines and a supplier of ECSs to its competitors. In that position, UTC would have been able to withhold or delay delivery of ECSs to its small aircraft turbine engine competitors, adversely affecting their competitiveness. Moreover, UTC would have had the incentive to do so, as the potential resulting additional engine sales for Pratt & Whitney would have produced much higher revenues and profits for UTC than it would have lost from the lower sales of ECSs to the other small aircraft turbine engine manufacturers. If UTC were to reduce the competitiveness of its competitors in the supply of large aircraft turbine engines,

customers would have had significantly fewer choices, and competition thus would have been lessened substantially.

The Proposed Final Judgment will preserve competition by requiring UTC to divest the Engine Control Divestiture Assets, i.e., all the Goodrich assets that are used to design, develop, and manufacture engine control products for small engines. The assets to be divested include Goodrich's manufacturing facility located in West Hartford, Connecticut, and all tangible and intangible assets used by or located at that facility. The divested assets also include certain assets used or located in Goodrich's Montreal facility, as well as assets related to certain maintenance, repair and overhaul services. In addition, the Proposed Final Judgment provides for transition services agreements and supply agreements that will make the divestiture as seamless as possible and enhance the ability of the acquirer of the Engine Control Divestiture Assets to operate them as a successful and competitive business. The United States believes that the divestiture of the Engine Control Divestiture Assets, along with the other requirements in the Proposed Final Judgment, is sufficient to remedy the anticompetitive effects in the market for small aircraft turbine engines, as alleged in the Complaint.

C. Engine Control Systems for Large Aircraft Turbine Engines

In addition to adversely affecting the competitiveness of Rolls-Royce in the supply of large aircraft turbine engines, UTC's purchase of Goodrich's share in AEC also likely would lessen competition substantially in the market for ECSs for large aircraft turbine engines. UTC and AEC are two of the only three producers of such ECSs, and UTC's purchase of Goodrich would give UTC fifty percent ownership of AEC, one of UTC's two main competitors. Competition would be lessened substantially if UTC were

to impede AEC's competing to provide replacement ECSs or to form teams to supply ECSs for new engines. Moreover, competition would be lessened substantially, if, as a result of the acquisition, UTC and Rolls-Royce were to use AEC to combine their ECS intellectual property and research and development results, rather than competing independently to develop innovative and cost-effective ECS solutions. The United States believes that the divestiture of the Goodrich AEC shares is sufficient to remedy the anticompetitive effects in the market for ECSs for large aircraft turbine engines, as alleged in the Complaint.

III. SUMMARY OF PUBLIC COMMENTS AND THE RESPONSES OF THE UNITED STATES

During the 60-day comment period, the United States received comments from (1) Williams International and (2) Joseph C. Jefferis. The comments are attached to this response. As explained in detail below, after consideration of the two comments, the United States continues to believe that the Proposed Final Judgment is in the public interest.

A. Williams International

1. Summary of the Comment

Williams International ("Williams") competes with UTC's Pratt & Whitney in the development, manufacture and sale of small aircraft turbine engines, and purchases the ECSs for some of its engines from Goodrich. In its Comment, Williams notes that it had serious concerns regarding the likely impact of the acquisition on both the pricing and continued availability of the full authority digital engine control ("FADEC") systems of the Engine Control Divestiture Assets. Williams states that the Proposed Final Judgment "does appear to be a thoughtful, good faith attempt to deal with those concerns," but that

"there are still a number of discrete issues that Williams International believes the [Proposed Final Judgment] does not fully and adequately address." Williams then describes "three remaining primary areas of concern."

First, Williams is concerned that the Proposed Final Judgment does not adequately protect from disclosure to either UTC or potential acquirers the confidential information of customers of the Engine Control Divestiture Assets, such as Williams. For example, Williams considers Section V.A of the Hold Separate Stipulation and Order, which requires UTC to keep competitively sensitive information of the Engine Control Divestiture Assets separate from UTC's, to be ambiguous as to whether it applies to customer information in the possession of the Engine Control Divestiture Assets. Williams also notes that this provision does not appear to apply to the sharing of information with potential purchasers of the engine control assets.

Similarly, Williams finds "woefully inadequate" Section IV.B of the Proposed Final Judgment, which requires UTC to provide to prospective purchasers of the Engine Control Divestiture Assets, "subject to customary confidentiality assurance, all information and documents relating to [the Engine Control Divestiture Assets] customarily provided in due diligence." Williams argues that standard due diligence protections are not sufficient in this matter, because the Proposed Final Judgment could be considered to supersede private nondisclosure agreements.

Second, Williams takes issue with the United States having "sole discretion" to accept or reject an acquirer of the Engine Control Divestiture Assets. Williams assumes that this means that the United States's evaluation of potential purchasers will be performed without any input from engine manufacturers. Williams also takes issue with

the requirement that the purchaser of the assets have "the intent and capability … of competing effectively" in engine controls, asserting that an acquirer also should demonstrate that it is likely to become a "suitable long-term business partner" to the engine manufacturers.

Finally, Williams has concerns about the provisions in the Proposed Final Judgment and Hold Separate Stipulation and Order designed to protect the viability of the divested assets prior to their sale. Williams asserts that the Proposed Final Judgment provides "virtually nothing" relating to UTC's obligations to maintain the Engine Control Divestiture Assets prior to their sale, "particularly with respect to personnel." It also argues that the provisions of the Hold Separate Stipulation and Order are inadequate to prevent the movement of personnel away from the divested business. Williams cites as an example of its concerns the appointment of Curtis Reusser, former president of Goodrich's Electronic Systems segment, to the position of president of the Aircraft Systems business within UTC Aerospace Systems, in which capacity he oversees portions of the acquired Goodrich business that are not subject to divestiture. Williams claims that, during his tenure with Goodrich, Mr. Reusser was directly involved in dealings with Williams regarding Goodrich's performance under its contract, and with all details of the parties' business relationship.

3. Response of the United States

Regarding Williams's concerns about the confidentiality of its information in the possession of the Engine Control Divestiture Assets, the United States believes that the protections of the Hold Separate Stipulation and Order and the Proposed Final Judgment are sufficient. Paragraph V.A of the Hold Separate Stipulation and Order requires UTC

to operate the Engine Control Divestiture Assets so that the "management, sales, and operations… are held entirely separate, distinct, and apart from those of UTC's other operations." This paragraph also specifically requires that sensitive information relating to these products be "kept separate and apart from other UTC operations." To assert that customer information will be accessible by UTC despite these provisions would require a strained interpretation contrary to the plain language of the Hold Separate Stipulation and Order.[1]

As for Williams's assertion that its confidential information might not be properly protected against discovery by potential acquirers of the divestiture assets, the United States sees no reason to provide additional protection for this type of information. In most acquisitions, the purchaser undertakes a "due diligence" investigation to confirm the value of the business that is being purchased. This investigation necessarily involves information that is confidential, possibly including information relating to the acquired company's customers.[2] Potential acquirers who wish to review such information generally are required to hold such information confidential, often signing nondisclosure agreements that bar dissemination or use of the information. Williams provides no reason to believe that such information is at greater risk of disclosure or improper use here than in any other asset sale. The additional degree of protection apparently sought by Williams would make the divestiture process unnecessarily burdensome, possibly

[1] In virtually every lawsuit in which it agrees to a divestiture remedy to resolve the competitive harm from a proposed acquisition, the United States enters into a Hold Separate Stipulation and Order with the merging parties. The language of Paragraph V.A of the Hold Separate Stipulation and Order is routinely included in such documents. The United States is unaware of other instances in which customers of a divested business have expressed similar concerns.

[2] In fact, Paragraph IV.B of the Proposed Final Judgment *requires* the defendants to disclose such information as is "customarily provided in a due diligence process," in part to help ensure that the assets are sold to an acquirer that will maintain them as a competitive force in the market. However, the information so provided is "subject to customary confidentiality assurances."

deterring potential acquirers and thus thwarting the central goal of the Proposed Final Judgment, which is expeditious divestiture to a suitable purchaser.[3] Williams also provides no support for its concern that the "scrutiny of the DOJ" will somehow lead to reduced confidentiality protections, or for its view that the Proposed Final Judgment might be held to "take precedence over private non-disclosure agreements." Nothing in either the Proposed Final Judgment or the Hold Separate Stipulation and Order suggests any such counterintuitive outcome. If anything, fear of the "scrutiny of the DOJ" – and surely that of this court – will lead to more protection of confidential information rather than less.

Williams need have no concern about the scope of the review undertaken by the United States. While the United States has sole discretion to decide whether a divestiture to a particular proposed acquirer meets the objectives of the Proposed Final Judgment, the United States's evaluation includes consideration of information from numerous sources, including affected customers. Information gathered by the United States during its investigation of UTC's proposed acquisition of Goodrich, including conversations with dozens of customers, is taken into account in this evaluation, and new interviews with customers also are undertaken. The United States also considers the financial resources and business plans of the proposed acquirer, to ensure that the divested assets will be maintained as a long-term competitive force in the market. This is no mere cursory review. Indeed, after a thorough evaluation of documentary information, responses to questions, and information provided by potentially affected

[3] In its Comment, Williams notes that "[t]he DOJ may respond that requiring customary confidentiality assurances pursuant to the due diligence process is no different than what would generally apply in the case of any private contractor of Williams International being sold to a prospective buyer, and that this level of protection in the [Proposed Final Judgment] should be sufficient." Williams Comment, p.6. That is precisely the case. Williams provides no justification for burdening the divestiture process by giving this information additional protection not typically provided in due diligence investigations.

customers, the United States rejected the first acquirer proposed by the defendants for the Engine Control Divestiture Assets.

Finally, the United States disagrees with Williams's assertion that the Proposed Final Judgment and Hold Separate Stipulation and Order do not adequately protect the viability of the assets pending their sale. As Williams notes, the Hold Separate Stipulation and Order contains provisions requiring the defendants to maintain the viability of the assets. Paragraph V.D requires defendants to use "all reasonable efforts to maintain and increase the sales and revenues of all products produced by or sold by" the Engine Control Divestiture Assets, as well as maintaining promotional, sales, technical assistance, and other forms of support for the business. Paragraph V.E requires UTC to provide sufficient working capital and lines and sources of credit to maintain the Engine Control Divestiture Assets as an economically viable and competitive, ongoing business. Paragraph V.F requires UTC to take "all steps necessary to ensure that the [Engine Control Divestiture Assets] are fully maintained in operable condition at no less than current capacity and sales." The requirements of the Hold Separate Stipulation and Order are sufficient to mandate a level of support from UTC for the Engine Control Divestiture Assets, without being so detailed that the operation of the assets is encumbered rather than maintained at its former level of independence.

As for the concern about the retention of employees of the Engine Control Divestiture Assets, the provisions of the Hold Separate Stipulation and Order are designed to prevent UTC from stripping valuable employees from the Engine Control Divestiture Assets by transferring them, or soliciting or encouraging them to move, within UTC. Section V.J of the Hold Separate Stipulation and Order bars the defendants

from transferring or reassigning individuals who have "primary responsibility" for the products produced by the assets to be divested. The interests and desires of individual employees must be respected, however, and they cannot be forced to remain with the Engine Control Divestiture Assets against their will.

In the specific case of Mr. Reusser, the United States was aware of the plan for his transfer during the negotiation of the Proposed Final Judgment. Although Mr. Reusser supervised the Goodrich organization responsible for products produced by the Engine Control Divestiture Assets, he was also responsible for other Goodrich divisions producing a wide range of products not at issue in this case, such as sensors, integrated systems, and intelligence, surveillance and reconnaissance systems.[4] Therefore, the products of the divestiture assets were not Mr. Reusser's "primary responsibility" as that term is used in Section V.J of the Hold Separate Stipulation and Order, and his transfer thus is not prohibited.

B. Joseph C. Jefferis

1. Summary of the Comment

Mr. Joseph C. Jefferis identifies himself as a "former Goodrich Corporation Risk and Control Specialist with Sarbanes-Oxley responsibilities," who served in that capacity from September 2003 to June 2007, when he was "terminated." He states that he filed for whistleblower status with the U.S. Department of Labor in August 2006.

In his comment, Mr. Jefferis recounts several incidents that he says he raised with the Department of Labor relating to Goodrich's conduct, including allegations relating to the Foreign Corrupt Practices Act, insider trading, price-fixing and collusion, and

[4] Williams also complains that Alan Oak, the Vice President and General Manager of GPECS, has left the company. Mr. Oak has retired, and the United States does not believe it would be reasonable to require UTC to persuade Mr. Oak not to do so.

accounting irregularities. One allegation that appears to be of particular interest to Mr. Jefferis relates to a "Community Action Alert" and "a series of dormant alternative fuel cell patents." Mr. Jefferis expresses concern that "dormant patent information I obtained during the secretive 'Community Action Alert' scheme that [a Goodrich representative] engaged me in was given to United Technologies unbeknownst to Goodrich Corporation shareholders and the positive outcome of the scientific studies of the patent information I provided resulted in the favorable terms of the merger agreement." He further alleges that various financial institutions might have been misled about certain licenses in approving financing for the acquisition, and appears to state that the acquisition of Goodrich by UTC will create a monopoly "around this technology." Mr. Jefferis summarizes his allegations as follows:

> It is my worry and concern that a combined Goodrich Corporation and United Technologies poses significant risks to national security given their history of export compliance violations, the unresolved export compliance issues I raised, the corporate espionage I may have engaged in, the bizarre handling of my reporting accounting concerns to the external audit firm, the perjury of [the Goodrich representative], the secrecy surrounding the Community Action Alert patents, and now the 'reinvention' using the prior art information.

2. Response of the United States

The Proposed Final Judgment is designed to remedy the competitive concerns raised by the acquisition of Goodrich by UTC, as alleged in the Complaint. Most of Mr. Jefferis's complaints do not relate to the likely competitive effect of the acquisition. Mr. Jefferis may be concerned, in part, about a possible monopoly in a certain fuel cell technology. Even so, the United States found no evidence that the acquisition of Goodrich by UTC would have an anticompetitive effect in fuel cells; therefore, the

Complaint contains no such allegation. Mr. Jefferis's complaint is thus beyond the purview of this proceeding.

IV. STANDARD OF JUDICIAL REVIEW

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the Proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination in accordance with the statute, the court is required to consider:

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

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

determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the Final Judgment are clear and manageable").

As the United States Court of Appeals for the District of Columbia 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); *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).[5] In determining whether a proposed settlement is in the public interest, the court "must accord deference to the

[5] *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

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

In its 2004 amendments to the Tunney Act,[6] Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement,

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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'").

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

stating "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[7]

IV. CONCLUSION

The United States continues to believe that the Proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint and that the Proposed Final Judgment therefore is in the public interest.

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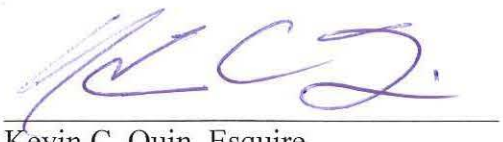
potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

[7] *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.").

The United States will move this Court to enter the Proposed Final Judgment after the comments and this response are published in the *Federal Register*.

Dated: February 12, 2013

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Kevin C. Quin, hereby certify that on February 12, 2013, I caused a copy of the Foregoing **RESPONSE OF PLAINTIFF UNITED STATES TO PUBLIC COMMENTS ON THE PROPOSED FINAL JUDGMENT** to be filed in this matter with the Clerk of Court and to be served on the following counsel of record for Defendants United Technologies Corporation and Goodrich Corporation and the Monitoring Trustee:

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