UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

WESTINGHOUSE AIR BRAKE TECHNOLOGIES CORP.,

FAIVELEY TRANSPORT S.A.,

and

FAIVELEY TRANSPORT NORTH AMERICA,

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 proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On July 27, 2015, Defendant Westinghouse Air Brake Technologies Corp. ("Wabtec") and Defendants Faiveley Transport S.A. and Faiveley Transport North America ("Faiveley") entered into an Exclusivity Agreement pursuant to which Wabtec made an irrevocable offer to acquire Faiveley for cash and stock totaling approximately $1.8 billion, including assumed debt.

The United States filed a civil antitrust Complaint on October 26, 2016, seeking to enjoin the proposed acquisition. The Complaint alleges that the acquisition likely would lessen competition substantially for the development, manufacture, and sale of various railroad freight car brake components including hand brakes, slack adjusters, truck-mounted brake assemblies, empty load devices, brake cylinders, and brake control valves in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would result in significant harm from expected price increases and decreases in quality of service by the incumbent suppliers in the markets for those products.

At the same time the Complaint was filed, the United States filed a Hold Separate Stipulation and Order and a 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 Faiveley's entire U.S. freight car brakes business, including all assets relating to Faiveley's freight car brake control valve development project (known as the FTEN) to a named buyer, Amsted Rail Company, Inc. ("Amsted"). These assets collectively are referred to as the "Divestiture Assets." Under the terms of the Hold Separate Stipulation and Order, Defendants will take certain steps to ensure that the Divesture Assets are operated as a competitively independent, economically viable and ongoing business concern, that the Divestiture Assets will remain independent and uninfluenced by the consummation of the acquisition; and that competition is maintained during the pendency of the ordered divestiture.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would

terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

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

A. The Defendants and the Proposed Transaction

Wabtec is a Delaware corporation headquartered in Wilmerding, Pennsylvania. It is one of the world's largest providers of rail equipment and services with global sales of $3.3 billion in 2015. In the United States, Wabtec makes and sells rail equipment, including braking equipment, for a variety of different end-uses, including the railroad freight industry. Wabtec's annual global sales of freight rail equipment totaled approximately $2 billion in 2015.

Faiveley Transport S.A. is a société anonyme based in Gennevilliers, France. Faiveley makes and sells rail equipment, including braking equipment, for a variety of end uses to customers in 24 countries, including the United States. In particular, it manufactures products used in freight rail applications. During the fiscal year beginning April 1, 2015 and ending March 31, 2016, Faiveley had global sales of approximately €1.1 billion, with approximately $174 million of revenue in the United States. Faiveley has manufacturing facilities in Europe, Asia, and North America, including six U.S. locations.

Faiveley Transport North America is a wholly-owned subsidiary of Faiveley Transport S.A. It is a New York Corporation headquartered in Greenville, South Carolina. It is the sole business unit of Faiveley that is responsible for the development, manufacture, and sale of freight car brake components in the United States.

In 2010, Faiveley entered into a joint venture with Amsted, a rail equipment supplier based in Chicago, Illinois, to form Amsted Rail Faiveley, LLC ("ARF"). Faiveley owns 67.5

percent of ARF and Amsted owns the remaining 32.5 percent. As part of the joint venture, all of the freight car brake components that are manufactured by Faiveley currently are marketed and sold to customers by Amsted. Critically, the joint venture allows Faiveley to bundle brake components with Amsted's other products such as wheels and axles, thereby increasing its ability to compete for the sale of freight car brake components against Wabtec.

On July 27, 2015, Wabtec and Faiveley entered into an Exclusivity Agreement whereby Wabtec would acquire Faiveley for cash and stock totaling approximately $1.8 billion, including assumed debt. The proposed acquisition would create the world's largest rail equipment supplier with expected revenue of approximately $4.5 billion per year and a presence in every key rail market in the world. As part of that acquisition, Wabtec proposed to acquire all of Faiveley's freight car brakes business in the United States, including its interest in the ARF joint venture and Faiveley's FTEN freight car brake control valve now being developed. This acquisition is the subject of the Complaint and proposed Final Judgment filed by the United States on October 26, 2016.

B. Background on Freight Car Brake Equipment Purchases

Rail freight transport is the use of railroads and freight trains to transport cargo. The railroad freight industry plays a significant role in the U.S. economy, hauling key commodities such as energy products, automobiles, construction materials, chemicals, coal, petroleum, equipment, food, metals, and minerals. The U.S. freight rail network accounts for approximately 40 percent of the distance all freight shipments of commodity goods travel in the United States. The U.S. freight rail network is one of the most developed rail networks in the world and it supports approximately $60 billion in railroad freight shipments each year. This freight network

consists of 140,000 miles of trackage owned and operated by seven Class I Railroads, 21 regional railroads, and 510 local railroads.

In order to deliver commodities throughout the United States, freight cars often must travel over multiple railroads' trackage. Traveling over multiple lines requires freight car equipment to be mechanically interoperable and meet common performance standards for certain types of rail equipment. In order for the brake systems on individual freight cars to work together properly, freight car brake systems must be comprised of industry-approved components and meet critical performance standards. For certain freight rail equipment, including freight car brake systems, the Association of American Railroads ("AAR") is responsible for setting technical and performance standards. The AAR is a policy- and standard-setting organization comprised of full, affiliate, and associate members. Full members include the Class I railroads. Affiliate and associate members include rail equipment suppliers and freight car owners.

AAR's functions include technical and mechanical standard setting for freight rail equipment. The AAR manages fifteen technical committees that write technical and performance standards for all components used on freight trains and approve products for use. Thus, a component manufacturer must have AAR approval for brake components before they can be used. Brake components face some of the lengthiest and most rigorous testing and approval processes because brakes are safety-critical components that must be fail-safe. The Brake Systems Committee of the AAR oversees the review and performance tests of braking equipment and it awards incremental approvals over time before a component can earn unconditional approval. Freight car owners and operators view AAR approval as a critical

certification. Industry participants view AAR approval as a high barrier to selling freight car brake systems and components in the United States.

Railroads and freight car leasing companies collectively spend over $20 billion annually to obtain new freight cars and to maintain approximately 1.5 million freight cars utilized throughout the United States. On average, there are expected to be approximately 75,000 new freight car builds per year in the United States, and demand for new cars is tied to macroeconomic conditions, including demand for the commodities these freight cars carry. In recent years, demand for freight cars has ranged from approximately 63,000 to 81,000 new car builds. Railroads and freight car leasing companies typically issue requests for proposals to freight car builders who compete to provide complete freight cars built to specification. Freight car builders source sub-systems and components from suppliers like, Wabtec and Faiveley. Where a product must be AAR approved, car builders must source it from an AAR-approved supplier of that product. For certain components of a freight car brake system, Wabtec and Faiveley are two of the only three AAR-approved suppliers of the product.

New freight car procurements typically include performance specifications identified by customers. Freight car builders use these specifications to source and price particular components for the procurement. Inclusion in new car procurements also becomes a source for long-term revenues for component suppliers. Incumbent suppliers for many freight car brake system components enjoy an advantage in the aftermarket. Although components are technically interoperable, changing suppliers often introduces switching costs and increased risk of failure for end-use customers. Thus, competitiveness for original equipment sales is critical.

C. Relevant Markets Affected by the Proposed Acquisition

Defendants compete across a range of freight car brake system components that require AAR approval. The Complaint alleges that each of these brake system components is a relevant product market in which competitive effects can be assessed. The different components are recognized in the railroad freight industry as separate product lines, they have unique characteristics and uses, they have customers that rely specifically on these products, they are distinctly priced, and they have specialized vendors. Competition would likely be lessened with respect to those components as a result of the proposed acquisition because there would be one fewer substantial equipment manufacturer in each of these highly concentrated markets. For purchasers of components of freight car brake components, Wabtec and Faiveley are two of the top three suppliers, with combined market shares of approximately 41 to 96 percent for the products in which they compete. Faiveley is expected to be an even stronger competitor after full commercialization of the FTEN.

1. U.S. Markets for Hand Brakes, Slack Adjusters, Truck-Mounted Brake Assemblies, Empty Load Devices, and Brake Cylinders

The Complaint alleges likely harm in five distinct product markets for freight car brake components that Faiveley currently sells under and through the ARF joint venture: hand brakes, slack adjusters, truck-mounted brake assemblies ("TMBs"), empty load devices, and brake cylinders. A hand brake is a manual wheel located at the end of a freight car that, when turned, can engage a freight car's brakes system without using pneumatic or hydraulic pressure. It is a secondary means to prevent a freight car from moving, for example, during maintenance or when being connected to a new locomotive. A slack adjuster is a pneumatically-driven "arm" that applies pressure to the brake shoe (a friction material) in order to change the brake shoe's

position relative to the train's wheel. As the brake shoe wears down, this adjustment in position maintains the brake systems' ability to apply the correct amount of braking force by ensuring the brake shoe is applied appropriately to the wheel to achieve optimal braking capability. TMBs are an approach to mounting brakes on freight car designs for which body-mounted brakes are not suitable. TMBs are free-standing equipment that do not require additional rigging and so are significantly lighter than body-mounted brakes. They are commonly used for special lightweight or low profile freight car designs. Empty load devices are incorporated into every freight car and detect when a freight car is empty. The empty load device relays this information to the brake system control board, which is then able to reduce the amount of braking force applied to the brakes on a freight car that is empty so that it decelerates in concert with the remainder of the freight cars in tow. A brake cylinder is a component of a freight car brake system that converts compressed air into mechanical force to apply the brake shoe to the wheel in order to stop or slow the train.

2. U.S. Market for Freight Brake Control Valves and Co-Valves

The Complaint also alleges likely harm in a distinct product market for freight car brake control valves and the associated co-valves that are typically sold with them. The control valve, often described as the brain of a freight car's brake system, regulates the flow of air to engage or disengage the brakes. A control valve is the most highly-engineered, technologically-sophisticated component in a freight car brake system. Without it, a supplier cannot offer a complete freight car brake system. The development of a control valve also requires significant development time and financial resources. In addition, it faces one of the railroad freight

industry's lengthiest and most rigorous testing and approval processes. This results in extremely high entry barriers for this market.

Working closely with the control valve are its complementary valves: the dirt collector, angle cock, and vent valve (collectively, "co-valves"). A dirt collector is a ball style cut-out-cock with a dirt chamber that is installed adjacent to the control valve. It allows for impurities in the air compressor to be filtered out to keep the air lines feeding the braking system clear of obstructions that would reduce air pressure. An angle cock is placed at the end of the brake pipe and provides a means for closing the brake pipe at the end of the freight car. A vent valve is a device on a freight car that reacts to a rapid drop in brake pipe pressure and is used to exhaust air from the brake pipe during emergency brake applications. These co-valves are an essential part of the development, manufacture, and sale of control valves, and for new freight car builds, sales of co-valves correlate with the sale of the control valve.

The market for the development, manufacture, and sale of control valves is characterized by a century-old duopoly between Wabtec and another manufacturer. Over the past five years, Wabtec had approximately 40 percent of the U.S. control valve market and its rival had the other 60 percent of the market.

On June 29, 2016, after a lengthy and expensive development process, Faiveley obtained conditional approval from the AAR to sell its control valve. In doing so, it become the first firm in over 25 years and only the second in the last 50 years to develop a control valve and make substantial progress through the industry's formidable testing and approval process. Faiveley has built the first 200 units and satisfactorily completed all AAR laboratory tests. It projects sales of a few thousand units over the next few years as it works with railroads to continue to test

and demonstrate the FTEN in various functional environments. Full commercialization and unconditional AAR approval is expected within seven years.

D. Geographic Market

As alleged in the Complaint, the United States is the relevant geographic market for the development, manufacture, and sale of freight brake components. Wabtec and Faiveley compete with each other for customers located throughout the United States.

When a geographic market is defined based on the location of customers, competitors in the market are firms that sell to customers in the specified region, even though some suppliers that sell into the relevant market may be located outside the geographic market. Before suppliers can sell components of freight car brake systems in the United States, they must receive AAR approval. The AAR's regulatory authority requires products be certified for interoperability within the U.S. freight rail network. Because these products are certified for use and sale anywhere in the United States, the regulatory framework determines which firms can supply the U.S. customer base, which supports a United States geographic market. Furthermore, suppliers of freight car brake systems and components typically deliver their products and services to customers' locations and are able to price discriminate based on customers' locations.

In addition, a small but significant increase in price of each of the foregoing components of a freight car brake system sold into the United States would not cause a sufficient number of U.S. customers to turn to providers of freight brake components sold into other countries because those products lack AAR approval and interoperability with U.S. freight rail networks.

E. Anticompetitive Effects

1. Freight Car Hand Brakes, Slack Adjusters, Truck-Mounted Brake Assemblies, Empty Load Devices, and Brake Cylinders

Wabtec and Faiveley presently compete vigorously in the development, manufacture, and sale of hand brakes, slack adjusters, TMBs, empty load devices, and brake cylinders, and because these markets are highly concentrated and subject to high entry barriers, unilateral anticompetitive effects would be likely to result from the acquisition. In each of the foregoing relevant markets, Wabtec and Faiveley presently compete against each other and another large competitor in a bargaining format where products are not highly differentiated by function or performance and price is the primary customer consideration, given that performance is presumed after approval by the industry's standard-setting body, the AAR. Given the nature and the extent of this competition, a merger between two competing sellers would remove a buyer's ability to negotiate these sellers against each other. The loss of this bargaining competition can significantly enhance the ability and incentive of the merged entity to obtain a result more favorable to it and less favorable to the buyer than the merging firms would have obtained separately, absent the merger. As its substantial market shares attest, customers derive significant benefits from having Faiveley in the market today. The resulting loss of a competitor and increased concentration of market share indicate that the acquisition likely will result in significant harm from expected price increases and decreases in quality of service if the proposed acquisition is consummated.

2. Freight Car Control Valves and Co-Valves

Wabtec and a second manufacturer are now the only unconditionally approved suppliers of freight car brake control valves. As the second-largest railway brake manufacturer in the

world, Faiveley was uniquely positioned to enter this market because of both its general competency and the substantial progress it has already made in developing the product. Absent the merger it would have become the only other freight car brake control valve supplier.

The proposed acquisition would eliminate future competition for the development, manufacture, and sale of control valves by eliminating Faiveley's entry into this market. Faiveley's entry into the control valve market would have posed an immediate threat to the incumbent suppliers' by forcing them to compete aggressively or risk losing a sale to Faiveley. This market is also characterized by bargaining and price competition and involves the same competitive dynamics described above. Faiveley's customers would have enjoyed enhanced price competition immediately as Faiveley strove to gain quick acceptance of its control valve. Over the long term, the existence of Faiveley as a third supplier would have continued to enhance competition.

Without the required divestiture of assets, Wabtec's acquisition of Faiveley would have eliminated important head-to-head competition in the development, manufacture, and sale of freight car brake components and likely would have given Wabtec the incentive and ability to raise prices and decrease the quality of service provided to the railroad freight car industry. Absent the required divestiture of assets, the acquisition also would have eliminated a third potential supplier of control valves, thereby freezing in place a longstanding duopoly in that market.

F. Barriers to Entry

Given the substantial time required to develop and qualify a component of a freight car brake system, timely and sufficient entry by other competitors into any of the relevant markets, is

unlikely to mitigate the harmful effects of the proposed acquisition. The likelihood of another potential entrant in the control valve market is particularly remote given the historical dearth of meaningful attempts to enter this market, as well as the substantial time and cost associated with entry into the control valve market.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestitures required by the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the relevant markets by establishing a new, independent, and economically viable competitor in the development, manufacture, and sale of freight car brake components by quickly transferring full ownership of the ARF joint venture to Amsted. It is also expected to eliminate the anticompetitive effects of the acquisition from the loss of competition in the development, manufacture, and sale of brake control valves by transferring to Amsted all assets relating to the FTEN control valve project, including the FTEN valve itself, as well as dirt collectors, angle cocks, and vent valves.

Paragraph II(G) of the proposed Final Judgment defines the Divestiture Assets to include all assets owned or under the control of Faiveley at the current ARF facility in Greenville, South Carolina, and include Faiveley's full and complete interest, rights, and property in ARF and the FTEN control valve. The Divestiture Assets include all tangible assets relating to ARF and the FTEN control valve, including, but not limited to, research and development activities; all manufacturing equipment, tooling and fixed assets, including, at the option of the Acquirer, the braking simulation testing equipment known as the "whale" located at Greenville, South Carolina, personal property, inventory, office furniture, materials, supplies, and other tangible property; all licenses, permits and authorizations issued by any governmental organization; all

contracts, teaming arrangements, agreements, leases, commitments, certifications, and understandings, including supply agreements; all customer lists, contracts, accounts, and credit records; all repair and performance records, and all other records.

The Divestiture Assets also include all intangible assets relating to ARF and the FTEN control valve, including, but not limited to, all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names, technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information Faiveley provides to its own employees, customers, suppliers, agents or licensees, and all research data, including, but not limited to, designs of experiments, and the results of successful and unsuccessful designs and experiments.

Paragraph IV(A) of the proposed Final Judgment requires Defendants, within twenty (20) calendar days after the signing of the Hold Separate Stipulation and Order in this matter to divest the Divestiture Assets in a manner consistent with the Final Judgment to Amsted or an Acquirer acceptable to the United States, in its sole discretion. The Divestiture Assets must be divested in such a way as to satisfy the United States in its sole discretion that they assets can and will be operated by the purchaser as a viable, ongoing business that can compete effectively in the relevant market. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with the named acquirer (Amsted) or any other prospective purchaser. 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.

In the event that Defendants do not accomplish the divestiture within the period prescribed in the proposed Final Judgment, Paragraph V(A) of the proposed Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Wabtec will pay all costs and expenses of the trustee. The trustee's commission will be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After his or her appointment becomes effective, the trustee will file monthly reports with the Court and the United States setting forth his or her efforts to accomplish the divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, in order to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

Paragraph IV(I) of the proposed Final Judgment provides that final approval of the divestiture, including the identity of the Acquirer, is left to the sole discretion of the United States to ensure the continued independence and viability of the Divestiture Assets in the relevant markets. In this matter, Amsted has been identified as the expected purchaser of the Divestiture Assets and is currently in final negotiations with Defendants for a purchase agreement. After a thorough examination of Amsted, its plans for the Divestiture Assets and the proposed sale agreements, as well as consideration of feedback from customers, the United States approved Amsted as the buyer. Amsted is a strong competitor in other freight car

equipment such as bogies, wheels, and axles. It is uniquely positioned as the current face of Faiveley brake components to the marketplace (through ARF) and has been the expected conduit through which FTEN was to be marketed by Faiveley absent the merger. Amsted's intimate familiarity with the products, the personnel, the AAR approval process, and the relevant customers should ensure that in its hands the Divestiture Assets will provide meaningful competition.

Under Paragraph IV(I) of the proposed Final Judgment, in the event Amsted is unable to acquire the Divestiture Assets, another Acquirer may purchase the Divestiture Assets, subject to approval by the Department in its sole discretion. The divestiture of assets must be accomplished as a single divestiture of all the Divestiture Assets to a single Acquirer. The Divestiture Assets may not be sold piecemeal. This is to protect the integrity of the Divestiture Assets as an ongoing, viable business and to enable the existing business to continue as a vigorous competitor in the future.

Section XI of the proposed Final Judgment requires Wabtec to provide notification to the Antitrust Division of certain proposed acquisitions not otherwise subject to filing under the Hart-Scott Rodino Act, 15 U.S.C. 18a (the "HSR Act"), and in the same format as, and per the instructions relating to the notification required under that statute. The notification requirement applies in the case of any direct or indirect acquisitions of any assets of or interest in any entity engaged in certain activities relating to freight car brake systems or components in the United States. Section XI further provides for waiting periods and opportunities for the United States to obtain additional information similar to the provisions of the HSR Act before such acquisitions can be consummated.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. 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
450 Fifth Street N.W., Suite 8700
Antitrust Division
United States Department of Justice
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Wabtec's acquisition of Faiveley. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the development, manufacture, and sale of certain components of a freight car brake system, including hand brakes, slack adjusters, truck-mounted brake assemblies, empty load devices, brake cylinders, and control valves, in the relevant markets identified by the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

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.

Id. at § 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. U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (noting that the court's "inquiry is limited" because the government has "broad discretion" to determine the adequacy of the relief secured through a settlement); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 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 mechanism to enforce the final judgment are clear and manageable.").[1]

As the United States Court of Appeals for the District of Columbia Circuit has held, a court conducting inquiry under the APPA may consider, 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) (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.

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

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] 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*, 8 F. Supp. 3d at 75 (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 government'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 U.S. Airways*, 38 F. Supp. 3d at 76 (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.

[2] *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'").

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*, 38 F. Supp 3d at 75 (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 (concluding that "the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." 489 F. Supp. 2d at 15.

In its 2004 amendments, 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*, 38 F. Supp. 3d at 76 (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). This language codified what Congress intended when it enacted the Tunney Act in 1974, as the author of this legislation, Senator Tunney explained: "The 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.[3] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 76.

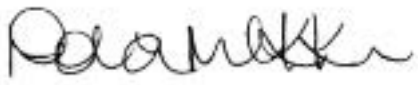
[3] *See also United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (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, 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.").

VIII. DETERMINATIVE DOCUMENTS

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

Dated: October 26, 2016

Respectfully submitted,



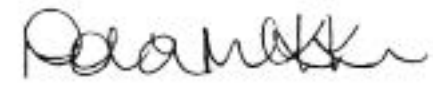
DOHA MEKKI
United States Department of Justice
Antitrust Division, Litigation II Section
450 Fifth Street, N.W., Suite 8700
Washington, DC 20530
Telephone: (202) 598-8023
Facsimile: (202) 514-9033
doha.mekki@usdoj.gov

CERTIFICATE OF SERVICE

I, Doha Mekki, hereby certify that on October 26, 2016, I caused a copy of the foregoing Competitive Impact Statement to be served upon defendants Westinghouse Air Brake Technologies Corp., Faiveley Transport S.A., and Faiveley Transport North America by mailing the documents electronically to their duly authorized legal representatives as follows:

Defendant Westinghouse Air Brake Technologies Corp.
Craig A. Waldman, Esq.
Jones Day
555 California Street
San Francisco, CA 94104-1500
(415) 875-5765
cwaldman@jonesday.com

Defendants Faiveley Transport S.A. and Faiveley Transport North America
Ilene Knable Gotts, Esq.
Wachtell, Lipton, Rosen & Katz
51 West 52nd Street
New York, NY 10019
(212) 403-1247
ikgotts@wlrk.com



DOHA MEKKI
Trial Attorney, Litigation II Section
United States Department of Justice
Antitrust Division
450 Fifth Street N.W., Suite 8700
Washington, D.C. 20530
Telephone: (202) 598-8023
Facsimile: (202) 514-9033
doha.mekki@usdoj.gov