UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GENERAL ELECTRIC CO.

and

BAKER HUGHES INCORPORATED,

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

Defendant General Electric Co. ("GE") and Defendant Baker Hughes Incorporated ("Baker Hughes") entered into a Transaction Agreement and Plan of Merger dated October 30, 2016 ("Transaction"). GE and Baker Hughes are two of the leading providers of refinery process chemicals and services used by oil and gas refineries to remove impurities from the oil and gas and to prevent damage to refinery equipment.

The United States filed a civil antitrust Complaint on June 12, 2017 seeking to enjoin the Transaction. The Complaint alleges that the likely effect of the Transaction would be to lessen competition substantially for refinery process chemicals and services in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, resulting in higher prices, reduced service quality, and diminished innovation.

At the same time the Complaint was filed, the United States also filed a proposed Final Judgment and a Hold Separate Stipulation and Order ("Hold Separate") that are designed to eliminate the anticompetitive effects of the Transaction. Under the proposed Final Judgment, which is explained more fully below, GE is required to divest its GE Water & Process Technologies business unit. Under the terms of the Hold Separate, GE will take certain steps during the pendency of the ordered divestiture to ensure that GE Water & Process Technologies is operated as a competitively independent, economically viable, and ongoing business concern.

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 ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

GE is a New York corporation headquartered in Boston, Massachusetts. GE is a large, diversified corporation that, among other lines of business, supplies the oil supplies the oil and gas industry through a number of business units, including GE Water & Process Technologies, a

standalone business unit that sells refinery process chemicals and services. GE earned $16 billion in revenues from its oil and gas businesses in 2015.

Baker Hughes is a Delaware corporation headquartered in Houston, Texas, with extensive operations in the oil and gas industry, including selling refinery process chemicals and services. Baker Hughes earned $15.7 billion in revenues in 2015.

The Transaction, as initially agreed to by Defendants, would lessen competition substantially.

B. The Competitive Effects of the Transaction on Refinery Process Chemicals and Services in the United States

The Complaint alleges that the provision of refinery process chemicals and services is a line of commerce and a relevant market within the meaning of Section 7 of the Clayton Act. Refineries process crude oil and natural gas extracted from wells ("hydrocarbons") into finished products like gasoline. Refineries rely on a variety of special chemicals, collectively known as refinery process chemicals, to remove salts, solids, metals, and other impurities from the hydrocarbons and to prevent corrosion and damage to refinery equipment. Refineries rely on process chemical and service providers to evaluate the specific hydrocarbons flowing into their refineries and to formulate and apply customized chemical solutions to ensure the safe and efficient processing of those hydrocarbons. To develop the chemical solutions needed to address current and future challenges, these service providers maintain dedicated research and development facilities. Although refinery process chemicals and services represent just a fraction of an oil and gas refiner's overall cost of processing hydrocarbons, using the wrong chemicals can cost a refiner millions in lost production or compromised equipment. As a result,

oil and gas refineries are unlikely to stop using refinery process chemicals or switch to other products in response to a small but significant and non-transitory increase in price.

Oil and gas refiners choose from those suppliers that have service staff and support infrastructure in their local area. GE and Baker Hughes have such infrastructure, and compete with one another for customers, in areas throughout the United States. A hypothetical monopolist of refinery process chemicals and services in the United States likely would impose at least a small but significant price increase because few if any customers would substitute to purchasing other products or to purchasing outside the United States. Therefore, the United States is a relevant geographic market under Section 7 of the Clayton Act for the provision of refinery process chemicals and services.

The market for the provision of refinery process chemicals and services in the United States is highly concentrated and would become more concentrated as a result of the proposed transaction. A combined GE and Baker Hughes would control over 50% of the market for refinery process chemicals and services in the United States. The Transaction would eliminate significant head-to-head competition between GE and Baker Hughes and give the merged firm the incentive and ability to raise its prices above competitive levels, reduce its investment in research and development, and provide lower levels of service.

Entry by new refinery process chemical and service providers or expansion by existing providers would not be timely, likely, and sufficient to prevent the substantial lessening of competition caused by the Transaction. Successful entry into the refinery process chemicals and services business is difficult, costly, and time consuming. In addition to local infrastructure, a new refinery process chemicals and services provider would have to develop a portfolio of

production chemicals and hire experienced staff. In addition, because of the significant investment oil and gas refiners make in infrastructure and the high costs of any problem or delay, refiners disfavor using new providers and typically only switch providers if their existing provider performs poorly over a long period of time. As a result, it is difficult and time consuming for a new provider to enter the market, develop a track record of successful work, and grow its business.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the proposed transaction by establishing GE Water & Process Technologies as an independent and economically viable competitor in refinery process chemicals and services. The sale of GE Water & Process Technologies will provide the buyer of the divestiture assets with the necessary assets to maintain a significant presence in the United States and remain an effective competitor.

A. The Divestiture Package

To ensure continued vigorous competition, the proposed Final Judgment requires the divestiture of all of the tangible and intangible assets of GE Water & Process Technologies that are currently used to serve customers. Under the proposed Final Judgment, the tangible assets of GE Water & Process Technologies that must be divested include worldwide manufacturing plants, service centers, labs, warehouse and distribution facilities, and offices, including the business's global headquarters located in Trevose, Pennsylvania. The transfer will also include all six global research and development facilities. This will ensure that the acquirer

of the divestiture assets has the infrastructure necessary to continue providing refinery process chemicals and services to refiners and compete for opportunities.

The proposed Final Judgment also requires the transfer and licensing of intangible assets, such as intellectual property rights, sufficient to allow the buyer to be an effective competitor. GE must fully divest the complete portfolio of intellectual property used primarily by GE Water & Process Technologies. GE will keep intellectual property used primarily by other GE business units in addition to GE Water & Process Technologies, but will grant the buyer of the divestiture assets a perpetual, royalty-free license for the use of such technology.

B. Procedures

The proposed Final Judgment requires Defendants to sell the divestiture package within 90 days after the Court signs the Hold Separate in this matter, subject to one or more extensions up to a total of 90 days by the United States. The proposed Final Judgment contemplates the sale of the divestiture assets to SUEZ, a French *société anonyme*, which GE has identified as the proposed buyer of the divestiture assets. Suez provides water and wastewater treatment and waste management systems to customers throughout the world, and serves a range of industrial customers and municipalities in the United States. The proposed Final Judgment also provides for a process to sell the divestiture assets to an alternative acquirer in the event that the proposed sale to Suez is not completed.

The assets must be divested in such a way as to satisfy the United States in its sole discretion that the operations can and will be operated by the purchaser as a viable, ongoing business that can compete effectively to provide refinery process chemicals and services.

Defendants must take all reasonable steps necessary to accomplish the divestiture quickly and shall cooperate with prospective purchasers.

In the event that Defendants do not accomplish the divestiture within the prescribed period, the proposed Final Judgment provides that upon application by the United States, the Court will appoint a trustee selected by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Defendants will pay all of the trustee's costs and expenses. The trustee will have the authority to divest the divestiture assets to an acquirer acceptable to the United States. 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 (6) 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. The divestiture provisions of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the provision of refinery process chemicals and services in the United States.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing

of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

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

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

Kathleen S. O'Neill
Chief, Transportation, Energy & Agriculture Section
Antitrust Division
United States Department of Justice
450 5th Street, NW, Suite 8000
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 the Transaction proposed by Defendants. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the provision of refinery process and water treatment chemicals and services in the United States. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

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, U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (noting the court has broad discretion of the adequacy of the relief at issue); *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, 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) (quoting *United States v. Bechtel Corp*., 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[2] In determining whether a

[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).

[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").

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*, 38 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 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 U.S. Airways*, 38 F. Supp. 3d at 74 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would

See generally Microsoft, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

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

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 74 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable; *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court recently confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing

or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 75 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[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 75.

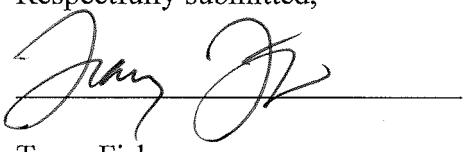
[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 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: June 12, 2017

Respectfully submitted,



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