UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. RAYTHEON COMPANY, GENERAL MOTORS CORPORATION, and HE HOLDINGS, INC., Defendants.	Civil No: 1:97CV02397 United States District Judge Emmet G. Sullivan Filed: October 22, 1997

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 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 October 16, 1997, the United States filed a civil antitrust complaint alleging that the proposed acquisition by Raytheon Company ("Raytheon") of Hughes Aircraft Co. ("Hughes") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that Raytheon and Hughes are the only two firms that design, develop, and produce second generation ("2nd Gen.") electro-optical (“EO”) systems for Department of Defense ("DoD") ground applications. It alleges that Raytheon and Hughes are also the only two firms that design, develop, and produce critical infrared ("IR") detectors, called “SADA II” detectors, used in

ground EO systems, and are the leading firms that develop and produce staring IR detectors used for sensors in missile seeker heads and aircraft and missile warning system applications. The Complaint further alleges that Raytheon, through its majority ownership in a joint venture with Lockheed Martin Corporation ("Lockheed Martin"), and Hughes are competitors for the Follow-On-To-TOW (“FOTT”) new advanced antitank missile program that will replace the current inventory of TOW antitank missiles.

The prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; and (2) a permanent injunction preventing Raytheon from acquiring Hughes.

When the Complaint was filed, the United States also filed a proposed settlement that would permit Raytheon to complete its acquisition of Hughes, but require a divestiture and other terms that will preserve competition in the relevant markets. This settlement consists of a Stipulation and Order, Hold Separate and Partition Plan Stipulation and Order, and a proposed Final Judgment.

The proposed Final Judgment orders Raytheon to divest, within one-hundred and eighty (180) calendar days after October 3, 1997 or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, the FPA Business (as defined in the Final Judgment) of Raytheon TI Systems ("RTIS"), and the EO Business (as defined in the Final Judgment) of Hughes, to an acquirer(s) acceptable to the Antitrust Division of the Department of Justice

("DoJ") and DoD. RTIS's FPA Business includes the 2nd Gen. scanning and third generation ("3rd Gen.") staring IR detector businesses (operated out of the Semiconductor Building and the Research West Building, located at the Expressway site in Dallas, Texas), all tangible and intangible assets used in producing those detectors, including production facilities, research and development activities, and all dewar and cryogenic cooler manufacturing assembly.

Hughes' EO Business includes the 2nd Gen. ground EO business operated out of the El Segundo, California and La Grange, Georgia facilities, which produce A-kits and B-kits for ground vehicles and other applications, including the Integrated Bradley Acquisition System ("IBAS"), Thermal Imaging System for the M1 Abrams tank ("M-1 TIS"), Long-Range Advanced Scout Surveillance System (" LRASSS"), and Horizontal Technology Integration Program ("HTI") programs, all tangible and intangible assets used in producing A-kits and B-kits, production facilities, and research and development activities. In addition, Raytheon is required to provide, at the option of the purchaser, a contract for computer support services and information and communications services sufficient to support the EO Business over a period of one year, and, at the option of the purchaser, an option to purchase or lease manufacturing space in addition to that currently set aside for the EO Business.

Until such divestitures are completed, the terms of the Hold Separate and Partition Plan Stipulation and Order entered into by the parties apply to ensure that the FPA Business and the EO Business shall be maintained as an independent competitor from Raytheon.

In addition to the divestitures, the proposed Final Judgment requires that Raytheon establish firewalls to preserve the independence of the Hughes team competing for the FOTT program ("Hughes FOTT Team") from the RTIS/Lockheed Martin FOTT joint venture (RTIS FOTT Team). The firewall provisions prohibit the flow of information between the two teams and between either team and any other employee of Raytheon. The Proposed Final Judgment requires Raytheon to delegate to the head of RTIS Missile Systems Division the sole discretion to determine all matters relating to RTIS FOTT Team's bid and to create economic incentives for the RTIS FOTT Team members to ensure all reasonable efforts will be made to submit a competitive bid for the FOTT Program.

The plaintiff 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 the 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

Raytheon is a Delaware corporation headquartered in Lexington, Massachusetts. Raytheon produces heavy construction equipment; refrigerators and freezers; radio and TV broadcasting and communications equipment; semiconductors and related devices; aircraft; guided missiles and space vehicles; search, detection and navigation systems; and engineering services. RTIS, a division of Raytheon, produces ground EO systems at a facility in McKinney,

Texas and IR detectors at its Expressway facility in Dallas, Texas. Amber, a separate unit of Raytheon, produces detectors at a facility in Goleta, California. In 1996, Raytheon reported total sales of about $12 billion.

General Motors Corporation ("General Motors") is a Delaware corporation headquartered in Detroit, Michigan. Hughes, a missile and defense electronics company, is an indirect subsidiary of General Motors. Hughes produces ground EO systems at facilities in El Segundo, California and LaGrange, Georgia. Hughes operates the industry's premier detector facility, Santa Barbara Research Center ("SBRC"), in Santa Barbara, California. In 1996, Hughes reported total sales of approximately $6 billion.

HE Holdings, Inc. ("HE Holdings") is a Delaware corporation headquartered in Detroit, Michigan. Hughes is a direct subsidiary of HE Holdings.

On January 16, 1997, Raytheon entered into an agreement with General Motors to purchase HE Holdings, the parent of Hughes. This transaction, which would, in part, take place in the highly concentrated SADA II detector, staring FPA, ground EO systems, and FOTT missile markets, precipitated the government's suit.

B. The Relevant Markets

SADA II Detectors

IR detectors are sensing devices that convert IR radiation into an electrical signal. The devices detect the differences in the heat emissions between an object and its surroundings, and can therefore produce a thermal image of objects in the device's field of view. The detector consists of linear or mosaic arrays of individual diodes made from semiconductor materials such as mercury cadmium telluride ("MCT") or indium antimonide ("InSb"). The detector is attached to a silicon chip or "readout" device that contains the circuitry which stores the energy captured by the detector and converts this energy to a voltage signal. When mated to the readout circuit, the detector is often called a focal plane array ("FPA"). The FPA is typically housed in an evacuated cooler dewar assembly which isolates the FPA and cools it to cryogenic temperatures.

The combination of FPA cooler dewar assembly, optics, electronics, software, and a visual display is commonly called a FLIR (Forward Looking Infrared). FLIRs are used for surveillance and weapons fire control purposes in ground and airborne EO systems. FPAs are also used in heat-seeking missile guidance systems and missile warning systems, applications for which no pictorial image is required. Since the Gulf War, great strides have been made in IR technology, and the military is switching from older first generation ("1st Gen.") lower performance technology to more advanced 2nd Gen. technology in a variety of applications.

Second generation scanning FPAs consist of individual detector elements arranged in two dimensions varying in size from 240 x 2 to 480 x 4. The detector is scanned mechanically with

mirrors across a field of view. Second generation scanning FPAs differ from 1st. Gen. scanning FPAs in that the readout circuit is mounted directly to the detector material. For this reason, 2nd Gen. FPAs are photovoltaic, while 1st. Gen. FPAs are photo conductive. Scanning FPAs are preferred on ground vehicles because of their wide field of view.

FPAs are distinguished by the spectrum of the electromagnetic wavelength they detect -- longwave ("LW"), midwave ("MW") or shortwave ("SW"). LW is visible in the 8 to 12 micron range, MW in the 3 to 5 micron range, and SW in the 1 to 2 micron range. Short wave is not typically used for tactical applications. InSb is the primary material used for detecting MW IR radiation, and it is only used in staring arrays. MCT, the leading material for detecting LW IR radiation, is used in virtually all scanned arrays, but is also used in staring FPAs.

In the late 1960s, DoD started to develop an IR detector common across all the services. This effort resulted in the 1st Gen. "common module" detectors, which were placed in the field in approximately 1970. Since the common module detector is not mounted directly to a integrated readout circuit, fewer detector elements can be placed on the array. Because it has fewer detector elements, the sensitivity and resolution of 1st Gen. FPAs are not as good as that of 2nd Gen. FPAs. First generation detectors were used in Desert Storm, and it was discovered that U.S. weaponry could fire further than the FLIR systems could detect. The desire for EO systems with a range closer to that of the weapon systems motivated the development of 2nd Gen. devices. First generation FPAs are still in use today, although in the early 1990s, the U.S. military stopped placing new 1st Gen. FLIRs in the field.

In the late 1980s, the Army's Night Vision Laboratory began development of 2nd Gen. detectors under the Standardized Advanced Dewar Assembly ("SADA") program. SADA assemblies use a two dimensional MCT array sensitive to LW IR radiation. SADA detectors include four different configurations: SADA I, SADA II, SADA III A and SADA III B. Each type has different specifications so that one does not substitute for another.

The Army uses a SADA II for ground vehicles. As part of a broader effort undertaken in 1992 to insert a common 2nd Gen. FLIR system into various battlefield platforms, the Army decided to use SADA II detectors in the M1A2 Abrams Tank, the M2A3 Bradley Fighting Vehicle, and the LRASSS. The SADA II is also used in the FLIR for the Improved Targeting Acquisition System ("ITAS") for the High Mobility Motorized Wheeled Vehicle ("HMMWV").

Because they do not match the field of view achievable with SADA II detectors, staring FPAs are not viable substitutes for a SADA II detector. Staring FPAs of a size needed to match the field of view obtainable from a scanning FPA are not yet available in LW MCT, which is the only material that meets the Army's needs to see through battlefield smoke, dust, and clutter.

Even if large format LW MCT arrays became available in the future, a switch to such arrays would not be economically justified in response to a small but significant and nontransitory price increase in the SADA II detectors, because of the substantial configuration changes and consequent costs required to replace SADA II detectors in ground vehicles with staring detectors.

Raytheon and Hughes are the only two firms that have sold SADA II detectors to DoD. Hughes qualified as a SADA II supplier in mid-1996, and Raytheon was permitted to bid for 1997 purchases based on its demonstrated success toward completing the qualification process. Raytheon is expected to be fully qualified by the end of 1997. In 1997, about 103 SADA II detectors having a total dollar value of about $6.6 million were purchased, of which 70 percent were supplied by Hughes and 30 percent by Raytheon. DoD projects purchases of 2,945 SADA II detectors through the year 2002, having a total dollar value of about $138.8 million.

Raytheon's acquisition of Hughes would eliminate all competition in the development, production, and sale of SADA II detectors. The proposed acquisition will result in a single supplier with the incentive and ability to raise prices and little or no incentive to minimize cost.

Successful entry into the production and sale of SADA II detectors is difficult, time consuming, and costly. A potential entrant would have to design and develop a product, establish production processes, and complete a rigorous qualification process. A new facility capable of producing SADA II detectors could cost over $20 million. Only one other firm, Sofradir of France, is trying to qualify under the SADA II program. Sofradir, which is partially owned by the French government, is beginning the qualification process. It is unrealistic to expect sufficient new entry in a timely fashion to protect competition in upcoming SADA II purchases.

Staring FPAs

Staring or third generation ("3rd Gen.") FPAs consist of a mosaic of diodes typically square or rectangular in shape. Since they contain no scanning mechanism, staring FPAs provide an image by staring at the scene and rapidly updating changes in the scene. Staring FPAs are lighter weight than scanning, and they can be more economical to use. Staring FPAs are produced in sizes ranging from 64 x 64 to 1024 x 1024. The largest size currently produced for tactical applications, however, is 640 x 480. Staring FPAs provide greater sensitivity and resolution than scanning FPAs, because they have a larger number of detectors. However, staring FPAs are more difficult to produce than scanning FPAs because of the difficulty in producing large InSb or MCT wafers. Due to their smaller physical size and lighter weight, staring FPAs are used in missile seeker heads and airborne applications where small size and light weight are a premium. Staring FPAs are also the detector of choice for missile warning systems.

Staring FPAs have primarily been made of InSb because it was the first technology capable of producing staring FPAs and the material itself is easier to work with. Staring FPAs are now available using MCT technology.

Raytheon and Hughes are the two leading suppliers of staring FPAs for military programs. Raytheon produces staring FPAs at its RTIS facility in Dallas, Texas and its Amber facility, in Goleta, California. Hughes operates SBRC, the industry's premier staring FPA facility, in Santa Barbara, California. Hughes and Raytheon have supplied or are contracted to

supply the staring FPAs on most DoD missile and aircraft programs. DoD projects purchases of about 14,000 staring FPAs over the next five years having a value of about $35 million.

Raytheon's acquisition of Hughes would combine the two leading suppliers of staring FPAs with over 90 percent of the market. The acquisition would create a clear dominant supplier with the incentive and ability to raise prices and little or no incentive to minimize cost.

Boeing Company ("Boeing") and Lockheed Martin make staring FPAs for military applications, but neither is a major supplier in the tactical market. Boeing has focused on space applications, where the FPA must meet more rigid durability and quality standards. Consequently, FPAs for space applications cost significantly more than FPAs for tactical applications. Lockheed Martin operates a very small, research-oriented staring FPA operation. Boeing would need to refocus its staring FPA business from the higher price space applications and Lockheed Martin would need to invest in a production-oriented facility in order for either to be a more significant supplier in the tactical market.

Successful entry into the production and sale of staring FPAs is difficult, time consuming, and costly. A potential entrant would have to design and develop a product and establish production processes. A new facility capable of producing staring FPAs could cost over $20 million. It is unrealistic to expect new entry in a timely fashion to protect competition in upcoming staring FPA purchases.

The acquisition also likely will result in lessening of competition in the market for missile systems. Raytheon and Hughes are not only suppliers of staring FPAs, but are also major suppliers of the missile systems of which these devices are critical components. With the acquisition of Hughes, Raytheon will control access to virtually all currently viable staring FPAs for tactical applications. Raytheon will have an incentive to refuse to sell, or to sell on disadvantageous terms, its state-of-the-art staring FPAs to its missile competitors. Without access to the latest staring FPAs, a missile manufacturer is at a serious competitive disadvantage.

2nd Gen. Ground EO Systems

A ground EO system is an integrated system with a thermal imager (usually a FLIR), including an integrated cooler dewar assembly with detector, afocal assemblies, and associated electronics. It might also include the optics, electronics, software, visual displays, fire control and stabilization necessary to adapt the system to a particular platform.

Targeting and navigation are the two major types of ground infrared EO systems. Targeting systems, sometimes called "fire control systems," acquire the target and direct the missile or gun round to the target. These systems are much more complex than those used for navigation, which only need to permit the operator to see the general area.

A ground EO system operating in or on a ground combat vehicle, in the dust, heat and smoke of a battlefield, faces risks and demands that are different from those faced by an EO system on a fighter aircraft or a helicopter operating substantially above the battlefield. Many

problems that are unique to designing EO systems for the ground combat environment are not faced in designing an EO system for airborne applications. Among these is the requirement that any FLIR on a tank be able to absorb the tremendous shock of a direct hit and keep functioning. In addition, the shock of the recoil of the gun and the extreme vibrations that constantly accompany the operation of a ground combat vehicle must also be accounted for in designing and producing a ground EO system. An EO system operating on the ground may also have to see through several miles of battlefield smoke and debris. For these reasons, the Army spent over $90 million in the early 1990s to specifically develop an EO system for its ground vehicles.

Raytheon and Hughes are the only two firms that develop and produce 2nd Gen. EO systems for ground vehicles. Raytheon's RTIS and Hughes are the only two firms that have established the developmental capacity and low-cost production processes needed to economically produce 2nd Gen. ground EO systems.

During the next five years, DoD expects to spend about $200 million a year for 2nd Gen. ground EO systems to be purchased for the following programs: the Improved Target Acquisition System for the HMMWV; the Improved Bradley Acquisition System for the Bradley Fighting Vehicle; the Commander's Independent Thermal Viewer for the M1 Abrams tank; the Thermal Independent Sight for the M1 Abrams tank; the Commander's Independent Viewer for the Bradley Fighting Vehicle; and the Long Range Advanced Scout Surveillance System. Raytheon and Hughes are the only sources for these ground EO systems.

Raytheon's acquisition of Hughes would eliminate all competition in the development, production, and sale of 2nd Gen. ground EO systems for military applications. The proposed acquisition would result in a single supplier with the incentive and ability to raise prices and little or no incentive to minimize cost.

Successful entry into the production and sale of 2nd Gen. ground EO systems is difficult, time consuming, and costly. Entry requires advanced technology, skilled engineers and specialized equipment. A potential entrant would have to engage in difficult, expensive, and time consuming research to develop and produce 2nd Gen. ground EO systems. It is unrealistic to expect new entry in a timely fashion to protect competition in upcoming 2nd Gen. ground EO system purchases.

FOTT Program

FOTT is a U.S. Army engineering, manufacturing, and development ("EMD") program for an advanced missile to replace the current inventory of TOW anti-tank missiles. The program started on March 30, 1995 when the Army issued a Request for Information. An initial draft Request for Proposal was issued on May 15, 1996, a second draft Request for Proposal was issued on February 12, 1997, and a third draft Request for Proposal was issued on August 8, 1997. The Army currently anticipates issuing a formal Request for Proposal for the FOTT program at the end of 1997 or early 1998. A contract for EMD is expected to be awarded in the first half of 1998. Hughes and a joint venture between RTIS and Lockheed Martin, in which RTIS owns a 60% interest, are competing for the FOTT program.

The U.S. Army has determined that development of an advanced anti-tank missile is necessary and that no other missile system meets the mission objectives set for the FOTT program.

If Raytheon acquires Hughes, it will control the Hughes FOTT proposal and it will control a 60 percent interest in the RTIS/Lockheed Martin joint venture FOTT proposal. In such a situation, Raytheon has a strong economic incentive to favor its Hughes proposal, where it stands to win 100 percent of the program, over the team in which it has only a 60 percent interest. Raytheon's acquisition of Hughes will eliminate the aggressive competition that would otherwise exist between these independent teams. FOTT is a potential $8 billion to $10 billion program.

It would be very difficult for another firm to successfully enter the FOTT competition at this stage. The Hughes and RTIS/Lockheed Martin joint venture teams have completed the validation and demonstration stage and have each spent over $20 million during the last three years developing a missile to demonstrate during the EMD selection. Selection of a contractor for the EMD contract is expected during the first half of 1998.

C. Harm to Competition as a Consequence of the Acquisition

Raytheon's acquisition of Hughes would eliminate competition in the research, development, and production of SADA II detectors and ground EO systems, both necessary to ground military weapons systems in the United States. It would combine the two leading suppliers of staring FPAs with over 90 percent of the market. In addition, Raytheon's acquisition

of Hughes would eliminate the aggressive competition that would otherwise exist between Hughes and the RTIS/Lockheed Martin joint venture for the FOTT antitank missile. Entry by a new company would not be timely, likely or sufficient to prevent harm to competition in any of these product areas.

The Complaint alleges that the transaction would have the following effects, among others: competition generally in the innovation, development, production, and sale of SADA II detectors, staring FPAs, ground EO systems, and the FOTT missile in the United States would be lessened substantially; actual and future competition between Raytheon and Hughes in the development, production and sale of SADA II detectors, staring FPAs, ground EO systems, and the FOTT missile in the United States will be eliminated; and prices for SADA II detectors, staring FPAs, ground EO systems, and the FOTT missile in the United States would likely increase.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The provisions of the proposed Final Judgment are designed to eliminate the anticompetitive effects of the acquisition of Hughes by Raytheon.

The proposed Final Judgment provides that Raytheon must divest, within one hundred eighty (180) calendar days after October 3, 1997, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later, the FPA Business of RTIS and the EO Business of Hughes to an acquirer(s) acceptable to the DoJ and DoD. In addition, Raytheon is required to

provide, at the option of the purchaser, a contract for computer support services and information and communications services sufficient to support the EO Business over a period of one year, and, at the option of the purchaser, an option to purchase or lease manufacturing space in addition to that currently set aside for the EO Business.

If defendants fail to divest these businesses, a trustee (selected by DoJ in consultation with DoD) will be appointed by the Court. The trustee will be authorized to sell the FPA Business and the EO Business. The Final Judgment provides that Raytheon will pay all costs and expenses of the trustee. After his or her appointment becomes effective, the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish divestiture. At the end of six months, if the divestiture has not been accomplished, the trustee and the parties 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.

Divestiture of the FPA Business, the EO Business and the options preserves competition because it will restore the SADA II, staring FPA, and the ground EO systems markets to structures that existed prior to the acquisition and will preserve the existence of independent competitors. Divestiture will keep at least two producers of SADA II detectors and ground EO systems in the market competing for upcoming contracts, which will preserve and encourage ongoing competition in product innovation and development, production, and sales.

Divestiture will also maintain at least two major competitors for staring FPAs and prevent missile system manufacturers from being foreclosed from a critical input. The divestiture thus will preserve competition in upcoming programs.

In addition to the divestitures, the Final Judgment requires that Raytheon establish procedures to assure that the current Hughes and the RTIS/Lockheed Martin joint venture remain independent competitors for the FOTT program. The firewall provisions required by the Final Judgment prevent the flow information between Hughes' FOTT team and the RTIS FOTT team and between either team and any other Raytheon employee. Raytheon is required to delegate to the head of its RTIS Missile Systems Division the sole discretion to determine all matters relating to the RTIS FOTT bid and to create economic incentives for the RTIS FOTT team members to ensure all reasonable efforts will be made to submit a competitive bid for the FOTT program.

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 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. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register. Written comments should be submitted to:

J. Robert Kramer II
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 3000
Washington, D.C. 20530

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

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants Raytheon and General Motors. The United States could have brought suit and sought preliminary and permanent injunctions against Raytheon's acquisition of Hughes.

The United States is satisfied that the divestiture of the described assets and the other terms specified in the proposed Final Judgment will encourage viable competition in the research, development, and production of SADA II detectors, staring FPAs, ground EO systems, and the FOTT program. The United States is satisfied that the proposed relief will prevent the acquisition from having anticompetitive effects in these markets. The divestiture of the FPA Business and the EO Business and the other proposed terms will restore the SADA II, staring FPA, ground EO systems, and FOTT missile markets to structures that existed prior to the acquisition and will preserve the existence of independent competitors in those markets.

VII. STANDARD OF REVIEW UNDER THE APPA FOR 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." In making that determination, the court may consider --

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought,

> anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment 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) (emphasis added). As the Court of Appeals for the District of Columbia Circuit recently held, the APPA permits a court to 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 United States v. Microsoft, 56 F.3d 1448 (D.C. Cir. 1995).

In conducting this inquiry, "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."[1/] Rather,

> 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

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[1] 119 Cong. Rec. 24598 (1973). See also United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

> responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, 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.), cert. denied, 454 U.S. 1083 (1981); see also, Microsoft, 56 F.3d 1448 (D.C. Cir.1995). Precedent requires 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.[2/]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether

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[2] United States v. Bechtel, 648 F.2d at 666 (internal citations omitted)(emphasis added); see United States v. BNS, Inc., 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); United States v. Gillette Co., 406 F. Supp. at 716. See also United States v. American Cyanamid Co., 719 F.2d 558, 565 (2d Cir. 1983).

it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[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.' (citations omitted)."[3/]

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.

FOR PLAINTIFF UNITED STATES OF AMERICA:

_____/s/_____
J. ROBERT KRAMER II
Chief, Litigation II Section
PA Bar #23963

[3] United States v. American Tel. and Tel Co., 552 F. Supp. 131, 150 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting United States v. Gillette Co., supra, 406 F. Supp. at 716; United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky 1985).

_____/s/_____
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Dated: October 22, 1997