UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

CENTRAL PARKING CORPORATION
and
ALLRIGHT HOLDINGS, INC.,

Defendants.

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Civil Action No. 99 0652
Judge Robertson
Filed: 3/28/99

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

The plaintiff filed a civil antitrust Complaint in this Court on March 16, 1999, alleging that the proposed merger between Central Parking Corporation (Central) and Allright Holdings, Inc. (Allright) would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that Central and Allright own, lease, and manage off-street parking facilities for motorists in several cities of the United States, and that they are direct and substantial competitors of each

other in certain local parking markets identified in the Complaint. The Complaint also states that Central is the largest parking management company, in terms of parking locations, spaces, and parking revenues, that Allright is the second largest parking management company in the United States, and that they are two of only four such companies with a nationwide presence. The proposed acquisition would give Central a dominant market share of off-street parking facilities for motorists in local markets identified in the Complaint. In such markets, meaningful entry would be unlikely, untimely, and insufficient to undermine anticompetitive effects likely to result from the proposed merger.

The prayer for relief seeks: (a) adjudication that Central's proposed merger with Allright would violate Section 7 of the Clayton Act; (b) permanent injunctive relief preventing the consummation of the proposed acquisition; (c) and such other relief as is proper.

A proposed settlement has now been reached which is designed to eliminate the anticompetitive effects likely to result from the proposed merger. Within five months after the filing of the Complaint in this case, the defendants have agreed to divest their parking facilities in those local markets in which they are likely to be able to exert market power as a result of the proposed merger. A Stipulation and proposed Final Judgment embodying the settlement has been filed with the Court.

The proposed Final Judgment orders the defendants to divest certain of their off-street parking facilities which they operate, within five months after the filing of the Complaint in this

case, unless the United States grants an extension of time. If the defendants fail to divest these parking properties within the five month period, the Court may appoint a trustee to divest the parking facilities identified in the Final Judgment. The proposed Final Judgment also prohibits the defendants from taking any action that would impede the operation of the parking facilities. The proposed Final Judgment also requires that the divestitures be made to an acquirer or acquirers that have the capability and intent to compete effectively in the provision of off-street parking services.

The plaintiff and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. THE ALLEGED VIOLATIONS

A. The Defendants

Central is headquartered in Nashville, Tennessee and provides off-street parking services to motorists in the United States, Canada, Mexico, Germany, Spain, and Malaysia. It is the largest company in the United States offering such services, in terms of the number of facilities. The company operates over 2,400 parking facilities containing over a million spaces. Its portfolio of parking facilities include owned, leased and managed properties. In fiscal year 1997, Central had revenues of $222,976,000.

Allright is headquartered in Houston, Texas and provides off-street parking services to motorists in the United States. The company is currently 44.5% owned by Apollo Real Estate Investment Fund II, L.P., 44.5% owned by AEW Partners L.P., 9.1% owned by management, and 1.9% owned by certain financial advisors to Apollo and AEW and one member of the previous Allright management team. It is the second largest parking company, in terms of the number of locations in the United States. Allright operates over 2,300 parking facilities containing nearly 600,000 spaces. Like Central, its portfolio of parking facilities includes owned, leased and managed properties. In fiscal year 1997, Allright had annual revenues of $178,637,000.

B. Description of the Events Giving Rise to the Alleged Violation

On or about September 21, 1998, Central and Allright entered into an agreement whereby Allright will become a wholly owned subsidiary of Central, which will continue as the surviving entity in structure and in name. Current Central shareholders will own approximately 80% of Central's common stock, and current Allright shareholders will own approximately 20% of Central's common stock. The total value of the proposed merger at the time it was announced was approximately $585 million.

C. Anticompetitive Consequences of the Proposed Merger

The Complaint alleges that off-street parking services for motorists constitutes a line of commerce, or relevant product market, for antitrust purposes. It also alleges that relevant geographic markets in which to measure the effects of the proposed merger are no larger than the central business districts (CBDs) of the cities identified in the Complaint. The Complaint further alleges that Central and Allright are direct and substantial competitors in offering off-street parking services to consumers.

Central and Allright establish parking prices, either unilaterally or in conjunction with the owners of parking facilities, on a location-by-location basis. In determining the appropriate price and service for any location, the defendants consider the prices charged by other providers of off-street parking services in the geographic market, as well as overall demand for parking services, and the availability of other off-street parking locations. The Complaint alleges that the proposed merger threatens competition by substantially increasing Central's market shares in the relevant markets, and accordingly, would allow Central to exercise substantial control over prices and services available to consumers.

Entry into the relevant markets is unlikely to occur in response to a small but significant price increase. To enter a relevant market and discipline a noncompetitive price increase, a firm must add to the supply of parking spaces that motorists view as substitutes. Creation of new parking spaces in a CBD, however, is most often a by- product of construction or tearing down

of buildings. Given the local character of competition, the cost of land, the limited availability of substitutable parking facilities, and the alternative options for the use of convenient land in the market, entry cannot be viewed as a likely and timely response that would undermine an anticompetitive price increase.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the relevant markets identified in the Complaint by reducing Central's market share where Central would be dominant as a result of the proposed merger. To that end, it requires the divestiture of 74 off-street parking facilities owned, leased or managed by Central and Allright in 18 cities. This relief is designed to ensure that the merger does not increase Central's market share in the local markets of the relevant cities to a level likely to lend to the exercise of market power.

Section IV of the proposed Final Judgment requires the defendants to divest those parking facilities identified in Schedules A and B of the Final Judgment as viable, ongoing businesses. Under the proposed Final Judgment, the defendants must take all reasonable steps necessary to accomplish quickly the divestiture of the specified assets, and shall cooperate with bona fide prospective purchasers by supplying all information relevant to the proposed sale. Unless the United States grants an extension of time, the defendants must divest the parking facilities within 150 days after the Complaint is filed. Until the divestitures take place, the parking properties must continue to be operated as parking facilities.

The defendants are also prohibited from entering into any agreement to operate any of the leased or managed properties divested within two (2) years of the divestiture.

If the defendants fail to divest any of the parking facilities within the time period specified in the Final Judgment, or extension thereof, the Court, upon application of the United States, shall appoint a trustee to effect the required divestitures. If a trustee is appointed, Section VI of the proposed Final Judgment provides that the defendants will pay all costs and expenses of the trustee and any professionals and agents retained by the trustee. The compensation paid to the trustee and any persons retained by the trustee shall be reasonable and shall be based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestitures and the speed with which they are accomplished. After appointment, the trustee will file monthly reports with the United States, the defendants and the Court, setting forth the trustee's efforts to accomplish the divestitures ordered under the proposed Final Judgment. If the trustee has not accomplished the divestitures within ninety (90) days after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestitures, (2) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished, and (3) the trustee's recommendations. At the same time, the trustee will furnish such report to the United States and defendants, who will each have the right to be heard and to make additional recommendations consistent with the purpose of the trust.

The relief in the proposed Final Judgment is intended to remedy the likely anticompetitive effects of the proposed merger between Allright and Central. Nothing in the proposed Final Judgment is intended to limit the United States' ability to investigate or bring actions, where appropriate, challenging other past or future activities of the defendants.

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 the 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. 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 Final Judgment at any time prior to its entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Any such written comments should be submitted to:

Craig W. Conrath
Chief, Merger Task Force
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
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, the filing of a complaint and a full trial on the merits of its complaint. The United States is satisfied, however, that the divestitures as called for by the proposed Final Judgment and other relief contained in the proposed Final Judgment will preserve viable competition in the relevant markets. Thus, the proposed Final Judgment would achieve the relief the Government would have sought 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 PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) 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;
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> (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). As the United States Court of Appeals for the D.C. Circuit recently held, this statute 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, 1461-62 (D.C. Cir. 1995).

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

> [a]bsent 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.

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

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[1]119 Cong. Rec. 24598 (1973). See 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. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), reprinted in U.S.C.C.A.N. 6535, 6538.

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), citing United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.1981); see also Microsoft, 56 F.3d at 1460-62. Precedent requires that

> the 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 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.'"[3]

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[2] Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); see BNS, 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716. See also Microsoft, 56 F.3d at 1461 (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' ") (citations omitted).

[3] United States v. American Tel. and Tel Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd. sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting Gillette Co., 406 F. Supp. at 716

This is strong and effective relief that should fully address the likely competitive harm posed by the proposed merger.

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.

Respectfully submitted,

_____/s/_____
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Dated: March 23, 1999

(citations omitted); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).