UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. ENTERCOM COMMUNICATIONS CORP. and LINCOLN FINANCIAL MEDIA COMPANY, Defendants.	**CASE NO.** **JUDGE:** **FILED:**

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), plaintiff United States of America ("United States") 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 Entercom Communications Corp. ("Entercom") and Lincoln National Life Insurance Company, a subsidiary of Lincoln National Corporation, entered into a Purchase Agreement, as amended and restated, dated December 7, 2014, pursuant to which Entercom would acquire Defendant Lincoln Financial Media Company ("Lincoln") for $105 million. Entercom's and Lincoln's broadcast radio stations compete head-to-head for the business of local and national companies that seek to advertise on English-language broadcast radio stations in the Denver, Colorado Metro Survey Area ("MSA").

The United States filed a civil antitrust Complaint on July 14, 2015 seeking to enjoin the proposed acquisition. The Complaint alleges that the acquisition's likely effect would be to increase English-language broadcast radio advertising prices in the Denver MSA in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the proposed acquisition. The proposed Final Judgment, which is explained more fully below, requires Defendants to divest the following broadcast radio stations (the "Divestiture Stations") to an Acquirer approved by the United States in a manner that preserves competition in the Denver MSA: KOSI FM, KKFN FM, and KYGO FM. These three broadcast radio stations are located in Denver, Colorado. The Hold Separate requires Defendants to take certain steps to ensure that the Divestiture Stations are operated as competitively independent, economically viable and ongoing business concerns, uninfluenced by Entercom so that competition is maintained until the required divestitures occur.

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 Acquisition

Entercom is incorporated in Pennsylvania, with its headquarters in Bala Cynwyd, Pennsylvania. Entercom owns and operates a nationwide portfolio of over 100 broadcast radio stations in 23 metropolitan areas, including the Denver MSA.

Lincoln is an indirect, wholly owned subsidiary of Lincoln National Corporation. Lincoln is organized under the laws of North Carolina, with headquarters in Atlanta, Georgia. Lincoln owns and operates 15 broadcast radio stations in four metropolitan areas, including the Denver MSA.

Pursuant to an agreement, as amended and restated, dated December 7, 2014, between Lincoln National Life Insurance Company and Entercom, Entercom agreed to acquire Lincoln in a cash-and-stock deal for $105 million. Lincoln National Life Insurance Company is a subsidiary of Lincoln National Corporation.

Entercom and Lincoln compete head-to-head against one another for the business of local and national advertisers that seek to purchase radio advertising time that targets English-language listeners located in the Denver MSA. The proposed acquisition would eliminate that competition.

B. Anticompetitive Consequences of the Transaction

1. Broadcast Radio Advertising

The Complaint alleges that the sale of broadcast radio advertising time to advertisers targeting English-language listeners located in the Denver MSA constitutes a relevant product market for analyzing this acquisition under Section 7 of the Clayton Act. Entercom and Lincoln sell radio advertising time to local and national advertisers that seek to target English-language listeners in the Denver MSA. An MSA is a geographical unit for which Nielson Audio, a company that surveys radio listeners, furnishes radio stations, advertisers, and advertising agencies in a particular area with data to aid in evaluating radio audiences. MSAs are widely accepted by radio stations, advertisers, and advertising agencies as the standard geographic area to use in evaluating radio audience size and demographic composition. A radio station's

advertising rates typically are based on the station's ability, relative to competing radio stations, to attract listening audiences that have certain demographic characteristics that advertisers want to reach.

Entercom and Lincoln broadcast radio stations in the Denver MSA generate almost all of their revenues by selling advertising time to local and national advertisers who want to reach listeners present in that MSA. Advertising placed on radio stations in an MSA is aimed at reaching listening audiences in that MSA, and radio stations outside that MSA do not provide effective access to these audiences.

Many local and national advertisers purchase radio advertising time because they find such advertising valuable, either by itself or as a complement to advertising on other media platforms. For such advertisers, radio time (a) may be less expensive and more cost-efficient than other media in reaching the advertiser's target audience (individuals most likely to purchase the advertiser's products or services); or (b) may offer promotional opportunities to advertisers that they cannot replicate as effectively using other media. For these and other reasons, many local and national advertisers who purchase radio advertising time view radio as a necessary advertising medium for them or as a necessary advertising complement to other media.

Many local and national advertisers also consider English-language radio to be particularly effective or necessary to reach their desired customers. These advertisers consider English-language radio, either alone or as a complement to other media, to be the most effective way to reach their target audience, and do not consider other media, including non-English-language radio, such as Spanish-language radio, for example, to be a reasonable substitute.

If there were a small but significant and non-transitory increase in the price ("SSNIP") on radio advertising time on English-language stations in the Denver MSA, advertisers would not

reduce their purchases sufficiently to render the price increase unprofitable. Advertisers would not switch enough purchases of advertising time to radio stations outside the MSA, to other media, or to non-English-language stations to render the price increase unprofitable.

In addition, radio stations negotiate prices individually with advertisers; consequently, radio stations can charge different advertisers different prices. Radio stations generally can identify advertisers with strong preferences to advertise on radio in their MSAs. Because of this ability to price discriminate among customers, radio stations may charge higher prices to advertisers that view radio in their MSA as particularly effective for their needs, while maintaining lower prices for more price-sensitive advertisers. As a result, Entercom and Lincoln could profitably raise prices to those advertisers that view English-language radio that targets listeners in the Denver MSA as a necessary advertising medium.

2. Harm to Competition in the Denver MSA

The Complaint alleges that the proposed acquisition likely would lessen competition substantially in interstate trade and commerce, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and likely would have the following effects, among others:

a) competition in the sale of broadcast radio advertising on English-language radio stations in the Denver MSA would be lessened substantially;

b) competition between Entercom broadcast radio stations and Lincoln broadcast radio stations in the sale of broadcast radio advertising in the Denver MSA would be eliminated; and

c) the prices for advertising time on English-language broadcast radio stations in the Denver MSA likely would increase.

The acquisition, by eliminating Lincoln as a separate competitor and combining its operations with Entercom's, would allow Entercom to increase its share of the broadcast radio advertising revenues in the Denver MSA. In the Denver MSA, combining the Entercom and

Lincoln broadcast radio stations would give Entercom approximately 37 percent of advertising sales on English-language broadcast radio stations.

Entercom's acquisition of Lincoln also would further concentrate an already highly concentrated broadcast radio market in the Denver MSA. Using the Herfindahl-Hirschman Index ("HHI"), a standard measure of market concentration (defined and explained in Appendix A), the post-acquisition HHI in the Denver MSA would be over 3,500 for English-language broadcast radio stations. Entercom's proposed acquisition of Lincoln would result in a substantial increase in the HHI set forth above in excess of the 200 points presumed likely to enhance market power under the Horizontal Merger Guidelines issued by the Department of Justice and Federal Trade Commission.

Furthermore, the transaction combines stations and station groups that are close substitutes and vigorous head-to-head competitors for advertisers seeking to reach specific English-language audiences in the Denver MSA. Advertisers select radio stations to reach a large percentage of their target audience based upon a number of factors, including, *inter alia*, the size of the station's audience, the demographic characteristics of its audience, and the geographic reach of a station's broadcast signal. Many advertisers seek to reach a large percentage of their target listeners by selecting those stations whose audience best correlates to their target listeners. Entercom and Lincoln, each of which operates highly rated radio stations in the Denver MSA, are important competitors for English-language listeners in the Denver MSA. Moreover, Entercom and Lincoln have multiple stations in the Denver MSA that seek to appeal to and attract the same listening audiences. For many local and national advertisers buying time in the Denver MSA, the Entercom and Lincoln stations are close substitutes for each other based on their specific audience characteristics.

During individual price negotiations between advertisers and radio stations, advertisers often provide the stations with information about their advertising needs, including their target audience and the desired frequency and timing of their advertisements. Radio stations have the ability to charge advertisers differing rates based in part on the number and attractiveness of competitive radio stations that can meet a particular advertiser's audience, reach, and frequency needs. During negotiations, advertisers that desire to reach a certain target audience and certain reach and frequency goals in the Denver MSA can gain more competitive rates by "playing off" Entercom stations, individually and collectively, against Lincoln stations, individually and collectively. The proposed acquisition would end that competition.

Post-acquisition, if Entercom raised prices or lowered services to those advertisers that buy advertising time on the Entercom and Lincoln stations in the Denver MSA, non-Entercom stations in that MSA, risking a significant loss of their existing audiences, would be unlikely to change their formats to attempt to attract the Entercom stations' audiences. Even if one or more non-Entercom stations changed their format, they would be unlikely to attract in a timely manner enough listeners to make a price increase or service reduction unprofitable for Entercom. Finally, the entry of new radio stations into the Denver MSA would not be timely, likely, or sufficient to deter the exercise of market power.

For all these reasons, the Complaint alleges that Entercom's proposed acquisition of Lincoln would lessen competition substantially in the sale of radio advertising time to advertisers targeting English-language listeners in the Denver MSA, eliminate head-to-head competition between Entercom and Lincoln stations in the Denver MSA, and result in increased prices and reduced quality of service for radio advertisers in that MSA, all in violation of Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the acquisition in the Denver MSA by maintaining the Divestiture Stations as independent, economically viable competitors. The proposed Final Judgment requires Entercom to divest the following broadcast radio stations located in the Denver MSA to Bonneville International Corporation: KOSI FM, KKFN FM, and KYGO FM. The United States has approved this divestiture buyer. The Antitrust Division required Entercom to identify the Acquirer of the Divestiture Stations in order to provide greater certainty and efficiency in the divestiture process.

The "Divestiture Assets" are defined in Paragraph II.H of the proposed Final Judgment to cover all assets, tangible or intangible, principally devoted to and necessary for the operation of the Divestiture Stations as viable, ongoing commercial broadcast radio stations. With respect to each Divestiture Station, the divestiture will include assets sufficient to satisfy the United States, in its sole discretion, that such assets can and will be used to operate each station as a viable, ongoing, commercial radio business.

To ensure that the Divestiture Stations are operated independently from Entercom after the divestiture, Sections IV and XI of the proposed Final Judgment prohibit Defendants from entering into any agreements during the term of the Final Judgment that create a long-term relationship with or any entanglements that affect competition between either Defendant and the Acquirer of the Divestiture Stations concerning the Divestiture Assets after the divestiture is completed. Examples of prohibited agreements include agreements to reacquire any part of the Divestiture Assets, agreements to acquire any option to reacquire any part of the Divestiture Assets or to assign the Divestiture Assets to any other person, agreements to enter into any time brokerage agreement, local marketing agreement, joint sales agreement, other cooperative selling

arrangement, or shared services agreement, or agreements to conduct other business negotiations jointly with the Acquirer(s) with respect to the Divestiture Assets, or providing financing or guarantees of financing with respect to the Divestiture Assets, during the term of this Final Judgment. The shared services prohibition does not preclude Defendants from continuing or entering into any non-sales-related shared services agreement that is approved in advance by the United States in its sole discretion. The time brokerage agreement prohibition does not preclude Defendants from entering into an agreement pursuant to which Bonneville can begin operating KOSI FM, KKFN FM, and KYGO FM immediately after the Court's approval of the Hold Separate Stipulation and Order in this matter, so long as the agreement with Bonneville expires upon the consummation of a final agreement to divest the Divestiture Assets to Bonneville.

Defendants are required to take all steps reasonably necessary to accomplish the divestiture quickly and to cooperate with prospective purchasers. Because transferring the broadcast license for each of the Divestiture Stations requires FCC approval, Defendants are specifically required to use their best efforts to obtain all necessary FCC approvals as expeditiously as possible. The divestiture of each of the Divestiture Stations must occur within 90 calendar days after the filing of the Hold Separate Stipulation and Order in this matter, subject to extension during the pendency of any necessary FCC order pertaining to the divestiture. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed ninety (90) calendar days in total, and shall notify the Court in such circumstances.

In the event that Defendants do not accomplish the divestitures the periods prescribed in the proposed Final Judgment, the proposed Final Judgment provides that the Court, upon application of the United States, will appoint a trustee selected by the United States to effect the divestitures. If a trustee is appointed, the proposed Final Judgment provides that Entercom will

pay all costs and expenses of the trustee. The trustee's commission will be structured 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 describing his or her efforts to accomplish the divestiture of any remaining stations. If the divestiture has not been accomplished after 6 months, the trustee and the United States will make recommendations to the Court, which shall enter such orders as appropriate, to carry out the purpose of the trust, including extending the trust or the term of the trustee's appointment.

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 United States Department of Justice, Antitrust Division's Internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

David C. Kully
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
450 5th Street, N.W. Suite 4000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and Defendants 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 Entercom's acquisition of Lincoln. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the sale of English-language broadcast radio advertising in the Denver MSA. 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.*, No. 13-cv-1236 (CKK), 2014-1 Trade Cas. (CCH) ¶ 78, 748, 2014 U.S. Dist. LEXIS 57801, at *7 (D.D.C. Apr. 25, 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*

[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).

> *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 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*, 2014 U.S. Dist. LEXIS 57801, at *16 (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*, 2014 U.S. Dist. LEXIS 57801, at

[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'").

*8 (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 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*, 2014 U.S. Dist. LEXIS 57801, at *9 (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*, 2014 U.S. Dist. LEXIS 57801, at *9 (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 Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 2014 U.S. Dist. LEXIS 57801, at *9.

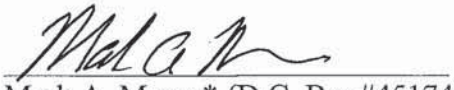
[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

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: July 14, 2015

Respectfully submitted,



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APPENDIX A

The term "HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1,500 and 2,500 points are considered to be moderately concentrated, and markets in which the HHI is in excess of 2,500 points are considered to be highly concentrated. *See* U.S. Department of Justice & FTC, *Horizontal Merger Guidelines* § 5.3 (2010). Transactions that increase the HHI by more than 200 points in highly

concentrated markets presumptively raise antitrust concerns under the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission. *See id.*