Department of Justice
Antitrust Division

United States v. General Electric Co., et al.

Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in United States of America v. General Electric Co., et al., Civil Action No. 1:17-cv-1146. On June 12, 2017, the United States filed a Complaint alleging that the proposed acquisition by General Electric Co. of Baker Hughes Incorporated, would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed the same time as the Complaint, requires General Electric Co. to sell its GE Water & Process Technologies business, including certain tangible and intangible assets, to one or more acquirers approved by the United States.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection at the Department of Justice's website at http://www.justice.gov/atr and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on

the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the Federal Register. Comments should be directed to Kathleen S. O'Neill, Chief, Transportation, Energy & Agriculture Section, Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite 8000, Washington DC 20530.

Patricia A. Brink
Director of Civil Enforcement

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
U.S. Department of Justice
Antitrust Division,
450 5th Street NW
Suite 8000
Washington DC 20001,

Plaintiff,

v.

GENERAL ELECTRIC CO.,
41 Farnsworth Street
Boston MA 02210,

and

BAKER HUGHES INCORPORATED,
2929 Allen Parkway, Suite 2100
Houston TX 77019,

Defendants.

CASE NO.: 1:17-cv-01146

JUDGE: Beryl A. Howell

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action to enjoin the acquisition of Baker Hughes Incorporated ("Baker Hughes") by General Electric Co. ("GE") and to obtain other equitable relief. The United States alleges as follows:

I. NATURE OF THE ACTION

1. GE's acquisition of Baker Hughes would combine two of the leading providers of refinery process chemicals and services in the United States. Refineries process crude oil and natural gas extracted from wells ("hydrocarbons") into finished products like gasoline. To

perform this process, 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.

2. Failures can be costly. If the refinery process chemical and service provider selects the wrong chemicals or fails to provide adequate and timely service, the result may be millions of dollars in lost production or damage to the refinery's equipment. For these reasons, oil and gas refiners choose a provider based on a number of factors that include not just pricing but the provider's experience, ability to offer timely and high-quality service, and research and development capabilities.

3. GE and Baker Hughes vigorously compete to win the business of oil and gas refiners. If the transaction is allowed to proceed, this competition will be lost, and the merged firm will control over 50% of the market, leading to higher prices, reduced service quality, and diminished innovation.

4. Accordingly, as alleged more specifically below, the acquisition, if consummated, would likely substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and should be enjoined.

II. DEFENDANTS AND THE TRANSACTION

5. Defendant 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 and gas industry with refinery process chemicals and services through its GE Water & Process Technologies business unit. GE generated $16 billion in revenues from oil- and gas-related products and services in 2015.

6. Defendant Baker Hughes is a Delaware corporation headquartered in Houston, Texas. Baker Hughes supplies the oil and gas industry with refinery process chemicals and services through its Downstream Chemicals business, which is part of Baker Hughes's Chemicals and Industrial Services organization. Baker Hughes's 2015 revenues were $15.7 billion.

7. Pursuant to a Transaction Agreement and Plan of Merger dated October 30, 2016 ("Transaction"), GE will acquire Baker Hughes.

III. JURISDICTION AND VENUE

8. The United States brings this action pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18.

9. Defendants provide refinery process chemicals and services in the flow of interstate commerce, and their provision of refinery process chemicals and services substantially affects interstate commerce. The Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

10. Defendants have consented to venue and personal jurisdiction in the District of Columbia for the purpose of this matter. Venue is therefore proper in this district under Section 12 of the Clayton Act, 15 U.S.C. § 22 and 28 U.S.C. 1391(b) and (c).

IV. RELEVANT MARKET

11. The provision of refinery process chemicals and services is a relevant product market and line of commerce under Section 7 of the Clayton Act. Oil and gas refiners have no reasonable substitutes for refinery process chemicals and services. Because oil and gas refiners have no reasonable alternatives to refinery process chemicals and services, few, if any, would substitute to other products in response to a price increase.

12. 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 local areas throughout the United States. One well-accepted methodology for assessing whether a group of products and services sold in a particular area constitutes a relevant market under the Clayton Act is to ask whether a hypothetical monopolist over all the products sold in the area would raise prices for a non-transitory period by a small but significant amount, or whether enough customers would switch to other products or services or purchase outside the area such that the price increase would be unprofitable. *Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines* (2010). 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 provision of refinery process chemicals and services in the United States is a relevant market under Section 7 of the Clayton Act.

V. LIKELY ANTICOMPETITIVE EFFECTS

13. The relevant market is highly concentrated and would become more concentrated as a result of the Transaction. GE's share of the refinery process chemicals and services market in the United States is approximately 20% while Baker Hughes's is approximately 35%.

14. Concentration in relevant markets is typically measured by the Herfindahl-Hirschman Index ("HHI").[1] Market concentration is one useful indicator of the likely competitive effects of a merger. The more concentrated a market and the more a transaction would increase concentration in a market, the more likely it is that a transaction would result in a meaningful reduction in competition. Markets in which the HHI is above 2,500 points are considered highly concentrated. Transactions that increase the HHI by more than 200 points in highly concentrated markets are presumed likely to enhance market power.

15. The refinery process chemicals and services market in the United States currently is highly concentrated, with an HHI over 2,900. The Transaction would increase the HHI by about 1,450, rendering the Transaction presumptively anticompetitive. *Fed. Trade Comm'n & U.S. Dep't of Justice Horizontal Merger Guidelines* (2010).

16. Defendants are two of a few firms that have the technical capabilities and expertise to provide refinery process chemicals and services in the United States. Defendants vigorously compete on price, service quality, and product development, and customers have benefitted from this competition.

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[1] *See* U.S. Dep't of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 5.3 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html. 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.

17. The Transaction would eliminate the competition between Defendants to provide refinery process chemicals and services in the United States. After the Transaction, GE would gain the incentive and ability to raise its bid prices significantly above competitive levels, reduce its investment in research and development, and provide lower levels of service.

VI. ABSENCE OF COUNTERVAILING FACTORS

18. Entry by a new provider of refinery process chemicals and services or expansion of existing marginal providers would not be timely, likely, and sufficient to prevent the substantial lessening of competition caused by the elimination of Baker Hughes as an independent competitor.

19. Successful entry into the provision of refinery process chemicals and services in the United States is difficult, costly, and time consuming. An entrant would need to develop local infrastructure, a full line of chemicals designed for refineries, and a track record of successfully treating the products processed by refineries. Because of the significant investment oil and gas refiners make in acquiring hydrocarbons to process and the high costs of any problem or delay, refinery oil and gas refiners are unlikely to switch away from established providers, making it difficult for new refinery process chemical and service providers to enter the market.

20. Defendants cannot demonstrate cognizable and merger-specific efficiencies that would be sufficient to offset the Transaction's anticompetitive effects.

VII. VIOLATION ALLEGED

21. The effect of the Transaction, if consummated, would likely be to lessen substantially competition for refinery process chemicals and services in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Unless restrained, the Transaction would likely have the following effects, among others:

a) competition in the market for refinery process chemicals and services in the United States would be substantially lessened;

b) prices for refinery process chemicals and services in the United States would increase;

c) the quality of refinery process chemicals and services in the United States would decrease; and

d) innovation in the refinery process chemicals and services market in the United States would diminish.

VIII. REQUESTED RELIEF

22. The United States requests that this Court:

a) Adjudge GE's proposed acquisition of Baker Hughes to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

b) Permanently enjoin and restrain Defendants from consummating the proposed acquisition by GE of Baker Hughes or from entering into or carrying out any contract, agreement, plan, or understanding, the effect of which would be to combine GE and Baker Hughes;

c) Award the United States its costs for this action; and

d) Award the United States such other and further relief as the Court deems just and proper.

Dated: June 12, 2017

Respectfully submitted,

FOR PLAINTIFF UNITED STATES:

/s/
Andrew C. Finch
Acting Assistant Attorney General

/s/
Patricia A. Brink
Director of Civil Enforcement

/s/
Kathleen S. O'Neill
Chief
Transportation, Energy &
Agriculture Section

/s/
Robert Lepore
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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. GENERAL ELECTRIC CO. and BAKER HUGHES INCORPORATED, Defendants.	CASE NO.: 1:17-cv-01146 JUDGE: Beryl A. Howell

FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on June 12, 2017, the United States and Defendants, General Electric Co. and Baker Hughes Incorporated, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, the essence of this Final Judgment is the prompt and certain divestiture of certain rights or assets by Defendants to assure that competition is not substantially lessened;

AND WHEREAS, the United States requires Defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to the United States that the divestitures required below can and will be made and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED AND DECREED:

I. Jurisdiction

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

II. Definitions

As used in this Final Judgment:

A. "Acquirer" means Suez or another entity to whom Defendants divest any of the Divestiture Assets or with whom Defendants have entered into definitive contracts to sell any of the Divestiture Assets.

B. "GE" means defendant General Electric Co., a New York corporation with its headquarters in Boston, Massachusetts, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Baker Hughes" means defendant Baker Hughes Incorporated, a Delaware corporation with its headquarters in Houston, Texas, its successors and assigns, and its

subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees.

D. "Suez" means SUEZ, a French *société anonyme* with its headquarters in Paris, France, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees. Suez is the proposed purchaser of the Divestiture Assets as identified by GE.

E. "GE Water & Process Technologies" means the GE Water & Process Technologies business unit of GE as it operated prior to the filing of the Complaint in this matter, including but not limited to the entities listed in the Appendix.

F. "Divestiture Assets" means all the assets of GE Water & Process Technologies, including:

1. All tangible assets that comprise the GE Water & Process Technologies business, including but not limited to all worldwide manufacturing plants; service centers; labs; warehouse and distribution facilities; offices; the global headquarters located in Trevose, Pennsylvania; all global research and development facilities; manufacturing equipment; tooling and fixed assets; personal property; inventory; office furniture; materials; supplies; other property; all licenses, permits and authorizations issued by any governmental organization relating to GE Water & Process Technologies; assignment and/or transfer of all contracts, agreements (including supply agreements), leases, commitments, certifications, and understandings exclusively relating to GE Water & Process Technologies; all customer lists, contracts, accounts, credit records; all other business and administrative records; and all other assets used exclusively by GE Water & Process Technologies;

2. The following intangible assets:

(a) all intangible assets owned, licensed, controlled, or used primarily by the GE Water & Process Technologies business, including but not limited to all patents, licenses and sublicenses, intellectual property, copyrights, trademarks, trade names, service marks, service names (excluding any trademark, trade name, service mark, or service name containing the GE monogram or the names "GE" or "General Electric"), technical information, computer software and related documentation, know-how, trade secrets, drawings, blueprints, designs, design protocols, specifications for materials, specifications for parts and devices, safety procedures for the handling of materials and substances, quality assurance and control procedures, design tools and simulation capability, all manuals and technical information provided by GE Water & Process Technologies to its own employees, customers, suppliers, agents, or licensees, and all research data concerning historic and current research and development efforts relating to the Divestiture Assets, including but not limited to designs of experiments and the results of successful and unsuccessful designs and experiments; and

(b) a worldwide, non-exclusive, royalty-free license to all intellectual property, including but not limited to all patents, copyrights, trademarks, trade names, service marks, service names, and trade secrets owned by GE or that GE has the right to license and used by the GE Water & Process Technologies business at any time during the period that the GE Water & Process Technologies business has been owned by GE. Such license (except for any license for trademarks, trade names, service marks, and service names containing the names "GE" or "General Electric") shall be perpetual and shall grant the Acquirer the right to make, have made, use, sell or offer for sale, copy, create derivative works, modify, improve, display, perform, and enhance the licensed intangible assets. Any improvements or modifications to these intangible assets developed by the Acquirer shall be owned solely by that Acquirer.

III. Applicability

A. This Final Judgment applies to GE and Baker Hughes, as defined above, and all other persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

B. If, prior to complying with Section IV and Section V of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of lesser business units that include the Divestiture Assets, they shall require the purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from the acquirers of the assets divested pursuant to this Final Judgment.

IV. Divestitures

A. Defendants are ordered and directed, within 90 calendar days after the signing of the Hold Separate Stipulation and Order in this matter, or five (5) calendar days after notice of the entry of the Final Judgment by the Court, whichever is later, to divest the Divestiture Assets in a manner consistent with this Final Judgment to an Acquirer acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period, not to exceed 90 calendar days in total, and shall notify the Court in such circumstances. Defendants agree to use their best efforts to divest the Divestiture Assets as expeditiously as possible.

B. In the event Defendants are divesting the Divestiture Assets to an Acquirer other than Suez, Defendants shall promptly make known, by usual and customary means, the availability of the Divestiture Assets to be divested.

C. Defendants shall inform any person making an inquiry regarding a possible purchase of the Divestiture Assets that they are being divested pursuant to this Final Judgment and provide that person with a copy of this Final Judgment.

D. In accomplishing the divestiture ordered by this Final Judgment, Defendants shall offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets customarily provided in a due diligence process except such information or documents subject to the attorney-client privileges or work-product doctrine. Defendants shall make available such information to the United States at the same time that such information is made available to any other person.

E. Defendants shall provide the Acquirer and the United States information relating to the personnel employed by the Divestiture Assets to enable the Acquirer(s) to make offers of employment. Defendants will not interfere with any negotiations by the Acquirer(s) to employ any defendant employee whose primary responsibility is related to the production, operation, development or sale of products and services by GE Water & Process Technologies.

F. Defendants shall permit the prospective Acquirer of the Divestiture Assets to have reasonable access to personnel and to make inspections of the physical facilities of GE Water & Process Technologies; access to any and all environmental, zoning, and other permit documents and information; and access to any and all financial, operational, or other documents and information customarily provided as part of a due diligence process.

G. Defendants shall warrant to the Acquirer that each asset will be operational on the date of sale.

H. Defendants shall not take any action that will impede in any way the permitting, operation, or divestiture of the Divestiture Assets.

I. Defendants shall warrant to the Acquirer (1) that there are no material defects in the environmental, zoning or other permits pertaining to the operation of each asset and (2) that, following the sale of the Divestiture Assets, Defendants will not undertake, directly or indirectly, any challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

J. Unless the United States otherwise consents in writing, the divestiture pursuant to Section IV, or by a Divestiture Trustee appointed pursuant to Section V, of this Final Judgment, shall include the entire Divestiture Assets and shall be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer(s) as part of a viable, ongoing business providing refinery process chemicals and services. The divestitures, whether pursuant to Section IV or Section V of this Final Judgment,

(1) shall be made to an Acquirer that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the provision of refinery process chemicals and services; and

(2) shall be accomplished so as to satisfy the United States, in its sole discretion, that none of the terms of any agreement between an Acquirer and Defendants give Defendants the ability unreasonably to raise the Acquirer's costs, to lower the Acquirer's efficiency, or otherwise to interfere in the ability of the Acquirer to compete effectively.

Any questions that arise concerning whether particular assets are appropriately considered Divestiture Assets subject to Section IV shall be resolved by the United States, in its sole discretion, consistent with the terms of this Final Judgment.

V. Appointment of Divestiture Trustee

A. If Defendants have not divested the Divestiture Assets within the time period specified in Section IV.A, Defendants shall notify the United States of that fact in writing. Upon

application of the United States, the Court shall appoint a Divestiture Trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a Divestiture Trustee becomes effective, only the Divestiture Trustee shall have the right to sell the Divestiture Assets. The Divestiture Trustee shall have the power and authority to accomplish the divestiture to an Acquirer(s) acceptable to the United States at such price and on such terms as are then obtainable upon reasonable effort by the Divestiture Trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and shall have such other powers as this Court deems appropriate. Subject to Section V.D of this Final Judgment, the Divestiture Trustee may hire at the cost and expense of Defendants any investment bankers, attorneys, or other agents, who shall be solely accountable to the Divestiture Trustee, reasonably necessary in the Divestiture Trustee's judgment to assist in the divestiture. Any such investment bankers, attorneys, or other agents shall serve on such terms and conditions as the United States approves including confidentiality requirements and conflict of interest certifications.

C. Defendants shall not object to a sale by the Divestiture Trustee on any ground other than the Divestiture Trustee's malfeasance. Any such objections by Defendants must be conveyed in writing to the United States and the Divestiture Trustee within ten (10) calendar days after the Divestiture Trustee has provided the notice required under Section VI.

D. The Divestiture Trustee shall serve at the cost and expense of Defendants pursuant to a written agreement, on such terms and conditions as the United States approves including confidentiality requirements and conflict of interest certifications. The Divestiture Trustee shall account for all monies derived from the sale of the assets sold by the Divestiture Trustee and all costs and expenses so incurred. After approval by the Court of the Divestiture

Trustee's accounting, including fees for its services yet unpaid and those of any professionals and agents retained by the Divestiture Trustee, all remaining money shall be paid to Defendants and the trust shall then be terminated. The compensation of the Divestiture Trustee and any professionals and agents retained by the Divestiture Trustee shall be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement providing the Divestiture Trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished, but timeliness is paramount. If the Divestiture Trustee and Defendants are unable to reach agreement on the Divestiture Trustee's or any agents' or consultants' compensation or other terms and conditions of engagement within 14 calendar days of appointment of the Divestiture Trustee, the United States may, in its sole discretion, take appropriate action, including making a recommendation to the Court. The Divestiture Trustee shall, within three (3) business days of hiring any other professionals or agents, provide written notice of such hiring and the rate of compensation to Defendants and the United States.

E. Defendants shall use their best efforts to assist the Divestiture Trustee in accomplishing the required divestiture. The Divestiture Trustee and any consultants, accountants, attorneys, and other agents retained by the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities of the business to be divested, and Defendants shall develop financial and other information relevant to such business as the Divestiture Trustee may reasonably request, subject to reasonable protection for trade secret or other confidential research, development, or commercial information or any applicable privileges. Defendants shall take no action to interfere with or to impede the Divestiture Trustee's accomplishment of the divestiture.

F. After its appointment, the Divestiture Trustee shall file monthly reports with the United States and, as appropriate, the Court setting forth the Divestiture Trustee's efforts to accomplish the divestiture ordered under this Final Judgment. To the extent such reports contain information that the Divestiture Trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person. The Divestiture Trustee shall maintain full records of all efforts made to divest the Divestiture Assets.

G. If the Divestiture Trustee has not accomplished the divestiture ordered under this Final Judgment within six months after its appointment, the Divestiture Trustee shall promptly file with the Court a report setting forth (1) the Divestiture Trustee's efforts to accomplish the required divestiture, (2) the reasons, in the Divestiture Trustee's judgment, why the required divestiture has not been accomplished, and (3) the Divestiture Trustee's recommendations. To the extent such report~~s~~ contains information that the Divestiture Trustee deems confidential, such report~~s~~ shall not be filed in the public docket of the Court. The Divestiture Trustee shall at the same time furnish such report to the United States which shall have the right to make additional recommendations consistent with the purpose of the trust. The Court thereafter shall enter such orders as it shall deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the term of the Divestiture Trustee's appointment by a period requested by the United States.

H. If the United States determines that the Divestiture Trustee has ceased to act or failed to act diligently or in a reasonably cost-effective manner, it may recommend the Court appoint a substitute Divestiture Trustee.

VI. Notice of Proposed Divestiture

A. In the event Defendants are divesting the Divestiture Assets to an Acquirer other than Suez, within two (2) business days following execution of a definitive divestiture agreement, Defendants or the Divestiture Trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the United States of any proposed divestiture required by Section IV or Section V of this Final Judgment. If the Divestiture Trustee is responsible, it shall similarly notify Defendants. The notice shall set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets, together with full details of the same.

B. Within fifteen (15) calendar days of receipt by the United States of such notice, the United States may request from Defendants, the proposed Acquirer(s), any other third party, or the Divestiture Trustee, if applicable, additional information concerning the proposed divestiture, the proposed Acquirer(s), and any other potential Acquirer. Defendants and the Divestiture Trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request, unless the parties shall otherwise agree.

C. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the United States has been provided the additional information requested from Defendants, the proposed Acquirer(s), any third party, and the Divestiture Trustee, whichever is later, the United States shall provide written notice to Defendants and the

Divestiture Trustee, if there is one, stating whether or not it objects to the proposed divestiture. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Section V.C of this Final Judgment. Absent written notice that the United States does not object to the proposed Acquirer(s) or upon objection by the United States, a divestiture proposed under Section IV or Section V shall not be consummated. Upon objection by Defendants under Section V.C, a divestiture proposed under Section V shall not be consummated unless approved by the Court.

VII. Financing

Defendants shall not finance all or any part of any purchase made pursuant to Section IV or Section V of this Final Judgment.

VIII. Hold Separate

Until the divestiture required by this Final Judgment has been accomplished, Defendants shall take all steps necessary to comply with the Hold Separate Stipulation and Order entered by this Court. Defendants shall take no action that would jeopardize the divestiture ordered by this Court.

IX. Affidavits

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture has been completed under Section IV or Section V, Defendants shall deliver to the United States an affidavit as to the fact and manner of its compliance with Section IV or Section V of this Final Judgment. In the event Defendants are divesting the Divestiture Assets to an Acquirer other than Suez, each such affidavit shall include the name, address, and telephone number of each person who, during the

preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the Divestiture Assets, and shall describe in detail each contact with any such person during that period. In the event Defendants are divesting the Divestiture Assets to an Acquirer other than Suez, each such affidavit shall also include a description of the efforts Defendants have taken to solicit buyers for the Divestiture Assets, and to provide required information to prospective Acquirers, including the limitations, if any, on such information. Assuming the information set forth in the affidavit is true and complete, any objection by the United States to information provided by Defendants, including limitation on information, shall be made within fourteen (14) calendar days of receipt of such affidavit.

B. Within twenty (20) calendar days of the filing of the Complaint in this matter, Defendants shall deliver to the United States an affidavit that describes in reasonable detail all actions Defendants have taken and all steps Defendants have implemented on an ongoing basis to comply with Section VIII of this Final Judgment. Defendants shall deliver to the United States an affidavit describing any changes to the efforts and actions outlined in Defendants' earlier affidavits filed pursuant to this section within fifteen (15) calendar days after the change is implemented.

C. Defendants shall keep all records of all efforts made to preserve and divest the Divestiture Assets until one year after such divestiture has been completed.

X. Compliance Inspection

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as any Hold Separate Stipulation and Order, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized

privilege, from time to time authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

(1) access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or response to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by Defendants to the United States, Defendants represent and identify in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(g) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to

claim of protection under Rule 26(c)(1)(g) of the Federal Rules of Civil Procedure," then the United States shall give Defendants ten (10) calendar days notice prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI. No Reacquisition

Defendants may not reacquire any part of the Divestiture Assets during the term of this Final Judgment.

XII. Retention of Jurisdiction

This Court retains jurisdiction to enable any party to this Final Judgment to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIII. Expiration of Final Judgment

Unless this Court grants an extension, this Final Judgment shall expire ten years from the date of its entry.

XIV. Public Interest Determination

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: _____

[Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16]

_____

United States District Judge

Appendix

GE Betz, Inc. (US)

Chemical Water Treatment Investments SRL (Argentina)

GE Betz (UK)

GE Betz Ireland Limited (Ireland)

GE Betz South Africa Pty Ltd (South Africa)

GE Betz Pty Limited (Australia) and GE Betz Pty Limited (New Zealand Branch)

GE Infrastructure (Shanghai) Co. Ltd. (China)

GE Ionics Hamma Holdings (IRE) Ltd (Ireland)

GE Power Controls Portugal Unipessoal LDA (Portugal)

GE Water & Process Technologies (Wuxi) Co. Ltd. (China)

GE Water & Process Technologies Asia Pte. Ltd. (Singapore)

GE Water & Process Technologies Austria GmbH (Austria)

GE Water & Process Technologies BVBA (Belgium)

GE Water & Process Technologies France SAS (France)

GE Water & Process Technologies GmbH (Germany)

GE Water & Process Technologies Hungary KFT (Hungary)

GE Water & Process Technologies Mexico, S. de R.L de C.V. (Mexico)

GE Water & Process Technologies Middle East FZE (Dubai)

GE Water & Process Technologies Netherlands BV (NL)

General Electric Water & Process Technologies Caribbean Holdings BV (Netherlands Antilles)

Ionics Iberica S.L.U. (Spain)

Water & Process Technologies SRL (Argentina)

Zenon Services Limited (Virgin Islands)

Zenon Systems Manufacturing and Services Limited Liability Company (Hungary)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. GENERAL ELECTRIC CO. and BAKER HUGHES INCORPORATED, Defendants.	CASE NO.: 1:17-cv-01146 JUDGE: Beryl A. Howell

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.").[2]

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

[2] 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).

> 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).[3] 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*, 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*

[3] *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'").

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 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.[4] 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.

[4] *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,

/s/

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