IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Department of Justice, Antitrust Division
450 5th Street, N.W., Suite 7000
Washington, D.C. 20530

Plaintiff,

v.

NEXSTAR BROADCASTING GROUP, INC.,
545 E. John Carpenter Freeway, Suite 700
Irving, Texas 75062

MISSION BROADCASTING, INC.,
30400 Detroit Road
Westlake, Ohio 44145

COMMUNICATIONS CORPORATION
OF AMERICA,
700 Saint John Street, Suite 300
Lafayette, Louisiana 70501

and

SILVER POINT CAPITAL FUND, L.P.,
2 Greenwich Plaza, 1st Floor
Greenwich, Connecticut 06830

Defendants.

Case:

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America (United States), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (APPA or the 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

Pursuant to a Stock Purchase Agreement dated April 24, 2013, Nexstar Broadcasting Group, Inc. (Nexstar) and Mission Broadcasting Inc. (Mission) will acquire all of the issued and outstanding voting securities of Communications Corporation of America (CCA) for $270 million. Both Nexstar and CCA own or operate many broadcast television stations in multiple television Designated Marketing Areas (DMAs) across the United States. Through various local services agreements, Nexstar sells the advertising for all of the television stations owned by Mission, which Nexstar effectively controls.

In Evansville, Indiana, Nexstar owns and operates WEHT, an ABC broadcast network affiliate. As the owner-operator of that station, Nexstar sells WEHT's advertising. Pursuant to a local services agreement, Nexstar also sells the advertising of WTVW, a CW broadcast network affiliate in Evansville that is owned by Mission. Accordingly, WEHT and WTVW do not meaningfully compete with one another for advertisers.

In Evansville, CCA owns and operates WEVV, a CBS broadcast network affiliate. WEVV also operates a digital subchannel on which it runs television programming affiliated with the FOX broadcast network. Although Nexstar and Mission intend to transfer CCA's WEVV license to a related third party, the third party is expected to have Nexstar sell its advertising pursuant to a local services or similar agreement. Nexstar would likely have effective control of this third party as it does of Mission.

Currently, Nexstar (on behalf of WEHT and WTVW) and CCA (on behalf of WEVV) compete for the business of local and national advertisers that seek spot advertising on broadcast television stations in the Evansville, Indiana DMA. Advertisers benefit from this competition. If

consummated, Nexstar's acquisition of control of CCA's advertising would result in Nexstar controlling the sale of advertising for three out of four major broadcast network affiliates (WEHT (ABC) and WEVV (CBS & FOX)) and a fourth network affiliation (WTVW (CW)) in the Evansville, Indiana DMA. Nexstar's already high market share of spot advertising in the DMA would increase from approximately 42 to 60 percent. Thus, the transaction would eliminate head-to-head competition between Nexstar and CCA and all the benefits from this competition, leading to higher prices for broadcast television spot advertising in the Evansville, Indiana DMA in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

The United States filed a civil antitrust Complaint on November 26, 2014, seeking to enjoin the proposed transaction. The Complaint alleges that the likely effect of this transaction would be to lessen competition substantially for broadcast television spot advertising in the Evansville, Indiana DMA in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. This loss of competition likely would result in advertisers paying higher prices.

At the same time the Complaint was filed, the United States also filed a Hold Separate Stipulation and Order (Hold Separate Order) and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the transaction. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest WEVV located in the Evansville, Indiana DMA. Under the terms of the Hold Separate Order, Defendants are required to take certain steps to ensure that WEVV is operated as a competitively independent, economically viable, and ongoing business concern, that will remain independent and uninfluenced by the consummation of the transaction, and that competition is maintained during the pendency of the ordered divestiture.

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 Transaction

Nexstar, a Delaware corporation with headquarters in Irving, Texas, owns or operates 72 broadcast television stations located in 41 DMAs in 18 states. Nexstar reported revenues of $378 million for 2013. Mission, a Delaware corporation with headquarters in Westlake, Ohio, owns 17 broadcast television stations. Nexstar receives substantially all of Mission's available cash and is deemed to have a controlling interest in Mission under generally accepted accounting principles. Accordingly, Mission's economic incentives are aligned with Nexstar's.

CCA, a Delaware corporation with headquarters in Lafayette, Louisiana, owns or operates 25 broadcast television stations in 10 DMAs throughout Louisiana, Texas, and Indiana. CCA reported revenues of $98.3 million for 2012. Silver Point Capital Fund, L.P., based in Greenwich, Connecticut, controls and is the ultimate parent entity of CCA.

The proposed transaction, as initially agreed to by Defendants, would lessen competition substantially in broadcast television spot advertising in the Evansville, Indiana DMA as a result of Nexstar's acquisition of CCA. This transaction is the subject of the Complaint and proposed Final Judgment filed by the United States on November 26, 2014.

B. Anticompetitive Consequences of the Proposed Transaction

1. The Relevant Product Market

The Complaint alleges that the sale of broadcast television spot advertising constitutes a relevant product market for analyzing this transaction under Section 7 of the Clayton Act. Broadcast television stations attract viewers through their programming, which is delivered for free over the air or retransmitted to viewers, mainly through wired cable or other terrestrial television systems and through satellite television systems. Broadcast television stations then sell advertising time to businesses that want to advertise their products to television viewers. Broadcast television "spot" advertising is sold directly by the station itself or through its national representative on a localized basis and is purchased by advertisers who want to target potential customers in specific geographic areas. Spot advertising differs from network and syndicated television advertising, which are sold by the major television networks and producers of syndicated programs on a nationwide basis and broadcast in every geographic area where the network or syndicated program is aired.

Broadcast television spot advertising possesses a unique combination of attributes that sets it apart from advertising using other types of media. Television combines sight, sound, and motion, thereby creating a more memorable advertisement. Moreover, of all media, broadcast television spot advertising reaches the largest percentage of all potential customers in a particular target geographic market and is therefore especially effective in introducing, establishing, and maintaining the image of a product or service. For a significant number of advertisers, broadcast television spot advertising, because of its unique attributes, is an advertising medium for which there is no close substitute. Advertisers generally do not consider other media, such as radio,

newspapers, or outdoor billboards, to be desirable substitutes for broadcast television advertising. None of these media can provide the important combination of sight, sound, and motion that makes television unique and impactful as a medium for advertising.

Like broadcast television, subscription television channels, such as those carried over cable or satellite television, combine elements of sight, sound, and motion, but they are not generally considered within the advertising industry as a desirable substitute for broadcast television spot advertising for two important reasons. First, satellite, cable, and other subscription content delivery systems do not generally have the "reach" of broadcast television. Typically in the United States, broadcast television can reach well over 90% of homes in a DMA, while cable television often reaches fewer homes. Second, because subscription services may offer more than 100 channels, they fragment the audience into small demographic segments. Because broadcast television programming typically has higher rating points than subscription television programming, broadcast television is generally viewed as providing a much easier and more efficient means for an advertiser to reach a high proportion of its target demographic. Generally in the industry, media buyers purchase time on subscription television channels not so much as a substitute for broadcast television, but rather to supplement a broadcast television message, to reach a narrow demographic (*e.g.*, 18–24 year olds) with greater frequency, or to target narrow geographic areas within a DMA.

Typically, advertisers do not consider internet-based media to be a substitute for broadcast television spot advertising. Although online video distributors (OVDs) such as Netflix and Hulu are important sources of video programming, as with cable television advertising, the local video advertising of OVDs lacks the reach of broadcast television spot advertising. And

non-video internet advertising (*e.g.*, website banner advertising) lacks the important combination of sight, sound, and motion that gives television its impact. Consequently, the typical local media advertiser purchases internet-based advertising primarily as a supplement to broadcast television spot advertising.

Consequently, a small but significant price increase in broadcast television spot advertising is unlikely to cause enough advertising customers to switch advertising purchases to other media to make the price increase unprofitable.

2. The Relevant Geographic Market

The Complaint alleges that the Evansville, Indiana DMA constitutes a relevant geographic market for purposes of analyzing this acquisition under Section 7 of the Clayton Act. A Designated Marketing Area or DMA is a geographic unit defined by A.C. Nielsen Company, a firm that surveys television viewers and furnishes broadcast television stations, advertisers, and advertising agencies in a particular area with data to aid in evaluating audience size and composition. DMAs are used to analyze revenues and shares of broadcast television stations in the *Investing in Television BIA Market Report 2014* (1st ed.), a standard industry reference. The Evansville, Indiana DMA encompasses 21 counties in Indiana, Kentucky, and Illinois. Signals from broadcast television stations located in the Evansville, Indiana DMA reach viewers throughout the DMA, but signals from broadcast television stations located outside the DMA reach few viewers within the DMA.

Advertisers can use television stations in the DMA to target the largest possible number of viewers within the DMA. Some of these advertisers are located in the Evansville, Indiana DMA and are trying to reach consumers that live in the DMA; others are regional or national

businesses wanting to target consumers in the Evansville, Indiana DMA. Advertising on television stations outside each of the Evansville, Indiana DMA is not an alternative for either local, regional, or national advertisers, because signals from television stations outside of the DMA reach relatively few viewers within the DMA. Thus, advertising on those stations outside the Evansville, Indiana DMA does not reach a significant number of potential customers within the DMA.

Consequently, a small but significant increase in broadcast television spot advertising prices within the Evansville, Indiana DMA would not cause advertisers to switch enough advertising purchases to television stations outside the Evansville, Indiana DMA to render the price increase unprofitable.

3. Harm to Competition in the Evansville, Indiana DMA

The Complaint alleges that the proposed acquisition would likely 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 television spot advertising in the Evansville, Indiana DMA would be lessened substantially;

(b) competition in the Evansville, Indiana DMA between Nexstar and CCA in the sale of broadcast television spot advertising would be eliminated; and

(c) the prices for broadcast television spot advertising on broadcast television stations in the Evansville, Indiana DMA likely would increase.

By virtue of its ownership and operation of WEHT and the existing local services agreement with Mission to sell the advertising of WTVW, Nexstar currently controls the

advertising of two broadcast television stations in the Evansville, Indiana DMA. Post-transaction, the market would effectively become a duopoly, with Nexstar controlling the advertising of three of the four major network (WEHT (ABC) and WEVV (CBS & FOX)) and a fourth network affiliation (WTVW (CW)) in the Evansville, Indiana DMA. Nexstar's market share of broadcast television spot advertising revenue in the DMA would increase from 42 to 60 percent. A single television station would control the vast majority of the remaining 40 percent.

Using the Herfindahl-Hirschman Index (HHI), a standard measure of market concentration (defined and explained in Appendix A to the Complaint), the proposed transaction would increase substantially the already high concentration in the Evansville, Indiana DMA broadcast television spot advertising market. The post-transaction HHI would be approximately 5100, representing an increase of about 1500 points. Under the *Horizontal Merger Guidelines* issued by the Department of Justice and Federal Trade Commission, mergers resulting in highly concentrated markets (with an HHI in excess of 2500) with an increase in the HHI of more than 200 points are presumed to be likely to enhance market power.

In the Evansville, Indiana DMA, Nexstar and CCA compete head-to-head against each other in the sale of broadcast television spot advertising. They are close substitutes for each other for a significant number of advertisers. Moreover, advertisers typically find it cost-effective to reach their target audience by buying time from multiple stations in a DMA. In negotiating rates with any one television station, advertisers benefit from competition between stations because they can put together an ad buy with the other stations in the DMA. The proposed transaction would end this type of competition between Nexstar and CCA and thereby adversely affect a substantial volume of interstate commerce. After the transaction, it is likely that a significant

number of Evansville, Indiana DMA advertisers would not be able to reach their desired audiences with equivalent efficacy unless they advertised on the television stations controlled by Nexstar. By leaving advertisers with only one alternative broadcast channel, the transaction will enable Nexstar unilaterally to raise prices. Given the structure of the Evansville, Indiana DMA, the economics of this industry suggest that the remaining major competitor will have substantial incentives to follow suit.

4. Lack of Countervailing Factors

The Complaint alleges that entry in the Evansville, Indiana DMA's broadcast television spot advertising market would not be timely, likely, or sufficient to prevent any anticompetitive effects. New entry is unlikely since any new station would require a Federal Communications Commission (FCC) license, which is difficult to obtain. Even if a new station became operational, commercial success would come over a period of many years. In addition, there are no merger-specific efficiencies that would alleviate the harm from the transaction.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The divestiture requirement of the proposed Final Judgment will eliminate the anticompetitive effects of the transaction in the Evansville, Indiana DMA by establishing a new, independent, and economically viable competitor, which will maintain the status quo in the DMA. The proposed Final Judgment requires Defendants to divest the Divestiture Assets to Bayou City Broadcasting Evansville, Inc. (Bayou City), an acquirer selected by Defendants and approved by the United States, in a manner consistent with the Final Judgment and the Hold Separate Order in this case. If Bayou City is unable to complete the purchase, the Defendants would be required to divest the Divestiture Assets to another buyer, approved by the United

States in its sole discretion. Defendants are required to use their best efforts to accomplish the divestitures ordered by this Final Judgment as expeditiously as possible and 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 in the relevant market. Because the transfer of the Divestiture Assets to Bayou City requires Federal Communications Commission (FCC) approval, Defendants are specifically required to use their best efforts to obtain all necessary FCC approvals as expeditiously as possible. The divestiture pursuant to this Section shall take place within five (5) calendar days of entry of the Final Judgment or within 90 days of the filing of the Complaint, whichever is later. 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 periods prescribed in the proposed Final Judgment, or it becomes apparent that Bayou City is unwilling or unable to complete its purchase of the Divestiture Assets, the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture. The United States may, after three months, determine not to seek appointment of a trustee if it believes the circumstances warrant allowing the Defendants more time. Under such circumstances, however, the United States may, at any time, exercise its right to select a trustee for the Court to appoint. If a trustee is appointed, the proposed Final Judgment provides that Defendants will pay all costs and expenses of the trustee. 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 transaction in broadcast television spot advertising in the Evansville, Indiana DMA.

The proposed Final Judgment also bars Nexstar from reacquiring the Divestiture Assets for the ten-year period of the decree. Nexstar can only affiliate with either FOX or CBS (WEVV's current network affiliates) a year or more from the filing of the Complaint, contingent on the United States' approval in its sole discretion.

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 to:

Scott A. Scheele
Chief, Telecom & Media Enforcement Section
Antitrust Division, U.S. Department of Justice
450 5th Street, N.W., Suite 7000
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 contemplated transaction. The United States is satisfied, however, that the divestiture of assets described in the proposed Final Judgment will preserve competition for the sale of broadcast television spot advertising in the Evansville, Indiana DMA. 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), 2014-1Trade Cas. (CCH) ¶ 78,748, 2014 U.S. Dist. LEXIS 57801, at *7 (D.D.C. Apr. 25, 2014) (noting court has broad discretion to review adequacy of 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 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

[1] The 2004 amendments to the APPA 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 APPA review).

evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

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

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

[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'").

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 *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 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 to the APPA, 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 APPA). The language wrote into the statute what Congress intended when it enacted the APPA in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F.

Supp. 2d at 11.[3] A court may 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.

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Respectfully submitted,

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COUNSEL FOR PLAINTIFF UNITED STATES OF AMERICA

Dated: November 26, 2014

[3] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").