IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. **DEUTSCHE BÖRSE AG,** and **NYSE EURONEXT,** Defendants.	Case: Assigned to: Assign. Date: Description: Antitrust

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 THIS PROCEEDING

On February 15, 2011, NYSE Euronext ("NYSE") and Deutsche Börse AG ("DB"), two of the world's leading owners and operators of financial exchanges, agreed to merge in a transaction valued at approximately $9 billion. NYSE and DB are seeking to combine their businesses and create the largest exchange group in the world under a new Dutch holding company ("NewCo"). NewCo would have dual headquarters in Frankfurt and New York.

Both NYSE and DB have substantial operations in the United States, including between them interests in five major American stock exchanges. NYSE is one of the two largest and most prestigious stock exchange operators in the United States. It owns the New York Stock Exchange LLC, NYSE Arca, Inc., and NYSE Amex LLC. DB, through a series of subsidiaries, is the largest unitholder of Direct Edge Holdings LLC ("Direct Edge"), which operates the EDGA and EDGX electronic exchanges and is the fourth largest stock exchange operator in the United States by volume of shares traded. Direct Edge is considered an innovator in the exchange space and a competitive constraint on NYSE. This transaction therefore poses a significant risk that NewCo could use its influence to dampen the competitive zeal of Direct Edge. The United States brought this lawsuit on December 22, 2011, seeking to enjoin the proposed transaction. After a thorough investigation, the United States believes that the likely effect of the merger would be to lessen substantially competition and potential competition in displayed equities trading services, listing services for exchange-traded products, including exchange-traded funds, and real-time proprietary equity data products in the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

Simultaneous with the filing of the complaint, the United States filed a proposed Final Judgment designed to remedy the Section 7 violation. Under the proposed Final Judgment, which is explained more fully below, Defendants are subject to affirmative obligations to divest DB of its holdings in Direct Edge and to immediately eliminate DB's ability, through its subsidiaries, to influence the business and governance of Direct Edge.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. Entry of the proposed Final Judgment would terminate this action, except that this

Court would retain jurisdiction to construe, modify, or enforce 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

DB is a German *Aktiengesellschaft* that runs financial exchanges and ancillary businesses in the United States and Europe. DB generates revenue from several sources, including fees for securities listings and trading, fees for market data, and charges for licensing of exchange-related technology. DB, through its subsidiaries, is the largest holder of equity in Direct Edge, a leading stock exchange operator in the United States. DB owns 50% of the equity and controls Frankfurt-based Eurex Group, a leading European derivatives exchange operator. DB has announced an agreement to buy the remaining equity in Eurex after DB completes its merger with NYSE. Eurex owns International Securities Exchange Holdings, Inc. ("ISE"), a leading options exchange in New York that also owns a 31.54% equity interest in Direct Edge. In 2010, DB's ISE and Eurex subsidiaries earned substantial revenues from sales in the United States.

NYSE is a publicly traded Delaware corporation with its principal place of business in New York, New York. NYSE operates financial exchanges in the United States and across Europe. In the United States, NYSE operates the New York Stock Exchange, which is the storied hybrid exchange with both trading floor and electronic components; NYSE Arca, which is an all-electronic exchange; and NYSE Amex, the former American Stock Exchange, which targets mainly small- and medium-sized companies. NYSE also generates revenue from a wide range of exchange-related businesses, including securities listings, trading, data licensing,

and technology licensing. In 2010, NYSE earned more than $3 billion in total revenues from within the United States.

Direct Edge is a Delaware limited liability company with its principal place of business in Jersey City, New Jersey. Direct Edge, through its subsidiary Direct Edge Holdings, Inc., owns and operates two leading U.S. stock exchanges, EDGA Exchange, Inc. and EDGX Exchange, Inc. Direct Edge is majority-owned by ISE, Goldman Sachs Group Inc., Citadel Investment Group LLC, and Knight Capital Group Inc. ISE owns 31.54% of Direct Edge and holds certain key voting and special veto rights, such as the right to veto entry by Direct Edge into options trading. ISE also has the right to appoint three members to the Direct Edge board of managers and one member to each of the corporate boards of EDGA Exchange, Inc. and EDGX Exchange, Inc. Goldman Sachs, Citadel, and Knight each own 19.9% of Direct Edge. The remaining 8.76% is owned by a group of five brokers, including affiliates of JP Morgan Chase & Co. (through LabMorgan Corp.), Bank of America (through Merrill Lynch L.P. Holdings, Inc.), Nomura Securities International, Inc., Deutsche Bank USA (through DB US Financial Markets Holding Corporation), and Sun Partners LLC. Direct Edge's exchanges compete head to head with the NYSE exchanges. In 2010, Direct Edge earned substantial revenues from within the United States.

B. Relevant Markets

Antitrust law, including Section 7 of the Clayton Act, protects consumers from anticompetitive conduct, such as a firm's acquisition of the ability to raise prices or reduce innovation. Market definition assists antitrust analysis by focusing attention on those markets where competitive effects are likely to be felt. Well-defined markets include both sellers and buyers, whose conduct most strongly influences the nature and magnitude of competitive

effects. Defining relevant markets in merger cases frequently begins by identifying a collection of products or set of services over which a hypothetical profit maximizing monopolist likely would impose at least small but significant and non-transitory increase in price. Defining markets in this way ensures that antitrust analysis takes account of a broad enough set of products to evaluate whether a transaction is likely to lead to a substantial lessening of competition.

Here, the investigation revealed three relevant markets. The first is displayed equities trading services, which includes stock trading services offered by trading venues that publicly disclose certain key information about quotes and transactions. Registered stock exchanges and electronic communication networks offer such displayed trading services. Displayed trading services are accompanied by the continuous pre-trade publication of the best-priced quotations for buying and selling exchange-traded stocks in a national consolidated data stream, the display of certain customer limit orders (offers to buy and sell stock at particular prices), and the provision of deep and reliable liquidity for a broad array of exchange-traded stocks. Displayed equities trading services form the backbone of the American national market system and facilitate equity price discovery in the United States. Displayed services are by their nature very different from undisplayed equity trading services, like dark pools, which offer no pre-trade transparency and cater mainly to institutional traders looking to buy or sell large volumes of stock while minimizing stock price movement.

A second relevant market consists of the listing services for exchange-traded products ("ETPs"). An ETP is typically an exchanged-listed equity security instrument other than a standard corporate cash equity, the performance of which is designed to track another specific instrument, asset or group of assets, such as a market index or a specific basket of corporate

stocks. ETPs typically are sponsored by firms that determine the composition of the ETP and then manage it for investors. The most popular type of ETP today is an exchange-traded fund ("ETF"), which is a security traded like a stock that is designed to replicate the returns of a stock, index or similar asset. Exchanges compete to list, or offer for trading, ETPs in exchange for listing fees and fees for ancillary services. Exchanges compete for listings mainly on the basis of their market structure, market maker incentives, marketing, and other associated services. ETP listings are a separate relevant market because there are no reasonable substitutes for listing an ETP if a sponsoring firm wants a widely-traded product with access to the liquidity offered by exchanges. In addition to which, only registered exchanges can offer these listing services.

A third relevant market encompasses real-time proprietary equity data products comprised of non-core data. There are two general types of equity data: "core" and "non-core." Core data refers to the transaction data the U.S. Securities and Exchange Commission requires stock exchanges to aggregate and distribute publicly, including the current best bid and offer for each stock on every exchange and information on each stock trade, including the last sale. Non-core data includes trading volume and "depth of book" data that certain exchanges collect and sell, *i.e.*, the underlying quotation data on any given exchange. Non-core data helps traders determine where liquidity for a given stock exists during the day and the depth of that liquidity. Access to market data is critical to many market participants and followers, who are willing to pay a premium for the best price, quote, volume, and other data available about exchange-listed equities being traded on the exchanges. Each exchange (or other trading venue) owns its non-core data and can distribute it for a profit. Proprietary data products can be made to replicate core data and exchanges can package and provide both core

and non-core data together. NYSE and Direct Edge, as registered exchange operators, are among only four major competitors supplying real-time proprietary equity data products derived from trading activities.

Antitrust analysis must also consider the geographic dimensions of competition. Here, the relevant geographic markets exist within the United States and are not affected by competition outside the United States. The competitive dynamics for each of the three markets is distinctly different outside the United States.

C. Competitive Effects

NewCo would have the incentive and ability to significantly influence the competitive conduct of Direct Edge through ISE's voting interest, governance rights, or other shareholder rights under corporate law, like the right to file shareholder derivative suits. NewCo would likely use its influence to induce Direct Edge to compete less aggressively, to coordinate Direct Edge's conduct with the NYSE exchanges, or to disrupt day-to-day business activities at Direct Edge.

NewCo's presence on the Direct Edge boards would chill discussion of head-to-head competition with the NYSE stock exchanges. Direct Edge was formed, in part, by a group of broker-dealers intending to constrain the two large stock exchange operators in the United States, NYSE and NASDAQ. The broker-dealer owners of Direct Edge, and others, can and do turn their trades to Direct Edge when NYSE or NASDAQ fails to compete aggressively.

Finally, NewCo also would gain access to non-public, competitively sensitive information about Direct Edge. This access would likely enhance NewCo's ability to coordinate the behavior of the NYSE and Direct Edge exchanges, or make the accommodating responses of NYSE faster and more targeted. And if Direct Edge gained access to

competitively sensitive NYSE information, it would further elevate the risk of coordinated effects.

Finally, even if it were unable to influence Direct Edge, NewCo would likely have, as a result of the partial ownership interest in Direct Edge, a reduced incentive to direct the NYSE exchanges to compete as aggressively against the Direct Edge exchanges. Since NewCo would share Direct Edge's losses inflicted by the NYSE exchanges, this may lead NewCo to behave in ways that would reduce those losses.

Supply responses from competitors or entry of potential competitors in any of the relevant markets would not prevent the likely anticompetitive effects of the proposed merger. The merged firm would possess significant advantages that any new or existing competitor would have to overcome to successfully compete with the merged firm. Entrants face significant entry barriers including hurdles of reputation, scale and network effects to successfully challenge the incumbents in the markets for displayed equities trading services, listing services for ETPs, and real-time proprietary equity data products.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment is designed to preserve competition in displayed equities trading services, listing services for exchange-traded products, and real-time proprietary equity data products by restricting NewCo's ability to influence Direct Edge and by eliminating NewCo's equity stake in Direct Edge. The proposed Final Judgment has two principal requirements: (1) the complete divestiture of Defendants' equity stake in Direct Edge, and (2) the immediate suspension of Defendants' ability to participate in the governance or business of Direct Edge. The proposed Final Judgment also has several sections designed to ensure its effectiveness and adequate compliance. Each of these sections is discussed below.

Before closing the DB-NYSE transaction, the proposed Final Judgment requires the Defendants provide a written plan explaining the steps they will take to render DB's interest in Direct Edge passive until such time as the divestiture occurs. Defendants must also certify that the plan complies with all applicable laws and that all voting, director, or other rights DB held have been eliminated, except as otherwise been provided for in the order. Within two calendar days of closing the transaction, any DB officer, director, manager, employee, affiliate, or agent must resign from the boards of all Direct Edge entities.

Further, from the date of the filing of the Final Judgment, the Defendants are prohibited from suggesting or nominating any candidate for election to the board of any Direct Edge entities or having any officer, director, manager, employee, or agent serve as an officer, director, manager, employee with or for any Direct Edge entities. The Defendants are also prohibited from any participation in a nonpublic meeting of any Direct Edge entities or in otherwise receiving any nonpublic information from any Direct Edge employee or board member, except to the extent necessary to fulfill the provisions of the proposed Final Judgment or to fulfill financial reporting obligations. The Defendants are further prohibited from voting except to the extent necessary to fulfill the provisions of the proposed Final Judgment, in which case they must vote their shares in proportion to how the other owners vote.

The Defendants are also prohibited from using their ownership interest in Direct Edge to exert any influence over it or to prevent it from making any necessary changes to its corporate governance documents to comply with the Final Judgment. The proposed Final Judgment provides that the Defendants must continue to provide regulatory and backup facility services to Direct Edge pursuant to existing contracts, and requires that the Defendants implement a firewall to prevent any inappropriate use of information gained by the Defendants

about Direct Edge's business as a result of those contracts. The firewall requires that only the employees of the Defendants specifically necessary to provide the agreed upon services may receive any information from Direct Edge under those agreements, and those employees are prohibited from using any such information for any purpose other than providing the agreed upon services. This provision will allow Direct Edge to continue to receive its contracted services while reducing the opportunities for the Defendants to misuse any information provided by Direct Edge under the agreement. The anticipated effect of all these provisions is to maintain Direct Edge as an independent and viable competitor.

The proposed Final Judgment provides a two-year period, which the United States in its sole discretion may extend up to three additional years, for Defendants to divest all equity ownership in Direct Edge. The assets may be divested by open market sale, public offering, private sale, private placement, or repurchase by Direct Edge. If the assets are divested by private sale or private placement the United States must, in its sole discretion, approve the buyers of the assets. This provision ensures that the divestiture itself does not create any competitive issues. To maintain the complete independence of Direct Edge after the divestiture, the proposed Final Judgment prohibits the Defendants from financing any part of any purchase made pursuant to the Final Judgment.

In the event that Defendants are unable to take the steps required by the proposed Final Judgment to render their Direct Edge interest passive or create a plan demonstrating their compliance with the proposed Final Judgment, or do not accomplish the divestiture as prescribed in the proposed Final Judgment, Section VII of the Final Judgment provides that the Court will appoint a trustee selected by the United States to effect the divestiture upon the request of the United States. If a trustee is appointed, the proposed Final Judgment provides

that Defendants will pay all costs and expenses of the trustee. 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 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 proposed Final Judgment lasts for ten years, and prohibits the Defendants from acquiring any additional equity interest in Direct Edge during that time. It also provides procedures for the United States to access the Defendants' records and personnel in order to secure compliance with the terms of the Final Judgment.

The proposed Final Judgment will eliminate the anticompetitive effects of the acquisition by maintaining Direct Edge as an independent and vibrant competitive constraint in displayed equities trading services, listing services for exchange-traded products, and real-time proprietary equity data products in the United States.

IV. REMEDIES APPLICABLE 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 APPLICABLE FOR APPROVAL OR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 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, 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 and published in the Federal Register.

Written comments should be submitted to:

James J. Tierney
Chief, Networks & Technology Enforcement Section
Antitrust Division
United States Department of Justice
450 Fifth Street, NW, Suite 7100
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, seeking preliminary and permanent injunctions against Defendants' transaction and proceeding to a full trial on the merits. The United States is satisfied, however, that the relief in the proposed Final Judgment will preserve competition in the markets for displayed equities trading services, listing services for exchange-traded products, and real-time proprietary equity data products. Thus, the proposed Final Judgment would protect competition as effectively as would any remedy available through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

VII. STANDARD OF REVIEW UNDER THE APPA FOR 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 60-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 United States 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. InBev N.V./S.A.*, 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, No. 08-1965 (JR), at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").[1]

Under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the United States'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) (citing *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

[1] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a 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).

> 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 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's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

In addition, "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 United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the

[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.'").

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 InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he '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. 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). This language effectuates what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to

engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 *Cong. Rec.* 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public interest determination is left to the discretion of the Court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[3]

VIII. DETERMINATIVE DOCUMENTS

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

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

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Respectfully submitted,

FOR PLAINTIFF
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