

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

INGERSOLL-DRESSER PUMP COMPANY,

INGERSOLL-RAND COMPANY, and

FLOWSERVE CORPORATION,

Defendants.

Civil Action No. 00 1818

Judge Jackson

Filed: July 31, 2000

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DISTRICT OF COLUMBIA
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COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On July 28, 2000, the United States filed a civil antitrust suit alleging that an acquisition by Flowserve Corporation ("Flowserve") of Ingersoll-Dresser Pump Company ("IDP") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that Flowserve's proposed acquisition of IDP would reduce the already small number of firms that compete on bids to sell certain costly, specialized and highly engineered pumps used in oil refineries and electrical generating facilities in the United States. According to the Complaint, such a reduction in competition would likely result in higher prices and reduced selection for those pumps. The prayer for relief in the Complaint seeks a judgment that the proposed acquisition would violate Section 7

of the Clayton Act, a permanent injunction that would prevent Flowserve from acquiring IDP, that the United States be awarded costs, and other relief that the Court deems just and proper.

At the same time the Complaint was filed, the United States also filed a proposed settlement that would permit Flowserve to complete its acquisition of IDP, yet preserve competition in the markets in which the transaction would otherwise raise significant competitive concerns. The settlement consists of a proposed Final Judgment and a Hold Separate Stipulation and Order. In essence, the Hold Separate Stipulation and Order would require Flowserve to maintain certain pump lines, and associated production assets, as economically viable, ongoing concerns, operated independently of Flowserve's other businesses until the divestitures mandated by the Final Judgment have been accomplished.

The proposed Final Judgment orders defendants to divest to one or more acquirers a perpetual, royalty-free, assignable, transferable license to manufacture and sell Flowserve's SCE, VLT, VMT, HQ, HX and WX pump lines, and IDP's J and CGT pump lines; Flowserve's pump plant in Tulsa, Oklahoma; and the IDP service centers in Batavia, Illinois and La Mirada, California. Defendants must complete these divestitures within 150 days after filing of the Complaint, or five days after entry of the Final Judgment, whichever is later. If they do not complete the divestitures within the prescribed time, the Court will appoint a trustee to sell the assets.

The United States and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 ("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

Flowserve is a New York corporation with its principal executive offices in Irving, Texas. Flowserve manufactures and sells a broad array of pumps, valves and seals used in a wide variety of manufacturing and processing industries, and provides parts and service for pumps, in the United States and abroad. Flowserve has total annual sales of over \$1 billion and maintains offices and facilities at approximately 25 locations in the United States.

Ingersoll-Rand Company ("I-R") is a New Jersey corporation with its principal executive offices in Woodcliff Lake, New Jersey. I-R is a general partner in, and controls, IDP. IDP is a Delaware general partnership, headquartered in Liberty Corner, New Jersey. IDP manufactures and sells a broad array of pumps, and provides service and parts for such pumps, in the United States and abroad. IDP is one of the world's largest pump manufacturers, with annual sales of over \$875 million. IDP maintains offices and facilities at approximately 27 locations in the United States.

On February 9, 2000, Flowserve agreed to acquire IDP for about \$775 million. This proposed transaction, which would combine Flowserve and IDP and substantially lessen competition in the sale of certain types of pumps, precipitated the government's antitrust suit.

B. The Competitive Effects of the Transaction

1. *API 610 Pumps and Power Plant Pumps*

The petroleum industry is a major purchaser of pumps for hundreds of applications. The American Petroleum Institute ("API"), the petroleum industry trade organization, sets voluntary standards for the pumps used in petroleum applications. The standards for centrifugal pumps are API Standard 610. A large refinery will have over a thousand pumps, and most meet API 610 standards. The standards detail not only the design of the pumps, but also the accessories used with the pump (*e.g.*, drivers, couplings, mounting plates), the inspection, testing and shipment of the pumps, and the information that must be included in bids and contracts. API 610 pumps are designed to withstand extreme conditions without leaking because they are used to move fluids under high pressure that are erosive, corrosive, hot and flammable. Thus, API 610 pumps are heavier and more rugged than most other types of pumps.

Power plant pumps are specialized, highly engineered pumps that perform critical functions in the steam cycle of a power plant. The steam cycle consists of a boiler or steam generator that feeds steam to a steam turbine that drives an electricity-producing generator. The three basic categories of power plant pumps are: (1) "circulating water pumps," which deliver cooling water to condensers that condense the spent steam that has passed through a steam turbine; (2) "condensate pumps," which extract the condensed steam; and (3) "boiler feed pumps," which move the condensed steam (now very hot water) back into the boiler or steam generator to make new steam.

2. *Product and Geographic Markets*

Competition in the sale of API 610 and power plant pumps takes the form of bids that are submitted in response to extensive specifications that take specialized engineers many months to formulate, respond to, and evaluate. The specifications for each bid differ from other bids in terms of technical product attributes and commercial terms. The result of the bidding process generally is a customized pump that can satisfy the most demanding of applications, accompanied by a package of technical engineering services and commercial terms. Because the technical and commercial needs of the customer differ markedly for each API 610 pump or power plant pump bid, a small but significant increase in the price of a pump that meets the bid specifications would not cause a significant number of customers in the United States to substitute other pumps that do not meet those bid specifications. Therefore, each bid for API 610 pumps and power plant pumps for installation in oil refineries and power generation plants in the United States is a relevant product market.

Those competitors that could constrain Flowserve and IDP from raising prices on bids for API 610 pumps and power plant pumps for installation in oil refineries and power generation plants in the United States are API 610 and power plant pump manufacturers with a substantial physical presence in the United States. Customers installing these pumps in the United States prefer domestic pump suppliers because reputation is important, as is the ability to provide quick and reliable servicing with parts availability and to avoid shipping costs and delays. In addition, with minor exceptions, only domestic manufacturers have an installed base of pumps in the United States, thus allowing customers to more readily observe and evaluate the operation and reliability of the pump in comparable applications. Moreover, pumps manufactured abroad may cost more

than comparable pumps manufactured in the United States. The relevant geographic market for analyzing the proposed acquisition is the United States.

3. *Anticompetitive Consequences of the Acquisition*

Based on capabilities and bidding history, there are only four credible competitors, including Flowserve and IDP, that might bid on a large majority of bids for API 610 pumps for oil refinery projects in the United States, and there are only three or four credible competitors, including Flowserve and IDP, that might bid on a large majority of bids for power plant pumps for electrical generating facilities located in the United States. Although each bidder may be familiar with its competitors, it does not know with any degree of certainty the commercial or technical terms of its competitors' bids prior to submitting its own bid. That uncertainty restrains each bidder's pricing, so it will have a reasonable probability of winning the bid. By eliminating IDP, one of Flowserve's few significant competitors, Flowserve would be able to increase its bid without increasing the probability that it would lose the bid. Similarly, the few remaining bidders could also increase their bids without increasing their risk of losing. Thus, the acquisition of IDP by Flowserve would create an incentive for each bidder to bid a higher amount than it would have were IDP still a competitor.¹

¹ Each bidder, in deciding how high to bid while facing the uncertainty as to what its rivals will bid, balances the benefit of receiving a higher price when it wins against the cost of a decreased probability of winning when its bid price is raised. When a bidder is eliminated, a given increase in a bid price by a remaining bidder leads to a smaller decrease in the probability of losing. This shift in the balance between the benefit and the cost of raising the bid price makes a price increase by each remaining bidder profitable.

The Complaint alleges that substantial entry by other pump manufacturers into the sale of API 610 and power plant pumps for installation in the United States is time-consuming, expensive and difficult, and hence, unlikely to counteract these anticompetitive effects.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the sale of API 610 and power plant pumps for installation in the United States. Within 150 days after the date the Complaint was filed, or five days after entry of the proposed Final Judgment, whichever is later, defendants must divest to an economically viable and effective acquirer(s) perpetual, royalty-free, assignable, transferable licenses to manufacture and sell Flowserve's SCE, VLT, VMT, HQ, HX and WX pump lines, and IDP's J and CGT pump lines; Flowserve's pump plant in Tulsa, Oklahoma; and the IDP service centers in Batavia, Illinois and La Mirada, California. Defendants must use their best efforts to accomplish the divestitures as expeditiously as possible. The proposed Final Judgment requires that these assets must be divested in such a way as to satisfy the United States, in its sole discretion, that the assets can and will be used by the acquirer(s) to compete effectively in the business of manufacturing and selling the divested pump lines to customers, including those in the petroleum and power generation industries in the United States.

Until the ordered divestitures take place, defendants must take all reasonable steps necessary to accomplish the divestitures and cooperate with any prospective acquirer(s). If defendants do not accomplish the ordered divestitures within the prescribed time period, the proposed Final Judgment provides that the Court will appoint a trustee to complete the divestitures. If a trustee is appointed, the proposed Final Judgment provides that defendants must pay all costs and expenses of the trustee. The trustee's commission will be structured to provide

an incentive for the trustee based on the price obtained and the speed with which divestitures are accomplished. After his or her appointment becomes effective, the trustee shall serve under such other conditions as the Court may prescribe. The trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish the required divestitures. At the end of 150 days, if the divestitures have not been accomplished, the trustee and the parties will make recommendations to the Court, which shall enter such orders as appropriate to accomplish the divestitures.

The relief in the proposed Final Judgment has been tailored to ensure that the ordered divestitures maintain competition that would have been eliminated as a result of the acquisition and to prevent the exercise of market power after the acquisition in the markets alleged in the Complaint.

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 parties 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 of the decree 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 sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. 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:

Gail Kursh
Chief, Health Care Task Force
Antitrust Division
United States Department of Justice
325 7th Street, NW, Suite 400
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendants Flowserve, I-R and IDP. The United States could have continued such litigation to seek preliminary and permanent injunctions against Flowserve's acquisition of IDP. The United States is satisfied, however, that defendants' divestiture of the assets described in the proposed Final Judgment will establish, preserve and ensure a viable competitor in the relevant markets identified by the United States. To this end, the United States is convinced that the proposed relief, once implemented by the Court, will prevent Flowserve's acquisition of IDP from having adverse competitive effects.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the court *may* consider--

- (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
- (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e) (emphasis added). As the Court of Appeals for the District of Columbia Circuit has held, the APPA permits a court to consider, among other things, the relationship

between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

Courts have recognized that the term "'public interest' take[s] meaning from the purposes of the regulatory legislation." *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 669 (1976). Since the purpose of the antitrust laws is to preserve "free and unfettered competition as the rule of trade," *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958), the focus of the "public interest" inquiry under the APPA is whether the proposed Final Judgment would serve the public interest in free and unfettered competition. *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert denied*, 465 U.S. 1101 (1984); *United States v. Waste Management, Inc.*, 1985-2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C. 1985).

In conducting this inquiry, "the 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."² Rather,

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.

² 119 Cong. Rec. 24598 (1973). *See United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See H.R. 93-1463*, 93rd Cong. 2d Sess. 8-9, *reprinted in* (1974) U.S.C.C. A.N. 6535, 6538.

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

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988), quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *see also Microsoft*, 56 F.3d 1448 (D.C. Cir. 1995). Precedent requires that

the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.³

A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

³ *United States v. Bechtel Corp.*, 648 F.2d at 666 (citations omitted) (emphasis added); *see United States v. BNS, Inc.*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.*, 406 F. Supp. at 716. *See also United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984).

The proposed decree, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a proposed final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. “[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is ‘within the reaches of public interest’ (citations omitted).”⁴

Moreover, the Court’s role under the Tunney Act 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. Since “[t]he 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 might have but did not pursue. *Id.*

⁴ *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982), *aff’d sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) quoting *United States v. Gilleue Co.*, *supra*, 406 F. Supp. at 716; *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

VIII. DETERMINATIVE DOCUMENTS

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

Dated: July 31, 2000.

Respectfully submitted,



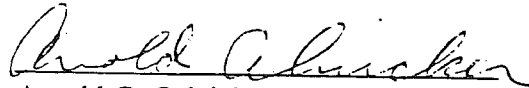
Arnold C. Celnicker
Georgia Bar No. 118050
U.S. Department of Justice
325 7th Street, NW, Suite 400
Washington, D.C. 20530
(202) 514-2474

CERTIFICATE OF SERVICE

I hereby certify that on this day of July 31, 2000, I caused a copy of the Competitive Impact Statement to be served by U.S. First Class Mail or overnight delivery upon:

Stephen J. Marzen
Shearman & Sterling
801 Pennsylvania Ave., N.W., Suite 900
Washington, D.C. 20004-2604
(202) 508-8174
Attorney for Flowserve Corporation

David I. Gelfand
Mark W. Nelson
Cleary, Gottlieb, Steen & Hamilton
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006-1801
(202) 974-1500
Attorneys for Ingersoll-Dresser Pump Company and Ingersoll-Rand Company



Arnold C. Celnicker
Trial Attorney, Georgia Bar No. 118050
U.S. Department of Justice, Antitrust Division
325 7th Street, N.W., Suite 400
Washington, DC 20530
(202) 305-7498