more than two years) for achieving compliance.

After the reviewing authority has determined that a state is in compliance with the Act,the state will be required as part of the Byrne Formula Grant application process in subsequent program years to certify that the state remains in compliance with the Act.

Dated: December 10, 1998.

Janet Reno,

Attorney General.

[FR Doc. 98–33377 Filed 12–16–98; 8:45 am]

BILLING CODE 4410–BB–M

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. General Electric Company; Response to Public Comments

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b) through (h), that a Public Comment and the Response of the United States have been filed with the United States District Court for the District of Montana, Missoula Division, in *United States* v. *General Electric Company,* Civil Action No. 96–121–M–CCL. Copies of the Complaint, proposed Final Judgment, Competitive Impact Statement, Public Comment, and the Response of the United States are available for inspection at the Department of Justice in Washington, D.C., in Room 215, 325 Seventh Street, N.W., and the Office of the Clerk of the United States District Court for the District of Montana, 301 South Park, Room 542, Helena, Montana 59626.

The Complaint in this case, filed in August 1996, alleged that General Electric had entered into agreements that violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, by requiring hospitals that licensed certain diagnostic software from GE to agree not to compete with GE in unrelated service markets. On July 14, 1998, the United States filed a proposed Final Judgment and a Stipulation signed by the parties allowing for entry of the Final Judgment following compliance with the Tunney Act. The United States also filed a Competitive Impact Statement (''CIS''), which it published, along with the proposed Final Judgment, in the **Federal Register.** *See* 63 FR 40737 (1998).

The proposed Final Judgment enjoins GE from agreeing with any licensee that the licensee will not service third-party medical equipment, or from otherwise restraining the licensee from providing third-party service as a condition of licensing certain advanced service materials. The proposed Final Judgment also requires GE to implement a compliance program, and provides procedures that the United States may utilize to determine and secure GE's compliance.

Under the Tunney Act, interested parties have 60 days from the date the proposed Final Judgment and CIS are published in the **Federal Register** to submit to the United States any comments they have on the Judgment. The 60-day period for public comments relating to this matter expired on September 28, 1998. The United States received only one Comment. The Comment and the Responses thereto, are hereby published in the **Federal Register** and have been filed with the Court.

Rebecca P. Dick,

Director of Civil Non-Merger Enforcement, Antitrust Division.

Ronald S. Katz, Esq.,

General Counsel, ISNI, Coudert Brothers, 4 Embarcadero Center, Ste. 3300, San Francisco CA 94111, Telephone: 415–986–1300.

United States District Court for the District of Montana Missoula Division

United States of America, Plaintiff, v. General Electric Company, Defendant. CV 96–121–M–CCL, PUBLIC COMMENT OF INDEPENDENT SERVICE NETWORK INTERNATIONAL PURSUANT TO 15 U.S.C. § 16(b), (d).

Pursuant to 15 U.S.C. § 16(b), (d), of the Antitrust Procedures and Penalty Acts (''APPA'') Independent Service Network International (''ISNI''), a trade association of 157 maintainers of high technology equipment, including medical equipment of the type at issue in this matter,[1] submits this public comment to the Competitive Impact Statement (''CIS'') published in the **Federal Register** at 63 FR 40737.

I. Introduction

This proposed consent decree grants GEMS the right to commit a *per se* violation of the antitrust laws, i.e., to prohibit hospital service organizations from licensing GEMS' advanced service materials unless the hospital agrees that such service materials may not be used by part-time employees. As will be detailed below, there is no justification for such a limitation, which could well distort the market, particularly in sparsely populated areas like Montana. Because *per see* violations of the antitrust laws are by definition contrary to public policy, it is not possible for the Court to make a determination that this consent decree is in the public interest pursuant to § (e) of the APPA.

A public interest determination is particularly important in this case because it involves the cost of healthcare, a subject important to all Americans, and because GEMS has a high market share in the relevant markets, which it has extended through recent aggressive transactions unopposed by the Government. Therefore, pursuant to APPA § (f) and based on the showing detailed below, ISNI respectfully requests that the Court not make a determination that this consent decree is in the public interest. ISNI also respectfully requests that the Court authorize ISNI to appear at any hearing that the court may convene in order to determine whether this consent decree is in the public interest.

II. ISNI and its Interest in this Proceeding

ISNI, an association of 157 independent service organizations (''ISOs''), i.e., organizations servicing equipment manufactured by others (see Betzner Decl., Exhibit B for a list of members), is a non-profit corporation incorporated in the District of Columbia. In competition with the Service organizations of manufacturers, the members of ISNI service various types of high-technology equipment, including medical equipment of the type that is the subject of the CIS. ISNI's members account for over $1.5 billion in commerce.

The purpose of ISNI for the past fourteen years has been to promote and maintain a closer union and organization of ISOs. Specifically ISNI develops educational methods to increase awareness about ISOs and studies economic and legal problems confronting them. ISNI also serves as a clearing house for information and data relating to its members' businesses and ISNI promotes better relations among providers, distributors and manufacturers of supplies and services.

ISNI appears in Appendix C of the Pre-discovery Disclosure Statement of the United States filed in this matter on May 16, 1997. Page C–1 of that

[1] InnoServ Technologies, Inc., which General Electric Medical Systems (''GEMS'') is attempting to acquire, is a member of ISNI, but, because of conflict of interest considerations, has not been informed of or consulted about this public comment. Similarly, this comment is not intended to express any views of Serviscope, an ISNI member acquired by GEMS in August, 1998. See attached Declaration of Claudia Betzner, para. 6.

The Innoserv conflict arises from another simultaneous consent decree between the U.S. and General Electric, described in a CIS at 63 FR 39894. Although that CIS informs the D.C. District Court about this consent decree, the CIS in this case, for reasons known only to the parties, does not inform this Court about that consent decree. That the two decrees are related is evidenced by the GEMS press release on the consent decrees, which stated that GEMS settled this suit in order ''to obtain clearance to complete the Innoserv acquisition * * *'' See attached Declaration of Claudia Betzner, Exhibit A.

document is headed ''List of individuals who may have relevant information'' and number four under that heading reads

> Individuals associated with industry associations * * * that likely possess information pertaining to: (a) the prices of medical equipment; (b) the functions of different types of medical equipment; (c) regulations for imaging equipment; and/or (d) market data, including trends in the medical equipment or service industries. (See Appendix C–58 to C–60.)

The seventh name listed on page C–58 of that document is that of Claudia Betzner, ISNI's Executive Director. Therefore, the Government acknowledges that ISNI has relevant information related to the proceeding.

ISNI has participated in various legal proceedings on behalf of its members. For example, ISNI, then known as Computer Service Network International, filed a friend-of-the-court brief which was cited by the United States Supreme Court in its landmark antitrust decision concerning service aftermarkets, *Eastman Kodak Co. v. Image Technical Services, Inc., et Al.,* 504 U.S. 451, 462 n.6 (1992). Also, pursuant to the order of Chief Judge Thomas P. Griesa of the Southern District of New York (Betzner Decl., Exhibit C), ISNI has been granted the right to intervene for purposes of appeal in the proceeding concerning the termination of the IBM consent decree, *United States of America* v. *International Business Machines Corporation*, 52 CIV. 72–344 (TPG), currently pending the U.S. Court of Appeals for the Second Circuit. ISNI has filed a brief in that proceeding.

In his order, Judge Griesa found that ''ISNI has a legitimate interest in appealing from the May ruling, and it is in the public interest to allow ISNI to appeal'' (*Id* at 2). Similarly, it is in the public interest for ISNI to intervene in this proceeding because, as a result of GEMS' anticompetitive practices, a dwindling number of its members compete with GEMS to service the equipment involved in this case. The reasons that the number is dwindling are that GEMS has a large market share; it has aggressively extended that market share through the transactions described below, unopposed by the U.S. government; and its advanced diagnostics are an essential facility necessary to compete in the relevant markets. Now GEMS may further its stranglehold on the service market by precluding, pursuant to the Proposed Final Judgment, ISOs and hospital service organizations from cooperating in certain ways, such as ISOs providing part-time employees for hospital service organizations, serving as agents for hospital service organizations, or joint-venturing with hospital service organizations.

Such cooperation is particularly important in sparsely populated areas like Montana, which may not have enough medical equipment of various types to justify full-time employees. Like businesses throughout history, hospital service organizations may find it most efficient from time to time to employ part-time personnel, and, depending on market conditions, it may be economic for an ISO to provide such part-time personnel. The Proposed Final Judgment, however, prevents this perfectly normal working of a free and open market.

The reasons that it is in the public interest for ISNI to intervene in this matter are cogently set forth in the Government's complaint in this matter. The complaint clearly targets GEMS' practice of constraining competition from the hospital *or its employees.* For example, paragraph 32 of the Complaint describes how under the offending GEMS licensing agreement, ''* * * the hospitals also agreed to prohibit *their service employees* from competing with G.E. during the employees' business and off hours'' (emphasis added).

Paragraph 33 of the Complaint quotes a ''continuing representation'' from the hospitals in GE's standard licensing agreement: ''You [the hospital] have no *full or part-time employee* who services any type of medical equipment of any person or entity other than you'' (emphasis added). Paragraph 37 of the Complaint states that to effectuate ''* * * its agreements not to compete, G.E. * * * provided valuable advanced diagnostics and training in exchange for the licensees' commitment that neither the licensees *nor their employees* would compete with G.E. in servicing medical equipment or provide service for medical equipment sold to other health care facilities by GE's competitors; and * * * to enforce the agreements not to compete when it discovered that licensees *or their employees* were servicing other health care providers' medical equipment'' (emphasis added).

These agreements against hospitals *and their employees* resulted in the following ''Harm to Competition'' described in the Complaint:

> 38. GE's agreements with its licensees have eliminated significant actual or potential high-quality, low-cost competitors throughout the United States from numerous markets for servicing medical equipment.
>
> * * * * *
>
> 40. Throughout the United States, health care providers that use imaging equipment have been forced to pay supra-competitive prices to have their equipment serviced.
>
> 41. Medical equipment owners and operators, and their patients, have been denied the benefits of free and open competition in the servicing of medical equipment in Montana and throughout the United States.
>
> 42. Medical equipment owners and operators, and their patients, have been denied the benefits of free and open competition in the sale of medical equipment in Montana and throughout the United States.
>
> 43. Less service has been purchased by medical equipment owners and operators than would have been purchased in the absence of GE's restraints.
>
> 44. By preventing hospitals with in-house service organizations from servicing other manufacturers' equipment, GE's agreements have made it more costly and difficult for those manufacturers to sell their imaging equipment in areas where they lack a significant installed base.
>
> 45. GE's agreements with its licensees in Montana have disadvantaged many of GE's competitors in selling imaging equipment in Montana and have reduced customer choice.

Despite these pernicious effects, the government has agreed in § V(g) of the Proposed Final Judgment in this matter that GE is not prohibited ''* * * from agreeing with a licensee of Defendant's Operating and Service Materials that such materials may be used only by the Licensee's full-time employees.'' As will be detailed below, there is no justification whatsoever for this agreement, which distorts the workings of free and open competition. It is a *per se* violation of the antitrust laws, which by definition is not in the public interest and should not be countenanced by this Court.

III. GEMS' Monopoly and its Successful Efforts to Maintain and Extend it

According to its own press release, ''E.G. Medical Systems, based in Milwaukee, WIS., is a $4.5 billion global provider of medical diagnostic imaging systems, services and solutions with 16,000 employees worldwide.'' (Betzner Decl., Exhibit A.) According to the Complaint in this matter, ''health care providers spend over three billion dollars each year to service and repair all types of medical equipment'' (para. 1), ''GE is the world's largest manufacturer of imaging equipment'' (para. 4), and GE's licensing agreements with hospitals ''* * * reduced competition in servicing medical equipment'' (para. 5).

Furthermore, GEMS has extended and maintained its market power by a number of recent aggressive transactions unopposed by the U.S. government:

- August, 1994: strategic alliance with Advanced NMR Systems, Inc.

regarding very high field magnetic resonance systems. (Betzner Decl., Exhibit D.)

- June, 1995: five-year agreement with Columbia/HCA Healthcare Corp. covering the service of all diagnostic imaging equipment in the hospital chain, which at that time consisted of 320 hospitals. (*Id.*, Exhibit E.)
- February, 1996: acquisition of National Medical Diagnostics, Inc., which at the time of acquisition provided medical equipment maintenance services to 220 hospitals in 23 states. (*Id.*, Exhibit F.)
- August, 1996: acquisition of Specialty Underwriters, a seller of maintenance insurance to the healthcare industry, and Maintenance Management, which provides service for medical equipment. (*Id.*, Exhibit G.)
- August, 1997: investment of $5.1 million in Advanced NMR Systems, Inc., an extension of the August 1994 alliance described above. (*Id.*, Exhibit H.)
- December, 1997: five-year marketing pact with INPHACT, a provider of on-line radiology services for radiologists. (*Id.*, Exhibit I.)
- August 1998: acquired Serviscope, a medical equipment maintenance and asset management company that was one of the few potential candidates to compete with GEMS to acquire Innoserv. (*Id.* at para 6.)
- September, 1998: pending acquisition of imaging business of Elscint (*Id.*, Exhibit J).

With each of these transactions, GEMS got stronger both absolutely and also relative to its much smaller hospital and ISO competitors. For GEMS to dictate when these hospital competitors can use part-time employees distorts free and open competition and has no justification whatsoever.

IV. Non-Compliance With The APPA

A. The CIS Does Not Provide the Required Information on the Restrictions on Part-time Employees

§ (b)(3) of the APPA requires the CIS to recite ''an explanation of the proposal for a consent judgment, including an explanation of * * * relief to be obtained thereby, and the anticipated effects on competition of such relief.'' The information required by § (b) has not been provided with respect to the part-time employee issue. Indeed, *no* information has been provided explaining or justifying GE's ability to restrict hospital competitors from using part-time employees. The reason for this lack of information is that there is no justification for this distortion of free and open competition, a fact which prevents this Court from determining that this Proposed Final Judgment is in the public interest.

Speaking about *this* case, the InnoServ CIS, 63 FR 39894, 39899, states that ''GE * * * agreed to all of the relief that the Government was seeking. * * *'' That is simply not true. Paragraph 3 of the Prayer for Relief in the Complaint reads as follows:

> That GE, its officers, directors, agents, employees, subsidiaries, and successors, and all other persons acting or claiming to act on its behalf, be permanently enjoined, restrained and prohibited from, in any manner, directly or indirectly, continuing, enforcing, or renewing these agreements, or from engaging in any other confirmation, conspiracy, agreement, understanding, plan, program, or other arrangement limiting competition in the service of medical equipment, except for reasonable limitations on the use of copyrighted software and manuals themselves. Clearly the unjustified limitation on the use of part-time employees by hospital service organizations is contrary to this prayer for relief because (1) that limitation is part of the enjoined agreement and (2) that limitation is an arrangement ''limiting competition in the service of medical equipment.'' *Id.*

B. The Proposed Final Judgment Is Not In the Public Interest

APPA § (e) requires this court to determine that the entry of judgment is in the public interest by considering among other things, ''the competitive impact of such judgment.'' Because of the part-time employee prohibition, the competitive impact of this judgment would be negative.

This Court can take judicial notice that since time immemorial employers have been using part-time employees to adjust to market conditions. The flexibility to use part-time employees is critical to being competitive: if one hires a full-time employee when only a part-time employee is needed, then one's costs are too high; if one does not hire a part-time employee when there is sufficient work for such an employee, then one's production is insufficient.

The need for part-time employees is particularly acute in sparsely populated areas like Montana. The CIS itself acknowledges this fact by acknowledging at page 40739 that (1) ''[h]ospitals are reluctant to purchase a piece of imaging equipment unless someone near their facility can service it'' and (2) ''[b]ecause manufacturers cannot economically place their own service engineers in areas [like Montana] where they do not have a large installed base, they need someone else in those areas who is qualified to service their equipment.'' Because the installed base is not large, that ''someone else'' may well be a part-time employee, especially in the critical early stages of the creation of an installed base of equipment.

An obvious source of part-time employees for a hospital service organization is a local ISO. Because the ISO might not have enough for its employees to do in a sparsely populated area, it could be economic for the ISO to provide such an employee or to enter into other mutually advantageous relationships with a hospital service organization. Such relationships could include becoming the service agent for the hospital service organization or joint venturing with a hospital service organization. Under § 5(g) of the Proposed Final Judgment, however, GEMS could choose not to license advanced service materials to such a hospital solely because a part-time employee may be using GE's advanced service materials.

There is absolutely no justification for this distortion of free and open competition. The only possible justification—security of the advanced service materials—is debunked by the CIS itself at page 40739:

> The non-compete agreements are not ancillary to any legitimate business interest that GE had in licensing advanced service materials particularly since they were not reasonably necessary to prevent the hospital from using the advanced service materials on third-party equipment, in a manner not authorized by the license agreements. As a result of software security procedures adopted by GE, the advanced service materials will only work on the specific GE machine to which the license agreement relates. Furthermore, the advanced service materials are model specific, i.e., the advanced service materials for one model of GE imaging equipment cannot be used on another model, even if the two models are of the same 'modality' (e.g., if both are GE CT scanners), and cannot be used on other manufacturers' equipment * * * Given the machine and model-specific nature of the software, the restrictions imposed by the license agreements on third-party service are unrelated to any legitimate interest GE has in preventing the unauthorized use of its software.

Obviously the same security that prevents hospitals from unauthorized use of the advanced software materials would also prevent such use by part-time employees of the hospitals.

This fact makes the agreement allowed by the Proposed Final Judgment—i.e., a license agreement between GE and a hospital prohibiting the hospital from allowing part-time employees to use GE's advanced service materials—a non-ancillary agreement to allocate territories or customers.

Indeed, it is just a potentially milder version of the agreement on which the

Government brought suit. That agreement was that hospitals could not compete with G.E. for service customers if the hospitals wanted GEMS' advanced service materials for their own use. The new agreement is that hospitals using part-time employees cannot compete with G.E. for service customers if the hospitals want GEMS' advanced service materials for the hospitals' own use. Such agreements are illegal *per se,* as the United States demonstrates at Appendix B–1 of its Pre-Discovery Disclosure Statement filed with this Court on May 16, 1997:

> Non-ancillary agreements between actual or potential competitors to allocate territories or customers are illegal *per se* because they are ''naked restraints of trade with no purpose except stifling of competition.'' *Palmer* v. *BRG of Georgia,* 498 U.S. 46, 49–50 (1990). Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other. *Id.* An agreement not to compete in terms of price or *output,* without some pro-competitive justification, is simply 'inconsistent with the Sherman Act's command that price and *supply* be responsive to consumer preference. *National Collegiate Athletic Association* v. *Board of Regents of the University of Oklahoma,* 468 U.S. 85, 109–10(1984). Moreover, 'the existence of a vertical aspect to the relationship between [GE and its hospital licensees] does not foreclose *per se* treatment of agreements to eliminate competition between them.' *United States* v. *General Electric Co.* (Order of March 18, 1997), 1997–1 CCH Trade Cases, at 71,765, pp. 79,408–409 (citing *Palmer*) * * * (emphasis added).

The underscored references to output and supply mentioned above relate directly to the employment of part-time employees, a factor which effects output/supply.

This Court has also recognized the *per se* nature of the challenged agreements at page five of its March 18, 1997 slip opinion in this matter:

> While it is true that restraints which are ancillary to a legitimate transaction are exempt from the *per se* rule, the government has alleged in the complaint that the agreements not to compete are not ancillary restraints * * * Of course, GE may offer evidence to refute the allegation later in this litigation, but for now the allegation is sufficient to withstand the motion to dismiss.

Not only did GE not refute this allegation, but also the CIS now acknowledges at page 40739 that ''* * * [t]he non-compete agreements are not ancillary to any legitimate business interest that GE had in licensing advanced service materials * * *''

Therefore, these agreements, with their totally unjustified prohibition on part-time employees, are still *per se* violations of the antitrust laws. As such, this Court should not determine that a consent decree that permits them is in the public interest because the Supreme Court has already determined that such agreements are ''naked restraints of trade with no purpose except stifling of competition.'' *Palmer,* 498 U.S. at 49–50.

C. The CIS Asserts, Incredibly, That There Were No Materials Which the United States Considered Determinative in Formulating the Consent Decree

APPA § (b) requires the United States to publish with the CIS ''* * * any other materials and documents which the United States considered determinative in formulating such proposal * * *'' The CIS at 40741 states, incredibly, that ''The government considered no materials or documents determinative in formulating the proposed Final Judgment.''

This Court can take judicial notice that antitrust cases are among the most complex, document-intensive cases in the Federal Courts. This Court should respond in the same way as another District Court Judge responded to the same incredible claim: with incredulity and with an order to produce documents required by law. *U.S.* v. *Central Contracting Co., Inc.,* 537 F. Supp. 571, 575, 577 (E.D.Va. 1982):

> The Act [APPA] clearly does not require a full airing of Justice Department files, but the Court cannot countenance plaintiff's claim that though Congress enacted sunshine legislation the courts may blandly (and blindly) accept government certification in case after case that no document or materials, by themselves or in the aggregate, led to a determination by the government that it should enter into a consent decree * * * * * * * * *
>
> This does not require full disclosure of Justice Department files . . . or defendant's files, but it does require a good faith review of all pertinent documents and materials and a disclosure of those which meet the above [APPA] criterium.

Although no entity but the Government can know what these documents are, they should include at least the documents, if any, which led the Government to conclude that it was reasonable to permit GE to distort free and open competition by having the ability to limit its competitors from having part-time employees. These documents or documents like them must exist or else there is no reasoned basis for the consent decree. If they do not exist, then the Antitrust Division is not acting in a professional, competent manner.

V. This Court Should Authorize ISNI to Participate in any Public Interest Hearing That the Court May Convene

APPA § (f) authorizes this Court to ''authorize full or limited participation in proceedings before the court by interested persons or agencies, including . . . intervention as a party pursuant to the Federal Rules of Civil Procedure . . .'' The defects of the CIS described above amply justify such an authorization.

As mentioned in § II above, the ISNI has the interest, expertise and the experience to aid the Court. At the very least, the Court should order a hearing before making its public interest determination and should permit the ISNI to participate in that hearing.

VI. Conclusion

Because the Proposed Final Judgment permits GEMS to engage in a *per se* violation of the antitrust laws, it is by definition not in the public interest. It will raise healthcare costs and reduce choice for patients. Therefore, ISNI respectfully requests the Court not to approve the Proposed Final Judgment.

Respectfully submitted.

Dated: September 24, 1998

By

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Certificate of Service

This certifies that on December 10, 1998, I caused copies of the foregoing Public Comment of Independent Service Network International to be served as indicated upon the parties to this action and courtesy copies to be served as indicated upon each commenter:

By hand:

Richard L. Rosen, Esquire, Arnold & Porter, 555 12th Street, Washington, D.C. 20004, Counsel for General Electric Company

By first-class mail

Ronald S. Katz, Esquire, Coudert Brothers, 4 Embarcadero Center, Suite 3300, San Francisco, CA 94111, Counsel for the Independent Service Network International

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Attorneys for the United States.

Responses to Public Comment.

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (''APPA'' or

''Tunney Act''), the United States hereby responds to the public comment received regarding the proposed Final Judgment in this case.

I. Background

On August 1, 1996, the United States filed the Complaint in this matter, alleging that General Electric Company (''GE'') has violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, by requiring hospitals that licensed certain diagnostic software from GE to agree not to compete with GE in unrelated service markets. On July 14, 1998, the United States filed a proposed Final Judgment and a Stipulation signed by the parties allowing for entry of the Final Judgment following compliance with the Tunney Act. The United States also filed a Competitive Impact Statement (''CIS''), which it published, along with the proposed Final Judgment, in the **Federal Register**. See 63 Fed. Reg. 40737 (1998).

As is explained more fully in the Complaint, CIS, and various memoranda filed in this matter, GE, the world's largest manufacturer of medical imaging equipment, is also a leading provider of service for all types and brands of medical equipment. Many hospitals with in-house service departments also want to offer service to other nearby hospitals or clinics. In sparsely populated rural areas, such as Montana, these hospitals may be the only service providers other than GE that are qualified to service certain equipment. GE regularly granted these hospitals licenses that permitted them to use GE's software (''advanced service materials'') to service their own medical imaging equipment, but only if the hospitals agreed not to compete with GE to service other customers, even though the hospitals would not use GE's software to provide that service. These agreements harmed competition by foreclosing actual and potential competitors from offering service. The United States alleged that these agreements not to compete were per se illegal.

The proposed Final Judgment prohibits certain conduct, requires GE to implement a compliance program, and provides procedures that the United States may utilize to determine and secure GE's compliance. The proposed Final Judgment enjoins GE from agreeing with any licensee that the licensee will not service third-party medical equipment. It defines ''third-party service'' to mean the service of any medical equipment in the United States not owned, leased, or operated by the party performing it. Section IV(A) of the Final Judgment prohibits GE from entering into or enforcing any agreement in conjunction with the licensing of advanced service materials or related training whereby (a) the end-user represents that it has not, does not, or will not perform third-party medical equipment service or (b) the end-user is prevented or restrained from providing third-party service. Section IV(B) prohibits GE from requiring that a potential licensee give GE information regarding that person's provision of third-party service. Section IV(C) enjoins GE from representing that it has a policy or general practice of refusing to license operating or service materials for medical equipment, or of refusing to provide training thereon, because an end-user offers third-party medical equipment service. Section IV(D) prohibits GE from offering to sell or license operating or service materials on terms that vary depending on whether the end user has provided, does provide or will provide third-party medical equipment service.

Under the Tunney Act, interested parties have 60 days from the date the proposed Final Judgment and CIS are published in the **Federal Register** to submit to the United States any comments they have on the Judgment. The United States then files with the court any such comments, along with its responses, and published them in the **Federal Register**. 15 U.S.C. § 16(d). Provided that nothing in the public comments alters its conclusion that the proposed Final Judgment is in the public interest, the United States files a motion with the court asking for entry of the Judgment. The court thereafter must make its own determination of whether the proposed Final Judgment is in the public interest. 15 U.S.C. § 16(e).

The 60-day period for public comments relating to this matter expired on September 28, 1998. The United States received only one comment, that of Independent Service Network International (''ISNI''). ISNI, based in Washington, D.C., is a trade association of 157 maintainers of high technology equipment, including some Independent Service Organizations (''ISOs'') that service medical imaging equipment. The United States has carefully considered the views expressed in ISNI's Comment. Nothing in the Comment has altered the United States' conclusion that the proposed Final Judgment is in the public interest. Accordingly, once ISNI's Comment and this Response are published in the **Federal Register**, as required by the Tunney Act, the United States will file a motion with this Court seeking entry of the proposed Final Judgment.

III. Response to the Comment of Independent Service Network International

ISNI's primary concern with the proposed Final Judgment relates to Section V(g), which states: ''[N]othing in this Final Judgment shall be construed . . . to prevent Defendant from agreeing with a licensee of [its advanced service materials] . . . that such materials may be used only by the licensee's full-time employees.'' ISNI contends that because the proposed Final Judgment does not prohibit GE from agreeing with its hospital licensees that part-time employees may not use GE's software and because, it asserts, such agreements would be *per se* violations of the Sherman Act, the proposed Final Judgment is not in the public interest. ISNI Comment at 7. ISNI believes that in the absence of such licensing restrictions, ISO's (including, presumably, some of ISNI's members) might ''share'' an employee with a hospital on a part-time basis, who then would use GE's software to repair the hospital's equipment. ISNI Comment at 10–11.

ISNI also contends that the United States failed to comply with the Tunney Act because in ISNI's view it did not adequately explain why the Judgment does not prohibit these restrictions regarding use by part-time employees, and because the United States did not identify any determinative documents. ISNI Comment at 9–15. ISNI urges the Court to hold a hearing on the public interest determination and seeks to participate at that hearing.

A. The Proposed Final Judgment Adequately and Properly Remedies the Violation Alleged in the Complaint.

ISNI's principal objection to the proposed Final Judgment—that it does not prohibit GE from entering into agreements with its licensees restricting the use of its software to certain employees—fails to raise an appropriate issue for consideration under the Tunney Act. The agreements to which ISNI objects are not of the type that were challenged in the United States' Complaint.

The Complaint in this case challenges agreements not to compete that GE required of hospitals that wished to secure GE's advanced service materials. Complaint ¶ 31. These noncompete agreements between GE and the hospitals that are its actual or potential competitors in the third-party service business were unrelated to any legitimate interest of GE. An agreement between horizontal competitors not to compete is tantamount to an agreement

to allocate markets and is the type of restraint that is so likely to have anticompetitive effects that it is deemed to be *per se* illegal under the antitrust laws. *See, e.g., Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam). The proposed Final Judgment prohibits GE from enforcing any such existing agreements and from entering into any similar agreements in the future. It provides full and complete relief for the violations alleged in the Complaint.

ISNI is complaining about other potential provisions in GE's licensing agreements—restrictions not challenged in the Complaint—that do restrict the way in which the hospital licensees may use GE's software. GE's licenses contain a number of these provisions. For example, the license requires the hospital to commit that ''[n]either [the] hospital nor any of [the hospital's] employees will permit any one other than [the hospital's] service employee . . . to have access to or to use any part of the [advanced service materials].'' These restrictions are similar to those found in many software licenses in order to prevent against misappropriation or to limit the license to certain categories of users. Contrary to ISNI's assertions, such provisions typically found in GE's licenses, including provisions regarding that only full-time employees use GE's software, do *not* prohibit licensee hospitals with part-time employees from competing with GE for third-party service customers. Licensee hospitals may even use their part-time employees to provide that service. The restrictions questioned by ISNI concern who within the hospital may use GE's software, not the provision of third-party service. The Complaint did not allege that such restrictions on use violate the antitrust laws, and thus the proposed Final Judgment does not prohibit them. *See* CIS at 8.

The Tunney Act does not contemplate judicial review of the government's determination of which conduct to challenge or which violations to allege in the Complaint. The government's decision not to challenge particular conduct based on the facts and law before it at a particular time, like any other decision not to prosecute, ''involves a complicated balancing of a number of factors which are peculiarly within [the government's] expertise.'' *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The United States has wide discretion within the reaches of the public interest to resolve potential litigation. *See United States v. Western Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993). Moreover, in conducting its Tunney Act evaluation, the Court must not look beyond the Complaint ''to evaluate claims that the government did not make and to inquire as to why they were not made.'' *United States v. Microsoft*, 56 F.3d, 1448, 1459 (D.C. Cir. 1995). Last year, the United States Court of Appeals for the District of Columbia Circuit stated that courts, in making their public interest determination:

> Must examine the decree in light of the violations charged in the complaint and should withhold approval only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes ''a mockery of judicial power.''

Massachusetts School of Law at Andover, Inc. v. *United States, 118 F.3d 776, 783 (D.C. Cir. 1997), quoting United States* v. *Microsoft Corp.*, 56 F.3d 1448, (D.C. Cir. 1995).

B. The Proposed Final Judgment Does Not Authorize GE to Include Any Particular Restrictions in Its Licenses

ISNI suggests that Section V(g) of the proposed Final Judgment grants GE the right to engage in *per se* illegal conduct. ISNI Comment at 2. ISNI has misconstrued the impact of Section V of the Final Judgment. Section V is intended to clarify the meaning of Section IV, which contains the key prohibitions. Section V makes it clear that the Judgment should not be read to prohibit certain conduct. It does not, however, reach any conclusions as to whether that conduct is otherwise lawful, nor does it authorize GE to engage in any particular activity. Instead, as was stated in the CIS, the proposed Final Judgment is silent as to whether any particular restriction addressed in Section V would violate the antitrust laws. CIS at 8. Section V thus provides GE with no defense to any later allegation, made by a private party or even the United States, that the conduct described in Section V(g) violated the antitrust laws. Furthermore, entry of a proposed Final Judgment does not bar a private party from seeking and obtaining appropriate antitrust remedies, whether or not the challenged conduct is prohibited by the Final Judgment. In short, the proposed Final Judgment does not authorize GE to include any particular restrictions in its licenses.[1]

[1] Although the proposed Final Judgment does not authorize GE to prevent a hospital's part-time employee from using its software, and although the United States takes no position regarding the validity of this particular restriction, ISNI's contention that this restriction is illegal per se is wrong. The Supreme court has ruled that certain conduct, such as the agreements challenged in this case, is so inherently anticompetitive that it is illegal *per se* under Section 1. *See Palmer,* 498 U.S. at 48–50. However, the *per se* standard is generally not applied to restrictions on the way a licensee can use software it has licensed, provided that the restrictions do not restrain competition that would occur in the absence of the license. An owner of intellectual property is ordinarily not required to license others to use it, but may choose to do so and to subject the licensee to reasonable restrictions and conditions. Such restrictions and conditions often serve procompetitive purposes by allowing licensors to exploit their intellectual property rights and by encouraging others to make similar investments. For these reasons, restrictions on the way a licensee may use intellectual property are generally reviewed under the rule of reason standard, which takes into account market conditions and other relevant factors, rather than a *per se* standard. *See* U.S. Department of Justice and the Federal Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property*, 4 Trade Reg. Rep. (CCH) ¶ 13,132 at 20,735–36, 20740–41 (1995).

C. The United States Has Complied with the Tunney Act

1. The CIS Adequately Explains the Relief

ISNI contends that the United States failed to comply with the Tunney Act because it did not explain why the Judgment does not prohibit GE from agreeing with its licenses that only full-time employees could use its software. ISNI mischaracterizes the CIS, which states:

> The limiting conditions are consistent with the relief sought in the Complaint. The Complaint alleged that GE had used its advanced service materials to induce hospitals with in-house service capability to agree not to compete with GE in the servicing of medical equipment. The Complaint did not allege that GE's refusal to license its intellectual property to any or all persons who might seek such licenses violated the antitrust laws, and the Final Judgment is silent as to that conduct.
>
> CIS at 8.

2. There Were No Determinative Documents

ISNI next contends that the United States failed to comply with the Tunney Act because it did not identify any determinative documents. ISNI characterizes as ''incredible'' the CIS's statement that there were no determinative materials or documents within the meaning of the APPA that were considered in formulating the proposed Final Judgment. ISNI Comment at 14.

The Tunney Act requires, in pertinent part, that the United States make available to the public copies of the proposed final Judgment ''and any other materials and documents which the United States considered determinative in formulating such proposal.'' 15 U.S.C. § 16(b) (emphasis added). Thus, the United States is required to disclose only those documents that it considered

determinative in its decision to settle the case on the terms set forth in the proposed Final Judgment. Documents that were determinative in the decision to file the case need not be disclosed. During Senate hearings on the Tunney Act, one witness specifically urged that ''as a condition precedent to * * * the entry of a consent decree in a civil case * * * the Department of Justice be required to file and make a matter of public record a detailed statement of the evidentiary facts on which the complaint * * * was predicated.'' [2] Congress, however, rejected that recommendation. ISNI's broad request for the documents providing the good-faith basis for filing the Compliant is contrary to the plain language of the Tunney Act and its legislative history and therefore should be denied.

ISNI's request falls outside the scope of what courts have interpreted to be determinative documents. Just last year, the United States Court of Appeals for the District of Columbia Circuit, in a case brought by the Antitrust Division challenging certain portions of the American Bar Association's law school accreditation activities, held that a third-party was not entitled to a wide range of documents in the government's files. *Massachusetts School of Law at Andover, Inc.* v. *United States*, 118 F.3d 776 (D.C. Cir. 1997). In that case, the United States asserted that the determinative documents provision referred ''only to documents, such as reports to the government, 'that individually had a significant impact on the government's formulation of relief—i.e., on its decision to propose or accept a particular settlement.' '' Id. at 784. The court held that both the statutory language and the legislative history supported this interpretation. Indeed, the court noted that during the senate debate on the Tunney Act, Senator Tunney himself cited a report to the government by an outside expert analyzing the economic consequences of proposed relief in an earlier case as exemplifying a ''determinative document.'' Id.[3] The court also considered a broad disclosure requirement to be inappropriate because it would directly interfere with the United States' ability to negotiate settlement agreements. Id. at 784–85. Similarly, in another recent Antitrust Division case the Second Circuit held that ''the range of materials that are 'determinative' under the Tunney Act is fairly narrow'' and that only documents that were ''a substantial inducement to the government to enter into the consent decree'' should be subject to disclosure. *United States* v. *Bleznak*, 153 F.3rd 16, 20–21 (2d Cir. 1998).[4]

ISNI has given no reason to doubt the United States' assertion that there are no determinative documents in this case. The United States did not receive any expert reports or any other document that substantially contributed to its determination to proceed with the settlement.

D. The Court Need Not Hold a Hearing in Making Its Public Interest Determination

ISNI requests that this Court convene a hearing before it makes its public interest determination. I further requests that the Court authorize ISNI to participate in the hearing. ISNI Comment at 15. The United States believes that a hearing is unnecessary because ISNI has already adequately expressed its views through the public comment procedure, as provided by statute. *See United States* v. *G. Heileman Brewing Co.*, 563 F. Supp. 642, 650 (D. Del. 1983) (court denies request for evidentiary hearing when ''those same issues have already been raised by movants through the APPA's third-party comment procedure); *United States* v. *Carrols Development Corp.*, 454 F. Supp. 1215, 1221–22 (N.D.N.Y. 1978) (request for limited participation denied when ''the moving parties have set forth their views in considerable detail in briefs and affidavits filed with this Court as well as in written comments submitted to the Government under the APPA''). If, however, the Court determines that a hearing would be useful in making its public interest determination, the United States would not object to ISNI's appearance as an *amicus curiae.*

IV. Conclusion

After careful review of ISNI's Comment, the United States continues to believe that entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint and is therefore in the public interest. Upon the publication of this Public Comment and the Response by the United States in the **Federal Register**, the United States will move the Court to enter the proposed Final Judgment. Once the United States moves for entry of the proposed Final Judgment, the Tunney Act directs this Court to determine whether its entry ''is in the public interest.'' 15 U.S.C. § 16(e). In making that determination, ''the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest.'' *Western Elec. Co.*, 993 F.2d at 1576 (emphasis added, internal quotation and citation omitted). This Court should evaluate the relief set forth in the proposed Final Judgment and should enter the Judgment if it falls within the government's ''rather broad discretion to settle with the defendant within the reaches of the public interest.'' *Microsoft*, 56 F.3d at 1461; *accord United States* v. *Associated Milk Producers*, 534 F.2d 113, 117–18 (8th Cir. 1976), *cert. denied*, 429 U.S. 940 (1976).

Dated: December 9, 1998.

Respectfully submitted,

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Certificate of Service

This certifies that on December 9, 1998, I caused copies of the foregoing Response to Public Comment to be served as indicated upon the parties to this action and courtesy copies to be served as indicated upon each commenter:

By facsimile & hand:

[2] The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 93d Cong., 1st Sess. 26, 57 (1973) (prepared statement of Maxwell M. Blecher, attorney).

[3] Congress enacted the Tunney Act in response to consent judgments entered in 1971 in three cases involving acquisitions by International Telephone and Telegraph Corporation (''ITT''), including that of the Hartford Fire Insurance Company. The consent judgments permitted ITT to retain Hartford. Subsequent Congressional hearings revealed that the Antitrust Division had employed Richard J. Ramsden, a financial consultant, to prepare a report analyzing the economic consequences of ITT's possible divestiture of Hartford. Ramsden concluded that requiring ITT to divest Hartford would have adverse consequences on ITT and on the stock market generally. Based in part on the Ramsden Report, the United States concluded that the need for the divestiture of Hartford was outweighed by the divestiture's projected adverse effects on the economy. In explaining the determinative documents provision, Senator Tunney stated, ''I am thinking here of the so-called Ramsden memorandum which was important in the ITT case.'' 119 Cong. Rec. 24,605 (1973).

[4] The single case cited by ISNI—*United States* v. *Central Contracting Co.*, 537 F. Supp. 571 (E.D. Va. 1982)—has not been followed by any other court. Moreover, even that opinion recognized that the Tunney Act ''does not require full disclosure of Justice Department files, or grand jury files, or defendant's files, but it does require a good faith review of all pertinent documents and materials and a disclosure of'' those ''materials and documents that substantially contribute to the determination [by the government] to proceed by consent decree * * *.'' Id. at 577.

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DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[Docket No 98–26]

Church of the Living Tree; Denial of Application

On April 7, 1998, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA) issued an Order to Show Cause to Church of the Living Tree (Respondent) of Leggett, California, notifying it of an opportunity to show cause as to why DEA should not deny its application for registration as a manufacturer (non-human consumption) of marijuana, under 21 U.S.C. 823(a), for reason that it is not authorized by the State of California to manufacture marijuana.

By letter dated April 14, 1998, Respondent filed a request for a hearing on the issues raised by the Order to Show Cause and the matter was docketed before Administrative Law Judge Mary Ellen Bittner. In its request for a hearing, Respondent indicated that it intends to rent space to medical marijuana patients to cultivate marijuana for their own use and that ''[a]fter the patients have harvested their plants and removed the medical portions, the remaining stalk material will be a legal commodity which we will use for making paper.''

On April 24, 1998, Judge Bittner issued an Order for Prehearing Statements. In lieu of filing a prehearing statement, the Government filed a Motion for Summary Disposition on May 21, 1998. On June 18, 1998, Respondent filed its response to the Government's motion. On July 31, 1998, Judge Bittner issued her Opinion and Recommended Decision, granting the Government's Motion for Summary Disposition and recommending that Respondent's application for registration as a manufacturer of marijuana for non-human consumption be denied. Neither party filed exceptions to Judge Bittner's Opinion and Recommended Decision and on August 31, 1998, Judge Bittner transmitted the record of these proceedings to the then-Acting Deputy Administrator. The Deputy Administrator has considered the record in its entirety, and pursuant to 21 CFR 1316.67, hereby issues his final order based upon findings of fact and conclusions of law as hereinafter set forth.

The Government included with its Motion for Summary Disposition a copy of Respondent's application dated January 21, 1997, for registration as a manufacturer of marijuana for non-human consumption and its attachments which indicated that Respondent intended to cultivate hemp for use in making paper. Also accompanying the motion was a letter from Respondent dated January 20, 1998, to among others, a DEA investigator in San Francisco, California. This letter outlined Respondent's proposal to rent space to medical marijuana patients who would grow marijuana on Respondent's property for their own use pursuant to California's Compassionate Use Act and then Respondent would use the mature stalks of the plant to manufacture paper.

In its motion, the Government argued that California does not permit the cultivation of marijuana for non-human consumption, citing California Health and Safety Code § 11358 which provides that, ''every person who plants, cultivates, harvests, dries or processes marijuana shall be punished by imprisonment in state prison.'' The Government contends that there is no provision under California law, including the Compassionate Use Act (California Health and Safety Code § 11362.5, which allows for the cultivation of marijuana for medical use in limited circumstances), which permits the cultivation of marijuana for non-human consumption. The Government pointed out that while 21 U.S.C. 823(a) does not include an express requirement of state authorization, DEA has previously held that it ''would be pointless to grant a Federal registration when Respondent lacked state authority.'' *Michael Schumacher*, 60 FR 13,171 (1995). Also, 21 CFR 1307.02 provides that DEA will not authorize ''any person to do any act which such person is not authorized or permitted to do under * * * the law of the State in which he/she desires to do such act. * * *''

The Government further argued that California's Compassionate Use Act does not provide Respondent with the required state authorization. Respondent proposes to rent space to medical marijuana patients who will grow marijuana on Respondent's property for their own medical use and Respondent would then use the mature stalks of the plants, which pursuant to 21 U.S.C. 802(16) are not considered a controlled substance. But the Government argued that ''if Respondent's registration is granted, as requested in Respondent's application, the registered location would only be authorized to manufacture marijuana for non-human consumption and any activity related to the manufacture of marijuana for human consumption would be outside of Respondent's authorization from DEA and in violation of Federal law.''

The Government argued that since Respondent is not authorized by California to grow marijuana for non-human consumption and because state authorization is a necessary prerequisite to DEA registration, there is no question of fact presented which would necessitate an evidentiary hearing. Therefore, the Government requested that Respondent's application be denied without a hearing.

In its response to the Government's motion, Respondent noted that the basis for the Government's motion that ''this matter be summarily dismissed rests upon the assumption that we are applying for Registration to cultivate cannabis for non-human consumption, and that is not allowed under California law.'' Respondent argued that:

> [a]fter five years of applying for Registration to cultivate industrial fiber hemp for research * * * it is clear that we are now taking a whole new tack. Following the only legal course available to us to cultivate cannabis within the State of California, we are now applying for registration as a Bulk Manufacturer of Medical Marijuana for California patients who qualify under the Compassionate Use Act of 1996. This purpose is decidedly ''for Human Consumption'', and fully complies with California law. This intention is quite clearly and unequivocally expressed in our letter of January 20, 1998.

In her Opinion and Recommended Decision, Judge Bittner found that pursuant to 21 CFR 1301.16(a), ''[a]n application may be amended or withdrawn with permission of the Administrator at any time where good cause is shown by the applicant or where the amendment or withdrawal is in the public interest.'' (emphasis added). Judge Bittner found that since there is no evidence that Respondent received permission to amend its application, the application before her is for registration as a manufacturer of marijuana for non-human consumption.

Judge Bittner agreed with the Government that state authorization to manufacture marijuana is required