investigations on or before March 29, 1999. On April 16, 1999, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before April 20, 1999, but such final comments must not contain new factual information and must otherwise comply with section 207.30 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

By order of the Commission.

Issued: December 1, 1998.

Donna R. Koehnke,

Secretary.

[FR Doc. 98–32678 Filed 12–8–98; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. General Electric Company and InnoServ Technologies, Inc., Civil Action No. 98–1744 (RCL)(D.D.C.); Response to Public Comments

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), that Public Comments and the Response of the United States have been filed with the United States District Court for the District of Columbia in *United States* v. *General Electric Company and InnoServ Technologies, Inc.*, Civil Action No. 98–1744 (RCL)(D.D.C., filed July 14, 1998). On July 14, 1998, the United States filed a Complaint alleging that the proposed acquisition of InnoServ Technologies by General Electric would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The proposed Final Judgment, filed at the same time as the Complaint, permits General Electric to acquire InnoServ but requires that General Electric divest InnoServ's PREVU diagnostic software used in the maintenance and repair of diagnostic imaging machines (*e.g.*, CT Scanners, MRIs, x-ray machines).

Public comment was invited within the statutory 60-day comment period. Such Comments, and the Responses thereto, are hereby published in the Federal Register and have been filed with the Court. Copies of the Complaint, Stipulation, proposed Final Judgment, Competitive Impact Statement, Public Comments and the Response of the United States are available for inspection in Room 215 of the Antitrust Division, Department of Justice, 325 7th Street, N.W., Washington, D.C. 20530 (telephone: 202–514–2481) and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, N.W., Washington, D.C.

Copies of any of these materials may be obtained upon request and payment of a copying fee.

Constance K. Robinson,

director of Operations & Merger Enforcement, Antitrust Division.

Response To Public Comments

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 comments received regarding the proposed Final Judgment in this case.

I. Background

On July 14, 1998, the United States filed the Complaint in this matter, alleging that the acquisition by General Electric Company (''GE'') of InnoServ Technologies, Inc. (''InnoServ'') would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and Stipulation signed by all the parties allowing for entry of the Final Judgment following compliance with the Tunney Act. A Competitive Impact Statement (''CIS'') was also filed with the Court and published in the **Federal Register**, along with the proposed Final Judgment, on July 24, 1998 (see 63 FR 39894).

As explained more fully in the Complaint and CIS, GE, through its wholly owned subsidiary, General Electric Medical Systems (''GEMS''), is the largest manufacturer of medical imaging equipment, such as CT scanners and magnetic resonance imagers (''MRIs''), and is the leading service provider of GE imaging equipment. InnoServ, despite struggling financially for the last two years, was one of the nation's largest independent service organizations (''ISOs'') and had significant expertise and competed with GE in servicing certain GE imaging equipment. GE and InnoServ also competed in numerous local markets for comprehensive multi-vendor and asset-management services (''multi-vendor service''). GE's acquisition of InnoServ was therefore likely to reduce competition substantially in two markets: (i) the market for servicing certain models of GE imaging equipment on a discrete, machine-by-machine basis; and (ii) the multi-vendor service market.

The proposed Final Judgment permits GE to acquire InnoServ, which it did on September 16, but requires GE to divest promptly InnoServ's proprietary diagnostic software (called ''PREVU''). Diagnostic software is used by service engineers to calibrate, maintain, and service imaging equipment more quickly. InnoServ is one of the very few companies other than GE that developed its own proprietary diagnostic software for GE imaging equipment, and the United States concluded that it was primarily PREVU that had made InnoServ a good competitor to GE.

The 60-day period for public comments expired on September 22, 1998. As of today, the United States has received comments from two persons—Independent Service Network International (''ISNI''), which filed Comments and Supplemental Comments, and Star Technologies.[1] The United States has carefully considered the views expressed in these comments, but nothing in these comments has altered the United States' conclusion that the proposed Final Judgment is in the public interest. Once these comments and this Response are published in the Federal Register, the United States will have fully complied with the Tunney Act and will then file a motion for entry of the proposed Final Judgment.

II. Response to Public Comments

A. Initial Comment of Independent Service Network International

ISNI, a trade association of 157 maintainers of high technology equipment, submitted two Comments. In its initial Comment, ISNI alleged that

[1] ISNI's initial Comments are attached as Appendix 1. The declaration of Claudia Betzner, ISNI's Executive Director, was submitted along with ISNI's initial Comments and is attached as Appendix 2. ISNI's Supplemental Comments are attached as Appendix 3. Star Technologies' Comment is attached as Appendix 4.

the CIS failed to comply with the APPA because it did not include certain information that ISNI believes necessary for it to evaluate whether entry of the proposed Final Judgment is in the public interest. Specifically, ISNI requests: (i) A technical and economic assessment of PREVU; (ii) a more detailed description of the relevant markets alleged in the Complaint and the effect of the proposed Final Judgment on those markets; (iii) information about other companies, if any, that expressed an interest in purchasing InnoServ; and (iv) information relating to the relationship between the settlement of this case and the simultaneous settlement of another Antitrust Division case against GE involving medical imaging equipment, *United States* v. *General Electric Co.*, No. CV–96–121–M–CCL (D. Mont., filed August 1, 1996) (the ''Montana case''). ISNI also challenges the United States' assertion that there were no documents considered determinative in formulating the proposed Final Judgment (Appendix 1, ISNI Comment at 16), and requests that the Court order the production of numerous types of documents that ISNI believes ''must exist'' (*id.* at 17–18). ISNI requests that the Court allow it to intervene and argues that a special master should be appointed (*id.* at 18–19). ''At the very least,'' ISNI asserts, the Court should hold a hearing in which ISNI may reply to this Response (*id.* at 19).

The United States responds to each of ISNI's specific requests in detail below. In order to put ISNI's Comments in context, however, we note initially that the essence of ISNI's concerns have nothing to do with either GE's acquisition of InnoServ or whether GE's divestiture of PREVU is in the public interest. Rather, ISNI's real aim is to convince this Court that GE has market power in various medical equipment and service markets, and that the United States should have challenged seven other transactions by GE in these markets dating back to 1994. (Appendix 1, ISNI Comment at 7–9). ISNI believes that the divestiture of PREVU will not resolve these competitive concerns, and therefore that GE should be compelled to license its own advanced diagnostic materials to ISNI's members and other service competitors (Appendix 1, ISNI Comment at 16).

Whether GE's prior transactions were anticompetitive, and whether it would be procompetitive to have GE license its own software, are not germane to an assessment of whether entry of the proposed Final Judgment serves the public interest. The proper focus of a Tunney Act proceeding is on the proposed final judgment, and the court should not look beyond the complaint in the case before it ''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). Nor does the APPA give a court authority to impose different terms on the parties.[2]

In this case, the United States concluded that the divestiture of PREVU would adequately remedy the antitrust violation alleged in the Complaint because it is PREVU, not GE's software, that would otherwise be eliminated from the market by this merger. While ISNI might believe that more competition would be created if GE had to license its software to INSI's members, the Tunney Act does not empower a court to reject a proposed final judgment based on beliefs that ''other remedies were preferable,'' Microsoft, 56 F.3d at 1460, or ''because a third party claims it could be better treated,'' *id.* at 1461 n.9.

In making its public interest 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.'' *United States* v. *Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir. 1992) (emphasis added, internal quotation and citation omitted). The settlement embodied in the proposed Final Judgment is well within the reaches of this public interest standard.

1. InnoServ's PREVU Software

ISNI's first request for additional information seeks a ''technical and economic evaluation'' of PREVU in order to demonstrate that its divestiture can establish a viable competitor in the relevant markets alleged in the Complaint. Specifically, ISNI argues that the United States must: (1) Provide a detailed description of PREVU; (ii) state whether anyone has licensed or purchased PREVU from InnoServ; (iii) state whether anyone has expressed an interest in licensing or purchasing PREVU from InnoServ; (iv) state whether PREVU helps InnoServ and potentially others to compete with GEMS and, is so, how; (v) compare the effectiveness of PREVU and the effectiveness of GEMS' advanced diagnostic software; and (vi) explain why it is not anticompetitive for GEMS to retain a non-exclusive license to use PREVU despite the fact that GE is not required to license its own advanced diagnostic software to competing service providers. (Appendix 1, ISNI Comment at 12).

ISNI apparently believes that it needs this information to determine whether any potential purchaser of the PREVU package could in fact compete effectively with GE, given that InnoServ itself was struggling financially. ISNI asks, ''how will the divestiture of PREVU create an effective competitor when it was not able to make InnoServ an effective competitor?'' (*id.* at 11). Yet this argument is relevant not to whether the proposed Final Judgment is in the public interest but rather to whether the United States should have filed suit to challenge this acquisition at all. If, as ISNI seems to fear, InnoServ was unable to compete effectively with GE using PREVU, then GE's acquisition of InnoServ could not have substantially reduced competition. If, as the United States concluded, PREVU was regarded by some in the industry as an important competitive tool and that it made InnoServ a good alternative to GE for many customers, then the divestiture of PREVU will restore that competition and thus remedy the antitrust violation alleged in the Complaint.

The United States have been investigating markets for servicing medical imaging equipment for several years, both in connection with this transaction and in the Montana case.[3] Based on the evidence it has gathered in these matters, the United States determined that for more complicated types of imaging equipment, such as CT scanners and MRIs, diagnostic software such as GE's own software and InnoServ's PREVU allow service engineers to service and repair equipment much more quickly and efficiently. For that reason, ISOs that have access to diagnostic software for servicing imaging equipment have a competitive edge over those that do not. InnoServ was one of the very few ISOs that had developed advanced diagnostic software designed to be used to service GE imaging equipment. Although PREVU is not as fast or sophisticated as GE's own diagnostic software, it made

[2] A court may decline to enter a proposed final judgment unless the parties accept certain conditions, *see, e.g., United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 225 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983), but if the parties do not agree to those conditions, the court's only choices are to enter the final judgment the parties proposed or leave the parties to litigate the case.

[3] As explained in more detail in Section II(A)(4), the Montana case involved a challenge to restrictions GE had imposed on over 500 hospitals that had licensed its advanced diagnostic software used to maintain GE imaging equipment. These restrictions prevented the hospital licensees from competing with GE to service third-party medical equipment.

InnoServ's engineers more efficient than they would have been without any software at all. Thus, the United States concluded that PREVU gave InnoServ a competitive advantage over other ISOs and made it an effective competitor to GE. The United States also concluded that PREVU was sufficiently important to InnoServ's competitiveness that GE's divestiture of PREVU would offset to a large extent the competitive harm flowing from the merger.

The fact that PREVU is not as sophisticated or efficient as GE's own software does not mean that InnoServ was not an effective competitor, that the proposed Final Judgment is not in the public interest, or that this Court must insist that GE license its own software. PREVU made InnoServ a closer competitor to GE than it would have been without any diagnostic software at all. InnoServ was able to compete with GE by, among other things, offering service at lower prices than GE offered. The proposed Final Judgment need only address the anticompetitive effects flowing from the merger. It does so by requiring GE to divest PREVU, which will enable its purchaser to compete as effectively as InnoServ did against GE.

Because the United States' conclusions concerning PREVU's competitive significance were based on its evaluation of customer demand for the services InnoServ offered, not a technical comparison between PREVU and GE's software, providing the ''detailed description'' of PREVU requested by ISNI would not facilitate evaluation of the proposed Final Judgment. To the extent ISNI seeks such a description to enable its members to determine whether they are interested in purchasing PREVU, they may obtain it directly from GE. The proposed Final Judgment obligates GE to provide the kind of information about PREVU ''customarily provided in a due diligence process'' to all bona fide prospective purchasers. (Proposed Final Judgment ¶ IV(C)).

ISNI also requests information about whether others have purchased or licensed PREVU from InnoServ, or have expressed an interest in doing so. Prior to this transaction, InnoServ offered to license PREVU, in conjunction with a parts contract, to hospitals and other equipment owners wishing to service their own equipment. At least 15 InnoServ customers elected to license PREVU in this way. Since GE's acquisition of InnoServ, more than a dozen entities have expressed to GE some interest in the possible purchase of PREVU pursuant to the proposed Final Judgment. GE is currently negotiating with some of these companies regarding such a purchase.

Finally, ISNI requests an explanation of why it is not anticompetitive for GEMS to retain a non-exclusive license to use PREVU. The proposed Final Judgment permits GE to retain a license to use PREVU under very limited conditions: (i) to fulfill InnoServ service contracts in effect on the date GE acquired InnoServ; (ii) in connection with fulfilling any service contracts resulting from written proposals made by InnoServ to prospective customers that were outstanding on that date, provided that any such contract is entered into within 90 days thereafter; and (iii) in connection with fulfilling any renewals of any service contracts described in (i) or (ii), so long as the renewal was entered into prior to any sale of PREVU by GE or a trustee. (Proposed Final Judgment ¶ IV(E)). GE's license to use PREVU under these limited conditions expires, for each such service contract, on the expiration date of the contract in effect on the date that PREVU is sold. (*Id.*). These provisions were included in the proposed Final Judgment solely for the convenience of any InnoServ customers who want to continue to have their equipment serviced with PREVU. Requiring GE to stop using PREVU before it is divested would deny those customers their preferred service option without promoting competition.

2. The Relevant Markets

ISNI contends that additional information must be provided about the relevant markets alleged in the Complaint in order to determine the effect of the proposed Final Judgment on those markets. It requests, at a minimum, information relating to how these markets were defined, the structure of these markets, the number of firms competing in them, the market share of each such firm, and an analysis of the effect of the proposed Final Judgment on price, output, consumer choice, and product quality (Appendix 1, ISNI Comment at 13).

The detailed information about market definition and structure that ISNI has requested will not assist the Court in evaluating whether GE's divestiture of PREVU will ameliorate the anticompetitive effects of its acquisition of InnoServ. The number of firms competing in each market, and each firm's market share, are relevant only to assessing the competitive effects of the acquisition itself. The issue of whether the United States should have filed a lawsuit in the first place is not before the court in a Tunney Act proceeding. Under the proposed Final Judgment, the acquirer of PREVU will be free to offer service throughout the United States, and the structure of each market is therefore not important to understanding how the proposed Final Judgment will affect competition in that market.

Moreover, the thirteen paragraphs in the Complaint devoted to market definition and anticompetitive effects (Complaint ¶¶ 9–19) provide sufficient information for industry participants such as ISNI to comment on the adequacy of the proposed Final Judgment. The Complaint alleges that the sale of service for each model of medical imaging equipment is a separate product market (*id.* ¶ 12) and that the geographic markets are local, with the precise boundaries differing depending on the type of equipment involved and other factors (*id.* ¶ 17). Prior to its acquisition by GE, InnoServ engineers were servicing approximately 13 different models of GE CT scanners and 6 models of GE MRIs, in addition to several other types of GE imaging equipment (for example, ultrasound, cath lab, and mammography machines). InnoServ offered service within a 100-mile radius of 36 metropolitan areas. Therefore, there are over 650 markets potentially affected by this acquisition. To answer each of ISNI's sweeping requests for each of these markets would be burdensome and effectively require the United States to do much of the work it would have had to do if it were litigating this case. One of the major benefits of antitrust consent judgments is that they enable the government ''to reallocate necessarily limited (enforcement) resources,'' Microsoft, 56 F.3d at 1459, a benefit that would be lost if the United States were forced to compile and disclose this kind of information during a Tunney Act proceeding.

3. Alternative Purchasers of InnoServ

ISNI also requests information about companies other than GE, if any, that expressed an interest in acquiring InnoServ. Specifically, it asks the United States to identify any such companies, to state whether there was an appraisal conducted by a third party of the value of InnoServ or PREVU, and to state how long InnoServ was on the market. This information is necessary, in ISNI's view, to determine whether there was a serious suitor of InnoServ that would have been a preferable purchaser from the standpoint of the antitrust laws but that lost to GE in a bidding war (Appendix 1, ISNI Comment at 14–15).

ISNI fails to explain what relevance this information could have to an

evaluation of whether the proposed Final Judgment is in the public interest. Such information could be relevant if the United States had elected not to challenge the transaction on the grounds that the parties had met the stringent criteria of the failing company defense.[4] But they did not, and the United States did not rely on such a defense in electing to file its Complaint and agreeing to the proposed Final Judgment. Thus, the information ISNI seeks is irrelevant to the issue before the Court.

4. The Montana Case

The United States noted in the CIS that, ''[i]n conjunction with this settlement, GE has also agreed to consent to all of the relief that the government was seeking in (the Montana case).'' ISNI requests additional information about the proposed Final Judgment reached in the Montana case. It cites GE's press release announcing the resolution of these two cases, in which it stated that ''[t]o obtain clearance to complete the InnoServ transaction, G.E. Medical Systems agreed to settle (the Montana case)'' (Appendix 1, ISNI Comment at 15). It asks for supporting evidence or explanation of statements in the CIS that ''[t]he United States evaluated the merits of the settlement proposals in each case independently, concluding that the proposed settlement of this case is in the public interest for the reasons stated herein, and that the proposed settlement of the Montana case is in the public interest for the reasons stated in the Competitive Impact Statement filed in that case today'' (*id.*). Finally, ISNI suggests that statements in the Montana CIS demonstrate that the relief in this case is not adequate and that the United States should have sought mandatory licensing of GE's own diagnostic software (*id.* at 16).

In the Montana case, filed in 1996, the United States challenged restrictions GE had imposed on over 500 hospitals that had licensed its advanced diagnostic software used to maintain and repair GE imaging equipment. These restrictions prevented hospital licensees from competing with GE to service any kind of medical equipment—whether manufactured by GE or another company—at other hospitals and clinics. Because GE's software was designed to be used on specific models of GE imaging equipment, the United States alleged that these anticompetitive restraints were not ancillary to GE's legitimate right to protect its intellectual property from misuse. As stated in the CIS in the Montana case, see 63 FR 40737 (July 30, 1998), the proposed Final Judgment in that case secures all of the relief that the United States was seeking by requiring GE to void the restrictive provisions in its existing licenses and commit not to impose such restrictions in the future. By eliminating these agreements not to compete from GE's licenses, the proposed Final Judgment in the Montana case will allow over 500 hospitals across the country to service third-party medical equipment if they so wish.

The United States evaluated the merits of this settlement and the Montana settlement independently and concluded that each was in the public interest. In the Montana case, the settlement provided all of the relief that the United States had been seeking from GE. In this case, the United States concluded that GE's divestiture of PREVU would adequately address the anticompetitive effects of its acquisition of InnoServ because it ensured that the PREVU software could remain in the marketplace. The simultaneous settlement of the two cases makes sense because the markets affected by the anticompetitive conduct challenged in the two cases overlap to some extent.[5] GE had been contesting the Montana action for more than two years. Its willingness to settle that litigation on the government's terms—regardless of GE's public explanation for doing so—advanced the public interest by allowing hospitals to service third-party medical equipment. That same relief also could help ameliorate some of the competitive effects of the InnoServ transaction. In these circumstances, the United States and GE agreed to settle both cases at the same time.

ISNI cites the Montana CIS to support its arguments that PREVU is inferior to GE's software, that a purchaser of PREVU will not be able to compete effectively with GE, and that the United States should have insisted that GE license its advanced diagnostic software to ISOs such as ISNI's members. PREVU is not as sophisticated or efficient as GE's own software, but hat fact is irrelevant to the issue of whether the proposed Final Judgment is in the public interest. The United States concluded that PREVU made InnoServ a more effective alternative to GE. The proposed Final Judgment need only address the anticompetitive effects flowing from the merger, and it does so by requiring GE to divest PREVU to a purchaser that, in the United States' judgment, has the ''managerial, operational, and financial capability to compete effectively.'' (Proposed Final Judgment ¶ IV(B)). Requiring GE to license its own software might well create more competition than existed in the market prior to the InnoServ transaction. But the relief in this case need only address the anticompetitive effects flowing from the merger challenged in the Complaint; it need not create more competition than existed prior to GE's acquisition. The software that would otherwise be eliminated from the market by this merger is PREVU, not GE's software, so requiring GE to divest PREVU is clearly relief that is in the public interest.

The Complaint in this case challenged GE's acquisition of InnoServ, not its longstanding policy of not licensing its own software to ISOs. ISNI ''would have it be otherwise, but [does not] have the power to force the government to make that claim. And since the claim is not made, a remedy directed to that claim is hardly appropriate.'' Microsoft, 56 F.3d at 1460.

5. There Are No ''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. It argues that the Court should order the United States to produce certain documents that ISNI believes ''must exist'': documents providing the good-faith basis for the filing of the Complaint; third-party analyses or evaluations of InnoServ and/or PREVU; documents relating to the efforts of others, if any, to acquire InnoServ; documents supporting

[4] Under the failing company defense, an otherwise anticompetitive merger does not violate the antitrust laws if one party faces the ''grave probability of business failure,'' would not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act, has made unsuccessful good-faith efforts to elicit reasonable alternative offers from competitively-preferable purchasers, and absent the acquisition, the assets of the company would exit the relevant market. *United States* v. *Greater Buffalo Press, Inc.*, 402 U.S. 549, 555 (1971); *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 136–37 (1969); U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 5.1 (issued April 2, 1992), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992) and 57 Fed. Reg. 41,552 (1992). During the course of its investigation, the United States did review InnoServ's finances and its attempts to sell the company, but ultimately the decision to accept the proposed Final Judgment was not based on issues relating to the failing firm defense.

[5] The agreements challenged in the Montana case had their greatest anticompetitive effects in more rural areas, where the licensee hospitals were likely to be among the few, if not only, potential competitors to GE. In contrast, InnoServ tended to compete mostly within a 100-mile radius of larger metropolitan areas (Complaint ¶ 18). Nevertheless, there was at least some overlap in the geographic markets affected by the two cases.

conclusory statements in the CIS regarding how the divestiture of PREVU will increase competition; and documents comparing PREVU to GE's own advanced diagnostic materials. (Appendix 1, ISNI Comment at 16–18).

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 the United States 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.'' [6] Congress, however, rejected that recommendation. ISNI's broad request for the documents providing the good-faith basis for filing the Complaint is contrary to the plain language of the Tunney Act and its legislative history and should be denied.

ISNI's other requests similarly fall 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.* versus *United States (''MSL'')*, 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.*[7] 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* versus *Bleznak, et al.*, 153 F.3d 16, 20–21 (2d Cir. 1998).[8]

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 concerning the effects of requiring GE to divest PREVU, and there are no documents that constituted a substantial inducement to the United States to enter into the proposed Final Judgment. The decision to settle on these terms was based on an assessment of the importance of diagnostic software generally and of PREVU specifically, and there is no document that had a determinative impact on that assessment.

6. The Court Should Deny ISNI's Request To Intervene and To Appoint a Special Master

ISNI requests this Court to permit it to intervene to aid the Court in its public interest determination (Appendix 1, ISNI Comment at 3, 18–19). In order to intervene in this case, ISNI must first file a motion with this Court and upon each party to this action.[9] If it does so, the United States will respond fully to that motion. From its informal intervention request, however, it appears that ISNI should not be granted intervenor status.

''The general rule * * * has been that private parties will not be allowed to intervene in government antitrust litigation.'' 7C Wright, Miller and Kane, Federal Practice and Procedure 2d § 1908 at 266 (1986). In this District alone, applications for intervention have been denied in several Tunney Act cases. *United States* versus *The Thomson Corp., et al.*, 1996–2 Trade Cas. (CCH) ¶71,620, 78,386 (D.D.C. 1996); *United States* versus *Microsoft Corp.*, 159 F.R.D. 318, 328 (D.D.C.), rev'd on other grounds, 56 F.3d 1448 (D.C. Cir. 1995); *United States* versus *Airline Tariff Publ'g Co.*, 1993–1 Trade Cas. (CCH) ¶70,191, at 69,894 (D.D.C. 1993); *United States* versus *Stroh Brewery Co.*, 1982–2 Trade Cas. (CCH) ¶64.804, at 71,959–61 (D.D.C. 1982); *United States* versus *American Tel. & Tel. Co.*, 1982–2 Trade Cas. (CCH) ¶64,726, at 71,524–26 (D.D.C. 1982).

The eligibility requirements for intervention are the same in a Tunney Act proceeding as in any other case and are set forth in Rule 24 of the Federal Rules of Civil Procedure. 15 U.S.C. § 16(f)(3)(in making public interest determination, court may authorize ''intervention as a party pursuant to the Federal Rules of civil Procedure''); MSL, 118 F.3d at 780 n.2 (11the Tunney Act looks entirely to Fed.R.Civ.P.24 to supply the legal standard for intervention''). A third party may be granted intervention either as ''of right'' under rule 24(a) or ''permissive[ly]'' under Rule 24(b). ISNI's request does not meet the standards under either provision.

To intervene as of right, ISNI must show that it has ''an interest relating to the property or transaction which is the subject of the action and [that it] is so situated that the disposition of the action may as a practical matter impair

[6] The Antitrust Procedures and Penalties Act: Hearings on S. 783 and S. 1088 Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 93d Congress., 1st Sess. 26, 57 (1973) (prepared statement of Maxwell M. Blecher, attorney).

[7] 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 diverse 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).

[8] The single case cited by INSI—*United States* versus *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 ''material and documents that substantially contribute to the determination [by the government] to proceed by consent decree * * *.'' *Id.* at 577.

[9] Fed.R.Civ.P. 24(c) states that ''[a] person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.''

or impede [its] ability to [protect that interest. Unless [it is] adequately represented by existing parties.'' Fed. R. Civ. P. 24(a)(2).[10] ISNI's primary ''interest'' in this proceeding seems to be in using a broad public interest inquiry to obtain for its members access to GE's advanced diagnostic software. (Appendix 1, ISNI Comment at 7, 16, 19). But the entry of the proposed Final Judgment will not impair or impede any interest ISNI or its members may have in obtaining a license to GE's software both because this case related solely to GE's acquisition of InnoServ, not its software licensing policies, *see* Sections II(A)(1), (4), and because even it this case did deal with GE's licensing policies, entry of the proposed Final Judgment would not affirmatively set back ISNI's pursuit of that interest. See MSL, 118 F.3d at 780 (movant ''points to no case equating failure to promote an interest with its impairment''). Nor can ISNI use an appeal to protecting the ''public interest'' to support its request for intervention. Private parties ''are not entitled to intervene simply to advance their own ideas of what the public interest requires. In federal antitrust litigation, it is the United States, not private parties, which 'must alone speak for the public interest.' '' *United States* versus *G. Heileman Brewing Co.,* 563F. Supp. 642, 648 (D. Del. 1983) (*quoting Buckeye Coal & Ry. Co.* versus *Hocking Valley Ry. Co.,* 269 U.S. 42, 49 (1925)). Therefore, ''[a] private party generally will not be permitted to intervene in government antitrust litigation absent some strong showing that the Government is not vigorously and faithfully representing the public interest.'' *United States* versus *Haftford-Empire Co.,* 573 F.2d 1, 2 (6th Cir. 1973), *quoted with approval in United States* versus *LTV Corp.,* 746 F.2d 51, 54 n.7 (D.C. Cir. 1984). thus, intervention of right in support of the public interest is allowed, if at all, only after a showing of bad faith or malfeasance on the part of the government. *United States* versus *Associated Milk Producers, Inc.,* 534 F.2d 113, 117 (8th Cir. 1976); G. Heileman Brewing, 563 F. Supp. at 649. While it is not evident that ISNI has even alleged bad faith or malfeasance, it is clear that it neither has made nor can make this necessary showing because the United States has acted properly and in good faith.

ISNI also fails to meet the requirements for permissive intervention. Under Rule 24(b)(2), an applicant may intervene when its ''claim or defense and the main action have a question of law or fact in common.'' [11] The words ''claim or defense'' refer to ''the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit.'' *Diamond* v. *Charles,* 476 U.S. 54, 76 (1986). ISNI has made no showing that it has such a ''claim or defense'' here. In addition, a court ''must consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.'' Fed R. Civ. P 24(b). As Judge Greene noted in the *AT&T* case, any rights granted to an intervenor in a Tunney Act proceeding are likely to impose burdens on the judicial process:

> It could be argued that these include the right to file counterclaims and cross-claims, to adduce witness testimony and other evidence, and to appeal from orders of the Court. Such parties might also be contended to have the implicit right to veto any settlement simply by withholding their consent—a result that would in practice void the instant settlement proposal (whatever its substantive merit) and that would eliminate consent decrees as an option in antitrust cases generally (since someone would always or almost always be dissatisfied).

AT&T, 1982–2 Trade Cas. (CCH ¶ 64,726 at 71,525 n.7. ISNI has already attempted to expand this Tunney Act proceeding far beyond its proper scope by suggesting that the United States should have challenged previous transactions by GE, by arguing that GE should be required to license its own diagnostic software to ISNI's members, and by requesting a wide-ranging public interest inquiry in which ''fact gathering akin to discovery'' will take place. (Appendix 1, ISNI Comment at 7–8, 16, 19). Therefore, there is a particularly high risk that its intervention as a party would unnecessarily delay and complicate this Court's public interest determination. See Thomson Corp. 1996–2 Trade Cas. (CCH) ¶ 71,620, at 78,386 (D.D.C. 1996) (court denies motion to intervene by Lexis-Nexis, which suggested possibility of taking third-party depositions).

ISNI has also not shown why its intervention is necessary given that it has already submitted its extensive Comments. Congress provided the 60-day notice and comment period as a means by which interested parties such as ISNI could express concerns about proposed antitrust settlements in cases brought by the United States. ISNI has done so, and its intervention will constitute an unnecessary delay. See Airline Tariff Publ'g Co., 1993–1 Trade Cas. (CCH) ¶ 70,191, at 69,894 (D.D.C. 1993) (motion to intervene denied when movant's comments ''will enable [movant] to inform the Court and all parties of the effects of the proposed decree on its members''); Stroh Brewery Co., 1982–2 Trade Cas. (CCH ¶ 64,804, at 71,960 (D.D.C. 1982) (motion to intervene denied, in part, because movant ''fully able to express its concerns utilizing the comment procedures of the Tunney Act'').

In a few cases, courts have permitted third parties with greater interests than ISNI's to intervene on a very limited basis. For example, in the case challenging the merger of The Thomson Corporation and West Publishing Company, Hyper Law, Inc. (a small publisher) was permitted to intervene solely for the purpose of appealing entry of the final judgment after Judge Freidman concluded that it had ''sufficiently demonstrated that it will suffer actual, concrete, particularized injury traceable to the entry of the Final Judgment * * *.'' Thompson Corp., 1997–1 Trade Cas. (CCH) ¶ 71,735, at 79,182 (D.D.C. 1997). Similarly, the D.C. Circuit in the MSL case permitted the Massachusetts School of Law, the plaintiff in a parallel treble-damage action against the American Bar Association, to intervene in the government's case solely for the purpose of appealing its claim of entitlement in a Tunney Act proceeding to certain documents that it might not be able to obtain through discovery in its own case, a claim which entry of the final judgment would decisively impair. MSL, 118 F.3d at 781–82. In the Antitrust Division's case against market-makers in NASDAQ securities, the district court permitted private plaintiffs in parallel actions to intervene in the Tunney Act proceeding for what the court described as ''two very limited purposes'': filing a motion for disclosure of a single document and the underlying evidence cited therein for use in the private litigation; and raising an objection to a single provision of the proposed consent judgment that could have restricted use of potential evidence. *United States* v. *Alex. Brown & Sons, Inc., et al.,* 169 F.R.D. 532, 539 (S.D.N.Y. 1996). The court limited the role of the intervenors to ''submitting comments on the decree, engaging in oral argument, and filing appeals.'' *Id.* And, although ISNI itself was allowed to intervene in the case involving the modification of the 1956 consent

[10] Rule 24(a)(1) provides for intervention as of right when a statute confers an unconditional right to intervene, but the Tunney Act does not do so. *See* 15 U.S.C. § 16(f).

[11] Rule 24(b)(1) provides for intervention when a statute confers a conditional right to intervene. The Tunney Act provides for intervention, but expressly refers back to the Federal Rules of Civil Procedure. 15 U.S.C. § 16(f)(3); see MSL, 118 F.3d at 780 n.2.

judgment against IBM, its rights were limited to appealing the court's entry of the modified order (Appendix 1, ISNI Comment at 4; Appendix 2, Betzner Decl., Exh. C). In an earlier opinion, ISNI's attempt to intervene in the district court proceedings ''to conduct discovery, present evidence, introduce new issues, and otherwise influence the pace and direction of the proceedings'' was denied. *United States* v. *International Business Machines Corp.*, 1995–2 Trade Cas. (CCH) ¶ 71,135, at 75,459 (S.D.N.Y. 1995).[12]

These cases offer no support of ISNI's broad request to intervene in this case. ISNI has not made a showing that it will suffer injury from the entry of the proposed Final Judgment. It is not, as far as the United States is aware, involved in litigation against GE relating to the issues in this case. And, in contrast to the very limited rights afforded intervenors in the cases discussed above, ISNI apparently foresees a virtually unlimited role for itself, which will include engaging in ''fact gathering akin to discovery'' (Appendix 1, ISNI Comment at 19). ISNI intervention request falls far short of the requirements set forth in Rule 24 and should be denied.)

Finally, ISNI notes that the APPA permits a Court to appoint a special master to aid in its public interest determination (Appendix 1, ISNI Commend at 18–19). Under 15 U.S.C. § 16(f), the Court may, among other things, take testimony of Government officials and experts or appoint a special master to assist it in making its public interest determination. These procedures are discretionary, however, and the Court need not invoke any of them unless it believes that significant issues have been raised and that further proceedings would aid the court in resolving those issues. See S. Rep. No. 298, 93d Cong., 1st Sess. 6–7 (1973); H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8–9 (1974). The appointment of a special master in government antitrust cases is extremely rare. Indeed, the United States has been unable to locate any case in which a court has appointed a special master to assist it during a Tunney Act proceeding. ISNI's Comments do not raise any issues that would justify taking this extraordinary step.

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

In the event the Court denies ISNI's requests for intervention and the appointment of a special master, ISNI requests that a hearing be held in which it can reply to the United States' Response to its Comments. (Appendix 1, ISNI Comment at 19). The Tunney Act does not provide third parties with a right to reply, however, and Congress ''anticipated that the trial judge will adduce the necessary information [for making a public interest determination] through the least complicated and least time-consuming means possible.'' S. Rep. No. 298, 93d Cong., 1st Sess. 4 (1973). The United States believes that a hearing is unnecessary because ISNI has already adequately expressed its views through the public comment procedure. See G. Heileman Brewing Co., 563 F. Supp. at 650 (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.*

B. Supplemental Comment of ISNI

ISNI submitted a Supplemental Comment on September 16, 1998, the day that GE issued a press release announcing that it had completed its acquisition of InnoServ. ISNI contents that the fact that GE acquired InnoServ before the end of the 60-day notice and comment period under the APPA, and before the Court's approval of the proposed Final Judgment, ''undermines and disrespects the processes of the APPA'' and makes it more difficult for the United States to withdraw its consent to the entry of the proposed Final Judgment. (Appendix 3, ISNI Supplemental Comment at 2).

The vast majority of mergers challenged by the government are resolved by consent in the form of proposed final judgments that call for some form of divestiture. It is customary in such circumstances to permit the parties to merge at the time that the complaint and proposed final judgment are filed, subject to the parties' obligations under the proposed final judgment. For example, since October 1996 in this District alone, the United states has filed 13 cases challenging mergers that were settled on terms requiring a divestiture or some other relief. In each of these cases, the parties were allowed to merge prior to the close of the comment period and entry of the final judgment by the court. The parties in such cases understand that the proposed final judgment is subject to public comment, that the United States may revoke its consent at any time before the final judgment is entered, and that the final judgment will not be entered unless a court finds that it is in the public interest.

Parties are willing to assume this risk for legitimate business reasons. With many mergers, time is of the essence. Parties to mergers often designate a date certain on which either party may terminate the agreement if the merger has not been effected. The United States challenges numerous mergers because of competitive problems that can be fixed through a divestiture of assets rather than an injunction against the transaction as a whole. Often the parties to such mergers are willing to agree to such divestitures in exchange for the right to consummate their transaction in a timely manner. If the United States refuse to allow such mergers to proceed until after the 60-day notice and comment period plus any additional time the court required to make its public interest determination, many defendants might refuse to settle and force the government seek emergency injunctive relief from a court.[13]

The fact that GE might complete its acquisition of InnoServe before the entry of the proposed Final Judgment was disclosed in the Stipulation and Order, which was filed on the same day as the Complaint and other court papers. The Stipulation included a paragraph requiring the defendants to comply with the proposed Final Judgment once GE acquired InnoServ, even if that occurred prior to the Court's approval and entry of the judgment.[14]

[12] See also *United States* v. *American Cyanamid Co.*, 556 F. Supp. 357, 359–61 (S.D.N.Y. 1982) (permissive intervention granted because ''time consuming and expensive discovery demands often asserted by intervening parties will not be endured here. Applicants seek only to preserve their right to appeal * * * and participate in such further proceedings as this Court may direct on its own motion''), *aff'd.* 719 F.2d 558 (2d Cir. 1983); *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. at 219 (in case involving the dissolution of the world's largest corporation and the restructuring of the telecommunications industry, third parties allowed to intervene to appeal entry of the consent judgment, participate in post-judgment proceedings, and appeal from order approving AT&T's reorganization plan).

[13] In addition, permitting parties to merge quickly is precompetitive because it hastens the divestiture of the competitively important assets to a third party with the incentive and capability of competing vigorously against the acquiring party to the merger.

[14] ''The defendants agree to comply with the proposed Final Judgment pending its approval by

Likewise, the proposed Final Judgment itself gives GE ''180 calendar days from the filing of the Complaint in this action or five days after notice of entry of this Final Judgment by the Court, whichever is later, to sell InnoServ's PREVU diagnostic package * * *.'' (Proposed Final Judgment ¶IV(A)). Both of these provisions clearly envision that GE might acquire InnoServ, and thus begin its efforts to sell PREVU, before the Court's entry of the proposed Final Judgment.

Moreover, contrary to ISNI's assertion, GE's acquisition of InnoServ on September 16 does not make it more difficult for the United States to withdraw its consent to the proposed Final Judgment. Nor does it preclude this Court from evaluating whether entry of the proposed Final Judgment is in the public interest or declining to enter the order if it believes the settlement is unacceptable. By consummating its acquisition of InnoServ, GE has assumed the risk that the United States might withdraw its consent and proceed to trial or that this Court may decline to enter the proposed Final Judgment.[15]

C. Comment of Star Technologies

Star Technologies (''Star'') of Potomac, Maryland also submitted a Comment expressing concerns about the potential sale or license of InnoServ's PREVU software. Star manufacturers array processors used in conjunction with certain models of GE's CT scanners. Star has also developed diagnostic software, called Star Maintenance Software (''SMS''), for testing its array processors and has licensed SMS to numerous customers for their own internal use. Although InnoServ is a customer of Star for the repair of certain circuit boards, Star does not believe that InnoServ has licensed SMS in the past. Based on recent discussions with InnoServ, however, Star believes that PREVU incorporates, or in some way, uses SMS. Star is therefore interested in identifying any purchasers or licensees of PREVU so that it can seek to enforce its intellectual property rights by requiring any such buyer or licensee to sign a SMS license. (Appendix 4, Star Technologies Comment at 1–2).

The United States has informed Star that GE, since its September 16 acquisition of InnoServ, is the current owner of PREVU. It has also advised GE of Star's claim of potential infringement. This dispute properly is between Star and GE, and the proposed Final Judgment does not affect the rights of anyone involved in this dispute. In any sale of assets, the seller discloses all such liens and claims against the assets being sold, and GE will presumably do so when selling PREVU. So, too, will the trustee, in selling or licensing PREVU, if GE fails to sell PREVU within the time prescribed by the proposed Final Judgment. The proposed Final Judgment does not affect Star's intellectual property rights in any way, and does not affect Star's ability to locate the owner or licensees of PREVU any more than if InnoServ has decided to sell PREVU on its own.

III. Legal Standard Governing the Court's Public Interest Determination

Pursuant to the APPA, the United States is submitting these public comments and this Response to the Federal Register for publication. 15 U.S.C. § 16(d). Upon their publication, the United States will have fully complied with the APPA and will file a motion requesting that this Court enter the proposed Final Judgment. After receiving that motion, the Court must determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e). In doing so, as our motion for entry of the proposed Final Judgment will explain, the Court must apply a deferential standard and should withhold its approval only under very limited conditions. In the MSL case, the D.C. Circuit stated that ''constitutional questions would be raised if courts were to subject the government's exercise of its prosecutorial discretion to non-deferential review,'' and stated that a court should withhold approval of a proposed final judgment ''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.' '' MSL, 118 F.3d at 783, quoting Microsoft, 56 F.3d at 1462. As Judge Greene observed in the AT&T case:

> If courts acting under the Tunney Act disapproved proposed consent decrees merely because they did not contain the exact relief which the court would have imposed after a finding of liability, defendants would have no incentive to consent to judgment and this element of compromise would be destroyed. The consent decree would thus as a practical matter be eliminated as an antitrust enforcement tool, despite Congress' directive that it be preserved.

AT&T, 552 F. Supp. at 151. As this Response makes clear, the relief mandated by the proposed Final Judgment is well within the reaches of this public interest standard.

IV. Conclusion

After careful consideration of these public comments, the United States has concluded 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. Once these comments and this Response are published in the Federal Register, the United States will move the Court to enter the proposed Final Judgment.

Dated: November 17, 1998.

Respectfully submitted,

Jon B. Jacobs (D.C. Bar #412249)
Fred E. Haynes (D.C. Bar #165654)
Joan H. Hogan (D.C. Bar #451240)
Peter J. Mucchetti
Attorneys for the United States.
Bernard M. Hollander,
Senior Trial Attorney.
Antitrust Division, U.S. Department of justice, 325 Seventh Street, N.W., Suite 300, Washington DC 20530, (202) 514)–5012.

Appendix 1

United States of America, Department of Justice, Antitrust Division, 325 7th Street, NW, Suite 300, Washington, DC. 20530, *Plaintiff,* v. *General Electric Company,* 3135 Easton Turnpike, Fairfield, Connecticut 06431, and *InnoServ Technologies, Inc.,* 320 Westway, Suite 530, Arlington, Texas 76018, *Defendants.* Case Number 1:98CV01744. Judge: Royce C. Lamberth.

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

the Court, and shall, from the date of signing this Stipulation, comply with all the terms and provisions of the proposed Final Judgment as though it were in full force and effect as an order of the Court, provided, however, that defendants shall not be bound by the terms and provisions of the proposed Final Judgment unless and until the closing of any transaction in which General Electric Company directly or indirectly acquires all or any part of the assets or stock of InnoServ Technologies, Inc.'' (Stipulation and Order ¶3).

[15] The relief ISNI apparently prefers—the mandatory licensing of GE's diagnostic software to ISOs—also has nothing to do with the fact that GE has already acquired InnoServ. For the reasons stated above, the United States does not believe that this is an appropriate remedy for this acquisition. But if GE ultimately agreed to license it owns software, or was ordered to do so by this Court after a trial in this case, the fact that it has already acquired InnoServ would not make that licensing any more difficult.

[1] InnoServ Technologies, Inc., one of the defendants in the above-captioned case, is a member of ISNI, but, because of conflict of interest

Continued

comment to the Competitive Impact Statement (''CIS'') published in the **Federal Register** at 63 FR 39894.

I. Introduction

The CIS does not comply with the APPA because it does not provide the Court or the public with sufficient information to evaluate this consent decree. Information necessary for that evaluation includes the following:

1. A technical and economic evaluation of the key component of this settlement—InnoServ's PREVU advanced diagnostic package (''PREVU'')—to demonstrate that it can accomplish what the parties call ''the essence'' of this final judgment, *i.e.*, ''* * * to establish a viable competitor in the sale of service for certain models of G.E. diagnostic imaging equipment * * *'' 63 FR at 39894.

2. To define and describe the markets in which this ''essence'' of the consent decree is to be accomplished.

3. To provide information on other companies, if any, that expressed an interest in purchasing InnoServ and that would present less competitive problems than General Electric Medical Systems (''GEMS'') as an acquirer.

4. To describe and provide, pursuant to APPA §§ (b) and (c), materials and documents which the United States considered determinative in formulating the consent decree so that there can be meaningful public comment (the assertion in the CIS that there are no such materials or documents is, as a District Court stated in a similar case, ''incredible,'' *U.S.* v. *Central Contracting Co., Inc.*, 537 F. Supp. 571, 576 (1982)).

5. The relationship, if any, between this settlement and *United States* v. *General Electric Co.*, No. CV–96–121–M–CCL (D. Mont. filed August 1, 1996) (''Montana Case''), which GEMS stated it settled in order ''to obtain clearance to complete the InnoServ acquisition * * *'' *See*, Betzner Decl., Exhibit A.

Without the above information, it is not possible for the Court to make its public interest determination pursuant to § (e) of the APPA nor is it possible for the public to make meaningful comments on the CIS.

A public interest determination is particularly important in this case because it involves the cost of healthcare, a subject important to all Americans, because GEMS has a high market share in the relevant markets, which it has extended through recent aggressive transactions unopposed by the Government; and because there is no evidence that there is any legitimate reason for GEMS to acquire one of its few competitors, a company less than 1% its size. Therefore, pursuant to APPA § (f) and based on the showing detailed below, ISNI respectfully requests that the Court authorize ISNI to intervene as a party pursuant to the Federal Rules of Civil Procedure and that the Court appoint a special master to preside over the gathering of the information necessary to evaluate this CIS.

II. ISNI and Its Interest in This Proceeding

ISNI, an association of 157 independent service organizations, i.e., organizations servicing equipment manufactured by others (see Betzner Decl., Exhibit B for a list of members), is a nonprofit 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 independent service organizations. Specifically, ISNI develops educational methods to increase awareness about independent service organizations 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 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 a dwindling number of its members compete with GEMS in the markets alleged by the Justice Department in the complaint in this matter. 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.

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 (Betzner Decl., Exhibit J):

Paragraph 3: ''If G.E. acquires InnoServ, G.E. will increase its already high share in the markets for servicing certain models of G.E. imaging equipment on a discrete basis, particularly several models of CT scanners and MRI's, and it will eliminate an effective competitor in these markets. It will also substantially reduce competition in multi-vendor service markets. Unless blocked, this acquisition likely will result in higher prices for imaging equipment, maintenance and service.''

Paragraph 20: ''In many of these markets, InnoServ is one of the few ISOs that has specialized in servicing G.E. imaging equipment * * * the competition between G.E. and InnoServ in these markets has resulted in significant price reductions for consumers. G.E.'s acquisition of the InnoServ would eliminate this competition and increase G.E.'s already high share in the markets for servicing certain models of G.E. imaging equipment, particularly several models of CT scanners and MRIs. It would also substantially reduce competition in multi-vendor service markets.''

Paragraph 21: ''Successfully entry into the relative markets is difficult, time-consuming and costly. In general, customers prefer to purchase service from existing, reputable firms in the industry. Therefore, new entrants often find it difficult to enter on a scale necessary to succeed financially.''

Paragraph 23: ''G.E.'s proposed acquisition of InnoServ is likely to lessen competition substantially and tend to create a monopoly in interstate trading commerce in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.''

Paragraph 24: ''The transaction likely will have the following effects among others:

a. Actual and future competition between G.E. and InnoServ will be eliminated in the markets for servicing certain models of G.E. imaging equipment under discrete, machine-by-machine basis in numerous local markets throughout the United States;

---

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.

b. Competition generally in the markets for servicing certain models of G.E. imaging equipment on a discrete, machine-by-machine basis in numerous local markets throughout the United States will be lessened substantially;

c. Actual and future competition between G.E. and InnoServ will be eliminated in the markets for multi-vendor service in numerous local markets throughout the United States; and

d. Competition generally in the markets for multi-vendor service in numerous local markets throughout the United States will be lessened substantially.''

Despite these pernicious effects, the government has consented to this acquisition based essentially on the divestiture of PREVU. However, the parties have not provided this Court or the public with the fundamental information necessary to evaluate this settlement. ISNI, because of the expertise of its members and counsel, can aid the Court in obtaining and evaluating this information; ISNI respectfully requests that the Court grant ISNI the opportunity to do so pursuant to APPA § (f).

III. GEMS' Monopoly and Its Successful Efforts To Maintain and Extent It

According to its own press release, ''G.E. 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.) As indicated by the quotations from the Government's complaint in Section II above, GEMS has a monopoly market share in the markets alleged by the government in its complaint: (1) servicing certain models of G.E. imaging equipment on a discrete machine-by-machine basis in numerous local markets throughout the United States, and (2) multi-vendor service in numerous local markets throughout the United States.

What is more alarming is that G.E. has extended and maintained this monopolistic market share by a number of aggressive transactions in recent years 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.)

With each of these transactions, GEMS got stronger both absolutely and also relative to its much smaller ISO competitors. Innoserv, with revenues of $37 million a year, is described in the CIS as ''* * * one of the nation's largest independent service organizations ('ISOs'),'' 63 FR at 39898. That a $37 million a year company was considered of the largest competitors of a company 120 times its size in itself illustrates the weakness of GEMS' competitors.

Nonetheless, an ISO like Innoserv does provide customers with an alternative. This alternative keeps GEMS from having a 100% monopoly and also helps to keep prices down to a certain extent.

Eliminating that little spark of competition was the only logical motivation for GEMS to acquire InnoServ. This acquisition makes no sense except to eliminate one of the last vestiges of national competition for the service of GEMS imaging equipment. The fact that GEMS has since acquired one of the other remaining competitors—Serviscope—demonstrates that GEMS' goal is the lack of any meaningful service competition.

IV. Non-compliance With the APPA

Section (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,'' and § (e) requires this Court to determine that the entry of such judgment is in the public interest by considering ''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.'' As demonstrated below, the information required by § (b) has not been provided in the Competitive Impact Statement, and that fact disables the ISNI and other members of the public from making a ''meaningful public comment'' on its (APPA § (c)) and disables this Court from making its public interest determination pursuant to APPA § (e).

The following fundamental information is missing from the CIS: a technical and economic assessment of PREVU; a description of the markets involved in the settlement and the effect of the settlement on those markets; information about other firms, if any, that expressed interest in purchasing InnoServ; and information about the relationship of the simultaneous consent decree between the same two parties concerning a litigation in Montana that also involves GEMS' advanced diagnostics. The significance of the non-provision of these items of information will be discussed below.

A. The CIS Provides Nothing but Speculation About the Acknowledged Keystone of This Consent Decree, PREVU

The proposed stipulated final judgment of this litigation states that ''The *essence* of this Final Judgment is the prompt and certain divestiture through sale or licensing of certain rights or assets by the defendants to establish a viable competitor in the sale of service for certain models of G.E. diagnostic imaging equipment, and the sale of comprehensive asset-management or multi-vendor services, or in the licensing of advanced diagnostic software for use in any such service.'' 63 FR at 39894 (emphasis added). These ''rights or assets'' are PREVU, which is defined at 63 FR 39895.

But the CIS does not make a showing—or even try to make a showing—that PREVU *can* establish a viable competitor. One of the few things that the CIS says about PREVU is the conclusory statement that PREVU gives ''* * * InnoServ a competitive advantage in servicing certain models of imaging equipment and in multi-vendor service.'' *Id.* at 39898, and that ''InnoServ is an effective competitor of G.E. in part because InnoServ is one of the very few companies that has developed proprietary diagnostic software for servicing certain models of G.E. imaging equipment.'' (*Id.* at 39898). But this information about so-called

effective competition is contradicted by other information in the CIS:

> [InnoServ] has struggled financially for the past two years * * * losing over $1.5 million for the nine months ending January 31, 1998. In March 1998, InnoServ publicly expressed concern about its ability to continue to meet its working capital requirements.

This fact alone indicates that InnoServ is not providing effective competition to GEMS and that PREVU is not helping it to do so. It makes a significant difference in the antitrust analysis whether InnoServ is an effective or a struggling competitor. if it is effective, why is it losing money? If it is struggling, how will the divestiture of PREVU create an effective competitor when it was not able to make InnoServ an effective competitor? The contradictory statements on this subject in the CIS disable public commentators and the court from making this critical analysis.

The only other information about PREVU in the Competitive Impact Statement is as conclusory as that presented above. ''The divestiture of the PREVU diagnostic package will allow one or more third parties to use the software, which in turn will enable them to service more efficiently certain models of imaging equipment and better compete in the markets for servicing individual pieces of imaging equipment and providing multi-vendor service.'' *Id.* at 39899. There is absolutely no evidence supporting these conclusions. The reader of the CIS does not know whether any entity has ever asked to license or purchase PREVU. Similarly, the reader of the CIS cannot know if or, if so, why, use of PREVU will enable these unnamed ''third parties'' ''* * * to service more efficiently certain models of imaging equipment * * *.'' *Id.*

The CIS goes on to say, in a completely speculative manner, that ''in addition to using the package in its service business, a buyer of PREVU could resell or license PREVU to other parties.'' *Id.* Again, the reader of the CIS does not know the names of any potential ''other parties'' to whom the unnamed ''third parties'' buying PREVU could resell or license PREVU.

The CIS adds. ''The ability to improve upon PREVU * * * would further improve an entity's ability to compete with G.E.'' *Id.* Without having told the reader of the CIS in any detail what PREVU is, it is impossible to know whether it will improve anyone's ability to compete with GEMS or, *a fortiori*, ''further improve'' such ability.

At a minimum, the following information is needed for the public and the Court to evaluate this consent decree:

1. A detailed description of PREVU.
2. Whether anyone has licensed or purchased PREVU from InnoServ;
3. Whether anyone has expressed an interest to license or purchase PREVU from InnoServ;
4. Whether PREVU helps InnoServ and potentially others to compete with GEMS and, if so, how;
5. A comparison between the effectiveness of PREVU and the effectiveness of GEMS' advanced diagnostics;
6. Why it is not anticompetitive for GEMS to retain a non-exlusive non-assignable license to use PREVU (*Id.* at 39895) even though GEMS does not, and is not being required to, license its own advanced diagnostic software to competing service providers.

The CIS itself indicates doubt as to the value of PREVU by providing for the appointment of a trustee to sell PREVU if it is not sold within approximately 180 days. Advanced diagnostics allegedly capable of creating a viable competitor would not be on the market that long.

B. The CIS Does Not Provide Adequate Information About the Markets Involved and the Effect of the Consent Decree on Those Markets

The U.S. Supreme Court has held that anticompetitive restraints have to be considered ''in light of the competitive situation in 'the product market as a whole' '', *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 45 (1977), and that ''an antitrust policy divorced from market considerations would lack any objective benchmarks.'' *Id.* at 53, n. 21. At a minimum, such an analysis requires a definition of the relevant markets; the structure of such markets, including such factors as the number of firms and their respective market shares; and an analysis of the effect of the restraint and of the consent decree on price, output, consumer choice, and product quality.

As detailed below, *none* of this information appears in any useful way in the CIS.

The Government alleges the following markets in its Complaint (Betzner Decl., Exhibit J):

1. The markets for servicing certain models of G.E. imaging equipment on a discrete machine-by-machine basis in numerous local markets throughout the United States; and

2. the markets for multi-vendor service in numerous local markets throughout the United States.

See Complaint at paragraphs 2, 3, 12, 14, 16, 17, 19, and 24. However, nowhere have these markets been defined in the CIS.

Similarly, the complaint is bereft of information about market structure, in particular the number of firms in the alleged markets with their respective market shares. Indeed, *no* competitors in these markets are named except InnoServ and GEMS, and *no* markets shares are given.

Without market definitions and without a description of the structure of the market, it is impossible to describe the anticipated effects on competition of the consent decree as required by APPA § (b)(3). Without such information, the following assertion in the CIS is purely conclusory with no evidence at all backing it up: ''The proposed Final Judgment would promote additional competition in servicing certain models of G.E. imaging equipment and in multi-vendor service by requiring G.E. to divest InnoServ's proprietary diagnostic service software and related materials to an acquirer acceptable to the United States.'' 63 FR at 39898. The combination of the total lack of market information with the total lack of substantive information about PREVU stymies public commenters like ISNI from providing meaningful comment and disables this Court completely from making the public interest determination required by APPA § e.

C. The CIS Does Not Provide Information About Other Companies Interested in Purchasing Innoserv

Given (1) the power, alleged in the Complaint, of GEMS to affect the market, (2) GEMS' size, (3) GEMS' recent transactions increasing that size and power (see Section II above), and (4) the low price of InnoServ ($16 million—see 63 FR at 39898) relative to GEMS' size, it is not surprising that GEMS has made the first offer for InnoServ. What the CIS does not state, however, is (1) what other companies, if any, expressed interest in InnoServ; (2) whether there was, as is likely, some appraisal done by a third party like an investment bank of the worth of InnoServ and/or PREVU, or (3) how long InnoServ was on the market. This information is essential for the court to make its public interest determination because, given the facts listed at the beginning of this paragraph, there may have been a serious suitor of InnoServ that would have had a much less anticompetitive effect than GEMS but that would not complete in a bidding war with GEMS. Indeed, it is difficult to imagine an acquiring company with more of an anti-competitive effect than GEMS.

D. The CIS Does Not Provide Adequate Information on the Related Montana Consent Decree

According to the CIS, ''In conjunction with this settlement, GE has also agreed to consent to all of the relief that the government was seeking in another case, *United States* v. *General Electric Company,* No. CV–96–121–M–CCL (D.Mont. filed Aug. 1, 1996),'' 63 FR at 39899. GEMS states this fact more emphatically in its press release about the Innoserv consent decree:

To obtain clearance to complete the Innoserv acquisition, G.E. Medical Systems agreed to settle a civil lawsuit filed in Montana by the Antitrust Division of the Department of Justice. That lawsuit was filed in 1996 and challenged a G.E. Medical Systems practice under which health-care providers who were also in the business of performing third-party medical equipment service were not eligible to license G.E.'s proprietary advanced service materials, Betzner Decl., Exhibit A, emphasis added.

Even though the Montana consent decree involves GEMS' advanced diagnostics, the CIS gives no supporting evidence or explanation of the following assertions at CIS 39899: ''The United States evaluated the merits of the settlement proposals in each case independently, concluding that the proposed settlement of this case is in the public interest for the reasons stated herein, and that the proposed settlement of the Montana case is in the public interest for reasons stated in the Competitive Impact Statement filed in that case today.''

This dearth of evidence or explanation is problematic for public commenters like ISNI and for the Court because of the following assertion in the Montana CIS, 63 FR 40737, 40738: ''GE has developed advanced service materials [diagnostics like PREVU] that enable service engineers to service certain GE imaging equipment much more quickly than otherwise possible.'' ''Otherwise possible,'' of course, includes servicing with PREVU. Because of that fact the ''essence'' of the Innoserv Final Judgment, i.e., ''to establish a viable competitor'' to GEMS service, 63 FR 39894, does not appear to be possible because, by the U.S. Government's own cryptic evaluation, PREVU is inferior to the advanced service materials of GEMS.

The only way to accomplish this ''essence'' appears to be to require the licensing of GEMS' advanced diagnostics to competitors. Mandatory licensing of the intellectual property of a monopolist was used as a remedy in the *Kodak* case (*Image Technical Services, Inc.* v. *Eastman Kodak Co.,* 125 F.3d 1195, 1226, 1227 (9th Cir. 1997)) after a jury verdict. Such a remedy is *a fortiori,* appropriate here where GEMS seeks to extend its monopoly by a Government-approved and Court-approved acquisition.

The Government appears to have the remedy backwards in this case: it appears that the divestiture of PREVU will accomplish nothing whereas the mandatory licensing of GEMS advanced diagnostics could establish a viable competitor, which is the alleged ''essence'' of this consent decree.

E. 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 39900 states, incredibly, that ''there are not determinative materials or documents within the meaning of the APPA that were considered by the plaintiff 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 documents 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 following:

—those documents providing the good-faith basis for the Government to file its complaint;
—third-party analyses or evaluations of Innoserv and/or PREVU;
—documents relating to the efforts of others, if any, to acquire Innoserv;
—documents supporting the conclusory statements in the CIS about how the divestiture of PREVU will increase competition; and,
—documents comparing PREVU and the advanced service materials of GEMS litigated in the Montana case.

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 Intervene and Should Appoint a Special Master

APPA § (f) authorizes this Court to ''appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate'' and to ''authorize full or limited participation in proceeding 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 appointment and such an authorization.

If the Government had unfettered prosecutorial discretion to settle antitrust cases, the APPA would not exist. Yet the Government is endowing itself with such unfettered discretion by not providing in the CIS information necessary for this Court to make its required public interest determination and for the public to meaningfully comment on the CIS.

Whatever the reason for this non-compliance with the APPA, the Court cannot permit it. Because the Government and GEMS have not complied with the law although they clearly had the knowledge and the resources to do so, it is appropriate for the Court to use the APPA provisions that permit compliance with the APPA to occur.

As mentioned in § II above, the ISNI has the interest, expertise and the experience to aid the Court and to aid a special master appointed by the Court. A special master would be an efficient use of the Court's resources because fact gathering akin to discovery will be involved. The gathering and marshalling of facts will place this matter in the position in which it should have been when the CIS was filed. At that point the Court should be in a position to make its public interest determination or to order further proceedings.

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. Otherwise, the Government's

response to this comment will go unanswered, and there is no reason to believe that the quality of that response will be any better than the quality of the CIS.

VI. Conclusion

By keeping the public and the Court ignorant of information required by the APPA, the Government is endowing itself with the unfettered prosecutorial discretion contrary to the very purpose of the APPA. ISNI respectfully requests this Court to uphold both the letter and the spirit of that statute in this important sector of the economy affecting the healthcare costs of literally every American.

Respectfully submitted,

Dated: September 15, 1998.

Ronald S. Katz,

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

Appendix 2

United States of America, Department of Justice, Antitrust Division, 325 7th Street N.W., Suite 300, Washington, D.C. 20530, Plaintiff, v. General Electric Company, 3135 Easton Turnpike, Fairfield, Connecticut 06431, and InnoServ Technologies, Inc., 320 Westway, Suite 530, Arlington, Texas 76018, Defendants. Case Number 1.98CV01744. Judge: Royce C. Lamberth.

Declaration of Claudia Betzner in Support of Public Comment of Independent Service Network International Pursuant to 15 U.S.C. § 16(b), (d)

1. I, Claudia Betzner, am the Executive Director of the 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. Independent service organizations service equipment manufactured by others.

2. ISNI is a nonprofit corporation incorporated in the District of Columbia. Its members compete with the service divisions of manufacturers like General Electric Medical Systems (‘‘GEMS’’).

3. ISNI has participated in various legal proceedings on behalf of its members, including *Eastman Kodak Co.* versus *Image Technical Services, Inc., et al.,* 504 U.S. 451, 462 and *United States of America* versus *International Business Machines Corporation,* 52 CIV. 72–344 (TPG), Second Circuit, U.S. Court of Appeals (pending).

4. InnoServ is a current member of ISNI but has not been consulted about or advised of this public comment.

5. Serviscope is a member of ISNI but ISNI has been informed by Serviscope that it was acquired by GEMS in late August of 1998.

6. Attached hereto as Exhibit A is a true and correct copy of a press release from GEMS generated by a computer search.

7. Attached hereto as Exhibit B is a true and correct copy of a database listing of all current members of ISNI.

8. Attached hereto as Exhibit C is a true and correct copy of an Order issued by Chief Judge Thomas P. Griesa, Southern District of New York, in the case *United States of America* versus *International Business Machines Corporation, 52 CIV 72–344 (TPG).*

9. I have generated a computerized database search for articles on GEMS’ acquisitions. That search has generated true and correct copies of the articles which appear as Exhibits D through I of this declaration.

17. Attached hereto as Exihibit J is a true and correct copy of the Complaint in this matter.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of September, 1998, at Atlanta, Georgia.

Claudia Betzner,

Executive Director, ISN International.

Exhibit A

Level 1–1 of 28 Stories

Copyright 1998 PR Newswire Association, Inc., PR Newswire

July 14, 1998, Tuesday.

Section: Financial News
Distribution: To Business Editor
Length: 514 words
Headline: GE Medical System Receives Clearance to Acquire InnoServ Technologies
Dateline: Milwaukee, July 14

Body: GE Medical System announced today that it has received Department of Justice clearance to complete its acquisition of InnoServ Technologies, Inc. (Nasdaq: ISER), a provider of asset management, repair and maintenance programs for imaging, biomedical and laboratory equipment to health-care providers.

‘‘InnoServ is an important addition to GE Medical Systems that will enhance our capability to provide multi-vendor service solutions to help health-care providers become more productive,’’ said Jeffery R. Immelt, GE Medical Systems’ president and CEO.

‘‘InnoServ brings dedicated and talented service personnel to our GE team as well as enhance GE’s circuit board repair and X-Ray tube reloading capabilities—all of which will help us to be a better partner for our multi-vendor service customers,’’ Mr. Immelt said.

To obtain clearance to complete the InnoServ acquisition, GE Medical Systems agreed to settle a civil lawsuit filed in Montana by the Antitrust Division of the Department of Justice. That lawsuit was filed in 1996 and challenged a GE Medical Systems paractice under which health-care providers who were also in the business of performing third-party medical service were not eligible to license GE’s proprietary advanced service materials.

Under the revised policy announced today, health-care providers will be eligible to lincense GE Medical Systems’ advanced service materials for use by their own employees to service their own GE medical imaging equipment, without regard to the scope of their third-party service activities.

Under both the challenged eligibility standards and the revised policy, GE will require that its customers not use GE proprietary information when they provide service to third parties.

The settlement strongly affirms GEMS’ right to control key aspects of its intellectual property licensing: e.g., whether and what to license; which customers would receive licenses; what to charge for a license; and what restrictions to place on the use of licensed materials to protect against misues.

Under the settlement, there are no findings on admissions of any miscoduct by GE and GE is not liable for any damages, financial penalities or other monetary payment.

GE Medicare Systems also agreed to divest InnoServ’ PREVU diaguostic service materals following completion of the InnoServ acquisition.

‘‘The settlement agreement recognizes GE’s fundamental right to protect its intellectual property from misues. The Department of Justice agree with that goal. GE’s goal has always been the same: to allow customers to compete in the service field as they see fit but to ensure that they do not use GE’s proprietary software to do so,’’ Mr. Immelt said.

The InnoServ operations acquired by GE currently employ about 220 people, including more than 120 field engineers.

GE 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.

Source: GE Medical Systems
Contact: Charles Young, Manager of Global Public Relations of GE Medical Systems, 414–544–3530, pager 888–864–3332, charles.young£med.ge.com
Language: English
Load-Date: July 15, 1998

Exhibit B

Contact Company

AAI Engineering Support, Inc. Hunt Valley, MD
Access Corporation, Cincinnati, OH
Accram, Inc., Phoenix, AZ
Advanced Vio-Med Electronics, Slidell, LA
Advanced Technology Lab., Bothell, WA
Allina Ces, Roseville, MN
AM Services Operation, Santa Ana, CA
AMCOR, Fairfield, NJ
American Teleprocessing Corp., Houston, TX
AMSCO International, Erie, PA
Arand Corporation, Spring City, PA

ASI Copier & Fax Solutions, Dallas, TX
Authorized Technical Services, Oakland, CA
B.C. Tel Sys Support, Burnaby, BC
Baldwin, Cleveland, OH
Bay State Anesthesia Service, North Andover, MA
Beckmen Coulter, Fulton, CA
Bio Medic Inc., Crestwood, IL
Bio-Medical Equipment Service, Lousville, KY
Biomedical Concepts, Inc., Mandeville, LA
Biomedical Eqpt Spec Inc., Sioux City, IA
BioTechnical Services, San Diego, CA
BMC Solutions, Inc., Kennesaw, GA
Brains II, Inc., Markham, ON
C. Hoelzle Associates, Irvine, CA
Centura, Inc., Cleveland, OH
CIC Warrentek, College Station, TX
COHR, Chatsworth, CA
Comdisco Healthcare Group, Inc., Rosemont, IL
Comdoc Inc., Uniontown, OH
Compuquip, Inc., Miami, FL
Computer Maintenance Interntl, Falls Church, VA
Computer Maintenance Corp., College Park, GA
Computer Mtnce of the Triad, Winston Salem, NC
Computer Products & Services, Boca Raton, FL
Copy Systems, Inc., Frederick, MD
CopyTech Business Systems, Inc., Harrison, OH
CPO, Limited, Santa Clara, CA
Crystal Computer, Winchester, MA
CT Solutions, Inc., Fairfield, CA
Ctronics, Stockton, CA
Cyber Resources, Mountainside, NJ
D.F. Blumberg Associates, Inc., Ft. Washington, PA
Data Exchange Corp., Camarillo, CA
Data General Corp., Westboro, MA
Dataprep (Malaysia) SDN.BHD
Deccaid Services, Inc., Deer Park, NY
DecisionOne, Menomonee Falls, WI
DecisionOne Corp Canada, Markham, ON
Dependable X-Ray Inc., Antioch, IL
Diagnostic Parts Exchange, Tallahassee, FL
Digidyne Inc., Lachine, Quebec
Digital Document Solutions, Orange, CT
Digital ES, Inc., Oklahoma City, OK
Docusource, Van Nuys, CA
DXR Imaging, Oakland, CA
EAD Systems Corp., Holbrook, MA
Edwards Business Machines, Inc., Bethlehem, PA
ESSC, Canada, Concord, ON
Express Copy & Tech, Indianapolis, IN
G.E. Walker, Inc., Tampa, FL
Galaxy Computer, St. Paul, MN
Garrett Med-Tech, Inc., Aurora, CO
GEAC Computers, Markham
Genicom Corp., Chantilly, VA
Getronics Service, 1092 AB Amsterdam
Graphic Corporation, Birmingham, AL
Great Eastern Technology, Cambridge, MA
GTE Services, Needham, MA
Hahn & Company, Portland, OR
Halifax Engineering, Inc., Alexandria, VA
HealthTech Pub. Co. Inc., E. Providence, RI
Hospital Shared Services, Denver, CO
BE Digital, Cerritos, CA
IET Intelligent Electronics, Burlington, MA
Imaging Diagnostics, Inc., Goodlettsville, TN
Imtek Office Solution, Inc., Pasadena, MD
Innoserv Technologies, Inc., Arlington, TX
Integration Technologies Gp., Inc., Falls Church, VA
International Bandwidth Services, San Juan Capistrano, CA
J&S Medical Assoc., Natick, MA
Kennsco, Inc., Plymouth, MN
Kinetic Biomedical, Erie, PA
Labcare Services, Sacramento, CA
LFC Capital, Inc., Chicago, IL
Lockhead Martin Comm Sys & Srv., Dearborn, MI
Maintech, Wallington, NJ
Maintenance Alternatives Corp., Petalund, CA
Maintenance Plus Inc., Roselle Park, NJ
Mararthan Services, Inc., Westlake Village, CA
Marcon Services Ltd., Wichita, KS
Matlock Medical Imaging, Inc., Durham, NC
Medelex, Inc., Sunnyvale, CA
Medical Imaging Service, Inc., Jefferson, LA
Medical Imaging Technologies Svcs., Inc., Ettalong Beach NSW
Medical Systems Engineering, San Francisco, CA
MEDTRON Inc., Free Port, NY
MTI Technology, Anaheim, CA
National Customer Engineering, San Diego, CA
National MD, Cleveland, OH
Nationwide Technologies, Inc., Lake Forest, IL
New England Systems, Inc., Middlebury, CT
Nexor System Service OY, Helsinki
North American Imaging, Camarillo, CA
Northrup Grumman GSS, Bohemia, NY
Novare Services, Inc., Cincinatti, OH
OneSource Services, Inc., Cleveland, OH
Picker, Lincolnshire, IL
Precision Medtech Services, Inc., Jessup, MD
Preferred CT Services, Palo Alto, CA
Preferred Diagnostic Equipment, Riverside, CA
Professional Copy Systems, Salt Lake City, UT
Qr Systems, Inc., San Antonio, TX
R.P. Kincheloe Company, Dallas, TX
Radiology Services, Inc., Georgetown, MA
Radiology Services of P.R., Cidra, Puerto Rico
Recognition Service Div., Irving, TX
Red Lion Medical Safety, Newark, DE
Remedpar, Goodlettesville, TN
Reprographic Systems, Inc., Urbandale, IA
Revacomp, Inc., Houston, TX
RPI Inc., Chatsworth, CA
S.O.M.A. Inc., Philadelphia, PA
Safety Anesthesia Eqpt Srvs Inc., Flora Park, NY
Safety Anesthesia Equipment Sv., Floral Park
Scantron FPD, Omaha, NE
Service Results Technology, Markham, ON
Service Technologies Inc., Atlanta, GA
Serviscope Corporation, Wallingford, CT
Shields Business Solutions, Cinnaminson, NJ
SMS System Maintenance Svcs, Inc., Littleton, MA
SoftTech Solutions, Waterford, MI
Southeast Imaging Systems, Inc., Apopka, FL
Sunton Industries, Inc., Hollywood, FL
Technical Duplicator Services, Inc., Anaheim, CA
Technical Dynamics, Annandale, VA
Technical Equipment Services, Inc. San Diago, CA
Tecspec, Inc., San Diego, CA
Telos Corporation, Bountiful, UT
The Exchange Corp., Atlanta, GA
The Thomas Group, Anaheim, CA
Thijssen Field Service B.V., Veenedaal
Toshiba America Medical, Tustin, CA
U.S. Computer Group, Farmingdale, NY
U.S. Medical, Cincinnati, OH
Unisys Canada, ON
Universal Financial, Elmhurst, IL
Vanstar, Atlanta, GA
Vision Medical Services, Ontario, CA
Vitronics, Inc., Eatontown, NJ
World Data Products, Minnetonta, MN
X-Tech Systems, Goleta, CA
Xerographic Copier Services, Inc., San Antonio, TX
Xeographic Corporation, Atlanta, GA

Exhibit C

United States District Court, Southern District of New York

United States of America, *Plaintiff,* against International Business Machines Corporation, *Defendant.* 52 Civ. 72–344 (TPG).

Order

On May 1, 1997 this Court approved an agreement between plaintiff and defendant providing for the termination of the remaining provisions of a 1956

consent decree in stages, with the final provisions ending in the year 2002.

Independent Service Network International (''ISNI'') moves to intervene for purposes of appeal. The motion is granted.

ISNI is an organization of computer repair companies. Part of the business of these companies is to compete with IBM for the repair of IBM computers. At an earlier stage in the litigation, Judge Schwartz of this Court denied ISNI's motion to intervene. *United States* v. *International Business Machines Corp.*, No. 72–344, 1995 WL 366383 (S.D.N.Y. June 19, 1995). Later, when the termination agreement had been arrived at and was before the Court for approval, the undersigned, to whom the case had been reassigned, permitted ISNI to appear as amicus curiae. ISNI thereafter filed papers objecting to the termination agreement, and presented argument at the hearing. The Court's opinion of May 1 dealt in substantial part with ISNI's contentions. Although the Court rejected these contentions, they surely deserved the attention of the Court.

ISNI has a legitimate interest in appealing from the May ruling, and it is in the public interest to allow ISNI to appeal. Under these circumstances the Court has discretion to allow ISNI to intervene under Fed. R. Civ. P. 24(b)(2). *See United States* v. *American Cyanamid Co.*, 556 F. Supp. 357, 361 (S.D.N.Y. 1982), *aff'd,* 719 F.2d 558 (2d Cir. 1983).

Accordingly, the Court directs that ISNI is permitted to intervene. This is solely for the purpose of appealing the May 1 ruling. ISNI will be denominated an ''Objector.'' There is no need to amend the caption of the case.

So Ordered.

Dated: New York, New York, June 26, 1997.

Thomas P. Griesa,

U.S.D.J.

Exhibit D

343rd Story of Level 2 Printed in Full Format

Copyright 1994 Business Wire, Inc., Business Wire

August 2, 1994, Tuesday.

Distribution: Business Editors/Medical Writers
Length: 356 words
Headline: ANMR and GE Medical Systems expand alliance to include very high field Magnetic Resonance Systems
Dateline: Wilmington, Mass.
Body:

August 2, 1994—Advanced NMR Systems Inc. (NASDAQ NM:ANMR) announced Tuesday that it had concluded an agreement that expands its strategic alliance with GE Medical Systems (GEMS).

Under the agreement ANMR will be the system integrator of very high field (3T and 4T) Magnetic Resonance Systems based on the GEMS Signa MR product. In addition to system integration, ANMR will also supply any special order design and manufacturing capability. The agreement covers a 3-year period through June 30, 1997.

Under the agreement, 3T and 4T MR Systems will be made available to research institutions as investigational devices for research purposes. Revenues from this agreement will contribute to satisfying the GEMS obligation under the 1993 contract covering the ANMR InstaScan product (currently marketed by GEMS as SR–100). GEMS exclusivity on the InstaScan product will expire at the end of 1994.

The companies further announced that they were continuing discussions on a series of other collaborations which could result in additional agreements.

''There have been inquiries from research sites requesting that we provide a very high field MR research system based on the Signa product with the option of adding the InstaScan EPI system. This eventuality was anticipated in the original agreement. It is a great example of two organizations, each with added value, working together,'' said Paul J. Mirabella, general manager, Global MR Business for GEMS.

Jack Nelson, chairman and chief executive officer of ANMR, said, ''Our expanded alliance with GEMS allows us to provide the most sophisticated technology to the world's most prestigious research centers. This agreement recognizes our wish to exclusively manufacture higher field systems for GEMS while releasing ANMR to market InstaScan systems and/or retrofits via multiple OEM agreements after December 31, 1994.''

Contact: South Coast Communications, Joseph Allen, 714/252–8440 or Advanced NMR Systems, Shareholders Relations, 201/592–8838.

Language: English.
Load-Date: August 3, 1994.

Exhibit E

320th Story of Level 2 Printed in Full Format

Copyright 1995 Information Access Company, a Thomson Corporation Company, IAC (SM) Newsletter Database (TM), The Business Word, Inc., Hospital Materials Management

June, 1995.

Section: No. 6, Vol. 20; ISSN: 0888–3068
Lenght: 182 words
Headline: Columbia/HCA Signs Five-Year Deal With GE Medical Systems
Body:

Columbia/HCA Healthcare Corp., Nashville, Tenn., signed a five-year agreement with General Electric Medical Systems, Waukesha, Wis., that covers the sales, service and utilization of all diagnostic imaging equipment in the 320-hospital chain. The deal may signal future partnerships between hospitals and equipment companies.

The contract also gives GE responsiblity for providing Columbia/HCA with recommendations on new equipment purchases. Columbia/HCA will provide GE with information on when and why equipment needs to be replaced for every piece of equipment the system owns.

It is extremely difficult to place a dollar value on the contract, and no one can say how it will affect the 200 to 250 independent service vendors that worked on Columbia/HCA's equipment prior to the agreement. Another question, not yet answered, is whether GE and Columbia will take the agreement beyond imaging equipment to other areas in the chain.

If the concept takes hold, the industry will likely see more manufacturers enter not this double role.

Copyright 1995 The Business Word, Inc.

Language: English
IAC–ACC–NO: 2805689 ND
Load-Date: October 25, 1995

Exhibit F

1st Story of Level 1 Printed in Full Format

Copyright 1996 Plain Dealer Publishing Co., The Plain Dealer

February 21, 1996 Wednesday, Final/All.

Section: Business; Pg. 2C
Length: 271 words
Headline: Medical Maintenance Firm Gains Scope With Purchase
Byline: By Marcus Gleisser; Plain Dealer Reporter
Body:

GE Medical Systems of Milwaukee acquired National Medical Diagnostics Inc. of Warrensville Heights yesterday.

With this move, GE grows from specializing in the maintenance of diagnostic equipment to the broader area of handling a wide variety of high-tech medical equipment.

National Medical was owned by group of venture capital investors including KeyCorp., Morgenthaler, Primus, PNC Bank of Pittsburgh, and Canaan Venture Partners of New Canaan, Conn.

It will become a wholly owned subsidiary of GE Medical, retaining its name, location and employee structure, said Ray Dalton, National MD chief executive.

''We expect to grow substantially as a result of this move and will be adding more jobs here,'' Dalton said.

Both parties declined to give the dollar value of the transaction.

National Medical began serving a single hospital in the Denver area four years ago. It took off wildly, said Dalton, until now it provides maintenance and repair services to some 220 hospitals in 23 states.

From a first engineering-service contract worth $250,000 the Cleveland company has grown to more than $22 million in annual revenues and more than 200 employees.

For a fixed price, the company provides maintenance, repair, testing, calibration and other services for a hospital's entire array of medical equipment, including X-ray machines, life-support systems, CT scanners, computers and related telecommunications equipment.

In many cases, the company replaces the need for separate service contracts involving many different outside vendors. The one-stop maintenance often saves hospitals a considerable amount.

Language: English
Load-Date: February 22, 1996

Exhibit G

227th Story of Level 2 Printed in Full Format

Copyright 1996 Medical Data International, Inc., Medical Industry Today

August 27, 1996, Tuesday.

Section: Mergers & Acquisitions
Length: 303 words
Headline: GE Medical Systems Acquires Assets of Two Companies
Body:

GE MEDICAL SYSTEMS (Milwaukee, WI), a business of General Electric Company, has agreed to acquire the U.S. healthcare assets of Specialty Underwriters (SU) and Maintenance Management (MMC), GE Medical Systems announced in a release Monday.

Terms of the agreement were not disclosed.

Specialty Underwriters, a private firm based in Oak Creek, WI, was founded in 1982. It sells equipment maintenance insurance to healthcare and other industries. Maintenance Management provides on-site maintenance services for hospitals' and clinics' medical and office equipment.

''The acquisition of Specialty Underwriters' healthcare operations will help bolster GE Medical Systems' efforts in the multivendor service business. Our multivendor service offerings provide healthcare providers with a more efficient solution for managing and servicing hundreds and often thousands of pieces of clinical and biomedical equipment across their departments,'' said Tom Dunham, vice president and general manager of GE Medical Systems-Americas Service. ''As a one-stop-shop alternative, we reduce customers' overall maintenance costs while ensuring consistent, high quality.''

Said Michael H. Polaski, founder and president of Specialty Underwriters and Maintenance Management, ''The healthcare portion of our business has been very successful and should thrive as part of GE Medical Systems, whose entire focus is healthcare solutions. After the sale, we will continue to apply the successful formula we developed with SU and MMC to maintenance activities in other industries. Capital from this transaction will enable us to accelerate our plans to develop new products and enter new markets.''

GE Medical Systems is a leading provider of diagnostic imaging systems and related services.

Contact: Laurie Bernardy (414/544–3530)
Language: English
Load-Date: September 02, 1997

Exhibit H

1st Story of Level 1 Printed in Full Format

Copyright 1997 Business Wire, Inc., Business Wire

August 19, 1997, Tuesday.

Distribution: Health/Medical Writers or Business Editors
Length: 356 words
Headline: GE Medical Systems Invests $5.1 Million for Acquisition of Securities of Advanced NMR Systems, Inc. and Advanced NMR Systems, Inc.'s 3T and 4T Whole Body Imaging Business
Dateline: Wilmington, Mass.
Body:

19, 1997—Advanced NMR Systems Inc. (NASDAQ:ANMR) and GE Medical Systems jointly announced today that GE has invested $5.1 million of the acquisition of $2.7 million of ANMR preferred stock, convertible at $0.233 per share, and for the acquisition of ANMR's 3-tesla and 4-tesla whole body magnetic resonance imaging business. The companies had previously collaborated in the development of these systems. GE Medical Systems will continue to develop, manufacture, sell and service the 3T and 4T whole body imaging systems, and will also acquire ANMR's business of servicing 1.5T systems.

In announcing the transaction, Jeffrey R. Immelt, president and chief executive officer of GE Medical Systems, said, ''GE Medical Systems is excited about assuming sole responsibility for this 3T and 4T whole body imaging business, and we are committed to providing products and service to the developing market in 3T and 4T whole body imaging systems. We are also pleased with the opportunity to build upon our strategic relationship by becoming an ANMR shareholder.''

Jack Nelson, chairman and chief executive officer of Advanced NMR Systems Inc. said, ''This transaction further strengthens our balance sheet and positions us to concentrate on our future growth following our proposed merger with Advanced Mammography Systems. We are delighted to have GE as a significant investor in the company.''

Advanced NMR Systems Inc. and Advanced Mammography Systems Inc. (NASDAQ:MAMO) have executed a definitive agreement to merge. Advanced NMR Systems Inc. is awaiting SEC clearance of proxy material and a related registration statement for subsequent approval of shareholders for the merger.

Contact: Advanced NMR Systems Inc., Beverly Tkaczenko, 800/476–0569 or GE Medical Systems, Charles Young, 414/544–3530.

Language: English
Load-Date: August 20, 1997

Exhibit I

82nd Story of Level 2 Printed in Full Format

Copyright 1997 Business Wire, Inc., Business Wire

December 1, 1997, Monday.

Distribution: Business Editors, Health/Medical Writers
Length: 549 words
Headline: GE Medical Systems and INPHACT Form Strategic Alliance; Five-Year Joint Marketing Pact Could Generate $100 Million In Revenues
Dateline: Nashville, Tenn.
Body:

Dec. 1, 1997—General Electric Medical Systems, the world's leading manufacturer of diagnostic imaging equipment, and INPHACT, a Nashville-based provider of on-line radiology services for radiologists and health care facilities, have forged a give-year ''Strategic Alliance,'' The national agreement designates GE as an INPHACT preferred vendor and establishes joint marketing efforts that could generate more than $100 million in GE equipment and INPHACT service revenues during the contract period. INPHACT, which currently serves radiologists and health care facilities in seven states, will receive preferred purchase and service options on GE equipment for new client installations or upgrades for its existing clients. GE will help to jointly market INPHACT's 24/7 on-call image interpretation service, digital image transmission & archiving and physicians' practice management services to its current and new physician and facility clients, and INPHACT will help to jointly market GE's Integrated Imaging Services (''IIS'') for networking (PACS) products and services. ''INPHACT has developed leading-edge services that can help radiologists and health care facilities deliver radiology services more efficiently and cost effectively,'' said Tony Lombardo, General Manager of Sales for GE IIS. ''INPHACT has made our integrated imaging solutions (IIS) products and services an important element in its service platform, which results in reduction of duplicate studies, elimination of lost files, decreased maintenance costs and faster diagnoses for its clients,'' ''GE has already played an integral part in helping INPHACT develop our state-of-the-art on-line radiology services,'' said Jeffrey A. Landman, M.D., chairman and chief executive officer of INPHACT. ''GE's ongoing commitment to INPHACT and our clients assures that we will continue to be at the forefront of helping radiologists and health care facilities provide more in-depth service while reducing their costs.'' Founded in 1996, INPHACT (www.inphact.com) is a privately-held provider of on-line radiology and practice management services that currently serves radiologists and health care facilities in seven states. Earlier this year, the company introduced the Virtual Partner program, which offers a unique blend of 24/7 on-call image interpretation, practice management and equity partnership to radiologists. INPHACT also offers health care facilities 24-hour consulting, system design, digital image transmission and archival services. GE Medical Systems (GEMS), a business of General Electric Company, develops and produces diagnostic imaging equipment in several modalities, including X-ray, Mammography, Magnetic Resonance, Computed Tomography, Ultrasound, Nuclear Medicine Imaging and PET. GEMS also provides a variety of services—from networking to biomedical equipment maintenance. GE Medical Systems has annual sales of approximately $4 billion and employs more than 15,000 people worldwide.

Contact: Katcher Vaughn & Bailey Communications, Roy Vaughn, Lisa Achilles, 615/248–8202.

Today's News On The Net—Business Wire's full file on the Internet, with Hyperlinks to your home page.

URL: http://www.businesswire.com

Language: English
Load-Date: December 2, 1997

Exhibit J

United States District Court for the District of Columbia

United States of America, Department of Justice, Antitrust Division, 325 7th Street, N.W., Suite 300, Washington, D.C. 20530, *Plaintiff*, v. General Electric Company, 3135 Easton Turnpike, Fairfield, Connecticut 06431, and InnoServ Technologies, Inc., 320 Westway, Suite 530, Arlington, Texas 76018, *Defendants*. Case Number 1:98CV01744. Judge: Royce C. Lamberth. Deck Type: Antitrust. Date Stamp: 07/14/98.

Complaint

The United States of America, acting under direction of the Attorney General of the United States, brings this civil action to obtain equitable relief against defendants and alleges as follows:

1. The United States brings this antitrust case to block the proposed acquisition of InnoServ Technologies, Inc. (''InnoServ'') by General Electric Company (''GE''). GE is the largest manufacturer of medical imaging equipment, such as CT scanners and magnetic resonance imagers (MRIs), and is the leading service provider of GE imaging equipment. InnoServ is one of the nation's largest independent service organizations (''ISOs'') and has significant expertise and capabilities and competes with GE in servicing certain GE imaging equipment. GE and InnoServ also compete in numerous local markets for comprehensive multi-vendor and asset-management services (''multi-vendor service''), in which they contract to provide services relating to some or all of a hospital's capital equipment—including imaging and non-imaging medical equipment—regardless of manufacturer. The competition between GE and InnoServ in these markets has reduced prices significantly for imaging equipment service.

2. To help service its imaging equipment, GE has developed advanced diagnostic software that it uses to calibrate, maintain, and service more quickly a particular model of imaging equipment. InnoServ is one of very few companies that has developed its own proprietary diagnostic software (called ''PREVU'') for servicing certain GE imaging equipment. Although it is not as sophisticated or efficient as GE's own software, PREVU has made InnoServ an effective competitor to GE in the markets for servicing certain models of GE imaging equipment on a discrete, machine-by-machine basis, as well as in markets for providing multi-vendor service to hospitals that own GE equipment.

3. If GE acquires InnoServ, GE will increase its already high share in the markets for servicing certain models of GE imaging equipment on a discrete basis, particularly several models of CT scanners and MRIs, and it will eliminate an effective competitor in these markets. It will also substantially reduce competition in multi-vendor service markets. Unless blocked, this acquisition likely will result in higher prices for imaging equipment maintenance and service.

I. Jurisdiction and Venue

4. The United States files this action under Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, to prevent and restrain the defendants from violating Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

5. Both GE and InnoServ service medical imaging equipment in interstate commerce, and the operations of their medical equipment service businesses affect and are in the flow of interstate commerce. This Court has subject matter jurisdiction over the action and the parties pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. §§ 1331 and 1337.

6. The defendants transact business and are found within the District of Columbia. Venue is proper in this District under 15 U.S.C. § 22 and 28 U.S.C. § 1391(c).

II. The Defendants

7. GE is a New York corporation headquartered in Fairfield, Connecticut. GE is a diversified technology, manufacturing, and services company. In 1997, GE's total revenues exceeded $90 billion. Its wholly owned subsidiary, General Electric Medical Systems (''GEMS''), located in Waukesha, Wisconsin, manufactures medical imaging equipment such as CT scanners, MRIs, x-ray equipment, and nuclear-medicine cameras. GEMS is the leading service provider of imaging equipment manufactured by GE. Since 1994, GEMS has also serviced imaging equipment manufactured by other companies through GE HealthCare Services, its multi-vendor service group.

8. InnoServ is a California corporation headquartered in Arlington, Texas. InnoServ provides various forms of multi-vendor service to radiology, cardiology, biomedical, and laboratory departments of hospitals and other healthcare providers. In fiscal year 1997, InnoServ's total service revenues exceeded $37 million.

III. Trade and Commerce

A. Relevant Product Markets

1. Service of GE Imaging Equipment on a Discrete Basis

9. Hospitals, physicians, and other health care providers use various types (sometimes referred to as ''modalities'') of medical imaging equipment, such as CT scanners, MRIs, and nuclear cameras, to create images of the body's internal structure. Each modality of imaging equipment employs different technologies and generally is not interchangeable with any other. For example, an MRI is better suited than a CT scanner for imaging soft tissue, and a CT scanner can disclose a tumor that less sophisticated x-ray equipment cannot detect.

10. GE is the largest manufacturer of imaging equipment and sells various modalities of such equipment throughout the United States. For each modality, GE often has sold multiple models, particularly as it improves upon the equipment. Since 1987, GE has sold at least the following CT scanner models: the CT Max; the 9800/Quick; the 9800 Hilight Advantage; and the Hispeed Advantage.

11. Imaging equipment requires regular service, including preventive maintenance, general repairs, and emergency service. Health care providers spend over $3 billion each year to service and repair imaging equipment.

12. The sale of service for each model of imaging equipment is a separate product market. A hospital or clinic that owns a GE 9800/Quick CT scanner requiring service does not have any reasonable substitute to purchasing service for that equipment. Purchasing service for another piece of imaging equipment—for example, an ultrasound machine, which is used for very different kinds of medical diagnoses—is not a alternative. If faced with a small but significant increase in the price of servicing the GE 9800/Quick, most hospitals would not forego purchasing service for that model. The same is true for other models of GE imaging equipment.

13. Historically, after the warranty on a piece of GE imaging equipment has expired, hospitals and other owners of the equipment have entered into discrete contracts with a service provider for that equipment. GE and InnoServ compete to sigh such discrete service contracts for several different models of GE imaging equipment. If faced with a small but significant increase in the price of servicing a GE 9800/Quick CT scanner, most hospitals

preferring discrete service contracts would not switch to a multi-vendor service contract covering all of their imaging equipment. The same is true for other models of GE imaging equipment.

14. The service for certain models of GE imaging equipment on a discrete, machine-by-machine basis is a line of commerce and a relevant product market within the meaning of the Clayton Act.

2. Multi-vendor Service

15. In recent years, rather than have numerous discrete service contracts with several different equipment manufacturers or ISOs, some hospitals have chosen to contract with a single provider to service most or all of the hospital's equipment. Such multi-vendor service contracts may include service for all of a hospital's imaging equipment—regardless of manufacturer, modality, or model. They may also include service for all of the hospital's non-imaging medical equipment, such as biomedical and laboratory equipment. In some cases, hospitals also contract with a single entity for all of the hospital's capital equipment needs, including advice on capital equipment replacement decisions (''asset management''). Corporations owning a large number of individual hospitals, in particular, find this ''one-stop shopping'' approach an efficient method of purchasing service for their imaging (and often non-imaging) equipment. Both GE and InnoServ compete with one another and with other service providers to obtain such multi-vendor and asset management (defined herein as ''multi-vendor service'') contracts. Hospitals preferring to purchase multi-vendor service do not have reasonable alternatives to such contracts. If faced with a small but significant increase in the price of multi-vendor service, most of those hospitals would not switch to purchasing service on a discrete basis.

16. Multi-vendor service is a line of commerce and a relevant product market within the meaning of the Clayton Act.

B. Relevant Geographic Markets

17. The geographic markets for imaging equipment service are local, with the precise contours of those markets differing depending on the type of equipment involved and other factors. Hospitals strongly prefer to contract with nearby service providers, where such providers are qualified and able to service the equipment involved. In general, service providers located closer to the hospital customer can respond to service emergencies more quickly, thereby minimizing the amount of time during which the hospital's imaging equipment is not working. A hospital can lose substantial revenue if its imaging equipment is broken; in some cases, patients may need to be transferred to other health care facilities due to equipment failure. Therefore, given the importance of timely service, service providers located relatively far away from a hospital are at a substantial disadvantage in competing to service that hospital. If faced with a small but significant increase in the price of service from its local service provider, most hospitals would not switch to using a service provider located relatively far away.

18. GE offers both service contracts for discrete pieces of GE imaging equipment and multi-vendor service contracts throughout the United States. InnoServ offers similar services within a radius of about 100 miles of several large metropolitan areas.

19. Each local area in which GE and InnoServ are both sufficiently close to a hospital customer to provide timely imaging equipment service is a section of the country and a relevant geographic market within the meaning of the Clayton Act.

C. Anticompetitive Effect and Entry

20. GE and InnoServ compete in numerous local markets for servicing certain models of GE imaging equipment on a discrete basis and for multi-vendor service. In many of these markets, InnoServ is one of the few ISOs that has specialized in servicing GE imaging equipment. Moreover, GE and Innoserv were among the first service providers to offer comprehensive multi-vendor service; each signed a contract to provide such service to a large customer in 1995. Particularly because InnoServ is one of very few companies that has developed its own proprietary diagnostic software for GE imaging equipment, consumers in both discrete service markets and multi-vendor service markets view InnoServ service as a good substitute for GE service. The competition between GE and InnoServ in these markets has resulted in significant price reductions for consumers. GE's acquisition of InnoServ would eliminate this competition and increase GE's already high share in the markets for servicing certain models of GE imaging equipment, particularly several models of CT scanners and MRIs. It would also substantially reduce competition in multi-vendor service markets.

21. Successful entry into the relevant markets is difficult, time consuming, and costly. In general, customers prefer to purchase service from existing, reputable firms in the industry. Therefore, new entrants often find it difficult to enter on a scale necessary to succeed financially.

IV. Violation Alleged

22. On May 19, 1998, GE and InnoServ signed an Agreement and Plan of Merger under which GE intends to acquire the common stock of InnoServ for a purchase price of $16 million.

23. GE's proposed acquisition of InnoServ is likely to lessen competition substantially and tend to create a monopoly in interstate trade and commerce in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

24. The transaction likely will have the following effects, among others:

a. Actual and future competition between GE and InnoServ will be eliminated in the markets for servicing certain models of GE imaging equipment on a discrete, machine-by-machine basis in numerous local markets throughout the United States;

b. Competition generally in the markets for servicing certain models of GE imaging equipment on a discrete, machine-by-machine basis in numerous local markets throughout the United States will be lessened substantially;

c. Actual and future competition between GE and InnoServ will be eliminated in the markets for multi-vendor service in numerous local markets throughout the United States; and

d. Competition generally in the markets for multi-vendor service in numerous local markets throughout the United States will be lessened substantially.

V. Requested Relief

The United States requests:

1. That the proposed acquisition by GE of InnoServ be adjudged to violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18;

2. That GE and InnoServ be permanently enjoined from carrying out GE's intended acquisition of the common stock of InnoServ as expressed in the Agreement and Plan of Merger dated May 19, 1998, and from carrying out any agreement, understanding, or plan, the effect of which would be to combine the businesses or assets of GE and InnoServ;

3. That the United States be awarded its costs of this action; and

4. That the United States have such other relief as the Court may deem just and proper.

Dated: July 14, 1998.

Joel I. Klein,

Assistant Attorney General.

John M. Nannes,

Deputy Assistant Attorney General.

Constance K. Robinson,

Director of Operations and Merger Enforcement.

Respectfully submitted,

Jon B. Jacobs (D.C. Bar #412249), Fred E. Haynes (D.C. Bar #165654), Joan H. Hogan (D.C. Bar #451240), Peter J. Mucchetti,

Attorneys, Antitrust Division, 325 7th Street, N.W., Suite 300, Washington, D.C. 20530, (202) 514–5012.

M.J. Moltenbrey,

Chief, Civil Task Force.

Susan L. Edelheit,

Assistant Chief, Civil Task Force.

Appendix 3

United States District Court for the District of Columbia

United States of America, Department of Justice, Antitrust Division, 325 7th Street, N.W., Suite 300, Washington, D.C. 20530, *Plaintiff,* v. General Electric Company, 3135 Easton Turnpike, Fairfield, Connecticut 06431, and InnoServ Technologies, Inc., 320 Westway, Suite 530, Arlington, Texas 76018, *Defendants.* Case Number 1:98CV01744. Judge: Royce C. Lamberth.

Supplemental Public Comment of Independent Service Network International Pursuant to 15 U.S.C. § 16(b),(d)

Because of an event that occurred after Independent Service Network International (''ISNI'') submitted its public comment yesterday. ISNI submits this short supplemental comment pursuant to the Antitrust Procedures and Penalty Act (''APPA''), 15 U.S.C. § 16(b), (d). The new event, which occurred today, is GE Medical Systems' (''GEMS'') issuance of the attached news release stating that ''* * * it has completed its acquisition of InnoServ Technologies, Inc * * *.''

This press release completely undermines and disrespects the processes of the APPA for several reasons. First, it makes a sham of the public comment period if the very act that the Government's complaint challenged occurs during that period.

Second, one of the purposes of the public comment period is to provide the United States with more information. Based on this information, the United States has the right to withdraw its consent from the decree, 63 FR 39894. The fact that the defendants have presented the United States with a *fait accompli* has the obvious purpose of making the withdrawal of consent more difficult.

Finally, this Court, not the parties, has the final authority to approve the proposed consent decree. For GEMS to say that it has ''completed'' its acquisition of InnoServ Technologies ignores that salient fact.

Dated: September 16, 1998.

Respectfully submitted,

Ronald S. Katz, Esq.,

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

Appendix 4

Star Technologies

Via Facsimile and First Class Mail
(202) 307–9952

September 16, 1998.

Ms. Mary Jean Moltenbrey,
Chief, Civil Task Force, Antitrust Division, U.S. Department of Justice, 325 Seventh Street, N.W., Suite 300, Washington, DC 20530

Dear Ms. Moltenbrey: This letter is in response to the request for public comments on the proposed settlement of the government's action blocking the acquisition of InnoServ Technologies, Inc. by General Electric Co. In accordance with the proposed settlement, GE is required to sell InnoServ's PREVU software to a third party approved by the Justice Department. The software's buyer could then use PREVU in its service business, or resell or license PREVU to other parties. Because Star Technologies believes that PREVU either contains software developed by it or that portions of PREVU were derived from such software, approval of the sale of PREVU must address the assignment of transfer of Star's underlying software.

By way of background, Star Technologies was founded in 1981 as a manufacturer of array processors, which are devices used in conjunction with general-purpose computers to accelerate the processing of large amounts of numerical data. While the earliest applications for Star's array processors were in oil exploration, other applications included molecular modeling, and signal and imaging processing. Beginning in 1984, Star began selling its array processors to General Electric Medical Systems for use in GE's CT scanners. Independently from its business relationship with GE, which constituted a substantial amount of Star's business for several years, Star developed various versions of diagnostic software for testing its array processors. The version of software of concern now is known as ''Star Maintenance Software'' or ''SMS.'' Although developed primarily for internal use, Star has licensed SMS to numerous customers solely for their own internal use.

Among the customers to whom Star licensed SMS were several firms that perform third-party maintenance on GE's CT scanners. They use SMS to diagnose only the array processor elements designed and manufactured by Star that are a component of the GE CT scanners. While InnoServ is currently a customer of Star's for the repair of circuit boards used in Star's array processors. InnoServ has not licensed SMS from Star.

In recent discussions with Mr. Philip Cannon, Star's Vice President of Technology, Ms. Cathy Donovan, InnoServ's Manager of Technical Support, acknowledged that PREVU uses Star's diagnostic software, and also expressed her belief that such use was appropriately licensed by Star. Assuming that SMS was validly licensed from Star, any acquirer of PREVU would still need Star's consent to transfer or assign that license since SMS is an integral part of PREVU. Absent a valid existing license, the acquirer of PREVU must obtain a new license from Star for the SMS portion of the PREVU system.

With respect to the licensing of SMS, Star is willing to support the appointed trustee in establishing with a prospective acquirer of PREVU an appropriate license for the use of Star's diagnostic software. In any event, Star wishes to be apprised of attempts to sell the PREVU software so that it can ensure that its intellectual property is protected from misuse. If you have any questions or desire additional information in this regard, please contact the undersigned at (301) 315–0240.

Sincerely,

Star Technologies, Inc.

R.W. Tschippert,

Director of Contracts.

Certificate of Service

This certifies that on November 17, 1998, I caused copies of the foregoing Response to Public Comments 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. 2004, Counsel for General Electric Company.

Malcolm R. Pfunder, Esquire,

Gibson, Dunn & Crutcher, LLP, 1050 Connecticut Ave., N.W., Washington, D.C. 20036, Counsel for Innoserv Technologies, Inc.

By Facsimile (Without Appendices) and First-Class Mail

Robert Compton,

Star Technologies, 1151 Seven Locks Road, Building A, Potomac, MD 20854, (301) 315–0260 (facsimile).

Ronald S. Katz, Esquire,

Coudert Brothers, 4 Embarcadero Center, Suite 3300, San Francisco, CA 94111, Counsel for Independent Service Network International, (415) 986-0320 (facsimile).

Jon B. Jacobs

[FR Doc. 98–32147 Filed 12–8–98; 8:45 am]

BILLING CODE 4410–11–M