Land Management, HC 33 Box 33500, Ely, Nevada 89301. The ROD is also available at the following Web site: *http://www.blm.gov/nv/st/en/fo/ely_field_office.* Printed copies of the ROD are available for public inspection at several locations listed in the **SUPPLEMENTARY INFORMATION** section of this notice.

A limited number of copies of the document will be available at the following BLM offices:

—Las Vegas District Office, 4701 North Torrey Pines, Las Vegas, Nevada;
—Ely District Office, 702 North Industrial Way, Ely, Nevada; and
—Nevada State Office, 1340 Financial Boulevard, Reno, Nevada.

FOR FURTHER INFORMATION CONTACT: Doris Metcalf, telephone: (775) 289–1852, or e-mail: *doris_metcalf@blm.gov.*

SUPPLEMENTARY INFORMATION: Printed copies of the ROD are available for public inspection at the following locations:

—University of Nevada-Reno, Getchell Library, Government Publication Dept., Reno, Nevada;
—Washoe County Library, 301 South Center Street, Reno, Nevada;
—White Pine County Library, 950 Campton Street, Ely, Nevada;
—Nye County Library, 167 S. Central Street, Tonopah, Nevada;
—Lincoln County Library, 63 Main Street, Pioche, Nevada; and
—Clark County Library, 1401 E. Flamingo Rd., Las Vegas, Nevada.

The main issues addressed in the Final EIS were visual resources, biological resources, lands with wilderness characteristics, and socioeconomic effects. Three alternatives were analyzed in the Final EIS: (1) The Proposed Action, in which the power line would be located largely within West-Wide Energy Corridors; (2) an alternative alignment within the corridors; and (3) no Action, which would be to not authorize the ROW.

After careful consideration of many factors, including the need to provide electricity to the Western United States and strengthening and stabilizing the economies of White Pine, Nye, Lincoln, and Clark Counties, and balancing those factors with the need to protect air, visual and biological resources, the BLM has selected the agency preferred alternative. The BLM's preferred alternative will approve all of the facilities described in the Proposed Action, including the transmission-line route, except the R–SS–Site B sub-alternative, including the access road and Falcon-Gondor loop-ins will replace the Robinson Summit Substation components. Various site-specific applicant-committed mitigation measures will be implemented at the development stage to protect other resources and uses.

Comments on the ON Line Draft Supplemental EIS received from the public, cooperating agencies and internal BLM reviewers were incorporated into the Final EIS. The comments resulted in corrections, clarifying text, and the addition of new text used in the analysis of impacts. The ON Line Final EIS addresses impacts of the power line on private lands and those administered by the BLM.

This decision is subject to appeal to the Interior Board of Land Appeals (IBLA) as provided in 43 CFR part 4, within 30 days from the date of publication of this Notice of Availability in the **Federal Register**. The ROD contains instructions for filing an appeal with the IBLA.

The ROD for this project addresses only BLM's decisions for public lands and resources administered by BLM.

Rosemary Thomas,

District Manager, Ely District Office.

[FR Doc. 2011–6461 Filed 3–17–11; 8:45 am]

BILLING CODE 4310–HC–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Graftech International Ltd. and Seadrift Coke, L.P.; Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below the comment received on the proposed Final Judgment in *United States* v. *GrafTech International Ltd. and Seadrift Coke, L.P.,* Civil Action No. 1:10–CV–02039, which was filed in the United States District Court for the District of Columbia on March 3, 2011, together with the response of the United States to the comment.

Copies of the comments and the response are available for inspection at the Department of Justice Antitrust Division, 450 Fifth Street, NW., Suite 1010, Washington, DC 20530 (*telephone:* 202–514–2481), on the Department of Justice's Web site at *http://www.usdoj.gov/atr,* and at the Office of the Clerk of the United States District Court for the District of Columbia, 333 Constitution Avenue, NW., Washington, DC 20001. Copies of any of these materials may be obtained upon request and payment of a copying fee.

Patricia A. Brink,

Director of Civil Enforcement.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
UNITED STATES OF AMERICA,
Plaintiff,
v.
GRAFTECH INTERNATIONAL LTD.
and
SEADRIFT COKE L.P.
Defendants.
CASE NO.: 1:10-cv-02039
JUDGE: Collyer, Rosemary M.
DECK TYPE: Antitrust
DATE STAMP: March 3, 2011

Response of Plaintiff United States to Public Comment on the Proposed Final Judgment

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) ("APPA" or "Tunney Act"), the United States hereby responds to the public comment received regarding the proposed Final Judgment in this case. After careful consideration of the comment submitted, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this response have been published in the **Federal Register**, pursuant to 15 U.S.C. 16(d).

The United States filed a civil antitrust complaint on November 29, 2010, seeking to enjoin GrafTech International Ltd.'s ("GrafTech") proposed acquisition of Seadrift Coke L.P. ("Seadrift"). The Complaint alleged that the acquisition likely would substantially lessen competition in the worldwide sale of petroleum needle coke used to manufacture graphite electrodes, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. That loss of competition likely would result in higher prices, reduced output and less favorable terms of sale in the global petroleum needle coke market.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment, which is designed to remedy the expected anticompetitive effects of the acquisition, and a Stipulation signed by the plaintiffs and the defendants, consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act, 15 U.S.C. 16. Pursuant to those

requirements, the United States filed its Competitive Impact Statement ("CIS") with the Court on November 29, 2010; the proposed Final Judgment and CIS were published in the **Federal Register** on December 7, 2010, *see United States* v. *Graftech international Ltd. and Seadrift L.P.,* 75 FR 76026; and summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, were published in The Washington Post for seven (days beginning on December 3, 2010 and ending on December 9, 2010. The sixty-day period for public comment ended on February 7, 2011; one comment was received as described below and attached hereto.

I. The Investigation and Proposed Resolution

A. The Investigation

On April 1, 2010, Defendants GrafTech and Seadrift entered into an Agreement and Plan of Merger, pursuant to which GrafTech agreed to acquire the 81.1 percent of Seadrift stock it does not already own for about $308.1 million. Immediately following the announcement of the merger, the United States Department of Justice ("Department") opened an investigation into the likely competitive effects of the transaction that spanned more than seven months. As part of this detailed investigation, the Department issued Second Requests to the merging parties and several Civil Investigative Demands ("CIDs") to third parties. The Department considered more than a million documents submitted by the merging parties in response the Second Requests and by third parties in response to CIDs. The Department also took oral testimony from eight executives from the merging parties, and conducted over 100 interviews with customers, competitors and other market participants. The investigative staff carefully analyzed the information provided and thoroughly considered all of the issues presented. The Department considered the potential competitive effects of the transaction on the production and sale of petroleum needle coke used to manufacture graphite electrodes, and concluded that the merger likely would result in higher prices, reduced output and less favorable terms of sale in the global petroleum needle coke market.

As part of its investigation, the Department considered the potential competitive effects of the merger on the markets for numerous products and services and on a variety of customer groups. The Department concluded, as explained more fully in the Complaint and CIS, the acquisition of Seadrift by GrafTech could substantially lessen competition in the international petroleum needle coke market. Seadrift is a producer of petroleum needle coke, a product purchased by GrafTech and its competitors to make graphite electrodes which are, in turn, sold to steel producers to melt scrap in electric arc furnaces. Petroleum needle coke is a key input in large-diameter (18- to 32-inch) electrodes, in particular, because they are often used in high intensity applications, where petroleum needle coke's needle-like structure, low coefficient of thermal expansion, and low impurity rate are critical to efficient conduction of strong current without costly shutdowns to replace broken or exhausted graphite electrodes. Petroleum needle coke is available from four producers: ConocoPhillips Company ("Conoco"), Seadrift and two other competitors located in Japan. Sales typically are negotiated annually, with price terms and volume targets memorialized in formal contracts.

At the time of the proposed merger, GrafTech received a substantial portion of its petroleum needle coke supply from Conoco, pursuant to a multi-year agreement ("Supply Agreement"), which also included a provision that either GrafTech or Conoco could "audit" the books and records of the other. On September 27, 2010, in response to the proposed merger, Conoco activated the "termination clause" of that agreement, which effectively locked in volume targets and imposed most-favored-nation ("MFN") pricing for three years, while leaving the audit right intact. By operation of the merger, the audit clause would extend to Seadrift the information provided to GrafTech from Conoco. Should the audit clause be used in conjunction with the MFN, for example, to verify that GrafTech was, in fact, receiving the lowest price, Seadrift potentially would have access to its largest competitor's production and pricing to all other customers. By facilitating the exchange of customer-specific, real-time, competitor pricing information, the merger was likely to facilitate coordination.

Therefore, the Department concluded, as a result of its investigation, that GrafTech's acquisition of Seadrift likely would substantially lessen competition in the development, production and sale of petroleum needle coke in the United States, leading to higher prices, reduced output and less favorable terms of sale in the worldwide petroleum needle coke market, in violation of Section 7 of the Clayton Act. The proposed Final Judgment is designed to address the threat of information exchange created by the merger, by removing the opportunity and means for Seadrift and Conoco to engage in anticompetitive activity under cover of the Supply Agreement, and possibly future supply arrangements.

B. Proposed Final Judgment

The proposed Final Judgment contains several layers of prohibited and required conduct to eliminate the anticompetitive effects that otherwise would result from GrafTech's acquisition of Seadrift. First, the terms of the proposed Final Judgment require GrafTech and Seadrift immediately to abrogate, amend or otherwise alter the current petroleum needle coke Supply Agreement between GrafTech and Conoco to remove the terms related to the ongoing audit rights, sharing of non-public or proprietary information, and MFN pricing. Had these clauses persisted, they might have allowed GrafTech and Seadrift access to Conoco's customer-specific pricing, production and other commercial terms. GrafTech also is prohibited from adding similar terms to future contracts with Conoco for the ten-year period term of the proposed Final Judgment. Second, to enforce this prohibition, GrafTech must produce copies of each petroleum needle coke supply agreement to the United States on an annual basis. As an additional safeguard against any informal exchange of pricing or output information between GrafTech, Seadrift and Conoco, the proposed Final Judgment also mandates that GrafTech strictly segregate employees who negotiate terms with Conoco from those who make decisions about pricing and production at Seadrift, and vice versa. Finally, so that the United States can detect any changes in capacity, production or sales that might suggest coordination, GrafTech must report capacity, sales and production information on a quarterly basis.

These layers of protection prevent harm without imperiling the efficiencies that GrafTech expects from the merger. GrafTech anticipates substantial, merger-specific efficiencies by internal consumption of Seadrift petroleum needle coke, which would allow the elimination of double margins. Should this result in lower GrafTech prices for graphite electrode customers, it not only would benefit those customers directly, but it also likely would incentivize other graphite electrode competitors to reduce prices in response to that competition. Verified plans to improve the quality of Seadrift petroleum needle coke likely will benefit Seadrift's

graphite electrode customers, as well as the downstream consumers of finished graphite electrodes, in the future. Thus, the source of potential harm is eliminated without depriving consumers of the procompetitive efficiencies that GrafTech and Seadrift expect their merger to generate.

II. Standard of Judicial Review

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. 16(e)(l). In making that determination in accordance with the statute, the court is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A)–(B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (DC Cir. 1995); *see* generally *United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.DC 2007) (assessing public interest standard under the Tunney Act); *United States* v. *InBev N. V./S.A.,* 2009–2 Trade Cas. (CCH) ¶76,736, No. 08–1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.DC Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the Final Judgment are clear and manageable").

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See Microsoft, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see* also Microsoft, 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.DC 2001); InBev, 2009 U.S. Dist. LEXIS 84787, at *3 Courts have held that:

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

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[1] In determining whether a proposed settlement is in the public interest, the court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." SBC Commc'ns, 489 F. Supp. 2d at 17; *see* also Microsoft, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.DC 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.DC 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), aff'd sub nom. *Maryland* v. *United States,* 460 U.S. 1001 (1983); *see* also *United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). As this Court has previously recognized, to meet this standard "[t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms, it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *United States* v. *Abitibi-Consolidated Inc.,* 584 F. Supp. 2d 162, 165 (D.DC 2008) (citing SBC Commc'ns, 489 F. Supp. 2d at 17).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, rather than to "construct [its] own hypothetical case and then evaluate the decree against that case." Microsoft, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id.* at 1459–60. As this Court recently confirmed in SBC Communications, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." SBC Commc'ns, 489 F. Supp. 2d at 15.

In its 2004 amendments to the Tunney Act,[2] Congress made clear its

[1] Cf BNS, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). See generally Microsoft, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest' ").

[2] The 2004 amendments substituted the word "shall" for "may" when directing the courts to consider the enumerated factors and amended the list of factors to focus on competitive considerations and address potentially ambiguous judgment terms. Compare 15 U.S.C. 16(e) (2004), with 15 U.S.C. 16(e)(1) (2006); *see* also SBC Commc'ns, 489 F.

Continued

intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, stating "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. 16(e)(2). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." SBC Commc'ns, 489 F. Supp. 2d at 11.[3]

III. Summary of Public Comment and The United States's Response

During the sixty-day comment period, the United States received only one comment, from a Russian graphite electrode competitor, Energoprom. Energoprom's comment, which objected to the scope of the remedy described in the proposed Final Judgment, is attached hereto. As explained in detail below, after careful review, the United States continues to believe that the proposed Final Judgment is in the public interest.

A. Summary of the Public Comment

Energoprom, a competitor of GrafTech's, is the largest producer of graphite electrodes in the Russian Federation, with facilities in the Rostov and Novosibirsk regions of Russia. Energoprom argues first that the proposed Final Judgment should be expanded to require more thorough monitoring to protect competition in the petroleum needle coke market and, in the alternative, asserts that no settlement could be crafted that would prevent anticompetitive effects from the merger of GrafTech and Seadrift.[4]

Energoprom first argues that the proposed Final Judgment does not require sufficient monitoring to prevent anticompetitive effects arising from coordination. The company contends that GrafTech's acquisition of Seadrift, in combination with GrafTech's supply agreement with Conoco, increases the likelihood of price fixing, output coordination, and other anticompetitive agreements between Seadrift and Conoco.[5] To prevent such coordination, Energoprom submits that it is necessary to collect and analyze basic economic indicators regarding these companies and the market as a whole.[6] Energoprom further objects to the ten-year duration of the proposed Final Judgment, and questions whether competition will continue after its expiration.[7]

Second, Energoprom argues that neither the Complaint nor the proposed Final Judgment addresses the possibility that unilateral effects may result from the acquisition of Seadrift by Graftech. Energoprom argues that Seadrift has "a dominant market position" in the petroleum needle coke industry.[8] Acquiring Seadrift, in the company's view, would allow GrafTech to determine the production volume and terms of sale to GrafTech's competitors in the sale of graphite electrodes, creating the potential for abuse.[9] Energoprom argues that unilateral anticompetitive effects may include a reduction of Seadrift's output to GrafTech's competitors and less favorable terms of sale to GrafTech's competitors, either of which may cause Energoprom and other graphite electrode competitors to lose customers because of reduced Seadrift output or because competitors "couldn't provide consumers as low [a] price for electrodes as GrafTech did."[10]

B. The United States's Response

Energoprom's allegations are not new; in fact, the company expressed its concerns to the United States on several occasions during the investigation of the proposed acquisition. The United States is confident that Energoprom's suggestions for additional remedial measures are unnecessary to serve the public interest. Further, the United States's exercise of its discretion not to allege in the complaint potential unilateral effects from the acquisition is beyond the scope of Tunney Act review.

1. Additional Monitoring Requirements

Energoprom asserts that, to prevent anticompetitive effects from potential coordination between GrafTech, Seadrift and Conoco, the Final Judgment must compel the "systematic" production of more information than the proposed Final Judgment currently requires, including "the conditions of contracts entered into by each producer with consumers," each company's price lists, and "other documents" that reveal "basic economic indicators."[11] Energoprom suggests this information should be compared with similar information from the "market on the whole."

The additional documents and information that Energoprom suggests should be required, at best, would be unnecessary supplements to the comprehensive remedy included in the proposed Final Judgment and, at worst, would impose a significant burden on GrafTech as well as other competitors and customers in this industry. The proposed Final Judgment already provides several layers of protection against potential anticompetitive effects, whether they manifest as price increases or output reductions, including significant reporting requirements. First, the proposed Final Judgment removes the mechanism likely to facilitate coordination on price and input by requiring that GrafTech amend its supply agreement with Conoco to remove the audit and MFN provisions prior to consummating the merger.[12] The proposed Final Judgment likewise prohibits GrafTech from adding similar provisions for ten years. Second, the proposed Final Judgment requires that GrafTech produce copies of all of its contracts with Conoco, so the United States may monitor compliance with this prohibition and detect any variation of the audit and MFN provisions that might suggest a price-fixing or output restriction arrangement. Third, the proposed Final Judgment requires that GrafTech erect a firewall that separates those GrafTech employees negotiating prices and terms with Conoco from those making decisions about price and output for Seadrifi. Finally, GrafTech must produce information revealing

Supp. 2d at 11 (concluding that the 2004 amendments effected minimal changes" to Tunney Act review).

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

[4] Energoprom also argues that GrafTech has failed to abide by Russian competition agency reporting requirements, a complaint that is beyond the scope of this review.

[5] Energoprom Comment at 2.

[6] *Id.*

[7] *Id.*

[8] *Id.* at 3.

[9] *Id.* at 4

[10] *Id.*

[11] *Id.*

[12] In fact, GrafTech has already complied with this provision in the proposed Final Judgment.

Seadrift's projected output and external sales on a quarterly basis. Any significant change in production or sales levels immediately would reveal changes in production volume that might suggest output coordination, but also likely would provide a clear signal of the attendant output effects of an anticompetitive price-fixing agreement.

In addition, Energoprom's proposal that the proposed Final Judgment should require the "systematic collection, storage and processing" of information regarding customer contracts, price lists and other "economic indicators" ignores the significant administrative burden such a requirement would impose on the Defendants, without any attendant enforcement benefit. Moreover, Energoprom suggests this comprehensive collection of data would be useful only in an effort to measure "divergence" of Seadrift sales from "the market as a whole," [13] which suggests a similar collection effort would have to be made of third parties; such a requirement not only would be burdensome, but also is beyond the scope of a settlement to a Clayton Act action brought by the United States.

Energoprom also objects to the ten-year duration of the requirements in the proposed Final Judgment, arguing that "[i]t is not clear" what the competitive environment will be like in ten years.[14] However, it is precisely because it is difficult to foresee competitive conditions more than ten years into the future that the proposed Final Judgment is limited in duration. Ten years is the standard term of most Department consent decrees, and reflects Department experience about the most appropriate period for ensuring the prevention of harm posed by most mergers. Upon expiration of the Final Judgment, the Defendants will remain fully subject to the Sherman Act and the Division will remain able to investigate any potential anticompetitive conduct.

In sum, the carefully constructed layers of requirements and prohibitions included in the proposed Final Judgment are more than sufficient to remedy the harm alleged in the Complaint, and Energoprom's suggested additions merely would impose an unnecessary burden without providing any commensurate benefit to consumers.

2. Expansion of the Complaint To Allege Unilateral Effects

Energoprom also argues that the United States should have alleged that the merger likely would lead to unilateral anticompetitive effects. Energoprom asserts that, even absent coordination with Conoco, the acquisition of Seadrift would be sufficient to allow GrafTech the ability to impose anticompetitive price increases or output restrictions on downstream customers of graphite electrodes. This argument, however, is not a valid basis for the Court to reject a proposed remedy during Tunney Act review. As discussed above, in a Tunney Act proceeding the Court must evaluate the adequacy of the remedy only for the antitrust violations alleged in the complaint. *See United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1459 (DC Cir. 1995). The Tunney Act does not usurp the United States's prosecutorial discretion to choose the type of case to bring; courts "cannot look beyond the complaint. . . unless the complaint is drafted so narrowly as to make a mockery of judicial power." SBC Commc 'ns, 489 F. Supp. 2d at 15. Energoprom, however, seeks to "construct fits] own hypothetical case and then evaluate the decree against that case"—precisely the approach specifically forbidden in Tunney Act proceedings by the DC Circuit. *See* Microsoft, 56 F.3d at 1459. In this case, the United States did not allege that the acquisition of Seadrift was likely to generate a unilateral anticompetitive effect, and it is improper for Energoprom to measure the sufficiency of the remedy against such a hypothetical case.

Accordingly, the United States continues to believe that the proposed Final Judgment will remedy the competitive harm likely to result from GrafTech's acquisition of Seadrift and that entry of the proposed Final Judgment is in the public interest.

IV. Conclusion

The issues raised in the public comment were among the many considered by the United States when it evaluated the sufficiency of the proposed remedy. The United States has determined that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comment and this response are published in the **Federal Register**.

Dated: March 3, 2011

Respectfully submitted,

Stephanie A. Fleming, Esq., United States Department of Justice, Antitrust Division, Litigation II Section, 450 5th Street, NW., Suite 8700, Washington, DC 20530, *Phone:* (202) 514–9228, *Fax:* (202) 514–9033, *stephanie.fleming@usdoj.gov.*

CERTIFICATE OF SERVICE

I, Stephanie A. Fleming, hereby certify that on March 3, 2011, I caused a copy of the foregoing Response of Plaintiff United States to Public Comment on the Proposed Final Judgment to be served upon defendants GrafTech and Seadrift, mailing the documents electronically to their duly authorized legal representatives as follows:

Counsel for Defendant GrafTech: Jonathan Gleklen, Esq., Arnold & Porter LLP, 555 12111 Street, NW., Washington, DC 20004;

Counsel for Defendant Seadrift: Craig Seebald, Esq., Joel Grosberg, Esq., McDermott, Will & Emery, 600 13th Street, NW., Washington, DC 20006;

/s/

Stephanie A. Fleming, Esq., United States Department of Justice, Antitrust Division, Litigation II Section, 450 Fifth Street, NW., Suite 8700, Washington, DC 20530, *Phone:* (202) 514–9228, *Fax:* (202) 514–9033, *stephanie.fleming@usdoj.gov*;

To: 450 Fifth Street, NW., Suite 8700, Washington DC., 20530.

Letter No: 9091–TM–01–2011

Date: January 25, 2011.

Attn.: Maribeth Petrizzi, Chief, Litigation II Section, Antitrust Division United States Department of Justice

Fax:

Re: Comments to the proposed Final Judgment regarding acquisition of Seadrift Coke L.P. by GrafTech International Ltd.

Dear Ms Petrizzi:

In connection with filing a Complaint on 29.11.2010 by the United States of America, represented by Antitrust Division of the U.S. Department of Justice to the U.S. District Court, *District of Columbia* vs. *GrafTech International Ltd.* company ("GrafTech") and Seadrift Coke LP company ("Seadrift"), relating to the proposed acquisition of Seadrift by GrafTech, together with proposed Final Judgment and Competitive Impact Statement (published in the U.S. **Federal Register** dated December 7, 2010 Vol. 75 No. 234), being guided by Section 15 U.S.C. 16(d), Closed Joint Stock Company "ENERGOPROM MANAGEMENT" (Moscow, Russia), hereinafter—the Company, being the management company of electrode plants—JSC ENERGOPROM—

[13] Energoprom Comment at 2.

[14] *Id.*

Novocherkassk Electrode Plant" (Rostov region, Russia), JSC "ENERGOPROM—Chelyabinsk Electrode Plant" (Chelyabinsk, Russia), JSC "ENERGOPROM—Novosibirsk Electrode Plant" (Novosibirsk region, Russia), all these companies together form ENERGOPROM Group, hereby presents commentary to Final Judgment.

The above Complaint was filed by the United States of America in the announcement of GrafTech—the world's largest manufacturer of graphite electrode UHP, used in electric arc furnaces for electric steel smelting, about the proposed acquisition of Seadrift—the second largest world producer of petroleum needle coke—a key raw material used to produce graphite electrode UHP. The Complaint seeks to reduce the expected anticompetitive effect of the acquisition due to taking by the parties to the transaction a number of measures listed in the proposed Final Judgment.

ENERGOPROM Group is Russia's largest producer of graphite electrodes UHP, supplies the goods to Europe and the USA and uses petroleum needle coke in the production. ENERGOPROM Group considers that the aforementioned transaction is contrary to the basic principles of antitrust laws, which might result in substantial harm to the competition not only on the world petroleum needle coke market, but also as a consequence—on the market of graphite electrodes UHP and electric steel market.

According to subsection 2 of section II of the Competitive Impact Statement the alleged acquisition of Seadrift by GrafTech may substantially lessen competition in the worldwide sale of petroleum needle coke because it will allow Seadrift to be involved in the scope of the long-term petroleum needle coke supply agreements ("Supply Agreements") between GrafTech and Conoco Philips Company (hereinafter—"Conoco")—a competitor of Seadrift, the world's largest producer of needle coke, under which Conoco must provide petroleum needle coke to GrafTech with the most-favored-nation ("MFN") basis meaning that prices to GrafTech may not exceed the lowest price charged by Conoco to its other customers; [1] to ensure compliance with this MFN guarantee, GrafTech could demand to audit Conoco documents reflecting the company's costs, pricing to specific customers, volume of production to each customer and other commercially sensitive terms of sale. As a result of GrafTech and Seadrift merger Seadrift will be entitled to audit, which will allow it to monitor online prices charged by its direct competitor from the electrode producers and petroleum needle coke volume of sales to each customer.

However, even under the circumstances of absence of the MFN regime and rights to audit, acting between GrafTech and Conoco in respect of supply may provide GrafTech (and hence Seadrift) with inappropriate, in this situation, competitive information with respect to pricing, supply and production.

This situation creates the possibility of price fixing plot, coordination of industrial production volume and other anticompetitive agreements of Seadrift with its competitor—Conoco.

Sections IV and V of the proposed Final Judgment provide measures (the required conduct and prohibited conduct of parties to the transaction), which are designed to neutralize damage to the competition, which is applied by the acquisition in question.

In accordance with these sections of the proposed Final Judgment GrafTech and Seadrift shall:

—Amend the Supply Agreement in order to remove the most favored-nation basis price clause and audit rights clause;

—Provide the Antitrust Division of the U.S. Department of Justice with a copy of any agreements relating to the supply of petroleum needle coke, formed between defendants and Conoco for the duration of the proposed Final Judgment (10 years), as well as ordinary course of business documents, which provide information on the quantity of output and sales of Seadrift;

—Separate employees who are negotiating terms with Conoco from those who make decisions about pricing and production at Seadrift. Similarly, employees of Seadrift, who are negotiating agreements with competitors of GrafTech, will be prevented from sharing any competitively sensitive information thus obtained.

These provisions in the opinion of the Antitrust Division of the U.S. Department of Justice help to ensure that defendants comply with the proposed Final Judgment, as well as ensure that Conoco and Seadrift do not coordinate their actions in terms of production volumes and prices.

In our opinion the measures referred to in the proposed Final Judgment are not sufficient and proportionate to damage caused to competition by the acquisition.

In order to prevent coordination of the two largest producers of petroleum needle coke it is necessary to carry out systematic collection, storage and processing of information about functioning of these companies in the product market by analyzing the conditions of contracts entered into by each producer with consumers, price list of each company and other documents. In this case, the most important condition for determining coordination is fixed divergence by the dynamics of basic economic indicators of the activities of these companies with the average data of similar indicators for the market on the whole.

The proposed Final Judgment does not stipulate the need to provide by companies such documents and information.

In addition, the proposed Final Judgment is only valid for 10 years. It is not clear how will competitive environment be ensured at the end of this period.

Along with this, we would like to point out the following. The Complaint in question, Competitive Impact Statement, the proposed Final Judgment analyzes only one aspect of the anti-competitive acquisitions—possibility of action coordination of two competitors—Seadrift and Conoco companies. Another important aspect of the transaction is not touched upon. Before point it out, it is necessary to give a brief description of the world petroleum needle coke market.

World petroleum needle coke market is characterized by several features:

(1) A limited number of producers.

Only four companies work on the world petroleum needle coke market, including Conoco and Seadrift. The number and composition of producers did not change for a long time.

(2) High barriers to entry the market.

Specificity of petroleum needle coke market stipulates:

- Large capital-construction facility for the production of petroleum needle coke, and in case of the existing setup—a significant change in the organization of the refinery;
- High quality requirements for raw materials or need to prepare raw materials by its desulphurization.
- Use of the closed technologies that require long-term, debugging.
- Availability of skills and experience in technical and laboratory staff.
- Strict requirements for the quality of the original product.
- Limited sales market—only the electrode industry.

Thus, the market for petroleum needle coke is capital intensive and niche, and barriers to entry are high.

[1] Such provision was activated on September 27, 2010 and valid from 2011 until the end of 2013.

(3) Lack of substitute products to petroleum needle coke.

Neither pitch needle coke nor anode coke can neither be mixed with the petroleum needle coke, nor less serve as a complete substitute for petroleum needle coke. It is fully described in paragraphs 12–14, Section IV of the Complaint.

(4) Low-elasticity of demand for the goods, which means that increasing the price for the goods does not entail reducing the demand for it, which in turn is caused by the fact that the volume of demand exceeds the supply of goods on the market.[2]

All the above indicates that the world petroleum needle coke market is oligopolistic (market of collective dominance), so that each participant of the market, including the Seadrift company, occupies a dominant position and has a large market weight, regardless of the size of its market share.[3]

This fact in itself is a cause for heightened attention to the behavior of each such entity on the market because abuse by such entity a dominant position leads to serious negative consequences for competition.

In this situation Seadrift—a company with a dominant market position of the petroleum needle coke is acquired by the company, which is the world's largest producer of graphite electrode UHP.

This acquisition creates a situation where the production volume of petroleum needle coke and sales policy of this raw material to the producers of graphite electrodes is determined by another producer of graphite electrodes—their direct competitor. This situation creates a wide field for abuse and may lead to a significant deterioration of competition not only in the petroleum needle coke, but also in the market of graphite electrode UHP.

Section III of the Competitive Impact Statement states: "GrafTech anticipates substantial, merger-specific efficiencies by internal consumption of Seadrift petroleum needle coke, which would allow the elimination of double margins. Should this result in lower GrafTech prices for graphite electrodes downstream, it likely would incentivize other graphite electrodes competitors to reduce prices in response of that competition".

We do not believe that these conclusions are correct and, on the contrary, we would like to indicate the following possible ways to abuse by GrafTech and Seadrift companies:

(1) GrafTech may use the control over the supply of petroleum needle coke produced by Seadrift company to reduce the production of petroleum needle coke and higher prices for graphite electrodes.

By limiting the supply of petroleum needle coke GrafTech may interfere other producers of graphite electrodes to deliver the required amount of graphite electrodes to maintain the same level of production in industry.

(2) Prices for needle coke produced by Seadrift for other customers may be raised; so GrafTech may increase its market share at the expense of other producers of graphite electrodes because they couldn't provide consumers as low price for electrodes as GrafTech did.

(3) GrafTech may use the methods of unfair competition, forcing Seadrift waive or deviate without good reason to conclude contracts with particular buyers, to set different prices for coke for different customers, to impose needle coke consumers contract terms not profitable for them. This creates a situation where market players will be in different conditions and products of some may become uncompetitive.

In conclusion, we would like to draw attention to one point.

The market of petroleum needle coke and graphite electrodes UHP market are global and the Russian market is its integral part.

According to Russian law, if the transaction made outside the territory of the Russian Federation may have an impact on the state of competition in the Russian Federation it is subject to agreement with the Federal Antimonopoly Service of the Russian Federation. To our knowledge, Seadrift and GrafTech companies did not receive such approval, and therefore violated the laws of the Russian Federation.

Summarizing up the above said in its Complaint, the United States represented by Antitrust Division of the U.S. Department of Justice do not cover all the negative effects of the acquisition in question, but analyze only one aspect of it. But even in this aspect the measures stipulated by the proposed Final Judgment are not adequate and sufficient to prevent damage by the competition.

Public interests are to create maximum favorable conditions for the functioning of free market economy with there are separate, independent entities. The acquisition of Seadrift by GrafTech is inherently anti-competitive—GrafTech—the largest consumer of petroleum needle coke acquires the largest producer of petroleum needle coke, which forms the basis for discrimination of all other customers of this raw material in the whole world, which will negatively affect not only producers of graphite electrodes, but also producers of electric steel. In this connection the proposed Final Judgment by definition does not and can not be in the public interest, since the transaction should not be performed and approved under any circumstances, and therefore any proposed measures do not compensate for the damage which will be caused to competition in the petroleum needle coke market as well as and graphite electrodes market UHP that will negatively impact the electric steel market.

Based on the foregoing, ENERGOPROM Group requests Antitrust Division of the U.S. Department of Justice to withdraw its consent to the proposed Final Judgment.

Attachments:

—Articles of Association of CJSC "ENERGOPROM MANAGEMENT";
—Certificate of state registration of CJSC "ENERGOPROM MANAGEMENT";
—Decision of the sole shareholder on the appointment of the General Director of the company.

All documents are appostilled and translated into English.

Contacts: Closed Joint Stock Company <<ENERGOPROM MANAGEMENT>> 123001, Russia, Moscow, Sadovaya-Kudrinskaya, 32/1, Tel +7 495 789 96 46, fax +7 495 789 96 47, *Web-site: www.energoprom.ru, Contact e-mail: nproskurdina@energoprom.ru.*

Sincerely yours,

General Director Nadtochy A.

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[2] Reducing the price of petroleum needle coke, and consequently reducing the volume of its sales in 2009 is not indicative, because it is caused by the global financial crisis.

[3] The Competitive Impact Statement states that the Seadrift world market share is 19%.

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

[OMB Number 1117–0009]

Agency Information Collection Activities: Proposed Collection; Comments Requested: Controlled Substances Import/Export Declaration—DEA Form 236

ACTION: 60-Day Notice of Information Collection Under Review.

The Department of Justice (DOJ), Drug Enforcement Administration (DEA), will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with