IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. NATIONAL BROADCASTING COMPANY, INC., Defendant-Appellee, COALITION TO PRESERVE THE FINANCIAL INTEREST AND SYNDICATION RULE, Applicant for Intervention-Appellant.	No. 93-56592
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RESPONSE OF THE UNITED STATES IN OPPOSITION TO
INTERVENOR-APPLICANTS' MOTIONS FOR STAY PENDING APPEAL

IN THE UNITED STATES COURT OF APPEALS
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INTRODUCTION

The State of California and Governor Pete Wilson ("California"), and the Coalition To Preserve the Financial Interest and Syndication Rules (the "Coalition") have moved for a stay of the district court order (Coal. App. 180-81)[1] approving consensual modifications of antitrust consent decrees entered in the United States' cases against National Broadcasting Company, Inc., CBS, Inc., and American Broadcasting Companies, Inc. ("the Networks"). Movants seek to stay the decree modifications pending their appeals from the district court's denial of their motions to intervene in the modification proceedings (Coal. App. 173-74). The United States, which consented to and advocated the decree modifications sought by the Networks, opposes the stay motions.

Neither California nor the Coalition has shown that the denials of intervention are likely to be reversed by this Court or that they raise any substantial legal question. Moreover, California and the Coalition have not shown that, even if they were permitted to intervene and to appeal the modification order, that order likely would be reversed or would raise any substantial legal question. California and the Coalition also have failed to show that the balance of equities favors a stay. The district

[1] "Coal. App." refers to the "Appendix for Motion for Stay Pending Appeal" filed by the Coalition; "Cal. App." refers to the Appendix filed by the State of California; "NW App." refers to the Supplemental Appendix filed by the Networks.

court found that it is in the public interest to modify the consent judgments (Coal. App. 180). In approving the decree modifications and denying motions for stay pending appeal (see Coal. App. 174-75), the court expressly considered the contentions of the Coalition and California that anticompetitive conduct by the Networks would be likely absent the decree restrictions, and it found those contentions meritless. Delay in implementing a decree modification that the Department of Justice and the court have concluded will serve the public interest in competition obviously would be contrary to the public interest, as well as the Networks' private interests.

STATEMENT[2]

The consent decrees entered by the district court in the United States' antitrust cases against the three major television networks, ABC, CBS and NBC, prohibited the defendant Networks from obtaining financial interests or syndication rights, other than network exhibition rights, in any television programs produced, in whole or in part, by an independent producer (section IV, Coal. App. 13). See United States v. National Broadcasting Co., 449 F. Supp. 1127 (C.D. Cal. 1978).[3] The decrees also prohibited, subject to certain exceptions, the

[2]The Networks' Opposition to the Motions for Stay Pending Appeal of Intervention Orders, Dec. 9, 1993, provides a complete chronology of the decree proceedings in the district court and this Court and of proceedings on the Federal Communications Commission's financial interest and syndication rules before the FCC and the Seventh Circuit.

[3]Virtually identical decrees were entered against CBS and ABC in 1980.

Networks from conditioning the right to network exhibition of a program on the receipt of any right or interest from that program's producer (section VI(A), Coal. App. 14). In May 1992, the defendant Networks moved to modify the decrees to eliminate these "financial interest and syndication restrictions."

The United States tentatively consented to the proposed modifications. Following its standard procedures for modification or termination of antitrust decrees, the Department of Justice filed a memorandum with the district court explaining the background of the decrees, the standard applicable to judicial review of consensual antitrust decree modifications, and the bases for its conclusion that removal of the decrees' financial interest and syndication restrictions would further the public interest in competition.[4] At the Department's request, the Court entered an order which required the defendants to publish notice of the proposed modifications and instituted a 60-day period during which the public was encouraged to submit comments to the Department regarding the proposed modifications. (NW App. 371) California and the Coalition submitted comments

[4]Memorandum of the United States in Response to Motion of Defendant [Network] To Modify the Final Judgment, May 7, 1992 ("US Modification Mem.") (NW App. 1-53) (In the modification proceedings, identical memoranda were filed in all three cases.)

opposing the modifications;[5] the Department filed all comments with the court on August 27, 1992.

California and the Coalition then moved to intervene in the decree modification proceedings. California contended that it had a right to intervene under Fed. R. Civ. P. 24(a). Alternatively, California sought permission to intervene under Fed. R. Civ. P. 24(b)(1) and (2). The Coalition sought only permissive intervention under Rule 24(b)(2). The United States (NW App. 294-320) and the Networks (NW App. 253-93) opposed these motions. The United States made clear that it had no objection to California and the Coalition presenting to the court their views on the proposed modification, but pointed out that intervention was not necessary for that purpose. Even without intervenor status, movants had had ample opportunity to submit comments that the court would consider, and the court also could allow them to participate in any hearing on the modification.

On October 19, 1992, the district court (Judge Kelleher) held a hearing on the motions to intervene, and announced his "ruling" that:

> both with respect to the Coalition's motion to intervene, which is on the ground of permissive intervention, and the motion of the State of California to intervene based both on its claim to entitlement as of right and permissibly, each motion is denied.

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[5]The Association of Independent Television Stations (INTV), which has filed a statement amicus curiae in support of the stay motions, also was among the commenters opposing the modification. The Federal Trade Commission's Bureau of Economics, Action for Children's Television, and a group of labor and senior citizens organizations supported the modification.

Tr. 28-29 (Coal. App. 58-59). The ruling was noted in the Civil Minutes (Coal. App. 62), but no order was entered at that time. Neither the Coalition nor California filed a notice of appeal from the denial of the intervention motions. However, they filed ex parte applications for a stay of the district court proceedings pending appeal of the intervention rulings. (Coal. App. 110, Cal. App. Ex.K).

Over a period of several months, the Department of Justice reviewed and considered all the comments on the proposed modification. On November 17, 1992, the Department filed the Response of the United States to Public Comments ("US Response") (Coal. App. 63-108). The United States' Response addressed and refuted the various arguments of California, the Coalition and other commenters opposed to the proposed modification. The United States reiterated its conclusions that there was no competitive basis for retaining the decree restrictions and that the restrictions could themselves be anticompetitive. Accordingly, the United States asked the court to approve the modifications as consistent with the public interest in competition.[6]

Orders filed on August 6, 1993, denied the stay motions (Judge Kelleher) (Coal. App. 147-48), and transferred proceedings in

[6]In December 1992, the Seventh Circuit vacated financial interest and syndication restrictions imposed by the Federal Communications Commission. The court of appeals concluded that the FCC had failed to show that its rules would promote competition or serve any other public purpose. Schurz Communications, Inc. v. FCC, 982 F.2d 1043 (7th Cir. 1992).

this case to Judge Real (Coal. App. 149-50). The order denying the stay referred (Coal. App. 147) to "the Court's October 19, 1992 Order denying intervention." The court then scheduled a hearing on the modification motions for October 18, 1993. Prior to the hearing, the Networks, California and the Coalition filed "status reports." California and the Coalition requested that the court enter orders on the intervention motions and reiterated their requests for a stay of proceedings (or of any order approving the modification) pending appeals from the denial of intervention. (Coal. App. 150-55; 156-60.) The networks requested that the district court promptly enter the modification order. (Coal. App. 163-70; NW App. 358-64.) Counsel for California and the Coalition, as well as counsel for the Networks and the United States, appeared at the October 18, 1993, hearing. Judge Real asked all counsel whether they had anything to add to their written submissions. No one did. (Coal. App. 365-70.)

The district court's opinion on the modification motions was entered November 10, 1993. (Coal. App. 170-79.) The order "finding that it is in the public interest to modify the Consent Judgment[s]" and modifying the decrees so as to delete the financial interest and syndication restrictions was entered November 15, 1993. (Coal. App. 180-81.) In the opinion, the district court first summarized the history of the decrees, the significant changes that have occurred in the television industry since the decrees were entered, and the public notice and comment proceedings that had been held on the proposed decree

modifications. (Coal. App. 170-75.) Judge Real also stated that he had reviewed the motions for intervention and for stay pending appeal, and he adopted Judge Kelleher's denials of those motions. (Coal. App. 174-75.)

The district court then explained why it agreed with the Department of Justice that the Networks currently do not have monopsony power in program purchasing and would not be likely to acquire monopoly power in syndication. (Coal. App. 175-78.) The Court also found that there was no evidence of collusion among the Networks. (Id. at 175.) In reviewing the proposed modifications, the court explicitly stated that it had considered all comments and the materials that California and the Coalition had submitted in support of their intervention motions (id. at 175), and it expressly addressed their contentions that the Networks have monopoly or monopsony power, individually or through tacit collusion (id. at 175-78). The court, however, found no evidence to support these contentions, and it concluded that "[w]ithout evidence, the public interest is not served by [California and the Coalition's] self-serving suppositions" that collusion among the networks or other anticompetitive effects would be likely absent the decree restrictions. (Id. at 176.) The court also noted that the FTC's Bureau of Economics agreed with the Department's competition analysis and that the Seventh Circuit had found the FCC's financial interest and syndication restrictions unjustified. (See id. at 177-78.)

Thus, after considering the entire record, the court concluded that, under present conditions:

> the logic of restricting markets to aid competition is flawed. It is eminently possible that even in 1970 the anti-trust theory applicable to the FIN-SYN rules was flawed. That is not before me now but certainly in 1993 with the entry of the Fox network, the substantial rise in the number of program producers, the dramatic increase in cable television stations and the development in the sophistication of VCRs the competitive climate today would unfairly penalize NBC, ABC and CBS in the financing and syndication of off-network programming.

(Coal. App. 179.)

The Coalition filed a notice of appeal from the denial of intervention on November 17, 1993, and filed a motion in this Court on November 24, 1993, for stay of the modification order pending resolution of the intervention appeals. California filed its notice of appeal on November 19, 1993, and its stay motion on November 30.

ARGUMENT

As the two district judges who considered the stay motions concluded, California and the Coalition have failed to satisfy either of this Circuit's "two interrelated legal tests" for determining whether proceedings should be stayed pending appeal. Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983) (citing Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1201 (9th Cir. 1980)). They have neither shown "both a probability of success on the merits and the possibility of irreparable injury," nor "demonstrate[d] that serious legal questions are raised and that the balance of hardships tips sharply in [their] favor." Id. (citations omitted). Moreover,

"the public interest is a factor to be strongly considered" in determining whether to grant a stay pending appeal. Id. (citing Warm Springs Dam Task Force v. Gribble, 565 F.2d 549, 551 (9th Cir. 1977)). The public interest weighs strongly against continuation of the Network decrees' financial interest and syndication restrictions because the Department of Justice and the district court have found that removal of these restrictions will serve the public interest in competition.

I. MOVANTS HAVE NEITHER SHOWN A PROBABILITY OF SUCCESS ON THE MERITS NOR RAISED SERIOUS LEGAL QUESTIONS

Movants are not parties to the government's antitrust cases against the networks or to the decree modification proceedings. Unless the order denying them intervenor status is reversed, they will have no right to appeal from the order modifying the decree. United States v. LTV Corp., 746 F.2d 51, 53 (D.C. Cir. 1984); 7C Charles A. Wright, et al., Federal Practice and Procedure §1923 at 518 (1986). Thus, they are not entitled to a stay of the modification order unless they raise, at a minimum, serious legal questions both as to the intervention order and the modification order. Their motions fail to make that showing with respect to either order.

A. The Orders Denying Intervention Were Proper

When the district court was considering in 1977 whether to enter the NBC decree, CBS, which thought the decree too restrictive of the Networks, and independent program suppliers, who contended that the proposed decree did not impose sufficient restrictions, moved to intervene. The district court denied those motions. See United States v. NBC, 449 F. Supp. at 1143.[7] This Court affirmed in an unpublished memorandum (Coal. App. 22-29), concluding that the applicants had no right to intervene because they had not "made a strong showing that the government inadequately represents their interests" (id. at 26-28) and that the district court had not abused its discretion in denying permissive intervention (id. at 28-29). There is no reason to believe that the result on the present appeals will be different.

1. California Had No Right to Intervene

California, but not the Coalition, sought intervention as of right in the decree modification proceeding under Fed. R. Civ. P. 24(a)(2).[8] This Court reviews de novo orders denying intervention of right. See, e.g., California v. Tahoe Regional Planning Agency, 792 F.2d 775, 781 (9th Cir. 1986); In re Benny,

[7] In denying the motions, the district court emphasized that it had given "all interested persons . . . every opportunity fully and fairly to state their views and comments that formal intervention would have granted," and it took into account the clear Congressional intent not to compel a hearing or trial on the public interest issue in a consent decree proceeding. 449 F. Supp. at 1143-44.

[8] California does not claim that any statute gives it an unconditional right to intervene under Fed. R. Civ. P. 24(a)(1).

791 F.2d 712, 721-22 (9th Cir. 1986). For purposes of its stay motion, California contends that the district court erred in denying intervention of right only with respect to its "claim that the Tunney Act [Antitrust Procedures and Penalties Act, 15 U.S.C. §16] applies to these proceedings," and not with respect to its contention that the proposed modification is contrary to the public interest.[9]

Rule 24(a)(2) and this Court's decisions applying that rule establish a four-part test for intervention as of right. The application must be timely; the applicant must claim an interest in the property or transaction that is the subject of the action; the applicant must be so situated that, without intervention, disposition of the action may as a practical matter impair or impede the applicant's ability to protect its interest; and the applicant's interest must be inadequately represented by existing parties to the litigation. Fed. R. Civ. P. 24(a)(2); Scotts Valley Band of Pomo Indians v. United States, 921 F.2d 924, 926 (9th Cir. 1990); California v. Tahoe Regional Planning Agency, 792 F.2d at 781. Denial of California's request for intervention to litigate its contention that the Tunney Act applied to the decree modification proceedings was entirely proper because California failed to meet that standard.

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[9]Cal. Motion at 10, 13, 14 n.9 ("The State contended in the district court that it had a right to intervene under Federal Rules of Civil Procedure, Rule 24(a) so it could address the question of whether the modification is in the public interest. For purposes of this [stay] motion only, the State is not asserting Rule 24(a) as a ground to intervene on this issue.")

Even assuming that under, Rule 24(a), California's concern that the Tunney Act be applied rises to the level of "an interest relating to the property or transaction which is the subject of" the modification proceedings, the denial of intervention did not impair its opportunity to litigate that issue. California raised the Tunney Act issue in its comments on the proposed modification (NW App. 173-95), and the United States filed California's comments with the court. California also addressed the Tunney Act issue in its motion to intervene. (Cal. App. 20-21, 113-18.)

At the October 1992 hearing on the intervention motions, Judge Kelleher specifically asked counsel for California: "And what further would you do to indicate that the statute applied beyond what you have already done?" Counsel responded:

> I think I can flush [sic] it out in perhaps a little bit more detail, present a little bit more of the background, the legislative history of the case in perhaps little more detail. If we put in the nuts and bolts of it, I suspect we can probably flush [sic] it out a little bit more in an actual motion to intervene.

Tr. 21 (Coal. App. 51). In these circumstances, Judge Kelleher properly considered but rejected California's Tunney Act arguments as a basis for intervention. Tr. 22 (Coal. App. 52). A year passed between that hearing and Judge Kelleher and Judge Real's October 1993 hearing. California neither offered any new submissions on the Tunney Act issue nor made any request to supplement its earlier filings. Thus, the denial of intervention did not impair California's ability to present its arguments on the applicability of the Tunney Act.

Moreover, there would have been no point to further litigation over the applicability of the Tunney Act at the time California filed its motions, or at any time thereafter. The United States consistently has taken the position that the Tunney Act applies only to the initial entry of consent decrees,[10] but there is no doubt that the same standard -- the public interest standard -- applies to the entry of a consent decree under the Tunney Act and to the consensual modification of an antitrust decree. (See NW App. at 10-15, 33 n.49.) And the district court applied the public interest standard. (Coal. App. 180.) Further, by the time California filed its motion to intervene, the district court already had adopted the procedures recommended by the Department, which provided the same opportunity for public comment that the Tunney Act would have afforded, while improving actual notice.[11] And the Tunney Act, even if applicable, would not have required

[10]In United States v. Motor Vehicle Mfrs. Ass'n, 1981-2 Trade Cas. ¶64,370 (C.D. Cal. 1981), the district court directed the parties to a consensual modification to follow the Tunney Act procedures. The court's order, however, did not purport to hold that the Tunney Act is applicable to all consent modifications as a matter of law, and more recently the Second Circuit has held that the APPA is not applicable to judgment modification or termination proceedings. United States v. American Cyanamid Co., 719 F.2d 558, 565 n.7 (2d Cir. 1983) (quoting In re International Business Machines Co., 687 F.2d 591, 600 (2d Cir. 1982)), cert. denied, 465 U.S. 1101 (1984).

[11]California had notice of the procedures proposed in the United States' May 7, 1993 memorandum and of the court's May 14, 1993 order adopting those procedures. But did not raise any objections until it submitted its comments to the Department of Justice on August 7, 1993.

the Court to permit intervention,[12] take evidence, hold hearings or adopt any other specific post-comment procedures to obtain additional views from the public.

Nor would a strict application of the Tunney Act procedural requirements have added any relevant information to the record on which the court reviewed the proposed modifications. The US Modification Memorandum (NW App. 1-53) provided the information and analysis usually included in a competitive impact statement, see 15 U.S.C. §16(b), to the extent the requirements fit the modification context. As was implicit in the US Modification Memorandum, the only alternative the United States considered, see 15 U.S.C. §16(b)(6), was to leave the financial interest and syndication restrictions unchanged, and the US Modification Memorandum fully explained the reasons for rejecting this alternative. In evaluating the likely competitive effects of removing the decrees' financial interest and syndication restrictions and deciding whether to consent to the proposed modifications, the Department of Justice considered a wide range of materials and obtained information from many interested persons. (See NW App. at 15.) However, there were no "materials and documents which the United States considered determinative in formulating" the proposed modification. See 15 U.S.C. §16(b).

[12]Rule 24 governs intervention under the Tunney Act. See United States v. LTV Corp., 746 F.2d 51, 55 (D.C. Cir. 1984); United States v. Associated Milk Producers, Inc., 394 F. Supp. 29, 41, 43 (W.D. Mo. 1975), aff'd, 534 F.2d 113 (8th Cir.), cert. denied, 429 U.S. 940 (1976).

Accordingly, by the time California filed its motion to intervene, any error in not adhering strictly to Tunney Act procedures was of no practical significance to the modification proceedings.[13] In these circumstances, further litigation to resolve the theoretical issue whether the Tunney Act applied would only have delayed those proceedings unduly. Cf. United States v. Western Elec. Co., 552 F. Supp. 131, 145 (D.D.C. 1982), aff'd mem. sub. nom. Maryland v. United States, 460 U.S. 1001 (1983) (parties agreed that Tunney Act procedures would apply; it was "unnecessary for the [c]ourt to pass specifically upon the technical applicability of the Act").[14]

2. The District Court Did Not Abuse Its Discretion in Denying Permissive Intervention

California and the Coalition also sought permissive intervention under Rule 24(b). Rule 24(b) provides that "[u]pon timely application, anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have

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[13]Cf. United States v. Bechtel Corp., 648 F.2d 660, 664 (9th Cir.) (government's failure to comply with Tunney Act time limits did not preclude entry of decree), cert. denied, 454 U.S. 1083 (1981).

[14]American Express Co. v. United States Dep't of Justice, 453 F. Supp. 47 (S.D.N.Y. 1978), does not support California's contention (Motion at 12) that it should have been allowed to litigate the Tunney Act issue as an intervenor. The court in that case dismissed a separate action brought to challenge the procedures being used in a consent decree modification proceeding, holding that "any arguments directed to the applicability of the APPA [Tunney Act] to the modification or vacation of an existing consent decree are properly made directly to the court before which such proceedings are pending in the form of a motion to intervene or otherwise participate in those proceedings." 453 F. Supp. at 49 (emphasis added).

a question of law or fact in common." (Emphasis added.) In determining whether to grant, deny or limit permissive intervention, the court is to "consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Id. Orders denying permissive intervention are reviewed under an abuse of discretion standard. See, e.g., In re Benny, 791 F.2d at 721-22; California v. Tahoe Regional Planning Agency, 792 F.2d at 782.

a. Intervention was not necessary to allow movants to present their views and arguments to the court on any "claim or defense" they might have had related to the decree proceedings.[15] California and the Coalition submitted extensive comments, in which they set forth their concerns about possible anticompetitive effects of the proposed modifications (NW App. 54, 172, 173-95); the Coalition's comments inclujded a lengthy affidavit from an economic expert (NW App. 125-72). The Department of Justice filed all comments with the district court,

[15]The district court gave the Coalition ample opportunity to be heard on behalf of its members; thus there is no merit to the Coalition's argument (Motion at 10) that it should have been allowed to intervene because it has many members who are "the past and prospective victims of the networks' anticompetitive conduct."

Amicus INTV's assertion (Stmt. at 4) that only the Networks and the Department of Justice were "permitted to place their views before the court directly," mischaracterizes the district court's proceedings. The Department of Justice filed all comments (including California's, the Coalition's and INTV's) with the court several months before the United States' Response was filed, and in exactly the form they were submitted to the Department. INTV did not seek to intervene or to participate in any hearings, and its interests were not impaired by the rulings on the intervention motions.

carefully considered them before confirming its tentative decision to consent to the decree modifications, and filed a detailed response with the court (Coal. App. 63-108).

The Coalition and California not only were permitted to make written filings; they also received notice of all proceedings, including the final October 1993 hearing on the proposed modifications. Their counsel appeared at the hearing but offered neither further argument nor additional evidence in response to Judge Real's question whether anyone had anything to add to their written submissions. (NW App. 367-68.)[16] Further, the district court's opinion makes clear that, before approving the modification, it carefully considered all submissions, including the comments and intervention motions of California and the Coalition. (Coal. App. 175.)

Accordingly, when Judge Real reviewed the intervention motions, he could not help but conclude, as had Judge Kelleher, that whatever additional proceedings movants might seek as intervenors would be likely to cause undue delay in the modification proceedings. In these circumstances, denial of intervention was a proper exercise of discretion.[17]

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[16]The Department of Justice had suggested that the court afford the Coalition and California an opportunity to present oral argument on the motions. (See Cal. App. 52; NW App. 354.)

[17]The Coalition asserts (Coal. Motion at 9) that "Judge Kelleher did not find that the Coalition had failed to satisfy the requirements of Fed. R. Civ. P. 24(b)." Coal. Mem. 7, 20. That finding, however, was implicit in his ruling that the motions were denied. Further, Judge Real expressly stated that he had considered all the submissions, and there is no reason to

(continued...)

The district court's decision here accords with the decisions of other courts, which have generally exercised their discretion to deny motions for permissive intervention in antitrust consent decree and decree modification proceedings. See, e.g., United States v. G. Heileman Brewing Co., 563 F. Supp. 642, 649-50 (D. Del. 1983); United States v. Stroh Brewery Co., 1982-2 Trade Cas. (CCH) ¶64,804 at 71,960 (D.D.C. 1982) (in consent decree proceeding permissive intervention denied under Fed. R. Civ. P. 24(b) denied because "where there is no claim of bad faith or malfeasance . . . the potential for unwarranted delay and substantial prejudice to the original parties implicit in the proposed intervention clearly outweighs any benefit that may accrue therefrom"); United States v. Automobile Manufacturers Ass'n, 307 F. Supp. 617, 620 (C.D. Cal. 1969), aff'd, 397 U.S. 248 (1970) (permissive intervention denied to parties seeking to block entry of consent decree); United States v. Carrols Dev. Corp., 454 F. Supp. 1215, 1221 (N.D.N.Y. 1978) (same). Indeed, movants cite no case in which this Court or any other court of appeals has reversed an order denying permissive intervention in an antitrust decree proceeding.

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[17](...continued)
believe that he or Judge Kelleher failed to consider any factors he was required to take into account under Rule 24(b). In any event, this Court "may affirm a decision of the district court . . . on any ground finding support in the record. If the district court decision is correct, it must be affirmed, even if the court relied on wrong grounds or wrong reasoning." United States v. $129,374 in United States Currency, 769 F.2d 583, 586 (9th Cir. 1985) (citations omitted) (affirming denial of intervention of a right), cert. denied, 474 U.S. 1086 (1986).

The antitrust decision on which movants place greatest reliance, United States v. American Cyanamid, 556 F. Supp. 357 (S.D.N.Y. 1982), aff'd in part and rev'd in part, 719 F.2d 558 (2d Cir. 1983) (affirming grant of permissive intervention), cert. denied, 465 U.S. 1101 (1984), does not support their contention that it is an abuse of discretion to deny permissive intervention either in antitrust consent decree proceedings generally or in the circumstances of this case. At most, it establishes that a court's discretion is sufficiently broad that, at least in some cases, it also is not an abuse of discretion to grant intervention.[18]

b. Movants point to two factors Judge Kelleher identified in his comments at the October 19, 1992 hearing and argue that they provide insufficient support for his refusal to exercise his discretion to permit intervention under Rule 24(b). (Coal. Motion at 20-32; Cal. Motion at 10-12.) At that hearing, Judge Kelleher noted that, in light of the disposition of similar issues in past proceedings on this decree, he

> was rather startled to think that there were any parties who could properly contend that they had right to intervene here on the only basis really which would justify it; and

[18] In Cyanamid, the Second Circuit affirmed the grant of permissive intervention to MCI, a direct beneficiary of the decree requirement that defendant Cyanamid purchase a specified amount of melamine from unaffiliated United States producers. It held that the district court had not abused its discretion in granting intervention where "the applicant's claims that termination would have an anticompetitive effect . . . are directly related to the ultimate questions" before the court and "that no undue delay would result from granting leave to intervene." 719 F.2d at 563.

> that is, that their interests could not be and would not be protected absent intervention.

Tr. 6-7 (Coal. App. 36-37). He also remarked that "if [the Coalition or its members] had a justifiable interest to be protected and a meritorious claim in support of those interests, that the courts are open to your lawsuit." Tr. 19 (Coal. App. 49).

With respect to the first comment, movants (Coal. Motion at 20-30; Cal. Motion at 10-12) criticize Judge Kelleher for failing to take account of factors this Court has considered in other contexts in determining whether a party will adequately represent the interests of a would-be intervenor. But Rule 24(b) does not grant an automatic right to intervene to any person whose interests will not be represented by the parties to litigation.[19] Moreover, the question before the district court was not whether particular private interests had a right to antitrust relief, but whether the proposed antitrust consent decree modifications were consistent with the public interest in competition. Courts consistently recognize that in government antitrust cases, the United States represents the public interest in competition. See, e.g., United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); United States v. NBC, 449 F. Supp. at 1142 (cited in Bechtel); United States v. Associated Milk Producers, Inc., 534 F.2d 113, 117 (8th Cir.),

[19]Rule 24(a) governs intervention of right, and adequacy of representation is only one of the four criteria that an applicant claiming a right to intervene must satisfy. Moreover, the Coalition did not move to intervene under Rule 24(a).

cert. denied, 429 U.S. 940 (1976); United States v. G. Heileman Brewing Co., 563 F. Supp. 642, 648 (D. Del. 1983); see also Sam Fox Publishing Co. v. United States, 366 U.S. 683, 689 (1961). Therefore, an applicant claiming a right to intervene in a government antitrust case to represent that interest has the burden of "establish[ing] that the Government has not acted properly in the public interest." United States v. Blue Chip Stamp Co., 272 F. Supp. 432, 438 (C.D. Cal. 1967), aff'd sub nom. Thrifty Shoppers Script Co. v. United States, 389 U.S. 580 (1968) (per curiam); accord United States v. American Cyanamid, 556 F. Supp. at 360 (S.D.N.Y. 1982); United States v. G. Heileman Brewing Co., 563 F. Supp. at 650; United States v. Stroh Brewery Co., 1982-2 Trade Cases (CCH) ¶64,804 at 71,959-60; 7C Wright, supra, §1909 at 332 ("in the absence of a very compelling showing to the contrary, it will be assumed that the United States adequately represents the public interest in antitrust suits").[20] That California and the Coalition disagree with the Department's conclusion that the decree modifications will serve the public interest in competition does not establish that the Department's representation of the public interest was inadequate. See United

[20]The only government antitrust case of which we are aware in which a denial of intervention has been reversed is Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967). That case involved a unique situation. After the Supreme Court had found a violation of section 7 of the Clayton Act and directed "`divestiture without delay,'" 386 U.S. at 131 (quoting United States v. El Paso Natural Gas Co., 376 U.S. 651, 662 (1964)), the Department of Justice agreed to a decree inconsistent with the Supreme Court's mandate, thus failing adequately to represent the public interest in competition, 386 U.S. at 135-36.

States v. G. Heileman Brewing Co., 563 F. Supp. at 648; United States v. Blue Chip Stamp Co., 272 F. Supp. at 438-39. To the contrary, the district court's public interest review, in which it considered the submissions of California and the Coalition, "insur[ed] that the government has not breached its duty to the public in consenting to the decree modification." Bechtel, 648 F.2d at 666.

To the extent California and the Coalition had interests consistent with the public interest in competition, therefore, their interests were adequately represented. To the extent they had other private interests, the Department, of course, would not represent their views. But any such private claims would provide no basis for disapproving consensual decree modifications consistent with the public interest and would present factual and legal issues quite different from the public interest question raised in the modification proceeding. Thus, there is no basis for movants' assertion that judicial economy would be better served by allowing them to intervene to assert their private concerns in the modification proceeding.[21]

Further, Judge Kelleher was quite correct in observing that disposition of the modification motions would not impair the

[21]Even where an applicant satisfies the other criteria for intervention of right, this Court has recognized that "inconvenience . . . caused by requiring [an applicant] to litigate separately is not the sort of adverse practical effect contemplated by Rule 24(a)(2)." Blake v. Pallan, 554 F.2d 947, 954 (9th Cir. 1977); see 7C Wright, supra, §1908 at 311-12 (the practical disadvantages of filing a separate suit and perhaps duplicating some of the efforts in the ongoing action are not sufficient to warrant intervention of right).

ability of the Coalition members or of California or its citizens to secure whatever legal remedies would otherwise be available to them to prevent or redress actual or threatened anticompetitive conduct by the Networks. The Coalition's members may bring private antitrust actions for damages or injunctive relief. California also will retain its powers to bring antitrust actions or to seek regulation on behalf of its citizens. And neither the district court's prior decisions entering the consent decrees nor its decision modifying the decrees would have any stare decisis effect in any antitrust case. Both proceedings sought only judicial approval of decree provisions on which the parties agreed, and the court did not adjudicate the merits of any of the claims in the underlying actions that were terminated by the decrees.

3. The District Court Was Not Required To Allow Intervention for Purposes of Appeal

As movants concede, unless the denials of intervention are reversed, they have no right to seek review of the order modifying the decrees. (Cal. Motion at 2, Coal. Motion at 32 (both citing United States v. LTV Corp., 746 F.2d 51, 53 (D.C. Cir. 1984)); see also, e.g., United States v. $129,374 in United States Currency, 769 F.2d 583, 590 (9th Cir. 1985), cert. denied, 474 U.S. 1086 (1986). Contrary to movants' contentions, however, the district court was not required to allow them to intervene for purposes of pursuing such appeals, and it did not abuse its discretion in declining to do so.

At a minimum, an applicant seeking intervention for purposes of appeal must satisfy the criteria of Rule 24. Yniguez v. Arizona, 939 F.2d 727, 731 (9th Cir. 1991).[22] Neither movant had -- and the Coalition did not even claim -- a right to intervene in the district court modification proceedings. Thus neither has a right to intervene for purposes of appeal.[23]

Nor is there any basis on which this Court could properly hold that the district court in this case abused its discretion under Rule 24(b) in denying permissive intervention for purposes of appeal. Neither the United States nor the networks will appeal the order granting the relief they sought -- modification of the decrees. Thus there is no longer any "main action," and any intervenors' appeals would unnecessarily burden this Court, as well as the parties, by prolonging the litigation.[24]

Movants' reliance (Coal. Motion at 33; Cal. Motion at 15) on the few cases in which district courts have permitted opponents of consensual antitrust decrees or decree modifications to intervene

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[22]"[W]here no party appeals, the `case or controversy' requirement of Article III also qualifies an applicant's right to intervene post-judgment." Id.

[23]Further, the only claim to intervene of right that is at issue on this motion involves California's contention that the Tunney Act applies, and any error in that ruling was harmless. See pp. 13-15, supra.

[24]See, e.g., Bethune Plaza, Inc. v. Lumpkin, 863 F.2d 525 (7th Cir. 1988) ("The prospect that a new party might string out a case that the original parties want to resolve usually is a compelling objection to intervention rather than a reason to allow it").

under Rule 24(b) for purposes of appealing orders approving them, American Cyanamid, 556 F. Supp. at 361 and United States v. AT&T, 552 F. Supp. at 218-19, and on the Second Circuit's holding that granting intervention was not an abuse of discretion in Cyanamid, 719 F.2d at 562-63, is misplaced. Rule 24(b) affords considerable discretion to the district court, and movants do not cite, nor are we aware of, any case in which a reviewing court has found an abuse of discretion in the denial of permissive intervention for purposes of appeal in an antitrust consent decree or decree modification proceeding.

B. The Modification Order Raises No Serious Legal Questions

The stay motions should be denied for a further reason: California and the Coalition fail to raise any serious legal question as to the modification order they ask this Court to stay. Thus even if they were allowed to intervene and to appeal the modification order, a stay pending appeal would be unwarranted.[25]

The question before the district court was whether the proposed consensual modifications of consent decrees entered in a government antitrust cases more than ten years ago were

[25] Cf. United States v. Western Elec. Co., 1991-2 Trade Cas. (CCH) ¶69,610 (D.C. Cir. 1991) (vacating district court's stay pending intervenors' appeal of decision removing antitrust consent decree restriction; "[t]he stay was an abuse of discretion" because there was insufficient evidence of probability that order would be reversed, that denial of stay would cause irreparable injury or that the public interest would be served by the stay).

consistent with the public interest in competition. As this Court has emphasized:

> The balancing of competing social and political interests affected by a proposed antitrust 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."

United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.) (quoting United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975)), cert. denied, 454 U.S. 1083 (1981).[26]

In this case, the Department's initial memorandum (NW App. 1-53) and its response to public comments (Coal. App. 63-109) explained in detail the bases for its conclusion that removal of the decree restrictions would further the public interest in competition. The Department showed that the restrictions are unnecessary because no network has monopsony power in the acquisition of television programming and no network is likely to acquire monopoly power in syndication if the decree restrictions are removed. The Department also showed that the decree restrictions might themselves be anticompetitive. The district court

[26] See also, e.g., United States v. Western Elec. Co., 993 F.2d 1572, 1576-78 (D.C. Cir.), cert. denied, 114 S. Ct. 487 (1993) (district court may reject a modification that is not opposed by any party to the decree, "only if it has exceptional confidence that adverse antitrust consequences will result") (citing Bechtel); United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶61,508 (W.D. Mo. 1977) (while the Tunney Act requires an "independent public interest determination," the court is not to make a "de novo determination of facts and issues").

considered the comments and briefs of California and the Coalition, which opposed modification of the decree. But the court concluded that they had presented no evidence supporting their contentions that the proposed modification would have anticompetitive effects. (See Coal. App. 175-78.) Accordingly, it found the modification to be in the public interest and approved it.

California and the Coalition disagree with the district court's conclusion, but it is correct and amply supported by the record.[27] Indeed, movants do not even identify any controlling legal or factual issue that would raise a substantial question about the district court's public interest holding, much less any reason why this Court would be likely to reverse the district court's modification order if California and the Coalition were permitted to appeal.

II. THE EQUITIES DO NOT FAVOR ISSUANCE OF A STAY

Finally, a stay must be denied because movants will not suffer irreparable injury absent a stay; the balance of equities between movants and the Networks weighs against a stay; and further delay in removing decree restrictions that the Department and the court have determined are unnecessary and anticompetitive would be contrary to the public interest in competition.

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[27]As the district court noted (Coal. App. 176-78) the FTC's Bureau of Economics agreed with the Department's conclusion that removal of the financial interest and syndication restrictions was very unlikely to present a risk to competition while continuing the restrictions was likely to be anticompetitive, and the Seventh Circuit, in vacating the FCC's 1990 "fin/syn" rules reached essentially the same conclusions. Schurz, supra.

California and the Coalition are not parties to the decree, and neither the decree nor the modifications impose any obligations on the members of the Coalition or the people of the State of California. The modifications remove restrictions that applied only to the Networks. Thus the Networks, in competition with studios and other syndicators, now may acquire and hold financial interests and syndication rights in prime-time network entertainment programs.[28] Coalition members and other producers that receive offers from Networks to transfer such rights will have a new financing option. But nothing in the modification compels producers to transfer any rights to the Networks or penalizes them if they decline the Networks' offers.

Nonetheless, the Coalition asserts (Motion at 34-35) that, absent a stay, the Networks somehow would compel independent producers to grant financial interests and would exclude from Network broadcast programs in which they do not obtain financial interests. Whatever concerns the Coalition may have about anticompetitive Network conduct are unsupported by the record and contrary to the district court's public interest finding. As the district court and the Department explained, the Networks have no market power that would enable them to compel transfer of financial interests and syndication rights for less than a competitive price.

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[28]The networks remain subject to FCC rules, which prohibit active syndication. (See NW App. 340-45.) Thus movants' and INTV's (INTV Stmt. at 5-6) concerns about Network participation in syndication are premature as well as contrary to the evidence.

It may well be true that, absent a stay, the Networks will seek to acquire financial interests in independently produced television programs, and that some producers -- including members of the Coalition -- will find it in their interests to transfer such rights to the Networks. But such voluntary transactions would not be attributable to any anticompetitive Network conduct and would not cause any antitrust injury (much less any that could not be remedied by monetary damages).[29]

California also claims that it will suffer irreparable harm absent a stay "because of the effect the modification will have on the television industry . . . [which] is a vital part of the California economy." Cal. Motion at 9. These derivative claims, like the Coalition's, are contrary to the findings of the district court.

Movants' delay in seeking review of the denial of intervention further weakens their claim for equitable relief pending appeal. The United States recognizes that the present appeals from the November 1993 orders denying intervention are timely. (See Coal. Motion at 12, (citing Ingram v. Acands, Inc., 977 F.2d 1332, 1337-39 (9th Cir. 1992)). But Ingram and the cases discussed therein also indicate that movants were not required to await a written order before seeking review in this Court of Judge Kelleher's October 1992 oral ruling. Ingram, 977 F.2d at 1339.

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[29]Of course, the Coalition's members would not be entitled to a stay of a decision in a government antitrust case in order to prevent any losses they might sustain merely from having to compete with networks for financial interests.

Had movants sought such review more promptly, their appeals likely would have been resolved well in advance of the district court's ruling on the modification motions.[30]

On the other side of the balance of private interests, a stay will continue to prevent the Networks -- and any producers who may wish to sell financial interests and syndication rights in their programs to the Networks -- from entering into efficient and mutually advantageous arrangements. While we cannot quantify the harms to these private interests, they weigh against any stay of the modification order.

Moreover, public interest considerations weigh against issuance of a stay. First the Department and then the district court carefully analyzed the proposed modifications, taking into account the views of California, the Coalition and other interested persons. Based on this careful review, the Department concluded and the court agreed determined that the decree modification will further the public interest in competition. In addition, the FCC recently found it in the public interest to lift its rules prohibiting Network ownership of financial interests and syndication rights. (See NW App. 340-45.) The public also would be denied the benefits of the FCC's decision if the district court's order modifying the decrees were stayed.

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[30]California (Motion at 7) argues that a stay is necessary to prevent irreparable harm because, absent a stay, "it is likely that the Networks and the United States will argue that the order modifying the consent decree became final while the appeal was pending." But the modification order already is final, and a stay would not change that.

The impact on the public of a stay is difficult to quantify, but it may be some time before these appeals are resolved, and further delay in removing unnecessary and anticompetitive restrictions plainly would be contrary to the public interest in competition.

Of course, a stay would preserve the status quo, and that might serve certain producers' private interests in avoiding competition or increasing their bargaining power for as long as the appellate process takes. After a final judgment, however, the general rule is not to preserve the status quo but to give prevailing parties the benefits of their judgment. Here, none of the relevant factors supports a stay: all parties to the decrees -- the United States and the Networks -- are in agreement that the modifications should take effect; any likelihood that California and the Coalition will secure reversal of the denial of intervention and of the modification order is extremely remote; and the balance of equities weighs heavily against any stay.

CONCLUSION

This Court should deny the motions for stay. The United States does not oppose movants' request to expedite the intervention appeals, provided the United States' brief is due not less than 30 days after service of appellants' briefs.

Respectfully submitted.

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