UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

GRAY TELEVISION, INC., and
QUINCY MEDIA, INC.,

Defendants.

COMPETITIVE IMPACT STATEMENT

In accordance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the "APPA" or "Tunney Act"), the United States of America files this Competitive Impact Statement relating to the proposed Final Judgment filed in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On January 31, 2021, Defendant Gray Television, Inc. ("Gray") agreed to acquire Defendant Quincy Media, Inc. ("Quincy") for approximately $925 million in cash. The United States filed a civil antitrust Complaint on July 28, 2021, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to substantially lessen competition for licensing the television programming of NBC, CBS, ABC, and FOX (collectively, "Big Four") affiliate stations to cable, satellite, fiber optic television, and over-the-top providers (referred to collectively as multichannel video programming distributors, or "MVPDs") for retransmission to their subscribers and the sale of broadcast television spot advertising in seven local geographic markets in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The seven Designated Market Areas ("DMAs") in which a substantial reduction in

competition is alleged are: (i) Tucson, Arizona; (ii) Madison, Wisconsin; (iii) Rockford, Illinois; (iv) Paducah, Kentucky – Cape Girardeau, Missouri – Harrisburg-Mt. Vernon, Illinois; (v) Cedar Rapids-Waterloo-Iowa City-Dubuque, Iowa; (vi) La Crosse-Eau Claire, Wisconsin; and (vii) Wausau-Rhinelander, Wisconsin (collectively, "the Overlap DMAs").[1] In each Overlap DMA, Gray and Quincy each own at least one broadcast television station that is affiliated with one of the Big Four television networks. The loss of competition alleged in the Complaint likely would result in an increase in retransmission consent fees charged to MVPDs, much of which would be passed through to MVPD subscribers, and higher prices for broadcast television spot advertising in each Overlap DMA.

At the same time the Complaint was filed, the United States filed a proposed Final Judgment and Hold Separate Stipulation and Order ("Stipulation and Order"), which are designed to remedy the loss of competition alleged in the Complaint. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest the following broadcast television stations (the "Divestiture Stations") and related assets to an acquirer or acquirers acceptable to the United States in its sole discretion: KPOB-TV and WSIL-TV in the Paducah, Kentucky – Cape Girardeau, Missouri – Harrisburg-Mt. Vernon, Illinois, DMA; KVOA in the Tucson, Arizona, DMA; KWWL in the Cedar Rapids-Waterloo-Iowa City-Dubuque, Iowa, DMA; WAOW and WMOW in the Wausau-Rhinelander, Wisconsin, DMA;

[1] A DMA is a geographic unit for which The Nielsen Company (US), LLC —a firm that surveys television viewers—furnishes broadcast television stations, MVPDs, cable networks, advertisers, and advertising agencies in a particular area with data to aid in evaluating audience size and composition. DMAs are widely accepted by industry participants as the standard geographic areas to use in evaluating television audience size and demographic composition. The Federal Communications Commission ("FCC") also uses DMAs as geographic units with respect to its broadcast television regulations.

WKOW in the Madison, Wisconsin, DMA; WQOW and WXOW in the La Crosse-Eau Claire, Wisconsin, DMA; and WREX in the Rockford, Illinois, DMA.

Under the terms of the Stipulation and Order, Defendants must take certain steps to ensure that each Divestiture Station is operated as a competitively independent, economically viable, and ongoing business concern, which must remain independent and uninfluenced by Defendants, and that competition is maintained during the pendency of the required divestiture.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

(A) The Defendants and the Proposed Transaction

Gray is a Georgia corporation with its headquarters in Atlanta, Georgia. Gray owns 165 television stations in 94 DMAs, of which 139 are Big Four affiliates. In 2020, Gray reported revenues of $2.4 billion.

Quincy is an Illinois corporation with its headquarters in Quincy, Illinois. Quincy owns 20 television stations in 16 DMAs, of which 19 are Big Four affiliates. In 2020, Quincy had revenues of approximately $338 million.

(B) The Competitive Effects of the Transaction in the Market for Big Four Television Retransmission Consent

1. Background

MVPDs, such as Comcast, DirecTV, and Mediacom, typically pay the owner of each local Big Four broadcast station in a given DMA a per-subscriber fee for the right to retransmit the station's content to the MVPDs' subscribers. The per-subscriber fee and other terms under

which an MVPD is permitted to distribute a station's content to its subscribers are set forth in a retransmission agreement. A retransmission agreement is negotiated directly between a broadcast station group, such as Gray or Quincy, and a given MVPD, and this agreement typically covers all of the station group's stations located in the MVPD's service area, or "footprint."

2. Relevant Markets

Big Four broadcast content has special appeal to television viewers in comparison to the content that is available through other broadcast stations and cable networks. Big Four stations usually are the highest ranked in terms of audience share and ratings in each DMA, largely because of unique offerings such as local news, sports, and highly-ranked primetime programs. Viewers typically consider the Big Four stations to be close substitutes for one another. Because of Big Four stations' popular national content and valued local coverage, MVPDs regard Big Four programming as highly desirable for inclusion in the packages they offer subscribers. Non-Big Four broadcast stations are typically not close substitutes for viewers of Big Four stations. Stations that are affiliates of networks other than the Big Four, such as the CW Network, MyNetworkTV, or Telemundo, typically feature niche programming without local news, weather or sports—or, in the case of Telemundo, only offer local news, weather, and sports aimed at a Spanish-speaking audience. Stations that are unaffiliated with any network are similarly unlikely to carry programming with broad popular appeal.

If an MVPD suffers a blackout of a Big Four station in a given DMA, many of the MVPD's subscribers in that DMA are likely to turn to other Big Four stations in the DMA to watch similar content, such as sports, primetime shows, and local news and weather. This willingness of viewers to switch between competing Big Four broadcast stations limits an MVPD's expected losses in the case of a blackout, and thus limits a broadcaster's ability to

extract higher fees from that MVPD—since an MVPD's willingness to pay higher retransmission consent fees for content rises or falls with the harm it would suffer if that content were lost. Due to the limited programming typically offered by non-Big Four stations, viewers are much less likely to switch to a non-Big Four station than to switch to other Big Four stations in the event of a blackout of a Big Four station. Accordingly, competition from non-Big Four stations does not typically impose a significant competitive constraint on the retransmission consent fees charged by the owners of Big Four stations. For the same reasons, subscribers—and therefore MVPDs—generally do not view cable network programming as a close substitute for Big Four network content. This is primarily because cable networks offer different content than Big Four stations. For example, cable networks generally do not offer local news, which provides a valuable connection to the local community that is important to viewers of Big Four stations.

Because viewers do not regard non-Big Four broadcast stations or cable networks as close substitutes for the programming they receive from Big Four stations, these other sources of programming are not sufficient to discipline an increase in the fees charged for Big Four television retransmission consent. Accordingly, a small but significant increase in the retransmission consent fees of Big Four affiliates would not cause enough MVPDs to forego carrying the content of the Big Four stations to make such an increase unprofitable for the Big Four stations.

The relevant geographic markets for the licensing of Big Four television retransmission consent are the individual DMAs in which such licensing occurs. The Complaint alleges a substantial reduction of competition in the market for the licensing of Big Four television retransmission consent in the Overlap DMAs.

In the event of a blackout of a Big Four network station, FCC rules generally prohibit an MVPD from importing the same network's content from another DMA. Thus, MVPD subscribers in one DMA cannot switch to Big Four programming in another DMA in the face of a blackout. Therefore, substitution to stations outside the DMA cannot discipline an increase in the fees charged for retransmission consent for broadcast stations in the DMA.

3. Anticompetitive Effects

In each of the Overlap DMAs, Gray and Quincy each own at least one Big Four affiliate broadcast television station. By combining the Defendants' Big Four stations, the proposed merger would increase the Defendants' market shares in the licensing of Big Four television retransmission consent in each Overlap DMA, and would increase the market concentration in that business in each Overlap DMA. The chart below summarizes Defendants' approximate Big Four retransmission consent market shares, based on figures in BIA Advisory Services' *Investing in Television Market Report 2020* (1st edition), and market concentrations measured by the widely used Herfindahl-Hirschman Index ("HHI"),[2] in each Overlap DMA, before and after the proposed merger.

[2] The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2{,}600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size, and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Overlap DMA	Gray Share	Quincy Share	Merged Share	Pre-merger HHI	Post-merger HHI	HHI Increase
Tucson, AZ	30%	24%	54%	2,564	4,010	1,446
Madison, WI	30%	23%	53%	2,556	3,956	1,400
Paducah-Harrisburg, KY-IL	30%	23%	53%	2,622	4,022	1,400
Cedar Rapids, IA	26%	20%	46%	2,533	3,600	1,067
La Crosse-Eau Claire, WI	33%	20%	53%	2,622	3,956	1,333
Rockford, IL	27%	20%	47%	2,533	3,600	1,066
Wausau-Rhinelander, WI	44%	33%	77%	3,580	6,543	2,963

As indicated by the preceding chart, in each Big Four Overlap DMA the post-merger HHI would exceed 2,500, and the merger would increase the HHI by more than 200 points. As a result, the proposed merger is presumed likely to enhance market power under the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission.

The proposed merger would enable Gray to black out more Big Four stations simultaneously in each of the Overlap DMAs than either Gray or Quincy could black out independently today, likely leading to increased retransmission consent fees to any MVPD whose footprint includes any of the Overlap DMAs. Retransmission consent fees generally are passed through to an MVPD's subscribers in the form of higher subscription fees or as a line item on their bills.

(C) The Competitive Effects of the Transaction in the Market for Broadcast Television Spot Advertising

1. <u>Background</u>

Broadcast television stations sell advertising "spots" during breaks in their programming. Advertisers purchase spots from a broadcast station to communicate with viewers within the DMA in which the broadcast television station is located. Broadcast television spot advertising is distinguished from "network" advertising, which consists of advertising time slots sold on nationwide broadcast networks by those networks, and not by local broadcast television stations

or their representatives. Gray and Quincy each own at least one Big Four affiliated television station in each of the Overlap DMAs and compete with one another to sell broadcast television spot advertising in each of the Overlap DMAs.

2. Relevant Markets

Broadcast television spot advertising constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act, 15 U.S.C. § 18. Advertisers' inability or unwillingness to substitute to other types of advertising in response to a price increase in broadcast television spot advertising supports this relevant market definition.

Typically, an advertiser purchases broadcast television advertising spots as one component of an advertising strategy that may also include cable television advertising spots, newspaper advertisements, billboards, radio spots, digital advertisements, email advertisements, and direct mail. Different components of an advertising strategy generally target different audiences and serve distinct purposes. Advertisers that advertise on broadcast television stations do so because the stations offer popular programming such as local news, sports, and primetime and syndicated shows that are especially attractive to a broad demographic base and a large audience of viewers. Other categories of advertising may offer different characteristics, but are not close substitutes for broadcast television spot advertising. For example, ads associated with online search results target individual consumers or respond to specific keyword searches, whereas broadcast television spot advertising reaches a broad audience throughout a DMA. In the future, technological developments may bring various advertising categories into closer competition with each other. For example, broadcasters and cable networks are developing technology to make their spot advertising addressable, meaning that broadcasters could deliver targeted advertising in live broadcast and on-demand formats to smart televisions or streaming

devices. For certain advertisers, these technological changes may make other categories of advertising closer substitutes for advertising on broadcast television in the future. However, at this time, for many broadcast television spot advertising advertisers, these projected developments are insufficient to mitigate the anticompetitive effects of the merger in the Overlap DMAs.

MVPDs sell spot advertising to be shown during breaks in cable network programming. For viewers, these advertisements are similar to broadcast television spot ads. However, cable television spot advertising is not at this time a reasonable substitute for broadcast television spot advertising for most advertisers. First, broadcast television spot advertising is a more efficient option than cable television spot advertising for many advertisers. Because broadcast television offers highly rated programming with broad appeal, each broadcast television advertising spot typically offers the opportunity to reach more viewers (more "ratings points") than a single spot on a cable channel. By contrast, MVPDs offer dozens of cable networks with specialized programs that appeal to niche audiences. This fragmentation allows advertisers to target narrower demographic subsets by buying cable spots on particular channels, but it does not meet the needs of advertisers who want to reach a large percentage of a DMA's population. Second, households that have access to cable networks are divided among multiple MVPDs within a DMA. In contrast, broadcast television spot advertising has a much broader reach because it reaches all households that subscribe to an MVPD and, through an over-the-air signal, most households with a television that do not. Third and finally, MVPDs' inventory of cable television spot advertising is limited—typically to two minutes per hour—contrasting sharply with broadcast stations' much larger number of advertising minutes per hour. The inventory of DMA-wide cable television spot advertising is substantially further reduced by the large portion of

those spots allocated to local zone advertising, in which an MVPD sells spots by geographic zones within a DMA, allowing advertisers to target smaller geographic areas. Due to the limited inventories and lower ratings associated with cable television spot programming, cable television spot advertising does not offer a sufficient volume of ratings points, or broad enough household penetration, to provide a reasonable alternative to broadcast television spot advertising.

Digital advertising is also not a sufficiently close substitute for broadcast television spot advertising. Some digital advertising, such as static and floating banner advertisements, static images, text advertisements, wallpaper advertisements, pop-up advertisements, flash advertisements, and paid search results, lacks the combination of sight, sound, and motion that makes television spot advertising particularly impactful and memorable and therefore effective for advertisers. Digital video advertisements, on the other hand, do allow for a combination of sight, sound, and motion, and on this basis are more comparable to broadcast television spot advertising than other types of digital advertising. However, they are still not close substitutes for broadcast television spot advertising because digital advertisements typically have a different scope of reach compared to broadcast television spot advertising. For example, while advertisers use broadcast television spots to reach a large percentage of households within a given DMA, advertisers use digital advertising to reach a variety of different audiences. While a small portion of advertisers purchase DMA-wide advertisements on digital platforms, digital advertisements usually are targeted either very broadly, such as nationwide or regional, or to a geographic target smaller than a DMA, such as a city or a zip code, or to narrow demographic subsets of a population.

Other forms of advertising, such as radio, newspaper, billboard, and direct-mail advertising, also do not constitute effective substitutes for broadcast television spot advertising.

These forms of media do not reach as many local viewers or drive brand awareness to the same extent as broadcast television spot advertising does. Broadcast television spot advertising possesses a unique combination of attributes that advertisers value in a way that sets it apart from advertising on other media. Broadcast television spot advertising combines sight, sound, and motion in a way that makes television advertisements particularly memorable and impactful.

The relevant geographic markets for the sale of broadcast television spot advertising are the individual DMAs in which such advertising is viewed. The Complaint alleges a substantial reduction of competition in the market for sale of broadcast television advertising in the Overlap DMAs. For an advertiser seeking to reach potential customers in a given DMA, broadcast television stations located outside of the DMA do not provide effective access to the advertiser's target audience. The signals of broadcast television stations located outside of the DMA generally do not reach any significant portion of the target DMA through either over-the-air signal or MVPD distribution. Accordingly, a small but significant increase in the spot advertising prices of stations broadcasting into the DMA would not cause a sufficient number of advertisers to switch to stations outside the DMA to make such an increase unprofitable for the station.

3. Anticompetitive Effects

In each of the Overlap DMAs, Gray and Quincy each own at least one Big Four affiliate broadcast television station. By combining the Defendants' stations, the proposed merger would increase the Defendants' market shares in the sale of broadcast television spot advertising in each Overlap DMA, and would increase the market concentration in that business in each Overlap DMA. The chart below summarizes Defendants' approximate market shares, based on figures in BIA Advisory Services' *Investing in Television Market Report 2020* (1st edition), and the result of the transaction on the HHIs in the sale of broadcast television spot advertising.

Overlap DMA	Gray Share	Quincy Share	Merged Share	Pre-merger HHI	Post-merger HHI	HHI Increase
Tucson, AZ	27%	25%	52%	2,059	3,389	1,330
Madison, WI	31%	20%	51%	2,540	3,745	1,205
Paducah-Harrisburg, KY-IL	26%	22%	48%	2,886	4,022	1,136
Cedar Rapids, IA	41%	34%	75%	3,108	5,852	2,744
La Crosse-Eau Claire, WI	33%	23%	56%	2,587	4,084	1,497
Rockford, IL	28%	35%	63%	3,348	5,319	1,971
Wausau-Rhinelander, WI	40%	38%	78%	3,479	6,489	3,010

Defendants' large market shares reflect the fact that, in each Overlap DMA, Gray and Quincy each own one or more significant broadcast television stations. As indicated by the preceding chart, the post-merger HHI in each Overlap DMA is well above 2,500, and the HHI increase in each Overlap DMA far exceeds the 200-point threshold above which a transaction is presumed to enhance market power and harm competition under the *Horizontal Merger Guidelines*. Defendants' proposed transaction is thus presumptively unlawful in each Overlap DMA.

In addition to substantially increasing the concentration levels in each Overlap DMA, the proposed acquisition would combine Gray's and Quincy's broadcast television stations, which are generally close competitors in the sale of broadcast television spot advertising. In each Overlap DMA, Defendants' broadcast stations compete head-to-head in the sale of broadcast television spot advertising. Advertisers obtain lower prices as a result of this competition. In particular, advertisers in the Overlap DMAs can respond to an increase in one station's spot advertising prices by purchasing, or threatening to purchase, advertising spots on one or more stations owned by different broadcast station groups, thereby "buying around" the station that raises its prices. This practice allows the advertisers either to avoid the first station's price increase, or to pressure the first station to lower its prices. If Gray acquires Quincy's stations,

advertisers seeking to reach audiences in the Overlap DMAs would have fewer competing broadcast television alternatives available to meet their advertising needs, and would find it more difficult and costly to buy around higher prices imposed by the combined stations. This would likely result in increased advertising prices, lower quality local programming to which the spot advertising is attached (for example, less investment in local news), and less innovation in providing advertising solutions to advertisers.

(D) Entry

De novo entry into each Overlap DMA is unlikely. The FCC regulates entry through the issuance of broadcast television licenses, which are difficult to obtain because the availability of spectrum is limited and the regulatory process associated with obtaining a license is lengthy. Even if a new signal were to become available, commercial success would come over a period of many years, if at all. Because Big Four affiliated stations generally have the highest ratings in each DMA, they are more successful at selling broadcast television spot ads compared to non-Big Four affiliated broadcast stations. Thus, entry of a new broadcast station into an Overlap DMA would not be timely, likely, or sufficient to prevent or remedy the proposed acquisition's likely anticompetitive effects in the relevant markets.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The relief required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by establishing an independent and economically viable competitor in the markets for the licensing of Big Four television retransmission consent and the sale of broadcast television spot advertising. The proposed Final Judgment requires Defendants to divest the Divestiture Stations within 30 days after the entry of the Stipulation and Order to Allen Media Holdings, LLC ("Allen") or an alternative acquirer approved by the United States. Where

Defendants have filed applications with the FCC seeking approval to assign or transfer any licenses to acquirer, the 30-day time period will be extended until five business days after an FCC order has been issued. The assets must be divested in such a way as to satisfy the United States in its sole discretion that the assets can and will be operated by the acquirer as a viable, ongoing business that can compete effectively in the licensing of Big Four television retransmission consent and the sale of broadcast television spot advertising. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly, including obtaining any necessary FCC approvals as expeditiously as possible, and must cooperate with the acquirer.

(A) The Divestiture Assets

The Divestiture Assets, which are defined in Paragraph II(G) of the proposed Final Judgment, include all tangible and intangible assets of the Divestiture Stations. The assets include all tangible property; all licenses, permits, and authorizations; all contracts (including programming contracts and rights), agreements, network affiliation agreements, leases, and commitments and understandings; all trademarks, service marks, trade names, copyrights, patents, slogans, programming materials, and promotional materials; all customer lists, contracts, accounts, and credit records; all logs and other records; and the content and affiliation of each digital subchannel.

(B) The Excluded Assets

Certain assets are excluded from the Divestiture Assets, as described in Paragraph II(J) of the proposed Final Judgment. The assets that are excluded relate to: (1) the CW programming stream currently broadcast on KWWL in the Cedar Rapids-Waterloo-Iowa City-Dubuque, Iowa, DMA; (2) the CW programming stream currently broadcast on WMOW and WAOW in the Wausau-Rhinelander, Wisconsin, DMA; (3) the CW programming stream currently broadcast on

WREX in the Rockford, Illinois, DMA; (4) the CW and MeTV programming streams currently broadcast on WXOW and WQOW in the La Crosse-Eau Claire, Wisconsin, DMA; (5) the MeTV programming stream currently broadcast on WKOW in the Madison, Wisconsin, DMA; (6) satellite station WYOW, Eagle River, Wisconsin; (7) all real and tangible personal property owned by Quincy located at 501 and 513 Hampshire Street in Quincy, Illinois 62301; (8) all tangible personal property owned by Quincy located at 130 South 5th Street, Quincy, Illinois 62301; and (9) all real and tangible personal property owned by Quincy at the Digital Realty Data Center located at 350 East Cermak, Chicago, Illinois 60616.

The excluded CW and MeTV programming streams currently are derived from separate network affiliations and are broadcast from digital subchannels of the Divestiture Stations. As a result, the Defendants' retention of those CW and MeTV programming streams will not prevent the divestiture buyer from operating the Divestiture Stations as viable, independent competitors. Nor will Defendants' retention of these assets substantially lessen competition. Divesting one of the Defendants' Big Four affiliates in each Overlap DMA will ensure that competition in the licensing of Big Four television retransmission consent is not diminished. Also, nearly all of the merger-induced increase in concentration in the sale of broadcast television spot advertising in each Overlap DMA is avoided by the sale of one of Defendants' Big Four affiliates in each Overlap DMA, as the broadcast television spot advertising revenues attributable to non-Big Four affiliates (e.g., CW and MeTV) is very small, relative to that of the Big Four affiliates.

(C) General Conditions

The proposed Final Judgment contains provisions intended to facilitate the acquirer's efforts to hire certain employees. Specifically, Paragraph IV(J) of the proposed Final Judgment requires Defendants to provide the acquirer and the United States with organization charts and

information relating to these employees and to make them available for interviews. It also provides that Defendants must not interfere with any negotiations by the acquirer to hire these employees. In addition, for employees who elect employment with the acquirer, Defendants must waive all non-compete and non-disclosure agreements, vest all unvested pension and other equity rights, provide any pay pro-rata, provide all compensation and benefits that those employees have fully or partially accrued, and provide all other benefits that the employees would generally be provided had those employees continued employment with Defendants, including but not limited to any retention bonuses or payments. This paragraph further provides that Defendants may not solicit to hire any of those employees who were hired by the acquirer, unless an employee is terminated or laid off by the acquirer or the acquirer agrees in writing that Defendants may solicit to hire that individual. The non-solicitation period runs for sixty (60) days from the date of the divestiture.

Paragraph IV(L) of the proposed Final Judgment will facilitate the transfer to the acquirer of customers and other contractual relationships that are included within the Divestiture Assets. Defendants must transfer all contracts, agreements, and relationships to the acquirer and must make best efforts to assign, subcontract, or otherwise transfer contracts or agreements that require the consent of another party before assignment, subcontracting, or other transfer.

The proposed Final Judgment requires Defendants to provide certain transition services to maintain the viability and competitiveness of the Divestiture Stations during the transition to the acquirer. Paragraph IV(N) of the proposed Final Judgment requires Defendants, at the acquirer's option, to enter into a transition services agreement for back office, human resources, accounting, and information technology services for a period of up to six (6) months. The acquirer may terminate the transition services agreement, or any portion of it, without cost or

penalty at any time upon commercially reasonable notice. The paragraph further provides that the United States, in its sole discretion, may approve one or more extensions of this transition services agreement for a total of up to an additional six (6) months and that any amendments to or modifications of any provisions of a transition services agreement are subject to approval by the United States in its sole discretion. Paragraph IV(N) also provides that employees of Defendants tasked with supporting this agreement must not share any competitively sensitive information of the acquirer with any other employee of Defendants, unless such sharing is for the sole purpose of providing transition services to the acquirer.

(D) Appointment of Divestiture Trustee

If Defendants do not accomplish the divestiture within the period prescribed in Paragraph IV(A) of the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to effect the divestiture. If a divestiture trustee is appointed, the proposed Final Judgment provides that Defendants must pay all costs and expenses of the trustee. The divestiture trustee's commission must be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After the divestiture trustee's appointment becomes effective, the trustee must provide monthly reports to the United States setting forth his or her efforts to accomplish the divestiture. If the divestiture has not been accomplished within six months of the divestiture trustee's appointment, the divestiture trustee and the United States may make recommendations to the Court, which will enter such orders as appropriate, in order to carry out the purpose of the proposed Final Judgment, including by extending the trust or the term of the divestiture trustee's appointment.

(E) Notification Requirements

Section XI of the proposed Final Judgment requires Defendants to notify the United States in advance of acquiring, directly or indirectly, in a transaction that would not otherwise be reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"), any Big Four affiliation agreement in a DMA in which a Defendant already has a Big Four affiliation agreement in place. Pursuant to the proposed Final Judgment, Defendants must notify the United States of such acquisitions as it would for a required HSR Act filing, as specified in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations. The proposed Final Judgment further provides for waiting periods and opportunities for the United States to obtain additional information analogous to the provisions of the HSR Act before such acquisitions can be consummated. Requiring notification before the acquisition of Big Four affiliation agreement in a DMA in which a Defendant already has a Big Four affiliation agreement in place will permit the United States to assess the competitive effects of that acquisition before it is consummated and, if necessary, seek to enjoin the transaction.

(F) Prohibitions on Reacquisition and Limitations on Collaborations

To ensure that the Divestiture Stations are operated independently from Defendants after the divestitures, Paragraph XII(A) of the proposed Final Judgment provides that during the term of the Final Judgment Defendants shall not (1) reacquire any part of the Divestiture Assets; (2) acquire any option to reacquire any part of the Divestiture Assets or to assign them to any other person; (3) enter into any carriage agreement, local marketing agreement, joint sales agreement, other cooperative selling arrangement, or shared services agreement (except as provided in in Section XII), or conduct other business negotiations jointly with any acquirer of any of the

Divestiture Assets with respect to those Divestiture Assets; or (4) provide financing or guarantees of financing with respect to the Divestiture Assets.

Under Paragraph XII(B)(1) of the proposed Final Judgment, the shared services prohibition does not preclude Defendants from continuing or entering into agreements in a form customarily used in the industry to (a) share news helicopters or (b) pool generic video footage that does not include recording a reporter or other on-air talent, and does not preclude Defendants from entering into any non-sales-related shared services agreement or transition services agreement that is approved in advance by the United States in its sole discretion. Additionally, Paragraph XII(B)(2) provides that the restrictions of Paragraph XII(A) do not prevent Defendants from entering into agreements to provide news programming to the Divestiture Stations, provided that Defendants do not sell, price, market, hold out for sale, or profit from the sale of advertising associated with the news programming provided by Defendants under such agreements except by approval of the United States in its sole discretion.

The proposed Final Judgment makes one exception to the general prohibition against carriage agreements between the Defendants and the acquirer in the Rockford, Illinois, DMA. Paragraph XII(B)(3) of the proposed Final Judgment provides that Defendants and acquirer may rebroadcast WIFR-LD's CBS program stream on a digital subchannel of WREX, provided that the acquirer rebroadcasts the WIFR-LD program stream on a pass-through basis and coextensively with its main WREX signal, and that Defendants and the acquirer continue to operate WIFR-LD and WREX as separate commercial broadcast television stations. Currently, WIFR-LD's CBS program stream is broadcast on a low power signal. Rebroadcasting the program stream on a WREX digital subchannel would put the program stream on a full power signal, thereby allowing more viewers in the Rockford, Illinois, DMA to access WIFR-LD's

CBS programming on an over-the-air basis. Rebroadcasting WIFR-LD's CBS program stream in this way will not prevent the acquirer from operating WREX as a viable, independent competitor, nor will it substantially lessen competition in the Rockford, Illinois, DMA.

(G) Enforcement and Expiration of the Final Judgment

The proposed Final Judgment also contains provisions designed to promote compliance and will make enforcement of the Final Judgment as effective as possible. Paragraph XIV(A) provides that the United States retains and reserves all rights to enforce the Final Judgment, including the right to seek an order of contempt from the Court. Under the terms of this paragraph, Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

Paragraph XIV(B) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to remedy the loss of competition the United States alleges would otherwise be harmed by the transaction. Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of the Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIV(C) of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that a Defendant has violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph XIV(C) provides that, in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, the Defendant must reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any effort to enforce the Final Judgment, including the investigation of the potential violation.

Finally, Section XV of the proposed Final Judgment provides that the Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestiture has been completed and that continuation of the Final Judgment is no longer necessary or in the public interest.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, the comments and the United States' responses will be published in the *Federal Register* unless the Court agrees that the United States may instead publish them on the U.S. Department of Justice, Antitrust Division's internet website.

Written comments should be submitted in English to:

Scott Scheele
Chief, Media, Entertainment, and Communications Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW, Suite 7000
Washington, DC 20530
ATR.MEC.Information@usdoj.gov

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

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Gray's acquisition of Quincy. The United States is satisfied, however, that the relief required by the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for licensing Big Four television retransmission consent and the sale of broadcast television spot advertising in the Overlap DMAs. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

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

Under the Clayton Act and the APPA, proposed Final Judgments or "consent decrees" in antitrust cases brought by the United States are subject to a 60-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)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, 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 (D.C. Cir. 1995); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a proposed Final 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 mechanism to enforce the final judgment are clear and manageable").

As the U.S. 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 in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "make de novo determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[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." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19 2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Microsoft*, 56 F.3d at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [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.") (internal citations omitted); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case"). The ultimate question is whether "the remedies [obtained by the Final

Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co*., 900 F.2d at 309).

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, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). 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. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added the unambiguous instruction that "[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); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first 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 Sen. Tunney). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

VIII. DETERMINATIVE DOCUMENTS

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

Dated: July 28, 2021

Respectfully submitted,

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