IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN RADIO SYSTEMS CORPORATION and EZ COMMUNICATIONS, INC., Defendants.	No. 97 CV 405 (LFO) (Antitrust)

COMPETITIVE IMPACT STATEMENT

Plaintiff, the United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

Plaintiff filed a civil antitrust Complaint on February 27, 1997, alleging that the proposed acquisition of EZ Communications ("EZ") by American Radio Systems Corporation ("ARS") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that ARS and EZ own and operate numerous radio stations throughout the United States, and that after the transaction ARS would own eight radio stations in the Sacramento, California area, including six of the 12 stations authorized and operating as Class B broadcast facilities in that area.[1] This acquisition would give ARS half of the most competitively significant radio signals, and a significant share of the radio advertising market, including a large percentage of advertising directed to certain target audiences in Sacramento. As a result, the combination of these companies would substantially lessen competition in the sale of radio advertising time in Sacramento, California and the surrounding area.

The prayer for relief seeks: (a) adjudication that ARS's proposed acquisition of EZ would violate Section 7 of the Clayton Act; (b) preliminary and permanent injunctive relief preventing the consummation of the proposed acquisition; (c) an award to the United States of the costs of this action; and (d) such other relief as is proper.

Shortly before this suit was filed, a proposed settlement was reached that permits ARS to complete its acquisition of EZ, yet preserves competition in the market for which the transaction would raise significant competitive concerns. A Stipulation and proposed Final Judgment embodying the settlement were filed at the same time the Complaint was filed.

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[1]The Telecommunications Act of 1996 provides that a party may own up to a maximum of eight commercial radio stations in a radio market, not more than five of which are in the same service (AM or FM). However, a radio market for Federal Communications Commission ("FCC") purposes is delineated by examining overlapping principal community contours. Because ARS defined two separate radio markets in the Sacramento area for FCC purposes, based upon principal community contours, it took the position in its FCC filings and with the Department of Justice that the 1996 Telecommunications Act did not require divestiture of any of the six class B FM signals that it would own after the merger.

The proposed Final Judgment orders defendants to divest KSSJ-FM. Unless the United States grants a time extension, defendants must divest this radio station either within six months after the filing of the Complaint, or within five (5) business days after notice of entry of the Final Judgment, whichever is later. If defendants do not divest KSSJ-FM within the divestiture period, the Court shall, upon plaintiff's application, appoint a trustee to sell the assets. The proposed Final Judgment also requires defendants to ensure that, until the divestiture mandated by the Final Judgment has been accomplished, KSSJ-FM will be operated independently as a viable, ongoing business, and kept separate and apart from ARS's and EZ's other Sacramento radio stations. Additionally, the proposed Final Judgment provides that if KSSJ-FM's Class B license has not been issued by the FCC on or before December 31, 1997, the United States has the right to designate one additional ARS or EZ Class B radio station for divestiture. Further, the proposed Final Judgment requires defendants to give plaintiff prior notice regarding future radio station acquisitions or certain agreements pertaining to the sale of radio advertising time in Sacramento.

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

II. THE ALLEGED VIOLATIONS

A. The Defendants

Defendant ARS is a Delaware corporation with its headquarters in Boston, Massachusetts. It currently owns and operates 75 radio stations in 14 metropolitan areas in the United States. Its 1996 revenues were approximately $270 million. ARS owns four radio stations authorized and operating as Class B broadcast facilities in the Sacramento area.

EZ is a Virginia corporation headquartered in Fairfax, Virginia. It owns and operates twenty-three radio stations in seven metropolitan areas in the United States. Its 1996 revenues were approximately $118 million. EZ owns two radio stations authorized and operating as Class B broadcast facilities in the Sacramento area.

B. Description of the Events Giving Rise to the Alleged Violations

On August 5, 1996, ARS agreed to purchase EZ for approximately $655 million. As is more fully discussed below, ARS would control a significant share of the radio advertising in Sacramento, as well as a significant percentage of advertising directed to certain target audiences in Sacramento. The proposed acquisition of EZ by ARS, and the threatened loss of such competition that would be caused thereby, precipitated the government's suit.

C. Anticompetitive Consequences of the Proposed Merger

1. Sale of Radio Advertising Time in Sacramento

The Complaint alleges that the provision of advertising time on radio stations serving the Sacramento, California Metro Survey Area ("MSA") constitutes a line of commerce and section of the country, or relevant market, for antitrust purposes. The Sacramento MSA is the geographical unit for which Arbitron furnishes radio stations, advertisers, and advertising agencies in Sacramento with data to aid in evaluating radio audience size and composition. Advertisers use this data in making decisions about which radio station or combination of radio stations can deliver their target audiences in the most efficient and cost-effective way. Local and national advertising that is placed on radio stations within the Sacramento MSA is aimed at reaching listening audiences in the Sacramento MSA, and radio stations outside of the Sacramento MSA do not provide effective access to this audience. Thus, if there were a small but significant nontransitory increase in radio advertising prices within the Sacramento MSA, advertisers would not buy enough advertising time from radio stations located outside of the Sacramento MSA to defeat the increase.

Radio stations earn their revenues from the sale of advertising time to local and national advertisers. Many local and national advertisers purchase radio advertising time in Sacramento because such advertising is preferable to advertising in other media for their specific needs. For such advertisers, radio time: may be less expensive and more cost-efficient than other media at reaching the advertiser's target audience (individuals most likely to purchase the advertiser's products or services); may reach certain target audiences that cannot be reached as effectively through other media; or may offer promotional opportunities to advertisers that they cannot exploit as effectively using other media. For these reasons and others, many local and national advertisers in Sacramento who purchase radio advertising time view radio either as a necessary advertising medium for them, or as a necessary advertising complement to other media.

Although some local and national advertisers may switch some of their advertising to other media rather than absorb a price increase in radio advertising time in Sacramento, the existence of such advertisers would not prevent radio stations from profitably raising their prices a small but significant amount to those advertisers who have strong preferences for using radio over other media for some or all of their advertising campaigns. At a minimum, stations could profitably raise prices to those advertisers who view radio either as a necessary advertising medium for them, or as a necessary advertising complement to other media. Radio stations, which negotiate prices individually with advertisers, can identify those advertisers with strong radio preferences. Consequently, radio stations can charge different advertisers different rates. Because of this ability to price discriminate among different customers, radio stations may charge higher prices to advertisers that view radio as particularly effective for their needs, while maintaining lower prices for other advertisers.

2. Harm to Competition

The Complaint alleges that ARS's proposed acquisition of EZ would lessen competition substantially in the provision of radio advertising time in the Sacramento MSA. The proposed acquisition would create significant market concentration, and would permit ARS to control a substantial share of the advertising revenues in Sacramento. The transaction is likely to lead to further market concentration in view of the fact that KSSJ-FM has recently been upgraded to a Class B FM signal, which broadens the station's reach and is therefore likely to increase its (and hence ARS's) market share. Moreover, the proposed merger would concentrate many of Sacramento's strongest radio signals into the hands of ARS. After all transactions are complete, ARS would own six of the 12 stations in the Sacramento area authorized and operating as Class B broadcast facilities. Because weaker signals cannot penetrate as large a listening area, they do not have the potential to reach as many listeners as strong signals. All else being equal, concentrated ownership of strong signals is likely to create more listenership dominance than concentrated ownership of weaker signals.

ARS presently controls approximately 21% of radio advertising revenues in Sacramento, and its market share would rise to approximately 36% after the proposed merger. According to the Herfindahl-Hirschman Index ("HHI"), a widely-used measure of market concentration defined and explained in Exhibit A hereto, the pre-merger HHI in this market is 1895, which would rise by 998 points to 2893 after the merger. This substantial increase in concentration, exacerbated by the upgrade of KSSJ-FM's signal to Class B and the resultant likely increase of ARS's future market share, will give ARS the unilateral power to raise advertising prices and reduce the level of service provided to advertisers in Sacramento.

Furthermore, the proposed transactions would eliminate head-to-head competition between ARS and EZ for advertisers seeking to reach specific audiences. Advertisers select radio stations to reach a large percentage of their target audience based upon a number of factors, including, inter alia, the size of the station's audience, the characteristics of its audience, and the geographic reach of a station's signal. Many advertisers seek to reach a large percentage of their target audience by selecting those stations whose audience has a high correlation with their target audience. If a number of stations efficiently reach that target audience, advertisers benefit from the competition among such stations to offer better prices or services. Today, several ARS and EZ stations compete head-to-head to reach the same audiences and, for many local and national advertisers buying time in Sacramento, they are close substitutes for each other based on their specific audience characteristics. The proposed merger would eliminate such competition, notably including competition for advertisers seeking to reach female listeners in Sacramento.

Advertisers seeking to reach female listeners in Sacramento currently help to ensure competitive rates by "playing off" ARS stations against EZ stations. Because the direct competition between the ARS and EZ stations would be eliminated by the proposed merger, and because advertisers seeking to reach female listeners would have inferior alternatives to the merged entity, the acquisition would give ARS the ability to raise its rates and reduce the quality of its services to a significant number of its advertisers on its Sacramento stations. This is particularly true because of the merged entity's ability to charge different prices to different advertisers.

Format changes are unlikely to deter the anticompetitive consequences of the proposed merger. If ARS raised prices or reduced services to those advertisers who buy time on ARS and EZ stations because of their strength in delivering access to certain specific audiences, non-ARS radio stations in Sacramento would not be induced to change their formats to attract those audiences in sufficiently large numbers to defeat a price increase. Successful radio stations are unlikely to undertake a format change solely in response to small but significant increases in price being charged to advertisers by a multi-station firm such as ARS, because they would likely lose a substantial portion of their existing audiences. Even if less successful or less powerful stations did change format, they would still be unlikely to attract enough listeners to provide suitable alternatives to the merged entity.

Finally, new entry into the Sacramento radio advertising market is highly unlikely in response to a price increase by the merged parties. No unallocated radio broadcast frequencies exist in Sacramento. Also, stations located in adjacent communities cannot boost their power so as to enter the Sacramento market without interfering with other stations on the same or similar frequencies, a violation of Federal Communications Commission ("FCC") regulations.

For these reasons, plaintiff concludes that the merger as proposed would substantially lessen competition in the sale of radio advertising time in the Sacramento MSA, eliminate actual competition between ARS and EZ, and result in increased rates for radio advertising time in the Sacramento MSA, all in violation of

Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the sale of radio advertising time in the Sacramento MSA. It requires the divestiture of KSSJ-FM, a station oriented toward female listeners, and one of only 12 radio signals in the Sacramento area authorized and operating as Class B FM broadcast facilities. Class B signals are the strongest, and therefore the most competitively significant, radio broadcasting signals in the Sacramento area. Absent the divestiture, ARS would have controlled six of 12 of Sacramento's Class B signals. Such concentrated ownership of the most competitively significant signals in the area, coupled with the likely increase in ARS's revenue share following KSSJ-FM's signal upgrade, would enable ARS to maintain a dominant share of listeners that would be difficult for competing radio stations to challenge effectively, thereby reducing the choices available to radio advertisers in Sacramento, and diminishing competition. The divestiture of KSSJ-FM leaves ARS with five of the 12 Class B FM signals and less than 35 percent of the advertising revenues in Sacramento, and puts the station in the hands of a competitor, who will have the competitive benefit of the station's signal upgrade. In particular, the divestiture of KSSJ-FM, upgraded to a Class B signal, will permit ARS and the remaining radio stations in Sacramento to compete vigorously for advertisers seeking to reach female listeners.

Although KSSJ-FM is currently authorized and operating as a Class B FM station, it is still awaiting the formal issuance of its Class B license by the FCC. In the event that this license has not been issued by the FCC on or before December 31, 1997, then the proposed Final Judgment gives plaintiff the option to designate an additional Sacramento Class B FM station for divestiture by defendants.

Unless plaintiff grants an extension of time, defendants must divest KSSJ-FM either within six months after the Final Judgment has been filed or within five (5) business days after notice of entry of the Final Judgment, whichever is later. Until the divestitures take place, KSSJ-FM will be operated and maintained as an independent competitor to defendants' other stations in the Sacramento MSA.

If defendants fail to divest KSSJ-FM within the time periods specified in the Final Judgment, the Court, upon application of the plaintiff, shall appoint a trustee nominated by the plaintiff to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee and any professionals and agents retained by the trustee. The compensation paid to the trustee and any persons retained by the trustee shall be both reasonable in light of the value of KSSJ-FM, and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished. After appointment, the trustee will file monthly reports with defendants, the plaintiff and the Court, setting forth the trustee's efforts to accomplish the divestiture ordered under the proposed Final Judgment. If the trustee has not accomplished the divestiture within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. At the same time, the trustee will furnish such report to plaintiff and defendants, who will each have the right to be heard and to make additional recommendations.

The proposed Final Judgment requires that defendants maintain KSSJ-FM separate and apart from their other stations, pending divestiture. The Judgment also contains provisions to ensure that KSSJ-FM will be preserved, so that it will remain a viable, aggressive competitor after divestiture.

The proposed Final Judgment also prohibits defendants from entering into certain agreements with other Sacramento radio stations without providing at least thirty (30) days' notice to the Department of Justice. Specifically, defendants must notify the Department before acquiring any significant interest in another Sacramento radio station. Such acquisitions could raise competitive concerns but might be too small to be otherwise reportable under the Hart-Scott-Rodino ("HSR") premerger notification statute. Moreover, defendants may not agree to sell radio advertising time for any other Sacramento radio station without providing plaintiff with notice. This provision ensures that plaintiff will receive advance notice of any acquisition, or agreements, through which defendants would increase the amount of advertising time on radio stations that they can sell. In particular, this provision requires defendants to notify plaintiff before they enter into any joint sales agreements ("JSAs"), where one station takes over another station's advertising time, or enter into any local marketing agreements ("LMAs"), where one station takes over another station's broadcasting and advertising time, in the Sacramento MSA. Agreements whereby defendants sell advertising for or manage other area radio stations would effectively increase defendants' market share in the Sacramento area MSA. Despite their clear competitive significance, JSAs probably would not be reportable to the Department of Justice under the HSR Act. Thus, this provision in the proposed Final Judgment ensures that the Department will receive notice of and be able to act, if appropriate, to stop any agreements that might have anticompetitive effects in the Sacramento market.

The relief in the proposed Final Judgment is intended to remedy the anticompetitive effects of the proposed acquisition of EZ by ARS. Nothing in this Final Judgment is intended to limit the plaintiff's ability to investigate or to bring actions, where appropriate, challenging other past or future activities of defendants in the Sacramento MSA.

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 will neither impair nor assist 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 plaintiff and the 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 sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the plaintiff written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The plaintiff will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the plaintiff will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Craig W. Conrath
Chief, Merger Task Force
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and that 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

The plaintiff considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against defendants. The plaintiff is satisfied, however, that the divestiture of the KSSJ-FM Assets and other relief contained in the proposed Final Judgment will preserve viable competition in the sale of radio advertising time in the Sacramento MSA. Thus, the proposed Final Judgment would achieve the relief the Government would have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the Complaint.

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

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the Court may consider --

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment 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).

As the United States Court of Appeals for the D.C. Circuit recently held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, "[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."[2] Rather,

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at

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[2] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), reprinted in U.S.C.C.A.N. 6535, 6538.

71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988), citing United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d at 1460-62. Precedent requires that

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[3]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public

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[3] Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); see BNS, 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716. See also Microsoft, 56 F.3d at 1461 (whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'") (citations omitted).

interest.' "[4]

This is strong and effective relief that should fully address the competitive harm posed by the proposed merger.

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.

Respectfully submitted,

Dando B. Cellini

Merger Task Force
U.S. Department of Justice
Antitrust Division
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530
(202) 307-0829

Dated: March 20, 1997.

[4] United States v. American Tel. and Tel Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd. sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting Gillette Co., 406 F. Supp. at 716 (citations omitted); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

EXHIBIT A

DEFINITION OF HHI AND CALCULATIONS FOR MARKET

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It 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 thirty, thirty, twenty, and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the Merger Guidelines. See *Merger Guidelines* § 1.51.

Certificate of Service

I, Dando B. Cellini, hereby certify that, on March 20, 1997, I caused the foregoing document to be served on defendants Amercian Radio Systems Corporation and EZ Communications, Inc. by having a copy mailed, first-class, postage prepaid, to:

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