UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. THE NEWS CORPORATION LIMITED, FOX TELEVISION HOLDINGS, INC., and CHRIS-CRAFT INDUSTRIES, INC., Defendants.	Civil Action No. 1:01cv00771 JUDGE: Colleen Kollar-Kotelly Filed: May 14, 2001

COMPETITIVE IMPACT STATEMENT

The United States, 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

The United States filed a civil antitrust Complaint on April 11, 2001, alleging that the proposed acquisition of Chris-Craft Industries, Inc. (“Chris-Craft”) by The News Corporation

Limited ("News Corp") and Fox Television Holdings, Inc. ("FOX") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleges that the acquisition will result in News Corp's KSTU-TV, a FOX affiliate, and Chris-Craft's KTVX-TV, an ABC affiliate, being under News Corp's ownership and control. These two stations together account for approximately 40% of the broadcast television spot advertising revenue in the Salt Lake City market and currently compete vigorously against one another because local and national business consumers find them close substitutes due to the demographic reach of the stations.

As alleged in the Complaint, the proposed transaction would likely lead to higher prices for advertisers who purchase broadcast television spot advertising in the Salt Lake City market. Accordingly, the prayer for relief in the Complaint seeks: (a) adjudication that News Corp's proposed acquisition of Chris-Craft described in the Complaint 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 just and proper.

Shortly before the Complaint was filed, the United States reached a proposed settlement that would permit News Corp and Chris-Craft to consummate their acquisition provided that they divest KTVX-TV, the television station News Corp will acquire from Chris-Craft in Salt Lake City. The settlement consists of a proposed Final Judgment and a Hold Separate Stipulation and Order, which were filed simultaneously with the Complaint on April 11, 2001. 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 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 VIOLATION

A. The Defendants

News Corp is a foreign corporation existing under the laws of Australia and has its headquarters and principal place of business in Sydney, New South Wales, Australia. News Corp, through its subsidiary, FOX, owns 23 television stations in the United States. News Corp also owns cable and satellite distribution businesses and produces films for the television and the motion picture industries. FOX is a corporation existing under the laws of Delaware with its headquarters in Los Angeles, California. Through its subsidiaries, FOX owns and operates television stations in the United States, including KSTU-TV in Salt lake City.

Chris-Craft is a corporation existing under the laws of Delaware with its headquarters in New York, New York. Chris-Craft, through its subsidiaries, BHC and United Television, owns and operates 10 television stations in the United States, including KTVX-TV in Salt Lake City.

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

On August 13, 2000, News Corp; News Publishing Australia Ltd., a subsidiary of News Corp; FOX; and Christ-Craft, and its subsidiaries, BHC and United Television, entered into a $5.3 billion plan of merger under which News Corp would acquire Chris-Craft, BHC, and United Television. This proposed acquisition, which would lessen competition substantially in the

provision of broadcast television spot advertising time in the Salt Lake City market, precipitated the United States's antitrust suit.

C. Anticompetitive Consequences of the Proposed Acquisition

1. *The Sale of Broadcast Television Spot Advertising Time in the Salt Lake City DMA*

The Complaint alleges that the provision of spot advertising time on broadcast television stations serving the Salt Lake City DMA[1] constitutes a relevant product market under Section 7 of the Clayton Act. Broadcast television spot advertising comprises the majority of a broadcast television station's revenues and is sold either directly by the station, or through its national representative, on a localized, market-by-market basis. It is purchased by advertisers who want to target potential customers in specific geographic markets and differs from network and syndicated television advertising, both of which are sold by the major television networks and producers of syndicated programs on a nationwide basis and broadcast in every market where the network or syndicated program is aired.

Broadcast television spot advertising possesses unique attributes that set it apart from advertising using other types of media. In particular, only television combines sight, sound, and motion, thereby creating a more memorable advertisement. Moreover, of all media, broadcast television spot advertising reaches the largest percentage of all potential customers in a particular target market and is therefore especially effective in introducing and establishing the image of a

[1] A "DMA," or designated marketing area is a geographic unit defined by A.C. Nielsen Company, a firm that surveys television viewers and furnishes television stations, advertisers, and advertising agencies in a particular area with data to aid in evaluating audience size and composition. The Salt Lake City DMA generally encompasses the state of Utah.

product. For a significant number of advertisers, broadcast television spot advertising, because of its unique attributes, is an advertising medium for which there is no close substitute. Such customers would not switch to another advertising medium -- such as radio, cable, or newspaper -- if broadcast television spot advertising prices increased by a small but significant amount.

Even though some advertisers may switch some of their advertising to other media rather than absorb an increase in the price of broadcast television spot advertising, the existence of such advertisers would not prevent stations from profitably raising their prices a small but significant amount. During individualized negotiations between advertisers and broadcast television stations, advertisers provide stations with information about their advertising needs, including their target audience. This enables television stations to identify advertisers with strong preferences for broadcast television advertising. At a minimum, broadcast television stations could profitably raise prices to those advertisers who view broadcast television as a necessary advertising medium either as their sole method of advertising or as a necessary complement to other advertising media. Thus, the complaint alleges that the relevant product market in which to assess the competitive effects of this acquisition is the sale of broadcast television spot advertising.

The complaint further alleges that the Salt Lake City DMA constitutes a relevant geographic market within the meaning of Section 7 of the Clayton Act. Signals from broadcast television stations located in Salt Lake City reach viewers throughout the Salt Lake City DMA, but signals from broadcast television stations located outside the Salt Lake City DMA reach few viewers within the Salt Lake City DMA. Advertisers use broadcast television stations within the Salt Lake City DMA to reach the largest possible number of viewers within the entire DMA. Some of these advertisers are located in the Salt Lake City DMA and need to reach customers there while

others are regional or national businesses that want to target consumers in the Salt Lake City DMA. Advertising on television stations outside the Salt Lake City DMA therefore is not an alternative for these advertisers because such stations cannot be viewed by a significant number of potential customers within the DMA.

2. *Harm to Competition in the Salt Lake City DMA*

The Complaint alleges that News Corp's acquisition of Chris-Craft will likely have the following effects:

a. competition in the sale of broadcast television spot advertising in the Salt Lake City DMA would be substantially lessened;
b. actual and potential competition between KSTU-TV and KTVX-TV in the sale of broadcast television spot advertising in the Salt Lake City DMA would be eliminated; and
c. the prices for broadcast television spot advertising in the Salt Lake City DMA would likely increase.

Specifically, the proposed acquisition would give News Corp ownership of two of the top four broadcast stations in the Salt Lake City DMA and would increase its market share of broadcast television spot advertising revenue from approximately 21% to 40%. The acquisition would also further concentrate the already highly concentrated Salt Lake City market by increasing the Herfindahl-Hirschman Index ("HHI") (a measure of market concentration explained in Appendix A of the Complaint) by 785 points. Furthermore, the Complaint alleges that KSTU-TV and KTVX-TV compete head-to-head against each other in the sale of broadcast television spot advertising, largely because the demographic appeal of their programming makes them close substitutes for a significant number of advertisers. Advertisers are able to "play off" KSTU-TV and KTVX-TV against each other and obtain competitive rates for programs that target similar demographics. After the acquisition, a significant number of advertisers will be unable to reach

their desired audiences with equivalent efficiency unless they use News Corp's stations. The acquisition, therefore, would enable News Corp unilaterally to raise prices.

3. E*ntry*

The Complaint alleges that entry is unlikely to be timely, likely, or sufficient to restore the competition lost through the acquisition. Other broadcast television stations in the Salt Lake City DMA would not change their programming in response to a price increase imposed by News Corp after the acquisition. Programming schedules are complex and carefully constructed taking many factors into account, such as audience flow, station identity, and program popularity. As a result, a television station is unlikely to risk repositioning simply to capitalize on a small but significant price increase by News Corp after the acquisition.

Further, new entry into the Salt Lake City DMA is unlikely inasmuch as the Federal Communications Commission ("FCC") regulates entry through the issuance of licenses, which are difficult to obtain. Even if a new signal became available, commercial success would come over a period of many years at best. Thus, entry into the Salt Lake City DMA broadcast television spot advertising market would not be timely, likely, or sufficient to deter News Corp from unilaterally raising prices.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. Divestiture and Hold Separate Provisions

The proposed Final Judgment will preserve competition in the sale of broadcast television spot advertising time in the Salt Lake City DMA by requiring the defendants to divest KTVX-TV, the Salt Lake City television station that News Corp will acquire as a result of the acquisition. The sale of KTVX-TV will eliminate completely the overlap created in Salt Lake City by the acquisition, thereby completely restoring the pre-merger market structure and resolving any competitive concerns.

The divestiture requirements of the proposed Final Judgment, as stated in Section IV, direct defendants to divest KTVX-TV within one hundred fifty (150) days after filing of the Complaint or five (5) days after notice of the entry of the Final Judgement by the Court, whichever is later. The divestiture must be made to a buyer that in the United States' sole judgment has the intent and capability of competing effectively in the commercial television broadcast business in the Salt Lake City market. The United States, in the exercise of its sole discretion, may extend this time for two additional thirty (30) day periods. Defendants must use their best efforts to divest KTVX-TV as expeditiously as possible and, until the ordered divestiture takes place, the defendants must cooperate with any prospective purchasers.

Under the Hold Separate Stipulation and Order**,** until the ordered divestiture takes place, defendants shall preserve, maintain, and continue to operate KTVX-TV as a competitively independent, ongoing economically viable competitive business, with its assets, management, decision-making functions, and operations separate, distinct, and apart from KSTU-TV's and News Corp's other operations.

B. Trustee Provisions

In the event defendants fail to make the required divestiture of KTVX-TV within the time periods set forth in the proposed Final Judgment, a trustee will be appointed by the Court to effect the divestiture. News Corp will pay all costs and expenses of any trustee and of any professionals and agents retained by the trustee. After appointment, the trustee will report monthly to the United States, News Corp**,** and the Court on its efforts to accomplish the required divestiture. If the trustee has not accomplished the divestiture within six (6) months of its appointment, it shall inform the Court of its efforts to accomplish the required divestiture, the reasons the required divestiture has not been accomplished, and the trustee's recommendations.

C. Ban on Reacquisition

The defendants may not reacquire or enter into any local marketing agreement, joint sales agreement, or any other cooperative selling arrangement with respect to KTVX-TV during the term of the consent decree, which is for 10 years unless extended by the Court. The reacquisition of KTVX-TV, as well as arrangements whereby News Corp would manage KTVX-TV or sell advertising time in coordination with (or on behalf of) KTVX-TV would undermine, if not negate, the benefits of the relief obtained in the Salt Lake City DMA. Accordingly, this provision is necessary to protect the integrity of the relief.

The relief in the proposed Final Judgement is intended to remedy the likely anticompetitive effects of News Corp's proposed acquisition of Chris-Craft in the broadcast television spot advertising market in the Salt Lake City DMA. Nothing in the Final Judgment is intended to limit

the United States' ability to investigate or to bring actions, when appropriate, challenging other past or future activities of defendants in any other markets.

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 United States 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 United States 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 United States will evaluate and respond to the comments. All comments will be given due consideration by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to its entry. The United States will evaluate and respond to the comments. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Any such written comments should be submitted to:

J. Robert Kramer, II
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, NW, Suite 3000
Washington, DC 20530

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, as well as to punish violations of its provisions.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgement, a full trial on the merits of its Complaint against defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against News Corp's acquisition of Chris-Craft. The United States is satisfied, however, that the divestiture of KTVX-TV and other relief contained in the proposed Final Judgement will preserve competition in the sale of broadcast television spot advertising in the Salt Lake City DMA. Thus, the United States is convinced that

the proposed Final Judgment, once implemented by the Court, will prevent News Corp's acquisition of Chris-Craft from having adverse competitive effects.

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 District of Columbia Circuit held, the APPA 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 Corp., 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

In conducting this inquiry, "the 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,

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

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 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) (quoting 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 1458-62. 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

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[2] 119 Cong. Rec. 24598 (1973); see also 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, see 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, at 8-9 (1974), reprinted in 1974 U.S.C.C.A.N. 6535, 6538.

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 interest.' "[4]

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. 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 might have**,** but did not pursue. Id.

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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 Broad. 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)).

[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); see also United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

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:May 14, 2001

Respectfully submitted,

/s/

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