UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA, *Plaintiff*, v. **TEXAS TELEVISION, INC.**, **GULF COAST BROADCASTING COMPANY**, and **K-SIX TELEVISION, INC.**, *Defendants*.	Civil Action No.: C-96-64 2/6/96

COMPETITIVE IMPACT STATEMENT

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

I.

NATURE AND PURPOSE OF THE PROCEEDING

On February 6, 1996, the United States filed a civil antitrust complaint under Section 4 of the Sherman Act, as amended, 15 U.S.C. § 4, alleging that the Defendants, Texas Television, Inc., Gulf Coast Broadcasting Company, and K-Six Television, Inc., engaged in a combination and conspiracy, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, to increase the price of retransmission rights to cable operators in Corpus Christi, Texas and surrounding areas. The complaint alleges that, in furtherance of this conspiracy, each Defendant from at least June of 1993 through December 1993:

a. agreed not to enter into a retransmission consent agreement with any cable company until that company had reached agreements with all three Defendants;

b. agreed not to accept a retransmission consent agreement with any cable company if that agreement gave that Defendant a competitive advantage over the other two Defendants; and

c. in order to carry out these agreements, exchanged information with each other on the progress being made and the terms being considered in each Defendant's retransmission consent negotiations.

The effect of this combination and conspiracy was to increase the price of retransmission consent and to restrain competition among the defendants in the sale of retransmission rights. The complaint alleges that the combination and conspiracy is illegal, and accordingly requests that this Court prohibit Defendants from continuing or renewing such activity.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA, unless the United States withdraws its consent. The Court's entry of the proposed Final Judgment will terminate the action, except that the Court will retain jurisdiction over the matter for possible further proceedings to construe, modify or enforce the Judgment, or to punish violations of any of its provisions.

II.

DESCRIPTION OF PRACTICES GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

Defendants are three television broadcast stations conducting business in Corpus Christi, Texas and the surrounding areas. Texas Television, Inc. owns and operates KIII-TV (Channel 3), the ABC affiliate. Gulf Coast Broadcasting Company owns and operates KRIS-TV (Channel 6), the NBC affiliate. K-Six Television, Inc., a subsidiary of Corpus Christi Broadcasting Company, Inc., owns and operates KZTV-TV (Channel 10), the CBS affiliate. The complaint alleges that these three local broadcasters colluded in order to raise the price of retransmission rights being sold to local cable companies in the Corpus Christi broadcast television market.

Retransmission rights allow a cable operator to carry a local television station on its cable network. Before the enactment of the 1992 Cable Act, cable companies could carry a local broadcast station on its cable system, without obtaining authorization from the station. In contrast, under the Act, see 47 U.S.C. § 325(b)(1), cable companies are forbidden from carrying the signal of a local television station without that broadcaster's express permission. If a station elects to pursue "retransmission consent" under the Act, a cable operator may carry the station's signal only after mutually agreeable terms are negotiated. The Act established October 5, 1993, as the last day that cable operators could carry a station's signal without its retransmission consent, effectively setting that date as the deadline for concluding retransmission consent agreements. As the Act requires retransmission consent to be renegotiated every three years, such negotiations will recur in the fall of 1996.

In the months leading up to October 1993, the cable and broadcast companies in Corpus Christi announced their initial negotiating positions. Each of the cable companies stated that they would not pay cash for signals that their subscribers could receive for free over the air, a position that had been taken by other cable companies nationwide. Each of the three Corpus Christi broadcasters announced that they expected to be paid cash for use of their signals, much as cable operators pay for cable channels such as HBO or ESPN. Negotiations between the broadcasters and the individual cable companies were unproductive. At the time of the October 5 deadline, no retransmission consent deals had been concluded between any of the three Corpus Christi broadcast stations and any of the major local cable operators: Tele-Communications, Inc. ("TCI") (in the city of Corpus Christi), Crown Media (in Kingsville, Texas), and Falcon Cable Media and Post-Newsweek Cable, Inc. (each serving various small outlying communities). As required by law, the cable companies dropped the broadcasters' signals on October 5 just before midnight. The signals were still available over the air from the broadcasters themselves.

Intermittent negotiations with TCI continued through October and November 1993, accompanied by an extensive public relations battle by both sides, in part a reaction to a barrage of cable subscriber complaints to the cable companies and the broadcasters. The stations swapped commercials that advocated their side of the dispute, spots that when aired on a given station featured the insignias of all three stations, a clear message of broadcaster solidarity. Negotiations with the other cable companies essentially ceased pending the resolution of the TCI dispute. Except for Falcon Cable, which obtained several extensions from the broadcasters, the stations' signals remained off the cable systems until final deals were signed, starting with TCI in mid-November.

In response to the position taken by each cable company, the three Corpus Christi broadcasters restrained competition among themselves by entering into an agreements that established a coordinated negotiating strategy. Through these agreements, the broadcasters intended to maximize the concessions they could each obtain from each cable company, and to ensure that any concession obtained through this strategy would not favor one broadcaster over the others. First, as the broadcasters stated repeatedly to cable negotiators and to the public, all three agreed not to return to a given cable system until all three broadcasters had concluded retransmission agreements with that cable operator. This allowed the broadcasters to eliminate any advantage a cable company could gain by being able to play one broadcaster off another. The broadcasters recognized that the first station to return to a cable system placed the other two at a competitive disadvantage, since these stations would lose advertising revenue through reaching fewer viewers until their signals were restored to cable. The last stations would therefore be forced to sign on less favorable terms with the cable company than the first. By agreeing not to sign with a cable company until the other broadcasters had reached agreements with the same cable company, the broadcasters eliminated such competition among themselves. The "holdout agreement" had no purpose other than to guarantee that the three stations collectively obtained better retransmission consent deals. As one of the broadcasters announced publicly during the standoff, "until we are all convinced that we can get the best deal that we can get, then we're not going to be on cable."

The broadcasters also told cable negotiators that they had agreed to reject any deal that would grant any Corpus Christi station a competitive advantage over the other two. This secondary agreement supported the holdout agreement by eliminating the possibility that the last station to sign might acquire especially favorable terms from the cable company, since it could effectively withhold the signals of all three stations until it had reached a deal.

Pursuant to their agreement, the broadcasters in fact refused to return their signals to each individual cable system until all three broadcasters had concluded deals with that cable operator. At the insistence of the broadcasters, all three signals were restored to each cable system at approximately the same time. In several instances, this meant that broadcasters which had already reached an understanding with a cable company waited days to sign the agreement, in order to give the other stations time to finish their negotiations. The broadcasters' desire to return to cable simultaneously required them to keep each other informed as to the progress and content of their negotiations. The broadcasters therefore made frequent telephone calls to each other. At times, a broadcaster told cable negotiators that he would have to check with the other stations before taking a certain action, for example, approving a deal point or an extension. On at least one occasion, representatives of two of the stations met in a Corpus Christi restaurant to talk and exchange written information.

The broadcasters' collusion succeeded in extracting more favorable terms from the cable companies than they would have otherwise obtained, even though the broadcasters failed to achieve their goal of direct cash payments. Local cable operators also lost revenue from increased subscriber cancellations during this period and from purchasing tens of thousands of "A/B" switches so that their subscribers could more conveniently obtain the stations' over the air signals. The amount of commerce affected by the conduct is difficult to establish but appears to be substantial in light of the lengthy disruption that resulted from the concerted action of the broadcasters.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The parties have stipulated that the Court may enter the proposed Final Judgment at any time after compliance with the APPA. The proposed Final Judgment states that it shall not constitute an admission by either party with respect to any issue of fact or law.

The proposed Final Judgment enjoins any continuation or renewal, directly or indirectly, of the type of combination or conspiracy alleged in the Complaint. Specifically, Section IV.A. enjoins each Defendant from entering into any agreement with any broadcaster not affiliated with that Defendant that relates to retransmission consent or retransmission consent negotiations. Section IV.B. prohibits each Defendant from communicating to any non-affiliated broadcaster any information relating to retransmission consent or retransmission consent negotiations, or communicating certain types of information that relate to any actual or proposed transaction with any cable operator or other multichannel video programming distributor. Together, these provisions guarantee that there will be no recurrence of illegal activity by these broadcasters, whether with respect to retransmission consent or to any other transactions with cable companies or other multichannel video programming distributors that may occur in the future. Section IV.C. preserves the right of each Defendant to respond to news inquiries about retransmission consent negotiations, so long as the response does not reveal information about that Defendant's negotiating strategy, the content or progress of negotiations, its plans related to retransmission consent, or the type or value of consideration being sought for retransmission consent.

The Supreme Court has long recognized that certain types of concerted refusals to deal or group boycotts are per se violations of the Sherman Act, even when they fall short of outright price-fixing. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 290 (1985). The agreements between the broadcasters fell into this category because they had the purpose and effect of raising the price of retransmission rights in the Corpus Christi area. Moreover, the Supreme Court has held that an agreement between rival companies that restrains competition between them is illegal when it lacks, as did the agreements among these broadcasters, any pro-competitive justification. See Federal Trade Commission v. Indiana Federation of Dentists, 476 U.S. 447, 459 (1986). Although the 1992 Cable Act gave broadcasters the right to seek compensation for retransmission of their television signals, the antitrust laws require that such rights be exercised individually and independently by broadcasters. When competitors in a market coordinate their negotiations so as to strengthen their negotiating positions against third parties and so obtain better deals, as did these Defendants, their conduct violates the Sherman Act.

Section V. of the proposed final judgment is designed to ensure that persons affected by Defendants' illegal conduct receive notice of the restrictions placed on Defendant's future conduct by the Final Judgment. Thus, paragraphs V.A. and V.B. require each Defendant to send a designated notice to each cable, wireless or satellite television operator that currently distributes that Defendant's signal, and to all other such operators that may in the future request retransmission consent from that Defendant.

Sections VI. and VII. require each Defendant to set up an antitrust compliance program and designate an antitrust compliance officer. Under the program, each Defendant is required to furnish a copy of the Final Judgment and a less formal written explanation of it to each of its officers and directors and to each of its employees, sales representatives, or agents whose duties relate to retransmission consent for that Defendant's Corpus Christi television station.

The proposed Final Judgment also provides methods for determining and securing each Defendant's compliance with its terms. Section VIII. provides that, upon request of the Department of Justice, each Defendant shall submit written reports, under oath, with respect to any of the matters contained in the Final Judgment. Additionally, the Department of Justice is permitted to inspect and copy all books and records, and to interview the officers, directors, employees and agents of each Defendant.

Section IX. makes the Final Judgment effective for ten years from the date of its entry.

Section XI. of the proposed Final Judgment states that entry of the Final Judgment is in the public interest. The APPA conditions entry of the proposed Final Judgment upon a determination by the Court that the proposed Final Judgment is in the public interest.

The Government believes that the proposed Final Judgment is fully adequate to prevent the continuation or recurrence of the violation of Section 1 of the Sherman Act alleged in the Complaint, and that disposition of this proceeding without further litigation is appropriate and 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 attorney 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 the defendant.

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 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. Such comments should be made within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States will evaluate the comments, determine whether it should withdraw its consent, 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.

Written comments should be submitted to:

Donald J. Russell
Chief, Telecommunications Task Force
U.S. Department of Justice
Antitrust Division
555 4th Street N.W., Room 8100
Washington, D.C. 20001

Under Section X. of the proposed Final Judgment, the Court will retain jurisdiction over this matter for the purpose of enabling any of the parties to apply to the Court for such further orders or directions as may be necessary or appropriate for the construction, implementation, modification, or enforcement of the Final Judgment, or for the punishment of any violations of the Final Judgment.

VI.
ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The only alternative to the proposed Final Judgment considered by the Government was a full trial on the merits and on relief. Such litigation would involve substantial cost to the United States and is not warranted, because the proposed Final Judgment provides appropriate relief against the violations alleged in the Complaint.

VII.

DETERMINATIVE MATERIALS AND DOCUMENTS

No particular materials or documents were determinative in formulating the proposed Final Judgment. Consequently, the Government has not attached any such materials or documents to the proposed Final Judgment.

Dated:

Respectfully submitted,

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