IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. **UNIVISION COMMUNICATIONS INC.**, and **HISPANIC BROADCASTING CORPORATION**, Defendants.	Civil Action No. 1:03CV00758 Judge: Hon. Rosemary M. Collyer

COMPETITIVE IMPACT STATEMENT

Plaintiff, the United States of America, by and through the Antitrust Division of the Department of Justice ("Department"), 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 Department filed a civil antitrust complaint on March 26, 2003, alleging that the proposed acquisition of Hispanic Broadcasting Corporation ("HBC") by Univision Communications Inc. ("Univision") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. HBC is the nation's largest Spanish-language radio broadcaster. Univision, the largest Spanish-language media company in the United States, owns a significant equity interest, and possesses governance rights, in Entravision Communications Corporation ("Entravision"), another Spanish-language media company and HBC's principal competitor in Spanish-language radio in many markets. The Complaint alleges that, due to Univision's substantial partial ownership and governance rights in Entravision, the proposed acquisition of HBC would lessen competition substantially in the provision of Spanish-language radio advertising time to a significant number of advertisers in several geographic areas of the United States. The request for relief seeks: (a) a judgment that Univision's proposed acquisition would violate Section 7 of the Clayton Act; (b) preliminary and permanent injunctive relief preventing the consummation of the proposed merger; (c) an award to the United States of the costs of this action; and (d) such other relief as is just and proper.

Before this suit was filed, the Department reached an agreement with Univision and HBC on the terms of a proposed consent decree, which, if entered, would require Univision to reduce its equity interest in Entravision to 15 percent of outstanding shares within three years from the filing of the proposed decree and to 10 percent within six years. The decree would also require Univision to relinquish its right to place directors on Entravision's Board, eliminate certain rights Univision has to veto important Entravision actions, and restrain certain conduct that would interfere with the governance of Entravision's radio business.

A Stipulation and proposed Final Judgment embodying the settlement were filed simultaneously with the Complaint on March 26, 2003. The Department and the defendants have stipulated that they will be bound by the proposed Final Judgment upon its filing. The proposed Final Judgment may be entered after compliance with the APPA unless rejected by the Court. 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. Description of the Events Giving Rise to the Alleged Violation

A. The Defendants and the Proposed Transaction

Univision, a Delaware corporation with its principal place of business in Los Angeles, California, is the largest broadcaster of Spanish-language television programming in the United States with two broadcast networks, Univision and Telefutura, and one cable channel, Galavision. It also has several other Spanish-language media operations, including Internet sites and services, music recording, distribution, and publishing.

Univision has a significant and long-standing relationship with Entravision, a Spanish-language media company with television, radio, outdoor advertising, and publishing businesses. Entravision, which is not a party to this action, currently owns or operates approximately 55 radio stations throughout the United States, most of which broadcast Spanish-language programming. Entravision also owns or operates 49 television stations that broadcast Univision programming pursuant to an affiliation agreement that does not expire until December 31, 2021. As part of this affiliation agreement, Univision serves as Entravision's sole representative for the sale of television advertisements sold on a national basis.

At the time the proposed acquisition was announced, Univision owned an approximate 30-percent equity and seven-percent voting interest in Entravision. In addition, Univision, as the sole holder of Entravision's Class C common stock, has significant governance rights with respect to Entravision. Although Univision's representatives resigned after the proposed acquisition was announced, Univision has the right to place two representatives on Entravision's Board of Directors. Univision also has the right to veto important Entravision business decisions. Entravision's Bylaws provide Univision the right to veto Entravision's (a) issuance of equity, (b) incurrence of debt at certain levels, and (c) acquisitions or dispositions of assets valued at greater than $25 million. Entravision's Certificate of Incorporation provides Univision the right to approve any Entravision (a) merger, consolidation, business combination or reorganization, (b) dissolution, liquidation, or termination, and (c) transfer of any FCC license with respect to a television station that is an affiliate of Univision.

HBC, a Delaware corporation with its principal place of business in Dallas, Texas, is a media company that owns or operates more than 60 radio stations in 18 geographic regions in the United States. Nearly all of HBC's stations broadcast in Spanish. HBC's other businesses include a marketing group and interactive online services.

On June 11, 2002, Univision agreed to acquire all of the voting securities of HBC. This transaction, if consummated, would result in a reduction in competition between HBC and Entravision in the provision of Spanish-language radio advertising in certain markets where the firms compete.

B. Markets

The Complaint alleges that the provision of advertising time on Spanish-language radio stations to advertisers that consider Spanish-language radio to be a particularly effective medium is a relevant product market, and that the Dallas, Texas; El Paso, Texas; Las Vegas, Nevada; McAllen-Brownsville-Harlingen, Texas; Phoenix, Arizona; and San Jose, California metro areas ("Overlap Markets") are each a relevant geographic market.

1. Relevant Product Market

Radio broadcasters, like HBC and Entravision, sell advertising time to local and national advertisers in areas where their stations are located. HBC and Entravision each negotiate these transactions individually with each local and national advertiser, and the resulting price for advertising time reflects the circumstances of these individual negotiations and the preferences of each advertiser.

There are a significant number of local and national advertisers in the geographic markets identified below that consider Spanish-language radio to be particularly effective in reaching desired customers who speak Spanish and who listen predominately or exclusively to Spanish-language radio. Such advertisers view Spanish-language radio, either alone or in conjunction with other media, to be the most effective way to reach their target audience and do not consider other media, including non-Spanish-language radio, to be a reasonable substitute. These advertisers would not turn to other media, including radio that is not broadcast in Spanish, if faced with a small but significant increase in the price of advertising time on Spanish-language radio or a reduction in the value of the services provided.

Given the nature of individualized negotiations between radio stations and advertisers discussed above, Spanish-language radio stations are likely able to identify advertisers that place a high value on utilizing Spanish-language radio to reach their targeted audience. Such advertisers would not find it economical to switch, or credibly threaten to switch, to other media to avoid a post-merger price increase. In the geographic markets identified below, there are a significant number of advertisers that consider Spanish-language radio advertising to be a particularly effective medium, and the provision of advertising time on Spanish-language radio stations to these advertisers is a relevant product market within the meaning of Section 7 of the Clayton Act.

2. Relevant Geographic Markets

Advertising placed by local and national advertisers on radio stations in the Overlap Markets is aimed at reaching listening audiences within each of those Overlap Markets, and radio stations outside an Overlap Market do not provide effective access to that audience. If there were a small but significant increase in the price of advertising time on Spanish-language radio stations within an Overlap Market, advertisers would not switch enough purchases of advertising time to stations outside the Overlap Market and/or otherwise reduce their purchases to defeat the price increase. Thus, the Overlap Markets of Dallas, El Paso, Las Vegas, McAllen-Brownsville-Harlengen, Phoenix, and San Jose are each relevant geographic markets for the purpose of Section 7 of the Clayton Act.

C. Harm to Competition in Radio Advertising Markets

1. Current Competition Between HBC and Entravision

The Complaint alleges that Entravision and HBC are vigorous competitors in the provision of Spanish-language radio. They heavily promote their stations against each other in order to gain ratings; they program and format their stations with an eye toward attracting listeners from each other; they aggressively seek to acquire stations; and they closely monitor each other's competitive positions in the Overlap Markets. Most importantly, the Complaint alleges that HBC and Entravision compete aggressively to sell advertising time to advertisers that seek to reach Spanish-language audiences. During individualized rate negotiations, advertisers targeting Spanish-language listeners benefit from this competition, including the ability to play off HBC stations against Entravision stations to reach better terms.

2. Reduction in Competition from the Acquisition

The Complaint alleges that, given Univision's significant ownership stake and governance rights in HBC's principal competitor, Entravision, the acquisition of HBC by Univision will lessen competition substantially in the sale of advertising time on Spanish-language radio in the Overlap Markets. The market for the provision of Spanish-language radio in the Overlap Markets is highly concentrated, with HBC and Entravision's combined share of advertising revenue ranging from 70 to 95 percent. HBC and Entravision face few other significant competitors and, for many local and national advertisers buying advertising time on Spanish-language radio, they are the next best substitutes for each other.

The Complaint alleges that Univision's ownership of a substantial equity stake in Entravision, and its ability to influence or control competitively significant Entravision decisions, will lessen the incentives of both companies to compete aggressively against each other and will result in higher prices and lower service quality in the sale of Spanish-language radio advertising time. Univision's right to place directors on Entravision's board and right to veto certain strategic business decisions (namely any Entravision issuance of equity or debt, or acquisitions over $25 million) give it a significant degree of control or influence over Entravision and will likely impair Entravision's ability and incentive to compete with Univision/HBC. For example, Univision's right to veto any Entravision acquisition of assets over $25 million would allow Univision/HBC to prevent Entravision from purchasing any significant radio station assets in a market where HBC competes. A Univision veto on the issuance of new stock or debt could leave Entravision without access to capital it may need to make acquisitions or otherwise compete effectively with HBC. Entravision has frequently taken actions in the past that have been subject to these Univision veto rights and, because its plans call for more growth through acquisition, Entravision is likely to need Univision's approval on many occasions in the future. Indeed, the existence of these veto rights lessens competition even if they are not exercised because Entravision will have the incentive to constrain its normal competitive behavior against Univision/HBC to ensure that Univision/HBC provides the necessary approval.

Univision's approximately 30-percent equity interest in Entravision also will substantially reduce competition between Univision/HBC and Entravision. Univision/HBC will have reduced incentives to compete against Entravision for advertisers seeking a Spanish-language radio audience because Univision/HBC, as a substantial owner of Entravision stock, will benefit even if a customer chooses Entravision rather than HBC. Consequently, HBC will compete less aggressively to gain customers at the expense of Entravision, resulting in an increase in prices for a significant number of advertisers in the Overlap Markets. Advertisers that consider Spanish-language radio to be a particularly effective medium will find it difficult or impossible to "buy around" Univision/HBC and Entravision, *i.e.*, to effectively reach their targeted audience without using Univision/HBC and Entravision radio stations.

Entry of new Spanish-language radio stations into the relevant geographic markets would not be timely, likely, or sufficient to mitigate the competitive harm likely to result from this acquisition. In theory, entry could occur by obtaining a license for new radio spectrum or by reformatting an existing station. New radio spectrum acquisition is highly unlikely, however, because spectrum is a scarce and expensive commodity and reformatting by existing stations is unlikely to defeat a price increase by Univision/HBC or Entravision. 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 firm such as Univision/HBC, and even given such a format change, radio stations that did change formats would be unlikely to attract enough listeners to provide sufficient alternatives to the merged entity. Reformatting is an expensive endeavor that involves the loss of the station's existing audience, a significant expense to attract new listeners, and no assurance of attracting a significant listening base to justify the costs involved. It generally occurs when a station believes that a particular format is not being sufficiently served or when a station finds a niche between existing formats. An increase in the price of advertising rates charged by existing stations serving a specific format does not in itself provide assurance that a newly formatted station would attract a sufficient audience base, particularly if there are strong incumbents already in that format.

III. Explanation of the Proposed Final Judgment

The proposed Final Judgment is designed to preserve competition in the sale of advertising time on Spanish-language radio stations in the Overlap Markets by restricting Univision's ability to control or influence Entravision's radio business and by significantly reducing Univision's equity stake in Entravision. The proposed Final Judgment has three principal provisions: (1) exchange of Univision's Entravision stock for a nonvoting equity interest with limited shareholder rights; (2) divestitures of a substantial portion of the defendants' equity stake in Entravision; and (3) restrictions on the defendants' ability to interfere with the governance of Entravision's radio business. The proposed Final Judgment also has several sections designed to ensure its effectiveness and adequate compliance. Each of these sections is discussed below.

A. Exchange of Shares for Nonvoting Equity

Section IV of the proposed Final Judgment requires Univision to exchange all of its

Entravision Class A and Class C common stock for a nonvoting equity interest with limited rights and to certify that the voting and director rights that Univision has held in connection with its Entravision stock have been eliminated. The limited rights to be associated with the new class of stock to be issued to defendants are set forth in a Certificate of Designations, Preferences and Rights of Series U Preferred Stock, which is attached to the proposed Final Judgment. The exchange of stock must occur prior to the closing of the Univision/HBC merger.

These provisions will significantly curtail Univision's ability to influence or control Entravision's business conduct. As part of the acquisition of a new class of stock, Univision will relinquish certain rights it previously had in connection with Entravision governance. First, Univision will relinquish all shareholder voting rights so that it will not be able to vote on any corporate matters. Second, Univision will relinquish its two seats on Entravision's Board of Directors so that it will no longer have access to confidential Entravision information or the ability to vote on matters before the Board. Third, Univision will relinquish certain "veto" rights over important Entravision decisions, namely Univision's rights under the Entravision Bylaws to veto Entravision's issuance of equity, incurrence of debt at certain levels, and acquisitions or dispositions of assets valued at greater than $25 million. Retention of these rights would have allowed Univision to affect Entravision's strategic decision-making by preventing, or threatening to prevent, Entravision from making acquisitions or raising capital. Moreover, the continued existence of these veto rights would lessen competition even if they were not exercised because Entravision would have the incentive to constrain its normal competitive behavior against Univision/HBC to ensure that Univision/HBC would grant necessary approvals for future transactions subject to the veto rights.

The proposed Final Judgment does not require elimination of all shareholder rights that Univision currently possesses. As set forth in the Certificate of Designations, Univision will retain the modified right to veto any decision by Entravision to merge, consolidate, or otherwise reorganize Entravision with or into one or more entities that results in a transfer of all or substantially all of the assets of Entravision or a transfer of a majority of the voting power of Entravision.[1] Univision also retains the right to veto any Entravision dissolution, liquidation, or termination. Finally, Univision will also have the right to veto any disposition of any interest in any FCC license with respect to television stations that are affiliates of Univision. The proposed Final Judgment makes clear that these rights may be terminated if Entravision and the defendants choose to do so. *See* Section VII.C. Defendants, however, are restrained from seeking to expand or modify these limited rights in any manner.

B. Divestiture of Defendants' Entravision Holdings

Section V of the proposed Final Judgment requires Univision to reduce its equity stake in Entravision so that it owns no more than 15 percent of all outstanding Entravision stock by March 26, 2006, and no more than 10 percent by March 26, 2009. The divestitures of this stock may be made by any combination of open-market sale, public offering, private sale, or repurchase by Entravision. The stock may not be sold by private sale or placement to any Spanish-language

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[1] Section D(i) of the Certificate provides that without Univision's approval, Entravision will not "merge, consolidate or enter into a business combination, or otherwise reorganize this Corporation with or into one or more entities (other than a merger of a wholly-owned subsidiary of this Corporation into another wholly-owned subsidiary of this Corporation)." This approval right is identical to one that Univision possessed previously. Section VI.C of the proposed Final Judgment, however, limits Univision's rights in that it provides that Univision may not exercise its rights under D(i) unless the transaction at issue "results in a transfer of all or substantially all of the assets of Entravision or a transfer of a majority of the voting power of Entravision."

radio broadcaster other than Entravision unless the Department agrees to such a transaction in writing.

As explained above, if Univision/HBC owned a substantial, partial-ownership interest in Entravision, Univision/HBC would have an incentive to compete less aggressively. This is because Univision/HBC would receive some significant benefit even on sales it loses to Entravision. Reducing Univision/HBC's stake in Entravision to a much lower percentage reduces substantially the likelihood that Univision/HBC's competitive incentives will be affected by its partial ownership of Entravision, thus preserving Univision/HBC's incentive to compete with Entravision.

The terms of the proposed Final Judgment reflect a balancing of the potential harm to competition that might arise from a divestiture that proceeds either too slowly or too rapidly. In merger cases in which the Department seeks a divestiture of assets as a remedy, the Department requires completion of the divestiture within the shortest time period reasonable under the circumstances. In this case, the time periods for divestiture of stock are appropriate, however, because of concerns that a more rapid divestiture might harm competition by adversely affecting Entravision's ability to raise capital to fund expansion of its radio business.

C. Restrictions on Defendants' Ability to Participate in the Governance of Entravision

Section VI of the proposed Final Judgment restrains defendants from directly or indirectly: (1) suggesting or nominating any candidate for election to Entravision's board or serving as an officer, director, manager, or employee of Entravision; (2) accessing any nonpublic information relating to the governance of Entravision; (3) voting or permitting to be voted any shares of

Entravision stock that defendants own; (4) using or attempting to use any ownership interest in Entravision to exert any influence over Entravision in the conduct of Entravision's radio business; (5) using or attempting to use any rights or duties under the television affiliation agreement or relationship to influence Entravision in the conduct of Entravision's radio business; and (6) communicating to or receiving from Entravision any nonpublic information relating to Entravision's radio business.

Collectively, these provisions are intended to prevent defendants from participating in Entravision's governance or in the conduct of Entravision's radio business, notwithstanding the defendants' remaining equity interest in Entravision and the television affiliation relationship. While recognizing that Univision and Entravision have a mutual interest in matters affecting their television affiliation relationship, these provisions seek to ensure the competitive independence of the two companies in matters involving the radio business.

D. Permitted Conduct

Section VII of the proposed Final Judgment identifies certain conduct that is permitted. Individual managers, agents, and employees of the defendants are allowed to hold, acquire, or sell Entravision stock solely for personal investment. Officers and directors also may hold or sell Entravision stock but may not acquire any additional Entravision stock. Any Entravision stock held by these individuals is not subject to the stock-exchange or divestiture requirements of Sections IV and V of the proposed Final Judgment.

Section VII also provides that Univision may acquire a majority of Entravision's voting securities so long as the transaction is subject to the reporting and waiting requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a, provided, however, that Univision cannot acquire or retain any interest in Entravision's radio assets in any of the Overlap Markets as part of such a transaction without the approval of the Department, in its sole discretion. This provision makes clear that the proposed Final Judgment does not prohibit a transaction in which Univision would acquire a majority stake in Entravision so long as the Department is afforded the ability to review the transaction pursuant to the established Hart-Scott-Rodino framework. The Department, of course, would review any such transaction to determine whether it was likely to lessen competition in any relevant market. Because the Department has determined that a combination of Univision and Entravision would lessen competition in the sale of advertising on Spanish-language radio in the Overlap Markets, a transaction in which Univision acquired Entravision may not include any Entravision radio assets from the markets that are the subject of the Complaint unless the Department gives its approval.

E. Compliance, Inspection, and Other Provisions Designed to Ensure Effectiveness of the Proposed Final Judgment

Section VIII of the proposed Final Judgment provides for appointment of a trustee should defendants not comply with the terms of the proposed Final Judgment that require stock divestitures within the established time periods. The trustee would have the power to accomplish the divestitures. Section IX requires the defendants to distribute the proposed Final Judgment to certain officers, directors, and appropriate employees, and obtain statements from these individuals that they understand their obligations under the Final Judgment. The terms of this provision are designed to ensure that those individuals responsible for complying with the Final Judgment are aware of its existence and understand its requirements. Section IX also requires annual reports and certifications during the life of the decree. Section X provides a means for the

Department to obtain information from the defendants to determine or secure compliance with the proposed Final Judgment. Under Section XI, the Court would retain jurisdiction over this matter to modify or terminate any of its provisions, to enforce compliance, and to punish any violations of its provisions. Section XII provides that the proposed Final Judgment will expire 10 years after it is entered by the Court. Section XIII states that the entry of the proposed Final Judgment is 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 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 Department 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 Department 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 Department 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*. The Department will evaluate and respond to the comments. All comments will be given due consideration by the Department, 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 Department will be filed with the Court and published in the *Federal Register*.

Written comments should be submitted to:

James R. Wade
Chief, Litigation III Section
Antitrust Division
United States Department of Justice
325 7th Street, N.W., Suite 300
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 Department considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint for Injunctive Relief against Univision and HBC as well as a proposal by the defendants that they would, in lieu of divestitures, place their Entravision stock in a long-term trust. The Department is satisfied, however, that the divestiture of a substantial portion of equity interest in Entravision by Univision, the surrender of several key control rights, and the other relief contained in the proposed Final Judgment will preserve competition in the sale of radio advertising time on Spanish-language stations serving the Overlap Markets. Thus, the proposed Final Judgment would achieve substantially all the relief the Department 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 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 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." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).[2] Rather,

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[2] *See also United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the

> [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-Am. Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. May 17, 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. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. Precedent requires that

> [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. 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.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[3]

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settlement achieved [was] within the reaches of the public interest"). 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. No. 93-1463, 93rd Cong., 2d Sess. 8-9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538.

[3] *Cf. BNS*, 858 F.2d at 463 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing 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'").

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.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

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.* at 1459-60.

VIII. Determinative Documents

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

Dated this 7th day of May 2003.

Respectfully submitted,

_______/s/__________________

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Competitive Impact Statement was served on the following counsel, by electronic mail in PDF format and by hand delivery, this 7th day of May, 2003:

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