UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. NATIONAL ASSOCIATION OF BROADCASTERS, Defendant.	Civil Action No. 79-1549 Filed: July 16, 1982

COMPETITIVE IMPACT STATEMENT

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16(b)-(h), the United States of America files this Competitive Impact Statement relating to the proposed Final Judgment against the defendant in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On June 14, 1979, the United States filed a civil antitrust complaint under Section 4 of the Sherman Act (15 U.S.C. § 4), against the National Association of Broadcasters ("NAB"), alleging that the NAB had violated Section 1 of the Sherman Act (15 U.S.C. § 1), by combining and conspiring to restrain trade. Specifically, the complaint alleged that the NAB had promulgated and enforced a television code, certain provisions of which restricted the quantity, placement, and format of television advertisements.

In response to the parties' cross-motions for summary judgment, the District Court on March 3, 1982, issued an Opinion and Order which denied NAB's motion and which granted in part the Government's motion for summary judgment. The Court found NAB's "multiple product" rule to be per se unlawful. This rule restricted the number of products that could be advertised within a single advertisement of less than

60 seconds' duration. The Court accordingly entered an Order requiring NAB immediately to cease enforcement of that rule. 1/ The Court held that the merits of the Government's other allegations could be determined only after trial.

In July 1982, plaintiff and defendant agreed that the proposed Final Judgment may be entered after compliance with the Antitrust Procedures and Penalties Act. Entry of this proposed Final Judgment will terminate the action, except that the Court will retain jurisdiction to construe, modify, enforce, or to punish violations of, the proposed judgment.

II. EVENTS GIVING RISE TO THE ALLEGED VIOLATION

The National Association of Broadcasters is a non-profit trade association founded to further the interests of broadcasters. About 70 percent of the nation's television broadcasters are NAB members. Since 1952 the NAB has promulgated and enforced a television code that regulates, among other things, television advertising.

The Department's complaint focuses only on three types of advertising restrictions imposed by the television code. 2/ The first, the "time limitation" rule, sets an upper limit on the number of minutes of advertising (and other non-program material such as promotional and public service announcements) that a broadcaster may show per hour of broadcasting. 3/ There are different limits for prime time and non-prime time programming, and different prime time limits apply to network affiliates and to independent stations.

1/ On May 3, 1982, NAB filed a Notice of Appeal from the Order. NAB will move to have the Order vacated as moot if the proposed Final Judgment is entered. See parts III and IV below for a more complete discussion of that matter.

2/ The television code also deals with many other matters which are not addressed in the complaint and which would not be affected by the proposed Final Judgment.

3/ This rule is set forth in paragraph XIV, sections 1-3, and in paragraph XV of the NAB television code.

The second group of rules are the "consecutive announcement" and "program interruption" rules. 4/ The consecutive announcement rule limits the number of consecutive non-program announcements that a station may broadcast, i.e., the number of back-to-back commercials, promotions, and public service announcements. The program interruption rule limits the number of times that a program may be interrupted to show non-program material, i.e., the number of commercial breaks. Here too, the limits vary depending on the status of the station as a network affiliate or as an independent, and on the time of day. Together, these rules effectively establish a 30 second minimum for television commercials since a broadcaster who used shorter commercials would reach the maximum number of consecutive announcements or program interruptions allowed, before having filled the maximum time available for advertisements under the Code.

Third, the Code contained what is called the "multiple product" rule, which states that two unrelated products or services may not be advertised in a single commercial of less than 60 seconds' duration. 5/

In challenging the foregoing provisions, the complaint alleges that the effect of these Code provisions is to restrain trade in violation of Section 1 of the Sherman Act, by restricting the overall supply of television advertising available to advertisers, and by restricting competition in the format in which television commercials may be presented.

4/ Paragraph XIV, sections 4,5 of the NAB television code.

5/ This is the rule that Judge Greene found in his March 3, 1982 Opinion to be a per se violation of Section 1 of the Sherman Act. It is set forth in paragraph IX, section 5 of the television code.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendant have stipulated that the proposed Final Judgment may be entered by the Court at any time after compliance with the Antitrust Procedures and Penalties Act. The proposed judgment constitutes no admission by either party as to any issue of fact or law. Under the provisions of the Antitrust Procedures and Penalties Act, entry of the proposed judgment is conditioned on a determination by the Court that the proposed Final Judgment is in the public interest.

The proposed Final Judgment orders NAB to stop disseminating or enforcing the specific Code provisions challenged by the United States, and forbids NAB to adopt in the future rules respecting the quantity, length, or placement of non-program material on television, or any rule respecting the number of products or services to be advertised within a single non-program announcement on television. The proposed Final Judgment also orders NAB to send a copy of the Final Judgment to all NAB members and Code subscribers. The Final Judgment expressly provides that it does not limit the right of NAB members -- none of whom were named as defendants in the action -- to individually establish their own advertising standards. Nor does the Final Judgment prohibit NAB and its members from exercising their First Amendment rights of jointly advocating legislation or agency regulations, or of participating in agency or departmental proceedings.

The United States and the NAB have stipulated that the NAB will, upon entry of the proposed Final Judgment, request the Court of Appeals both to dismiss as moot NAB's appeal of Judge Greene's March 3 Order and to vacate that Order. The parties have further stipulated that the United States will not object to such a motion.

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. Had the United States obtained a final judgment in its favor after a trial on the merits, that judgment would have constituted *prima facie* evidence against the defendant in any private lawsuit. However, consent judgments or decrees entered before any testimony have been taken are not *prima facie* evidence against the defendant. 15 U.S.C. § 16(a).

Here, the proposed Final Judgment will dispose of all issues in the case, including the matters covered by the Court's March 3, 1982 Order. Where a settlement has rendered a court's earlier decision and its appeal moot, standard procedure is for the appealing party to ask the Court of Appeals to dismiss the appeal as moot, and then either to vacate the original decision as moot or remand it to the district court with instructions to vacate as moot. In this case, if and when the proposed Final Judgment is entered by the Court, defendant NAB will make a motion in the Court of Appeals to vacate the March 3 Order as moot, and the United States will not object to that motion. The Department anticipates that defendant NAB will argue in any subsequent private litigation against it regarding the television code, that the March 3 Order should have no *prima facie* effect. The Department expresses no opinion on that matter.

The proposed Final Judgment itself will neither assist nor hinder plaintiffs in any such lawsuit. *See* 15 U.S.C. § 16(a).

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendant have stipulated that the proposed Final Judgment may be entered by the Court after

compliance with the provisions of the Antitrust Procedures and Penalties Act, provided that the United States has not withdrawn its consent. The Act conditions entry on the Court's determination that the proposed judgment is in the public interest.

The Act provides a period of at least sixty (60) days preceding the effective date of the proposed judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wants 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 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:

Stanley M. Gorinson, Chief
Special Regulated Industries Section
Antitrust Division (SAFE-504B)
U.S. Department of Justice
Washington, D.C. 20530

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The principal alternative to entering into a consent decree would have been for the United States to continue to seek in court an injuction forbidding the NAB from enforcing the challenged provisions of its television code. The relief provided by this proposed Final Judgment is virtually the same as that which the United States could have expected to obtain had it been fully successful in a trial on the merits.

Although most provisions of the proposed judgment were revised and refined in the course of negotiations, no other relief substantially different in kind was considered by the United States.

VII. DETERMINATIVE DOCUMENTS

There are no materials or documents which the United States considered determinative in formulating the proposed Final Judgment. Therefore, none are being filed along with this Competitive Impact Statement.

Respectfully submitted,

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Dated: July 16, 1982.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of July, 1982 a copy of the foregoing Competitive Impact Statement has been served on defendant National Association of Broadcasters by mail, postage prepaid, addressed to the following counsel of record for defendant:

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/s/ John Dorsey

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