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 Filed: 10/31/03

RESPONSE TO PUBLIC COMMENTS

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("Tunney Act"), the United States hereby responds to the public comments received regarding the proposed Final Judgment in this case. After careful consideration of these comments, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comments and this Response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).

On March 26, 2003, the United States filed the Complaint in this matter 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.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and a Stipulation signed by the United States and the defendants consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act. Pursuant to those requirements, the United States filed a Competitive Impact Statement ("CIS") in this Court on May 7, 2003; published the proposed Final Judgment and CIS in the *Federal Register* on May 21, 2003; and published a summary of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, in the Washington Post for seven days on May 23, 2003, through May 29, 2003. The 60-day period for public comments, during which two comments were received as described below, expired on July 23, 2003.[1]

I. Background

As explained more fully in the Complaint and CIS, this transaction raised competitive concerns relating to the sale of advertising time on Spanish-language radio stations in several geographic markets. 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 that is HBC's principal competitor in Spanish-language radio in many markets. The Complaint alleges that, due to Univision's substantial equity interest and governance rights in Entravision, Univision's proposed acquisition

[1] On September 22, 2003, the Federal Communications Commission announced that it granted Univision's and HBC's applications for transfer of control that were required in order for the transaction to proceed. *See* Memorandum Opinion and Order, FCC 03-218 (located at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-218A1.pdf.). Univision and HBC closed their merger the same day.

of HBC would substantially lessen competition in the provision of Spanish-language radio advertising time to a significant number of advertisers in several geographic markets in the United States.

The proposed Final Judgment, if entered, would require Univision to reduce its equity interest in Entravision to 15 percent of the outstanding shares within three years from the filing of the proposed decree and to 10 percent within six years of such filing. The proposed decree would also require Univision to convert all of its Entravision equity into a nonvoting class of stock; to relinquish its right to place directors on Entravision's Board of Directors; to eliminate certain of Univision's rights to veto important Entravision actions; and to refrain from certain conduct that would interfere with the governance of Entravision's radio business.

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. Legal Standard Governing the Court's Public Interest Determination

Upon the publication of the public comments and this Response, the United States will have fully complied with the Tunney Act and will move the Court for entry of the proposed Final Judgment as being "in the public interest." 15 U.S.C. § 16(e). The Court, in making its public interest determination, should apply a deferential standard and should withhold its approval only under limited conditions. Specifically, the Court should review the proposed Final Judgment in light of the violations charged in the complaint and "withhold approval only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes 'a mockery of judicial power.'" *Mass. School of Law v.*

United States, 118 F.3d 776, 783 (D.C. Cir. 1997) (quoting *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995)).

It is not proper during a Tunney Act review "to reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they were not made." *Microsoft*, 56 F.3d at 1459; *see also United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6-7 (D.D.C. 2003) (rejecting argument that court should consider effects in markets other than those raised in the complaint); *United States v. Pearson PLC*, 55 F. Supp. 2d 43, 45 (D.D.C. 1999) (noting that a court should not "base its public interest determination on antitrust concerns in markets other than those alleged in the government's complaint"). Because "[t]he 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,"[2] 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 the United States might have but did not pursue. *Microsoft*, 56 F.3d at 1459-60; *see also United States v. Western Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (noting that a Tunney Act proceeding does not permit "*de novo* determination of facts and issues" because "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General" (citations omitted)).

Moreover, the United States is entitled to "due respect" concerning its "prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature

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[2] It is the United States' responsibility to investigate a transaction and decide what allegations to raise in any challenge it may bring. *See Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) ("[A]n agency's decision not to prosecute or enforce, whether through civil or criminal process, is generally committed to an agency's absolute discretion.").

of the case." *Archer-Daniels-Midland Co.*, 272 F. Supp. 2d at 6 (citing *Microsoft*, 56 F.3d at 1461).

III. Summary of Public Comments

The United States received comments from two entities, the American Antitrust Institute ("AAI," comment attached as Exhibit 1) and Spanish Broadcasting System, Inc. ("SBS," comment attached as Exhibit 2).

AAI takes the position that the United States' CIS fails to address and evaluate "the consequences of this merger in conventional terms in an overall market consisting of Spanish-language media, examining such traditional criteria as advertising effects [and] the consumer interest in diversity of sources of political and cultural information." AAI cmt. at 1. AAI also states that the United States' CIS fails to explain why the proposed Final Judgment does not require the elimination of all rights Univision currently possesses in Entravision and the divestiture of all stock Univision holds in Entravision. AAI cmt. at 1 n.2. These points are similar to SBS's comments on these issues and are addressed below. Additionally, AAI argues that the Division should have considered indicia of harm to non-price competition, such as quality and innovation.

SBS, a Spanish-language radio company that competes in many markets with HBC and Entravision, states that the United States should have alleged harm in its Complaint based on purported effects of the transaction on a "Spanish-language broadcasting market." SBS cmt. at 1-2. SBS further claims that the transaction will increase Univision's incentives (1) to refuse to deal with or discriminate against Spanish-language radio competitors who seek to advertise through Univision and (2) to force advertisers who wish to advertise through both radio and

television to purchase time from both Univision and HBC. *Id.* at 3. In addition, SBS argues that the United States' remedy fails to solve the competitive concerns in the Spanish-language radio markets raised in the Complaint because, according to SBS, Univision will be able to exercise undue influence over Entravision. *Id.* at 1, 4-6.

IV. The United States' Response to Specific Comments

Because both comments raise the general issue of whether the effects of the merger should be analyzed in light of an "overall" Spanish-language media market, the United States will first respond to that issue. It will then respond to the specific points AAI and SBS raised concerning whether the remedy addresses the competitive harm raised in the Complaint.

A. Allegations Not Raised in the Complaint Are Irrelevant to Whether the Proposed Final Judgment Is in the Public Interest.

1. SBS's Proposed Market and Alleged Harm Are Extraneous to the Competitive Issues Raised in the Complaint.

The Complaint alleges that the relevant market consists of the provision of advertising time on Spanish-language radio stations to the significant number of advertisers that consider Spanish-language radio advertising to be a particularly effective advertising medium. *See* Complaint ¶¶ 12-15. SBS, however, takes the position that the Complaint should have raised additional allegations of harm based on purported effects in a combined Spanish-language radio and television market. SBS cmt. at 1-2.

The Complaint's market definition does not extend to the issues raised by SBS, nor should it. The market definition analysis in the Complaint properly begins by examining how advertisers individually negotiate transactions with radio broadcasters such as Entravision and HBC. The resulting price for advertising time reflects the circumstances of these individual

negotiations and the preferences of each advertiser. The Complaint's market definition reflects these individualized negotiations by looking at the options available to individual advertisers. The Complaint alleges that a significant number of advertisers exist who do not have reasonable alternatives to advertising on Spanish-language radio; in other words, these advertisers cannot effectively switch to other media in the face of a small but significant increase in the price of advertising time on Spanish-language radio. This set of advertisers forms the relevant market alleged in the Complaint.

SBS does not appear to take issue with the theoretical framework underlying the Complaint's market definition. Rather, it alleges that there is *another* market to consider; namely, a purported market consisting of a set of advertisers that are dependent on Spanish-language television *and* radio. The Complaint, however, makes no such factual allegation. The proposed market differs significantly from the one alleged in the Complaint and would require markedly different supporting facts to be justified. Moreover, market definition is but one step toward the ultimate goal of determining competitive effects. The Complaint alleges that the transaction would likely cause anticompetitive effects with regard to Spanish-language radio (Complaint ¶¶ 24-27); it makes no such allegations regarding a combined television and radio market. So, SBS asks not only that the Court redraft the Complaint to include an additional market but also that the Court impose a competitive effects analysis based on that new market to find cognizable harm.

As discussed above, the United States is entitled to deference as to the case it brings, and, as *Microsoft* makes clear, it is not proper during a Tunney Act review "to reach beyond the complaint to evaluate claims that the government did *not* make and to inquire as to why they

were not made." *Microsoft*, 56 F.3d at 1459. The Tunney Act does not authorize the Court to consider allegations not raised in the Complaint based on concerns raised by a member of the public. Accordingly, SBS's suggestion that the Complaint is defective for failing to allege harm in a combined Spanish-language television and radio market should be rejected as a matter of law.

2. The CIS Properly Addresses the Market Effects Relevant to the Allegations in the Complaint.

AAI takes the position that the United States has not satisfied its requirements under the Tunney Act because the CIS fails to identify the competitive effects of the transaction in an "overall" Spanish-language media market and fails to justify the United States' decision not to challenge the transaction based on those purported effects. This position is not valid. Not only is the Court's review limited to the case actually brought by the United States, there is no requirement that the United States disclose its decision-making as to cases it chooses *not* to initiate. Rather, the Tunney Act provides that the United States must inform the public about the case it *did* initiate and explain how the proposed decree serves to resolve the competitive effects alleged in the Complaint.

The purpose of a CIS is to provide the public with "basic data about the decree" to allow for informed comment. *See generally United States v. Microsoft Corp.*, 215 F. Supp. 2d 1, 14-15 (D.D.C. 2002) (describing legislative history relating to CIS) (quoting 119 *Cong. Rec.* at 3452 (1973) (statement of Senator Tunney)). To that end, the Tunney Act provides that the CIS shall "recite" the following:

> (1) the nature and purpose of the proceeding;
> (2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;

> (3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;
> (4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;
> (5) a description of the procedures available for modification of such proposal; and
> (6) a description and evaluation of alternatives to such proposal actually considered by the United States.

15 U.S.C. § 16(b). The United States' CIS has satisfied all of these requirements. More specifically, the CIS explains the nature and purpose of the proceeding (at 1-3), describes the events that gave rise to the alleged violation of the antitrust law (at 3-9), explains the proposed Final Judgment (at 9-15), explains the remedies available to potential private litigants (at 15), explains the procedures available for modifying the proposed Final Judgment (at 15-16), and describes and evaluates alternatives to the proposed Final Judgment (at 16-17). There is simply no requirement that the Government identify purported effects it did not allege in the Complaint or explain why it did not make certain allegations in the Complaint. Accordingly, AAI's challenge to the sufficiency of the CIS fails.

3. The Government's Investigation Did Not Demonstrate the Likelihood of Substantial Harm in an "Overall" Spanish-Language Media Market.

Although the United States has no legal obligation to address matters not raised in the Complaint, we note that the United States conducted an extensive inquiry into the issue of whether the combination of Univision's Spanish-language television stations with HBC's Spanish-language radio stations in geographic regions where both are located was likely to cause significant anticompetitive effects. The inquiry included numerous interviews of a wide range of

advertisers and review of over a million pages of documents provided by the defendants and other entities. In the end, the evidence did not support the claims proffered by the comments.

a. The evidence did not justify a combined media market for advertisers.

The United States has traditionally treated radio and television as separate antitrust markets. Past investigations involving general-market (English-language) media mergers revealed that few advertisers consider the two media to be close substitutes; rather, most advertisers viewed the two media as separate or complementary products given the qualitative differences between the two media.[3] In examining whether this "separate market" conclusion applied in this transaction, the United States recognized that Univision has a strong presence in Spanish-language television and that, in certain geographic markets, there are a limited number of other Spanish-language television stations with ratings that would be attractive to advertisers trying to reach Spanish-language viewers. Nevertheless, the evidence garnered in this investigation showed the same qualitative differences between television and radio that exist for general-market advertisers also exist for Spanish-language advertisers. In the end, the investigation did not produce sufficient evidence to support the proposition that a significant number of advertisers considered Spanish-language television and Spanish-language radio to be sufficiently interchangeable to support the "combined" market proposed by the comments.[4]

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[3] *See, e.g.* Complaint ¶¶ 11-14, *United States v. Clear Channel Communications*, No. 1:00CV02063 (D.D.C. filed Aug. 29, 2000); Complaint ¶¶ 34-41, *United States v. Chancellor Media Company, Inc.*, No. CV-97-496 (E.D. N.Y. filed Nov. 6, 1997); Complaint ¶ 12, *United States v. EZ Communications, Inc.*, No. 1:97CV00406 (D.D.C. filed Feb. 27, 1997).

[4] SBS's submission does not provide a basis to establish a combined Spanish-language television and radio market. The letters that SBS attaches to its comment as Exhibit A for the most part discuss how certain advertisers depend on Spanish-language media (a point with which

b. The United States considered non price competition.

AAI also argues that the United States should examine indicia of harm other than price, such as quality and innovation. AAI cmt. at 4-5. The United States, in fact, considered such indicia during this investigation. In this case, the market is comprised of the competitive alternatives for certain advertisers seeking to purchase commercial time on Spanish-language radio stations. Market participants compete on the basis of both price *and* service (or "quality" or "innovation"). *See, e.g.*, Complaint ¶ 14 (relevant product market defined in terms of options available to certain advertisers facing "a small but significant increase in the price of advertising time on Spanish-language radio, *or a reduction in the value of services provided*") (emphasis added). As the Complaint and CIS state, Entravision and HBC heavily promote their stations against each other in an effort to gain high ratings; they program and format their stations in an effort to attract listeners away from each other; they aggressively seek to acquire stations; and they closely monitor each other's competitive positions. Complaint ¶ 19; CIS at 6. As explained in the CIS, the goal of the proposed Final Judgment is to protect such vigorous price and nonprice competition between Entravision and HBC by foreclosing the ability of a combined Univision/HBC to improperly influence Entravision's strategic decision making with regard to its radio business. *See* CIS at 9-11. Contrary to AAI's assumption, the United States considered the many ways in which advertisers benefit from competition – not just price competition – in crafting its remedy.

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the United States does not disagree). Only two of the letters, however, discuss the interchangeability of Spanish-language television and radio (May 27, 2003 letter from Castor A. Fernandez; May 27, 2003 letter from Caballero TV & Cable sales); the rest are silent on the issue.

c. The consideration of political and cultural viewpoints are extraneous to antitrust enforcement.

AAI also asserts that the United States should take into account under its antitrust analysis "consumer interest in diversity of sources of political and cultural information" within a combined Spanish-language television and radio market. AAI cmt. at 1, 3-4. It is not the role of the United States to use the antitrust laws to regulate actual content or to establish quotas for the types of programming that media stations must broadcast. Accordingly, we do not seek to ensure in the context of a merger review that media companies provide a balance of political views or a proper mix of cultural issues as part of their programming. The United States does seek to ensure that content is determined in a competitive marketplace, however. The relevant product identified in the Complaint is the provision of advertising time on Spanish-language radio stations; the customer is an advertiser purchasing that time. In order to supply this product, media stations compete to gain audience ratings, as it is audience access that is being sold to the advertisers. That competition benefits advertisers as discussed above. It also benefits individual audience members (listeners of radio stations) because stations will compete for their attention by offering high quality content. In this way, the relief in the Final Judgment that protects advertising competition also serves to protect individual audience members by maintaining vigorous competition between the Spanish-language radio stations owned by Univision/HBC and those owned by Entravision.

d. The allegation that Univision may refuse to deal with certain advertisers or impose tying arrangements does not warrant condemning the transaction.

SBS alleges that the merger will provide Univision an enhanced incentive to refuse to deal with or discriminate against Spanish-language radio competitors who seek to advertise on

Univision and will also provide Univision the ability to "tie" radio and television advertising time for advertisers who seek to use both mediums. (SBS Cmt. at 3). The United States did not find evidence upon which to base a cause of action pursuant to SBS's theory. If Univision engages in the alleged conduct in the future, and if the conduct satisfies the requirements of an antitrust violation, then the United States (or a private plaintiff with standing) could challenge the conduct at that time. The mere speculation that Univision will violate the antitrust laws, however, does not justify enjoining this transaction.

B. SBS's Assertions that the Proposed Final Judgment Will Not Remedy the Competitive Concerns Raised in the Complaint Are Unfounded.

SBS asserts that the remedy will not address the competitive harms raised in the Complaint because Univision will still have the ability to improperly influence Entravision's actions to the detriment of radio competition between Entravision and Univision/HBC. Specifically, SBS contends that (1) the existence of the television affiliation agreement between Univision and Entravision will cause Entravision to mitigate its radio competition with a combined Univision/HBC; (2) Univision's continued retention of limited shareholder "veto" rights in Entravision might foreclose competition-enhancing transactions; (3) the time period to complete the stock divestitures called for in the proposed Final Judgment is too long; and (4) Univision's ability to hold 10 percent of Entravision's stock will cause Univision/HBC to compete less aggressively against Entravision. SBS cmt. at 1, 4-6.[5]

[5] As noted above, AAI asserts that the CIS fails to explain why Univision was not forced to relinquish all its shareholder "veto" rights in Entravision and to divest all its Entravision equity. AAI cmt. at 1 n.2. These points are addressed in this response to SBS's comments.

Contrary to SBS's assertions, the proposed Final Judgment will preserve competition between Entravision and HBC by restricting Univision's ability to control or influence Entravision's radio business and by significantly reducing Univision's equity stake in Entravision. *See* CIS at 9-13 (describing specific means by which the proposed Final Judgment will preserve competition).

Addressing SBS's first contention, as stated in the CIS, Univision and Entravision have a long-standing television relationship in which Entravision broadcasts Univision programming on television stations owned by Entravision. This relationship is embodied in a pre-existing, long-term affiliation agreement that assigns rights and responsibilities to both parties and also provides for Univision to act as Entravision's national sales representative for *television* advertising. In addition to the fact that this vertical integration may yield certain efficiencies and consumer benefits, there is nothing in this affiliation agreement that allows Univision to control any Entravision *radio* decision, including decisions regarding the acquisition of radio stations. Moreover, the decree itself mandates that the two companies act as independent entities and there is no reason to believe that Univision will violate the terms of the decree (and thereby subject itself to contempt of court proceedings) by using its television relationship to influence any Entravision strategic decision. The Division found no evidence to suggest that the mere fact that a television affiliation agreement exists between them enables Univision to unduly influence Entravision's decisions with respect to its radio business, the only area in which the combined Univision/HBC will compete with Entravision. Finally, Entravision has every incentive to operate its radio stations in a fully competitive manner.

As to SBS's second contention, although Univision will maintain a few limited governance rights in Entravision that it held prior to the contemplation of this merger, the proposed Final Judgment eliminates Univision's ability to exercise these rights over Entravision radio decisions. The rights that are retained relate to the two entities' television relationship, which is not a basis of concern alleged in the Complaint. Univision will retain a modified right to veto a merger or transfer of ownership of Entravision. Although this right does impact ultimate ownership of Entravision, it cannot be used to veto or influence day-to-day decisions relating to radio competition or strategic decisions such as the buying or selling of individual radio stations.

With respect to SBS's third contention, while the United States traditionally requires defendants to divest business assets as expeditiously as possible to maintain their value and ongoing capabilities, the relief sought here is for divestiture of *stock*, the retention of which does not raise the same spoliation concerns as the retention of business assets raises. Moreover, based on our investigation, we concluded that a forced divestiture of equity within a short amount of time could cause material hardship to Entravision's vitality as a significant competitor (for example, a "fire-sale" of Univision's stock holdings in Entravision could depress Entravision's stock price to the point that it would not be able to issue equity to fund potential acquisitions). Such hardship should be avoided or minimized if at all possible so as to maintain Entravision as a strong competitor to the unified Univision/HBC. The time period reflects a balancing designed to minimize the potential harms to competition that might arise from a divestiture that proceeds either too slowly or too rapidly.

Finally, responding to SBS's fourth contention, under the circumstances of this case, Univision's ability to hold no more than 10 percent of Entravision's equity will not give it control or even significant influence over Entravision's business decisions. The decree significantly restrains Univision's ability to participate in Entravision's governance. For example, Univision will not be allowed: to suggest or nominate any candidate for Entravision's board of directors; to have Univision employees serve as Entravision employees; to participate in any Entravision board of directors meeting; to vote its equity; and to have access to any of Entravision's competitively sensitive information. *See* Final Judgment, Section VI. Moreover, Univision's reduced equity stake in Entravision is not sufficiently large to affect competition between them given the market structure of the relevant geographic markets at issue.[6]

V. Conclusion

After careful consideration of these public comments, the United States has concluded that entry of the Proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint and is, therefore, in the public interest. Pursuant to Section 16(d) of the Tunney Act, the United States is submitting these public comments and this Response to the *Federal Register* for publication. After these comments and this Response are published in the *Federal Register*, the United States will move this Court to enter the Proposed Final Judgment.

Dated this 31st day of October 2003.

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[6] *Cf. Archer-Daniels-Midland*, 272 F. Supp. 2d at 8 (crediting the Government's statement in Tunney Act proceeding that factual investigation showed that two companies operated as independent competitors notwithstanding one company's partial equity ownership in the other).

Respectfully submitted,

_____/s/_____

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Response to Public Comments was served on the following counsel, by electronic mail in PDF format, this 31st day of October, 2003:

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