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Department of Justice
Antitrust Division

United States v. Gray Television, Inc., et al.
Response to Public Comment

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), that one comment was received concerning the proposed Final Judgment in this case, and that comment together with the Response of Plaintiff United States to Public Comment on the Proposed Final Judgment have been filed with the United States District Court for the District of Columbia in *United States of America v. Gray Television, Inc., et al.*, Civil Action No. 1:18-cv-02951-CRC. Copies of the comment and the United States' response are available for inspection on the Antitrust Division's website at https://www.justice.gov/atr and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

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Patricia A. Brink
Director of Civil Enforcement

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. GRAY TELEVISION, INC., and RAYCOM MEDIA, INC., *Defendants*.	Case No. 1:18-cv-02951-CRC

RESPONSE OF PLAINTIFF UNITED STATES TO
PUBLIC COMMENT ON THE PROPOSED FINAL JUDGMENT

As required by the Antitrust Procedures and Penalties Act (the "APPA" or "Tunney Act"), 15 U.S.C. § 16(b)–(h), the United States hereby responds to the one public comment received by the United States about the proposed Final Judgment in this case. After careful consideration of the submitted comment, the United States continues to believe that the proposed remedy, as described in the proposed Final Judgment, will address the harm alleged in the Complaint and is therefore in the public interest. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this response have been published in the *Federal Register* pursuant to 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

On June 23, 2018, Gray Television, Inc. ("Gray") and Raycom Media, Inc. ("Raycom") entered into an Agreement and Plan of Merger pursuant to which Gray would acquire Raycom for approximately $3.6 billion. On December 14, 2018, the United States filed a civil antitrust Complaint seeking to enjoin Gray and Raycom (collectively, "Defendants") from carrying out the merger. The Complaint alleges that the merger would substantially lessen competition in the markets for the licensing of "Big 4" television retransmission consent and the sale of broadcast television spot advertising in each of nine Designated Market Areas ("DMAs") in which Gray and Raycom each owned an affiliate of a "Big 4" television network (i.e., an NBC, CBS, ABC, or FOX affiliate). These nine DMAs (the "Overlap DMAs") are: (i) Waco-Temple-Bryan, Texas; (ii) Tallahassee, Florida-Thomasville, Georgia; (iii) Toledo, Ohio; (iv) Odessa-Midland, Texas; (v) Knoxville, Tennessee; (vi) Augusta, Georgia; (vii) Panama City, Florida; (viii) Dothan, Alabama; and (ix) Albany, Georgia.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment and a Hold Separate Stipulation and Order ("Hold Separate") signed by Plaintiff and Defendants consenting to entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act, 15 U.S.C. § 16(b)–(h). Pursuant to those requirements, the United States filed a Competitive Impact Statement ("CIS") on December 14, 2018, describing the transaction and the proposed Final Judgment. 15 U.S.C. § 16(b). The United States published the Complaint, proposed Final Judgment, and CIS in the *Federal Register* on February 1, 2019, *see* 84 Fed. Reg. 1,216 (2019), and caused summaries of the proposed Final Judgment and CIS, together with directions for the submission of written comments related to the proposed Final

Judgment, to be published in *The Washington Post* for seven days, from February 4, 2019, through February 10, 2019,[1] *see* 15 U.S.C. § 16(c). The 60-day public comment period required by the Tunney Act, 15 U.S.C. § 16(b)–(d), ended on April 5, 2019. The United States received one comment, which is described below in Section IV, concerning the allegations in the Complaint (Exhibit 1).

II. THE COMPLAINT, THE HOLD SEPARATE, AND THE PROPOSED FINAL JUDGMENT

The Complaint alleged that Gray's acquisition of Raycom would substantially lessen competition in the licensing of Big 4 television retransmission consent and in the sale of broadcast television spot advertising in the Overlap DMAs. The proposed Final Judgment remedies this concern by requiring the Defendants to divest the Big 4 stations owned by either Gray or Raycom in each Overlap DMA. Without the proposed remedy, Gray's acquisition of Raycom would have resulted in the combined company owning an additional Big 4 station in each Overlap DMA.

Big 4 stations usually are the stations in each DMA ranked highest in terms of audience share and ratings, largely because of unique offerings such as local news, sports, and highly ranked primetime programs. Due to these features, multichannel video

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[1] Though not expressly required to do so by the Tunney Act, the United States also caused these summaries of the proposed Final Judgment and CIS, and directions for submission of written comments, to be published for seven days over a period of two weeks in 11 other newspapers that are widely read in the Overlap DMAs: *The Albany Herald*, *The Augusta Chronicle*, the *Dothan Eagle*, the *Waco Tribune-Herald*, *The Knoxville News-Sentinel*, the *Midland Reporter-Telegram*, *The Odessa American*, *The News Herald* (published in Panama City, Florida), the *Tallahassee Democrat*, *The Blade* (published in Toledo, Ohio), and *The Valdosta Daily Times*. The last date of publication of the materials in any of these newspapers was February 19, 2019.

programming distributors ("MVPDs"), such as cable and satellite television providers, regard Big 4 broadcast stations as highly desirable for inclusion in the packages they offer subscribers. Viewers typically consider Big 4 stations to be close substitutes for one another. If an MVPD suffers a blackout of a Big 4 station in a given DMA, many of the MVPD's subscribers are likely to turn to other Big 4 stations in the DMA to watch similar content. The combination of Gray's and Raycom's Big 4 stations would have increased the combined company's bargaining leverage against MVPDs in the Overlap DMAs, likely leading to increased "retransmission consent" fees, which generally are passed on to MVPD subscribers.

In addition to licensing retransmission consent, broadcast television stations sell advertising "spots" during breaks in their programming. An advertiser purchases spots from a broadcast station in order to reach viewers within the DMA in which the broadcast station is located. From an advertiser's perspective, broadcast television spot advertising possesses a unique combination of attributes that sets it apart from other kinds of advertising. Gray and Raycom compete to sell broadcast television advertising in each of the Overlap DMAs. Without the divestiture of a Big 4 station in each Overlap DMA, advertisers would have fewer broadcast television alternatives, likely resulting in increased prices for broadcast television spot advertising.

On August 22, 2018, the Defendants provided the United States with executed asset purchase agreements under which the Defendants proposed to divest the following Big 4 stations:

(a) Raycom-owned KXXV and KRHD-CD, the ABC affiliates in the Waco-Temple-Bryan, Texas, DMA, and WTXL-TV, the ABC affiliate in the

Tallahassee, Florida-Thomasville, Georgia, DMA to the E.W. Scripps Company or its subsidiaries (collectively "Scripps");

(b) Raycom-owned WTOL, the CBS affiliate in the Toledo, Ohio, DMA, and KWES-TV, the NBC affiliate in the Odessa-Midland, Texas, DMA to TEGNA Inc. or its subsidiaries (collectively "TEGNA");

(c) Raycom-owned WTNZ, the FOX affiliate in the Knoxville, Tennessee, DMA, WFXG, the FOX affiliate in the Augusta, Georgia, DMA, WPGX, the FOX affiliate in the Panama City, Florida, DMA, and WDFX-TV, the FOX affiliate in the Dothan, Alabama, DMA to Greensboro TV, LLC, a company controlled by Jim Lockwood ("Lockwood"); and

(d) Gray-owned WSWG, the CBS affiliate in the Albany, Georgia, DMA to Marquee Broadcasting Georgia, Inc. ("Marquee").

The United States investigated the sufficiency of the proposed divestitures for addressing competitive concerns with the proposed merger by reviewing documents and information from the proposed divestiture buyers and interviewing their executives. After this review, the United States concluded that the divestiture of the assets to each proposed purchaser would not cause competitive harm; each purchaser has an incentive to use the divestiture assets to compete in the relevant markets; and each purchaser has sufficient acumen, experience, and financial capability to compete effectively in the market over the long term. Each of the approved buyers has financial capability and experience running multiple broadcast television stations, including Big 4 affiliates. Moreover, each buyer has the experience and sophistication necessary to manage the assets its purchasing, plans to use the assets to compete in the markets in which they are located,

and has no other entanglements suggesting the divestitures would result in any competitive harm. Accordingly, the Division concluded that the divestiture of broadcast stations and related assets to Scripps, TEGNA, Lockwood, and Marquee, resolved the competitive concerns set forth in the Complaint. On January 2, 2019 Gray consummated its acquisition of Raycom.

The Hold Separate and the proposed Final Judgment were filed with the court on December 14, 2018. Under the proposed Final Judgment, the Defendants are required to divest the television stations set forth in the proposed asset purchase agreements and all assets necessary for their operation as viable, ongoing commercial broadcast television stations.[2] The proposed Final Judgment requires that these assets be divested to one or more acquirers acceptable to the United States, in its sole discretion. On December 31, 2018, and January 2, 2019, Gray sold the divestiture assets set forth in the proposed Final Judgment to Scripps, TEGNA, Lockwood, and Marquee, as approved by the United States. On January 2, 2019, Gray consummated its acquisition of Raycom.

Under the Hold Separate, the United States and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final

[2] The proposed Final Judgment contemplates that Gray would not be required to divest certain excluded assets, namely, the Telemundo and CW affiliations and programming streams in the Odessa-Midland, Texas, DMA; the Telemundo affiliation and programming stream in the Waco-Temple-Bryan, Texas, DMA; and the CW affiliation and programming stream in the Albany, Georgia, DMA. The United States has concluded that Gray's retention of these programming streams would not have a material effect on the adequacy of the proposed remedy.

Judgment and to punish violations thereof.

III. STANDARD OF JUDICIAL REVIEW

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a public comment period of at least 60 days, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, 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)(1)(A) & (B). In considering these statutory factors, the court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public-interest standard under the Tunney Act); *United States v. U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75

(D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the decree is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F. 3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead:

> [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]

In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also U.S. Airways*, 38 F. Supp. 3d at 74-75 (noting that a court should not reject the proposed remedies because it believes others are preferable and that room must be made for the government to grant concessions in the negotiation process for settlements); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant "due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case"). The ultimate question is 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.'" *Microsoft*, 56 F.3d at 1461 (*quoting United States v. Western Elec. Co.*, 900 F.2d 283, 309 (D.C. Cir. 1990)). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

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[3] *See also BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (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").

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; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). 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 did not pursue. *Microsoft*, 56 F.3d at 1459–60. As a court in this district confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments to the APPA,[4] Congress made clear its intent to preserve

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[4] The 2004 amendments substituted "shall" for "may" in directing relevant factors for a court to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act

the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[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 Sen. Tunney). Rather, the procedure for the public-interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11. A court can make its public-interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 76; *see also United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); S. Rep. No. 93-298 93d Cong., 1st Sess., at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").

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review).

IV. SUMMARY OF PUBLIC COMMENT AND THE UNITED STATES' RESPONSE

During the public comment period, the United States received only one comment concerning the proposed Final Judgment in this litigation. That comment, attached as Exhibit 1, is a letter from a self-described "television viewer" in Dothan, Alabama, one of the Overlap DMAs. The comment takes issue with Gray acquiring additional Big 4 stations in Dothan. As required by the APPA, the comment, and the United States' response, will be published in the Federal Register.

The United States believes that nothing in this comment warrants a change to the proposed Final Judgment or supports an inference that the proposed Final Judgment is not in the public interest. While the proposed merger would, absent the remedy, have put more Big 4 affiliate stations under Gray's control, the proposed Final Judgment avoids this result. In Dothan, Alabama, where Gray owns the CBS and NBC affiliates, the merger would have resulted in Gray also owning the FOX affiliate, WDFX-TV. As noted above, however, WDFX-TV was one of the stations sold to Lockwood on January 2, 2019. Therefore, consistent with the concerns expressed by the commenter, the proposed Final Judgment prevents Gray from increasing its control over television affiliates in Dotham.

CONCLUSION

After reviewing the public comment, the United States continues to believe that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move that this Court enter the proposed Final Judgment after the comment and this response are published in the Federal Register.

Dated: May 20, 2019

Respectfully submitted,

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EXHIBIT 1

2-8-2019

Sha'nah S. Martin
[redacted]

Owen Kendler, Chief
Media, Entertainment and Professional Ser. Sect.
Antitrust Division
Dep. of Justice
450 Fifth St. N.W.
Suite 4000
Washington, DC 20530

Dear Mr. Kendler:

I read your name in the legal notices of the local paper, The Dothan Eagle. While my remarks may not reflect on this case, Unites States of America V. Gray Television, Inc., et al, Civil Action No. 1:18-CV-2951-CRC, these thoughts will reflect how the actions of Gray Television and companies like Gray impact people like me, the TV viewer. I am bewildered at how my television viewing is limited because someone deemed it okay to have multiple networks (ABC, NBC, CBS) to be controlled by one company so there is not a bit of local coverage from Panama City or Montgomery as we once had. I realize it is all about money and the advertising dollars, but as a television viewer, the concept is a railroading of my preferences.

If the actions in this suit puts more local networks in Gray Television, Inc., then I am against it.

Sincerely,

Sha'nah S. Martin

P.S. I would appreciate it if you would send me one of business cards. It would be interesting to see all that information on one side of a card.
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