

reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surly a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.¹

In his *amicus* brief, S.M. Oliva, CVT's president, does not address the merits of the Proposed Final Judgment but rather objects to certain procedural aspects of the Proposed Final Judgment. In particular, Oliva alleges that the United States intentionally violated the Tunney Act by requiring the Defendants to complete certain divestitures within thirty days after the filing of the Complaint. (*Amicus* brief at 3, a copy of which is attached as Exhibit B.)

First, nothing in the Tunney Act precludes the United States from taking or refraining from certain actions during the sixty-day comment period. The statute also does not prohibit the Defendants from divesting certain assets and refraining from certain action before this Court enters the Proposed Final Judgment.

Second, contrary to Mr. Oliva's assertion, the required divestitures do not preclude this Court from evaluating whether entry of the Proposed Final Judgment is in the public interest or declining to enter the order if it believes the settlement is unacceptable. As Section IV(A) of the Hold Separate Stipulation and Order provides, the United States may withdraw its consent to the Proposed Final Judgment at any time before the entry of the Proposed Final Judgment. Moreover, the Hold Separate Stipulation and Order contemplates that this Court may not enter the Proposed Final Judgment. By divesting certain assets and refraining from any action in furtherance of their illegal market allocation agreement, the Defendants have assumed the risk that the United States might withdraw its consent and proceed to trial or that this Court may decline the Proposed Final Judgment.

Furthermore, the divestitures at issue are common in many other Tunney act proceedings. It is customary in the vast majority of mergers that are resolved by consent in the form of proposed final judgments to permit the defendants to merge at the time when the complaint and proposed final judgment are filed, subject to the defendant's obligations under the proposed final judgment to take steps to divest certain specified assets. In these mergers, the defendants are generally allowed to complete the merger prior to the close of the sixty-day comment period and entry of the final judgment by the court. The defendants in such cases, as here, understand that the proposed final judgment is subject to public comment, that the United States may revoke its consent at any time before the final judgment is entered, and that the final judgment will not be entered unless a court finds that it is in the public interest.

Third, to delay any remedial measures until after the sixty-day comment period expires might undermine the effectiveness of the relief. As the CIS states, "[g]iven that Defendants had closed the Cleveland Free Times and New Times Los Angeles in October 2002, a quick and effective remedy was necessary to reestablish competition." (CIS at 14.) Readers and advertisers will sooner benefit in Cleveland and Los Angeles as a result of a quick and effective divestiture.

B. Gary Beberman's Comment

In his e-mail, Mr. Beberman writes that the United States "may have been correct that the Village voice was colluding in anti-competitive behavior" but that "their actions were merely attempts to survive." (A copy of Mr. Beberman's comment is attached as Exhibit C.) Mr. Beberman, however, never states whether he supports or opposes entry of the Proposed Final Judgment. And any critique of whether this investigation should have been brought in the first place amounts to a challenge of the initial exercise of the United States' prosecutorial discretion, which is outside the scope of this proceeding. *See, e.g., United States v. Western Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (noting that 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). Likewise, Mr. Beberman's comments about another case, *United States v. Microsoft Corp.*, are extraneous

to this matter. (Also, the sixty-day comment period in that case ended on January 28, 2002, and the United States District Court for the District of Columbia entered the final judgment on November 12, 2002.)

C. Denise D'Anne's Comment

Mr. D'Anne thanked the United States for pursuing this action. (A copy of Ms. D'Anne's comment is attached as Exhibit D.)

III. 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 APPA, 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: May 1, 2003.

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Certificate of Service

I hereby certify that I served a copy of the foregoing Response to Public Comments via First Class United States Mail, this 1st day of May, 2003, on:

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[FR Doc. 03-12745 Filed 5-20-03; 8:45 am]

BILLING CODE 4410-11-M

¹ Citizen Publ'g, 394 U.S. at 139-40 (quoting Associated Press, 326 U.S. at 20).