

language advertisers who wish to advertise through both radio and television purchase time from both Univision and HBC rather than from the merged firm's rivals, including SBS. Such difficult-to-detect and subtle tying arrangements or refusals to deal—realistic possibilities here—impair competition. *See, e.g., Lorain Journal Co. v. United States*, 342 U.S. 143 (1951). It is unrealistic to expect that, following the acquisition, advertisers will stand up to the HBC/Univision colossus and challenge such practices themselves. The Clayton Act properly is invoked to restrain these restraints in their incipency.

The Department's failure to grapple with any of the competitive problems posed by combining the dominant Spanish-language radio broadcaster with the dominant Spanish-language television broadcaster should cause this Court to conduct an especially careful Tunney Act review. To be sure, that review is largely confined to determining whether the remedy the Department selected is a reasonable one for the competitive problem identified in the Department's Complaint. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1461–62 (D.C. Cir. 1995). But when as here, the Department has exercised its prosecutorial discretion to tailor its Complaint narrowly to the remedy selected, the Court must pay special attention to ensure that the fit between remedy and Complaint is indeed within the reaches of the public interest. As explained below, the fit here is very poor indeed.

2. The competitive problem the Compliant identifies is that Univision's significant control over, and its equity stake in, Entravision will cause HBC and Entravision to pull their competitive punches once HBC falls under Univision's control. The proposed Final Judgment seeks to preserve HBC/Entravision competition by requiring Univision to reduce its equity stake in Entravision and to relinquish certain rights Univision holds to control or influence Entravision's competitive activities. For a number of reasons, the proposed Final Judgment will not adequately protect purchasers of radio advertising from the adverse consequences of Univision's proposed acquisition of HBC.

First, the Department's requirement that Univision surrender certain rights and dilute its stock holding in Entravision fails to address the most significant way in which Univision influences Entravision: through the Univision/Entravision affiliate agreement. As the Department's Complaint explains, pursuant to this "long-term" agreement, "Entravision broadcasts Univision programming from Univision's two networks on 49 television stations. As part of this affiliation agreement, Univision serves as Entravision's sole representative for the sale of television advertisements sold on a national basis" (Compl. ¶ 23). This agreement is Entravision's lifeblood. From it, Entravision obtains key programming and significant advertising revenue. As Entravision's 2001 Annual Report explains, "Entravision has benefited enormously from a close relationship with Univision" which is "the dominant broadcaster of Spanish-

language television in the United States."³ A recent Entravision securities filing also strikingly illustrates the importance of the affiliate agreement: Of an overall increase of \$1.5 million in revenue for Entravision over the prior year, "\$1.4 million was attributable to our Univision stations and 0.1 million was attributable to our Telfutura stations [a Univision network]."⁴

The affiliate agreement plainly will give Entravision significant reason to pull its competitive punches against HBC once HBC is acquired by Univision. The Department recognizes this; for the proposed Final Judgment prohibits Univision from "using or attempting to use any rights or duties" under the affiliate agreement "to influence Entravision in the conduct of Entravision's radio business" (Proposed Final Judgment § VI.A.5). This remedy, however, is a mirage. Univision need not *actually* use the affiliate agreement to influence Entravision's behavior. The mere fact that Univision *might* deny Entravision rights under the agreement, or even create disputes under the agreement, will cause Entravision to compete less vigorously with HBC.⁵ Strikingly, the Department has rejected such "behavioral" remedies in other circumstances, even when punishable by contempt if violated.⁶ The Competitive Impact Statement provides no basis for believing that a "behavioral" remedy relating to the affiliate agreement will be effective here. By contrast, blocking Univision's acquisition of HBC will preserve competition.

Second, the proposed Final Judgment would allow Univision to retain shareholder rights to veto major strategic decisions of Entravision, including any plans i) to merge, consolidate or reorganize all or substantially all of its assets; ii) to transfer a majority of its voting power; iii) to dissolve, liquidate or terminate itself; as well as iv) to dispose of any interest in any FCC licenses relating to television stations that are Univision affiliates (Competitive Impact Statement ("CIS") at 11). Each of these actions that Univision can veto may have significant competitive impact. If, for example, Entravision wanted to sell a radio station to, or merge with, a rival, the proposed Final Judgment leaves Univision with the power to prevent possible competition-enhancing

transactions. It plainly harms rather than benefits competition to require Entravision to obtain its rival's approval to undertake such actions. The Department should not hinder the competitive activities of third parties through consent judgments.

Third, the proposed Final Judgment would require Univision to reduce its equity stake in Entravision over a very lengthy period: to no more than 15 percent by March 2006 and to no more than 10 percent by March 2009. The Department acknowledges that this divestiture is necessary to preserve competition; for Univision's significant stake in Entravision means that Univision/HBC "would receive some significant benefit even on sales it loses to Entravision" (CIS at 12). The Department nonetheless is willing to tolerate the lessened competition and consumer harm for as long as six years. Although the rapid sale of stock may be difficult to accomplish and impose costs upon Univision, the costs of accomplishing the transaction should not be borne by consumers. If owning the stock is competitively harmful, Univision should be required to sell the stock as expeditiously as possible. The Department's explanation for its unprecedented six-year divestiture period—that requiring a faster sale by Univision protects against "adversely affecting Entravision's ability to raise capital" (CIS at 12)—fails to persuade. If the Department's reasoning were valid, it would always permit divestitures to be made over the course of several years; but that is obviously not the Division's policy. And with good reason: The longer the merging parties hold assets that must be divested to preserve competition, the longer the period during which competition and consumers suffer. The speculative fear that Entravision's ability to raise capital will be harmed by requiring a shorter divestiture period is no warrant for inflicting competitive harm on advertisers and others.

Fourth, the divestiture the Department negotiated is insufficient to preserve competition. If the proposed Final Judgment is approved, Univision will continue to hold a ten percent stake in Entravision. Moreover, the Complaint alleges that Entravision and HBC have combined market shares ranging from 70 percent to as much as 95 percent in the several geographic markets (Compl. ¶ 21). It is plain that Univision will still financially benefit from every advertising dollar HBC loses to Entravision and, therefore, that Univision/HBC will compete less vigorously than if Univision's equity interest were divested completely. The Competitive Impact Statement fails to explain why a complete divestiture is inappropriate here.

Thus, for several reasons, the proposed Final Judgment leaves Entravision entangled with Univision in ways that will seriously harm competition. The Court accordingly should find that the Department's proposed Final Judgment is not within the reaches of the public interest.

Respectfully submitted,
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³ Entravision Communications Corporation Annual Report for 2001, at 25, available at www.entravision.com.

⁴ Entravision Communications Corporation 10-Q, at 7 (May 12, 2003), available at www.entravision.com.

⁵ *See, e.g.,* Letter from Arthur V. Belendiuk, Counsel to National Hispanic Policy Institute, Inc., to W. Kenneth Ferree, Esq., Chief, Media Bureau, Federal Communication Commission (July 11, 2003) (attached as Exhibit D).

⁶ For instance, the Department rejected Northwest Airline's suggestion that creating a voting trust for the stock it acquired in Continental Airlines would prevent a diminution of competition between the two airlines. The Department explained: "Courts are understandably loathe to rely on 'behavioral rules' as a substitute for divestiture, even where the rules are court-ordered." Trial Br. of the United States at 18, *United States v. Northwest Airlines Corp.* (No. 98-74611, filed Oct. 24, 2000) (emphasis added), available at www.usdoj.gov/atr/cases/f7200/7288.htm.