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The American
Antitrust Institute

June 12, 2003

James R. Wade
Chief, Litigation III Section
Antitrust Division
United States Dept. of Justice
325 7th Street, N.W., Suite 300
Washington, DC 20530

Cc: Chairman Michael Powell, Federal Communications Commission

Re: U.S. v. Univision Communications, Civ. Action No. 1:03CV00758

Dear Mr. Wade:

These constitute the Tunney Act comments of the American Antitrust Institute ("AAI") in regard to the acquisition of Hispanic Broadcasting Corporation ("HBC") by Univision Communications Inc. ("Univision").[1]

The Competitive Impact Statement ("CIS") in this case appears to reflect an unduly narrow interpretation of the Clayton Act. We have only minor quarrels with the standard analysis embodied in the CIS insofar as it identifies horizontal overlaps in the Spanish-language radio industry and seeks to eliminate these overlaps through divestitures.[2] Our principal concern is with what the CIS fails to address. It should 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. In addition, it should evaluate the consumer interest in diversity of sources of political and cultural information within this more general market.

I. The CIS Ignores the Elephant in the Room.

The CIS states that HBC is the nation's largest Spanish-language radio broadcaster and that Univision is the largest Spanish-language media company in the U.S.

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[1] The AAI is an independent 501(c)(3) research, education, and advocacy organization described at www.antitrustinstitute.org.

[2] For example, we are puzzled by the CIS's failure to explain why the Proposed Final Judgment does not require elimination of *all* shareholder rights that Univision currently possesses in Entravision and for failing to explain why it allows Univision to retain *any* stock in Entravision. If these are simply the best compromises the Division could get, why not say so?

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Univision is described as having two Spanish-language broadcast networks, Univision and Telefutura, one cable channel, Galavision, and several other Spanish-language media operations, including Internet sites and services, music recording, distribution, and publishing. Univision also has a 30-percent equity share in Entravision, which owns or operates 55 mostly-Spanish radio stations and 49 television stations that broadcast Univision programming. We are not informed of Univision's market share in Spanish-language television.

HBC owns or operates more than 60 radio stations, virtually all broadcasting in Spanish. We are not informed of HBC's market share in Spanish-language radio. And, of course, we are not informed of market shares in any combined Spanish-language media market.

The Complaint is limited to the provision of advertising time on Spanish-language radio stations to advertisers that consider Spanish-language radio to be a particularly effective medium. This is the only product market deemed relevant. Six metropolitan areas are designated as the relevant geographic markets.

The "elephant in the room" whose presence has been mentioned in the CIS but given no antitrust importance, is television. We recognize that the Antitrust Division has traditionally treated radio and television as separate markets, in that there are so many sources of information for English-speakers that diversity of sources has not appeared to rise to an antitrust concern. But here we are potentially faced with a different situation. Should television and radio directed at a Spanish-speaking audience be deemed a relevant market, not on the basis of competition for advertising but on the basis of competition for the consumer's attention? Even though the merger, after the divestiture of overlap radio markets, will arguably not increase concentration in either the television or the radio market, will it reduce in a significant way the diversity of sources of political and cultural information available to the Spanish-speaking consumer? This also raises the question of the role of other aspects of Spanish-language media, such as newspaper publishing and the Internet, which are not discussed in the CIS. An appropriate larger Spanish-language market should be analyzed not only in traditional (advertising) terms but also in terms of diversity of content sources.[3]

[3] It is true that for much of radio and TV, the consumer is not directly charged for consuming the product, although higher advertising costs may be passed on to the consumer in product prices and the consumer has opportunity costs that represent a kind of price to be paid for consumption. Nonetheless, producers of, e.g., news, are in competition with one another not only to gain advertisers, but to gain the consumer's business. Compare this with doctors who compete with one another for their patient's business, even though the medical bill may be paid by a third party. Would not the importance of consumer choice in medical care justify an antitrust case if the only two medical practices in a community were to merge, even if the merger would be guaranteed by the doctors not to affect the fees charged to health insurers?

II. The Hypothetical of the Dominating Voice

Consider the following hypothetical. There is a substantial group of Americans who only speak Spanish and whose sources of information are limited to Spanish-speaking TV, Spanish-speaking radio, and Spanish-speaking newspapers. A single corporation by acquisition gains control over all three media. The head of that corporation would be in the position to wield enormous political and economic influence by determining what the Spanish-speaking community will know and believe. He or she could determine what political candidates will gain exposure to the Spanish-speaking electorate and whether that exposure will be positive, negative, or neutral. Being able to sway a substantial part of the Hispanic vote could determine the outcome of local, state, and national elections and the owner of this political power would be in position to make deals with a political party and with an Administration. The same corporation could dramatically influence within the Spanish-speaking community which cultural trends, products and services will be ignored, denigrated or positively portrayed, thereby having a significant impact on the economy. This is the Hypothetical of a Dominating Voice.

Are the assumptions of this hypothetical far removed from the reality of the present acquisition?[4] Aside from the distinction that the present merger does not involve newspapers, one cannot tell from the CIS because the implications of putting the leading Hispanic radio and TV stations under the same corporate control is not addressed. In the section on Alternatives to the Proposed Final Judgment, we are only told that the Department considered a full trial on the merits and a proposal by the defendants for placing Entravision stock into a long-term trust.

Having advised the public that the leading Spanish-language TV conglomerate was acquiring the leading Spanish-language radio company, the DOJ has the Tunney Act obligation to explain why it has made the determination that this highly suggestive scenario is of no antitrust concern. The fact that there are relevant antitrust markets for Hispanic radio and Hispanic TV does not preclude the possibility that in certain circumstances there may also be a larger relevant antitrust market, depending on what types of anticompetitive effects one is concerned about. There is no inconsistency in being concerned both with advertising rates in radio markets and diversity of producers/editors of content in a more general market for information or specifics categories of information.

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[4] According to various sources, at least 9% of Hispanics do not speak English at all, and at least 15% do not speak the language well. Spanish is said to be the language most frequently spoken by nearly 75% of adults in the top ten Hispanic metropolitan areas. If these figures are approximately correct, there appears to be reason to believe that at least a significant section of the Spanish-speaking community in the U.S. is highly dependent on information it receives in Spanish and that English is in these situations an inadequate substitute. There are also studies demonstrating that commercial information conveyed in Spanish is far more persuasive to this group than information conveyed in English, even among those who are bilingual. Arguably, the same would be true of political information.

Let us be more precise about what information is lacking.

1. What proportion of Spanish-speaking consumers in the U.S. are completely or highly dependent upon Spanish-language sources of information? (Call this the "highly dependent consumer market.")

2. What proportion of the highly dependent consumer market pre- and post-merger depend on the merging parties as a principal source of information?

3. What options apart from Univision and HBC are available to the highly dependent consumer market, pre- and post-merger?

4. Using a variety of measures (e.g., advertising dollars, number of message recipients, contact hours), how substantial are these options in comparison to Univision and HBC? What are the relevant market shares and HHI's?

We recognize that these are not easy questions to answer, and that the answers will depend on the assumptions made about such matters as the definition of 'highly dependent'. Nevertheless, with answers to these questions and explicitness about the assumptions used, one can begin to evaluate whether the Hypothesis of a Dominating Voice represents a realistic threat.

III. Protecting the Public Interest Requires Analysis of the Impact of this Acquisition on Consumer Choice

Based on what is said in the CIS, there is no evidence that the DOJ has considered anything other than the probability of short-term price increases. Why no discussion of such other traditional antitrust concerns as the effect on consumer choice?[5] There have been many antitrust cases in which non-price factors were considered.[6] As one example, in *United States v. Philadelphia National Bank*, the Court expressed a concern with possible adverse effects of a bank merger on "price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, miscellaneous special and extra services..."[7]

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[5] Although the Federal Communications Commission has the opportunity to stop this merger on "public interest" grounds, this possibility would not relieve the Department of Justice from fully considering legitimate antitrust theories of competitive harm that coincidentally have the benefit of protecting First Amendment values.

[6] See Robert H. Lande, "Consumer Choice and Antitrust," 62 U. Pitt. L. Rev. 503, 508-512, and cases cited therein.

[7] 374 U.S. 363, 368 (1968).

Theories of possible antitrust liability in First Amendment-related cases come from many reputable sources. For example, Robert H. Lande and Neil W. Averitt have argued that consumer choice is no less a goal of antitrust than competitive pricing.[8] Maurice E. Stucke and Allen P. Grunes, two DOJ attorneys, have argued that it is proper to look beyond price effects to "the marketplace of ideas" in order to consider non-price dimensions of economic competition, such as diminished quality and choice.[9] Joseph Farrell, a former Chief Economist for the Antitrust Division, argued that price is merely a synecdoche (a part representing the whole) for what we desire from competition (i.e., innovation, quality, and price), and that it does not always adequately represent the package of desirables.[10] Robert Pitofsky has argued that non-economic political values such as the First Amendment can be relevant and may justify a higher degree of scrutiny in certain cases.[11] FTC Commissioner Thomas Leary has argued that diversity is an appropriate goal of antitrust.[12]

We are told in the CIS that the Court may only review the remedy in relation to the violations that the U.S. has alleged in its Complaint. It might be argued that the DOJ decision not to include a general Spanish-language media market in its complaint is the end of the story. But, as the CIS quotes the Ninth Circuit, "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

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[8] "Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law," 65 Antitrust L.J. 713, 715 (1997).

[9] "Antitrust and the Marketplace of Ideas," 69 Antitrust L. J. 249 at 297 (2001).

[10] "Thoughts on Antitrust and Innovation," Speech to the National Economists Club, Washington, DC (Jan. 25, 2001), at http://www.usdoj.gov/atr/public/speeches/7402.pdf.

[11] Robert Pitofsky, The Political Content of Antitrust, 127 U. PA. L. REV. 1051 (1979).

[12] See Thomas B. Leary, "The Significance of Variety in Antitrust Analysis," based on a speech delivered at the Steptoe & Johnson 2000 Antitrust Conference, on May 18, 2000, and available at http://www.ftc.gov/speeches/leary/atljva4.htm:

"It does not make sense to simply ignore the issue, however, because for many consumers variety may be a more significant issue than price. Consider the example of two chains of bookstores (or video rental stores) that compete in myriad neighborhoods, with a largely local clientele. One of the chains features best sellers or the most popular films, the other chain has a more eclectic offering, including a wider range of special interest and "artistic" selections. If the first chain were to acquire the second, there might well be some local price effects, but the most important effect on most consumers (but, not all) is likely to be the effect on variety if the combined store adopts the buyer's business model.

"This reality does not mean that the merger should be attacked on that account. It might well be, for example, that it is a lot easier for a potential new entrant to provide variety competition for the merged enterprise than it would be to provide price competition. What it does mean is that an initial focus on a hypothetical price effect, according to traditional Guidelines analysis, might miss the most important questions."

"*within the reaches of the public interest.*" United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981)." Because in practice a complaint is drawn up by the DOJ at the same time as a settlement order is drafted, the complaint is to some degree, in reality, not merely the cause of the settlement, but the result of the settlement. Although we do not want courts to displace the DOJ role of determining what goes into a complaint, a settlement that does not deal with obvious antitrust issues should not be approved until the CIS adequately explains what is going on.

In this acquisition, the Complaint includes facts about the two companies that would suggest to many observers that there may be critically important competitive issues that go beyond the radio market. If the Tunney Act is to protect the public interest, including the perception that antitrust settlements are not based on political considerations, both the public and the court must be provided with sufficient information to determine whether the complaint itself was unreasonably limited.

The legislative genesis of the Tunney Act was concern that settlements might be made on the basis of political rather than strictly professional analysis. To expand the Hypothetical of a Dominating Voice, if the ownership of the merging parties happened to be of the same political party as a particular national Administration, allowing the merger to proceed, subject only to a mild radio divestiture, with the potential of political gain for the political party, this would be the type of politicization of antitrust that the Tunney Act was intended to remove.

We certainly do not charge that this specific merger is being approved for political gain, but are trying to make a larger point. In order to protect antitrust from perceptions of political influence, it is essential that the Tunney Act's public interest oversight be fully informed, with all relevant major antitrust theories fully ventilated in the CIS.

Sincerely,

Albert A. Foer
President