UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA 450 Fifth Street NW Washington, DC 20530 *Plaintiff*, v. GRAY TELEVISION, INC. 4370 Peachtree Road NE Atlanta, Georgia 30319; and RAYCOM MEDIA, INC. RSA Tower 20th Floor 201 Monroe Street Montgomery, Alabama 36104 *Defendants*.	Case No. ____________________

COMPETITIVE IMPACT STATEMENT

Plaintiff United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On June 23, 2018, Defendant Gray Television, Inc. ("Gray") and Raycom Media, Inc. ("Raycom," and together with Gray, "Defendants") entered into an Agreement and Plan of Merger (the "Merger Agreement") pursuant to which Gray proposes to acquire Raycom for approximately $3.6 billion. The United States filed a civil antitrust Complaint on December 14, 2018, seeking to enjoin the proposed merger. The Complaint alleges that the proposed merger likely would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, in nine local geographic markets, in (1) the licensing of the television programming of NBC, CBS, ABC, and FOX ("Big 4") affiliate stations to cable, satellite, and fiber optic television providers (referred to collectively as multichannel video programming distributors, or "MVPDs") for retransmission to their subscribers (known as "retransmission consent"), and (2) the sale of broadcast television spot advertising. The nine Designated Market Areas ("DMAs") in which a substantial reduction in competition is alleged 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 (collectively, "the Overlap DMAs").[1] The loss of competition alleged in the Complaint likely would result in an increase in retransmission consent fees charged to MVPDs, much of which would be passed through to subscribers, and higher prices for broadcast television spot advertising in each Overlap DMA.

Concurrent with the filing of the Complaint, the United States filed a Hold Separate Stipulation and Order ("Hold Separate") and proposed Final Judgment, which are designed to eliminate the anticompetitive effects that would have resulted from Gray's merger with Raycom. Under the proposed Final Judgment, which is explained more fully below, Defendants are

[1] A DMA is a geographic unit for which A.C. Nielsen Company—a firm that surveys television viewers—furnishes broadcast television stations, MVPDs, cable and satellite television networks, advertisers, and advertising agencies in a particular area with data to aid in evaluating audience size and composition. DMAs are widely accepted by industry participants as the standard geographic areas to use in evaluating television audience size and demographic composition. The Federal Communications Commission ("FCC") also uses DMAs as geographic units with respect to its MVPD regulations.

required to divest the following broadcast television stations (the "Divestiture Stations") to acquirers acceptable to the United States in its sole discretion: (i) KXXV and KRHD-CD, located in the Waco-Temple-Bryan, Texas, DMA; (ii) WTXL-TV, located in the Tallahassee, Florida-Thomasville, Georgia, DMA; (iii) WTOL, located in the Toledo, Ohio, DMA; (iv) KWES-TV, located in the Odessa-Midland, Texas, DMA; (v) WTNZ, located in the Knoxville, Tennessee, DMA; (vi) WFXG, located in the Augusta, Georgia, DMA; (vii) WPGX, located in the Panama City, Florida, DMA; (viii) WDFX-TV, located in the Dothan, Alabama, DMA; and (ix) WSWG, located in the Albany, Georgia, DMA. Under the Hold Separate, Defendants will take certain steps to ensure that the Divestiture Stations will operate as independent, economically viable, and ongoing business concerns that will remain independent and uninfluenced by the consummation of the acquisition, and that competition is maintained during the pendency of the ordered divestitures.

The United States and 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 Judgment and to punish violations thereof.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

Gray is a Georgia corporation with its headquarters in Atlanta, Georgia. Gray owns 92 television stations in 56 DMAs, of which 83 are Big 4 affiliates.

Raycom is a Delaware corporation with its headquarters in Montgomery, Alabama. Raycom owns 51 television stations in 43 DMAs, of which 45 are Big 4 affiliates.

Pursuant to the Merger Agreement, Gray agreed to acquire Raycom for approximately $3.6 billion, through a merger transaction. This merger is the subject of the Complaint and proposed Final Judgment filed in this case.

B. Big 4 Television Retransmission Consent

1. Background

MVPDs, such as Comcast, DirecTV, and Mediacom, typically pay the owner of each local Big 4 broadcast station in a given DMA a per-subscriber fee for the right to retransmit the station's content to the MVPD's subscribers. The per-subscriber fee and other terms under which an MVPD is permitted to distribute a station's content to its subscribers is set forth in a retransmission agreement. Retransmission agreements are negotiated directly between a broadcast station group, such as Gray or Raycom, and a given MVPD, and these agreements cover all of the station group's stations located in the MVPDs service area, or "footprint."

Each broadcast station group typically renegotiates retransmission agreements with the MVPDs every few years. If an MVPD and a broadcast station group cannot agree on a retransmission consent fee at the expiration of a retransmission agreement, the result is a "blackout" of the broadcast group's stations from the particular MVPD—i.e., an open-ended period during which the MVPD may not distribute those stations to its subscribers, until a new contract is successfully negotiated.

2. Relevant Markets

The licensing of Big 4 television retransmission consent constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act. Big 4 broadcast content has unique appeal to television viewers, as compared to the other content that is available through broadcast and cable stations. Big 4 stations usually are the highest ranked in terms of audience share and ratings in each DMA, largely because of unique offerings such as local news, sports, and highly ranked primetime programs. Viewers typically consider the Big 4 stations to be close substitutes for one another. Due to these features, MVPDs regard Big 4 programming as highly desirable for inclusion in the packages they offer subscribers. Non-Big-4 broadcast stations are typically not close substitutes for viewers of Big 4 stations.

If an MVPD suffers a blackout of a Big 4 station in a given DMA, many of the MVPD's subscribers in that DMA are likely to turn to other Big 4 stations in the DMA to watch similar content. This willingness of viewers to switch between competing Big 4 broadcast stations limits an MVPD's expected losses in the case of a blackout, and thus limits a broadcaster's ability to extract higher fees from that MVPD—since an MVPD's willingness to pay higher retransmission consent fees for content rises or falls with the harm it would suffer if that content were lost. Due to the limited programming typically offered by non-Big-4 stations, viewers are much less likely to switch to a non-Big-4 station than to switch to other Big 4 stations in the event of a blackout of a Big 4 station. Accordingly, competition from non-Big-4 stations does not typically impose a significant competitive constraint on the retransmission consent fees charged by the owners of Big 4 stations. For the same reasons, subscribers—and therefore MVPDs—generally do not view cable network programming as a close substitute for Big 4 network content.

Because viewers do not regard non-Big-4 broadcast stations, or cable networks, as close substitutes for the programming they receive from Big 4 stations, these other sources of programming are not sufficient to discipline an increase in the fees charged for Big 4 television retransmission consent. Accordingly, a small but significant increase in the retransmission consent fees of Big 4 affiliates would not cause enough MVPDs to forego carrying the content of the Big 4 affiliates to make such an increase unprofitable for the Big 4 affiliates.

The relevant geographic markets for the licensing of Big 4 television retransmission consent are the individual DMAs in which such licensing occurs. In the event of a blackout of a Big 4 network station, FCC rules generally prohibit an MVPD from importing the same network's content from another DMA, so substitution to stations in other DMAs cannot discipline a fee increase by stations within a given DMA.

3. Anticompetitive Effects

In each of the Overlap DMAs, Gray and Raycom each own at least one Big 4 affiliate broadcast television station. By combining the Defendants' Big 4 stations, the proposed merger would increase the Defendants' market shares in the licensing of Big 4 television retransmission consent in each Overlap DMA, and would increase the market concentration in that business in each Overlap DMA. The chart below summarizes the Defendants' approximate Big 4 retransmission consent market shares, and market concentrations measured by the widely used Herfindahl-Hirschman Index ("HHI")[2], in each Overlap DMA, before and after the proposed merger.

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[2] The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2,600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size, and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Overlap DMA	Gray Share	Raycom Share	Merged Share	Pre-Merger HHI	Post-Merger HHI	HHI Increase
Augusta, GA	50%	24%	74%	3,741	6,119	2,379
Panama City, FL	50%	24%	73%	3,731	6,095	2,363
Dothan, AL	49%	24%	73%	3,692	6,065	2,373
Tallahassee, FL-Thomasville, GA	33%	32%	65%	3,338	5,448	2,110
Albany, GA	33%	32%	65%	3,339	5,440	2,101
Toledo, OH	25%	24%	49%	2,504	3,710	1,206
Waco-Temple-Bryan, TX	25%	24%	49%	2,503	3,687	1,184
Knoxville, TN	25%	24%	49%	2,503	3,681	1,178
Odessa-Midland, TX	24%	24%	48%	2,504	3,660	1,156

As indicated by the preceding chart, in each Overlap DMA the post-merger HHI would exceed 2,500 and the merger would increase the HHI by more than 200 points. As a result, the proposed merger is presumed likely to enhance market power under the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission.

In addition to substantially increasing the concentration levels in each Overlap DMA, the proposed merger would also enable Gray to black out more Big 4 stations simultaneously in each of the Overlap DMAs than either Gray or Raycom could black out independently today, increasing Gray's bargaining leverage and likely leading to increased retransmission consent fees to any MVPD whose footprint includes any of the Overlap DMAs. Retransmission consent fees—and thus the fee increases likely to be caused by the proposed merger—generally are passed through to an MVPD's subscribers in the form of higher subscription fees or as a line item on their bills.

C. Broadcast Television Spot Advertising

1. Background

Broadcast television stations sell advertising "spots" during breaks in their programming. An advertiser purchases spots from a broadcast station to communicate to viewers within the DMA in which the broadcast television station is located. Gray and Raycom compete to sell broadcast television spot advertising in each of the Overlap DMAs.

2. Relevant Markets

Broadcast television spot advertising constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act. Broadcast television spot advertising possesses a unique combination of attributes that set it apart from advertising on other media. Broadcast television spot advertising combines sight, sound, and motion in a way that makes television advertisements particularly memorable and impactful. Additionally, broadcast television spot advertising reaches a large percentage of an advertisers' potential customers in a DMA, making it especially effective for promoting brand awareness. Advertisers want to advertise on broadcast stations because they offer popular programming such as local news, sports, and primetime and syndicated shows that are especially attractive in reaching a broad demographic base and a large audience of viewers.

MVPDs sell spot advertising to be shown during breaks in cable network programming. However, cable television spot advertising is an ineffective substitute for broadcast television spot advertising. Cable television spot advertising reaches far fewer television households within a DMA, is limited in supply, and generally offers more specialized programs that appeal to niche audiences.

Digital media advertising is not an effective substitute for broadcast television spot advertising. Most forms of digital advertising lack the combination of sight, sound, and motion that characterize television advertising, and, while online video advertisements can combine sight, sound, and motion, these advertisements face challenges including the fact that they can be skipped, minimized, or blocked. Also, digital advertising serves a different purpose from broadcast advertising, as it typically targets narrow demographic subsets of a population and often seeks to generate an immediate response.

Other forms of advertising, such as radio, newspaper, billboard, and direct-mail advertising, also are not effective substitutes. They do not combine sight, sound, and motion, and consequently lack television's ability to capture consumers with emotive storytelling. In addition, they do not reach as many local viewers or drive brand awareness to the same extent as broadcast television does.

For these reasons, advertisers likely would not respond to a small but significant increase in the price of broadcast television spot advertising by switching to other forms of advertising in sufficiently large numbers to make the price increase unprofitable.

The relevant geographic markets for the sale of broadcast television spot advertising are the individual DMAs in which such advertising is sold. For an advertiser seeking to reach potential customers in a given DMA, broadcast television stations located outside of the DMA do not provide effective access to the advertiser's target audience, because their signals generally do not reach any significant portion of the target DMA.

3. <u>Anticompetitive Effects</u>

By combining the broadcast television stations of Gray and Raycom under common ownership, the proposed merger would increase the combined entity's market shares of the broadcast television spot advertising business in each of the Overlap DMAs. The chart below summarizes Defendants' approximate market shares and the result of the transaction on HHIs in the sale of broadcast television spot advertising in each Overlap DMA.

Overlap DMA	Gray Share	Raycom Share	Merged Share	Pre-merger HHI	Post-merger HHI	HHI Increase
Albany, GA	11%	71%	82%	5,407	7,007	1,600
Dothan, AL	65%	15%	80%	4,866	6,778	1,912
Toledo, OH	38%	37%	75%	3,088	5,872	2,784
Panama City, FL	54%	10%	64%	4,220	5,274	1,054
Augusta, GA	44%	17%	61%	3,695	5,197	1,503
Tallahassee, FL-Thomasville, GA	48%	16%	64%	3,267	4,759	1,492
Odessa-Midland, TX	30%	35%	65%	2,563	4,688	2,125
Waco-Temple-Bryan, TX	41%	19%	60%	2,988	4,564	1,576
Knoxville, TN	28%	10%	38%	2,791	3,367	576

Defendants' large market shares reflect the fact that, in each Overlap DMA, Gray and Raycom each own at least one Big 4 station, and often own one or more non-Big-4 network affiliates, which also sell spot advertising.

As indicated by the preceding chart, in each Overlap DMA the post-merger HHI would exceed 2,500 and the merger would increase the HHI by more than 200 points. As a result, the proposed merger is presumed likely to enhance market power under the *Horizontal Merger Guidelines*.

In each Overlap DMA, Defendants' broadcast stations compete head-to-head in the sale of broadcast television spot advertising. Advertisers targeting viewers in the Overlap DMAs can respond to an increase in one station's spot advertising prices by purchasing, or threatening to purchase, advertising spots on one or more stations owned by different broadcast station groups, allowing the advertisers to avoid the price increase or pressure the first station to lower its prices. The proposed merger would reduce the number of alternative sellers of broadcast television spot advertising to which such advertisers could turn to meet their needs, likely resulting in higher advertising prices.

D. Entry

Entry of a new broadcast station into an Overlap DMA would not be timely, likely, or sufficient to prevent or remedy the proposed merger's likely anticompetitive effects. The FCC regulates entry through the issuance of broadcast television licenses, which are difficult to obtain because the availability of spectrum is limited and the regulatory process associated with obtaining a license is lengthy. Even if a new signal were to become available, commercial success would come over a period of many years, if at all.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. The Divestitures

The divestiture requirements of the proposed Final Judgment will eliminate the substantial anticompetitive effects of the merger in each Overlap DMA, by maintaining the Divestiture Stations as independent, economically viable competitors. The proposed Final Judgment requires Gray to divest the Big 4 affiliates owned by either Gray or Raycom in each of the Overlap DMAs, as shown in the following chart:

Overlap DMA	Divestiture Stations	Big 4 Affiliation of Divestiture Stations	Current Owner of Divestiture Stations
Waco-Temple-Bryan, Texas	KXXV and KRHD-CD	ABC	Raycom
Tallahassee, Florida-Thomasville, Georgia	WTXL-TV	ABC	Raycom
Toledo, Ohio	WTOL	CBS	Raycom
Odessa-Midland, Texas	KWES-TV	NBC	Raycom
Knoxville, Tennessee	WTNZ	FOX	Raycom
Augusta, Georgia	WFXG	FOX	Raycom
Panama City, Florida	WPGX	FOX	Raycom
Dothan, Alabama	WDFX-TV	FOX	Raycom
Albany, Georgia	WSWG	CBS	Gray

The Divestiture Stations must be divested in such a way as to satisfy the United States in its sole discretion that the Divestiture Stations (1) can and will be operated by the purchaser(s) as part of a viable, ongoing commercial television broadcasting business, and (2) are divested to acquirer(s) that have the intent and capability to compete effectively in that business. The proposed Final Judgment requires divestiture of all assets, tangible or intangible, necessary for the operation of the Divestiture Stations as viable, ongoing commercial broadcast television stations.

B. The Excluded Assets

Certain assets are excluded from the assets to be divested, as described in Definitions S and T of the proposed Final Judgment. The excluded assets relate to: (1) the Telemundo and CW programming streams currently broadcast on KWES-TV in the Odessa-Midland, Texas, DMA; (2) the Telemundo programming stream currently broadcast on KXXV in the Waco-

Temple-Bryan, Texas, DMA; and (3) the CW programming stream currently broadcast on WSWG in the Albany, Georgia, DMA.

The excluded Telemundo and CW programming streams currently are derived from separate network affiliations, and are broadcast from digital subchannels of the Divestiture Stations. As a result, the Defendants' retention of these Telemundo and CW programming streams will not prevent the divestiture buyers from operating the Divestiture Stations as viable, independent competitors. Nor will Defendants' retention of these assets substantially lessen competition. Divesting one of the Defendants' Big 4 affiliates in each Overlap DMA will ensure that competition in the granting of Big 4 television retransmission consent is not diminished. Also, nearly all of the merger-induced increase in concentration in the sale of broadcast television spot advertising in each Overlap DMA is avoided by the sale of one Defendant's Big 4 affiliates in each Overlap DMA.

C. General Conditions and Proposed Buyers

Under the proposed Final Judgment, Defendants agree to use their best efforts to divest the Divestiture Stations and to obtain any necessary FCC approvals as expeditiously as possible. The proposed Final Judgment contains requirements for Defendants to provide prospective purchasers of the Divestiture Stations with access to relevant personnel and information. Additionally, to facilitate the continuous operations of the Divestiture Stations until the acquirers can provide such capabilities independently, Paragraph IV(H) of the proposed Final Judgment provides that, at the option of an acquirer of a Divestiture Station, Defendants shall enter into a transition services agreement with the acquirer for a period of up to six months.

The United States has determined that the following companies are acceptable purchasers of Divestiture Stations: The E.W. Scripps Company; TEGNA Inc.; Greensboro TV, LLC, a member of the Lockwood Broadcast Group of companies; and Marquee Broadcasting Georgia, Inc. (respectively, together with their subsidiaries and affiliated entities and individuals, "Scripps," "TEGNA," "Lockwood," and "Marquee"). The following table sets out the proposed purchaser for each Divestiture Station.

Overlap DMA	Divestiture Stations	Proposed Purchaser
Waco-Temple-Bryan, Texas	KXXV and KRHD-CD	Scripps
Tallahassee, Florida-Thomasville, Georgia	WTXL-TV	Scripps
Toledo, Ohio	WTOL	TEGNA
Odessa-Midland, Texas	KWES-TV	TEGNA
Knoxville, Tennessee	WTNZ	Lockwood
Augusta, Georgia	WFXG	Lockwood
Panama City, Florida	WPGX	Lockwood
Dothan, Alabama	WDFX-TV	Lockwood
Albany, Georgia	WSWG	Marquee

Under the proposed Final Judgment, in the event that Defendants attempt to divest KXXV, KRHD-CD, or WTXL-TV to an acquirer other than Scripps; WTOL or KWES-TV to an acquirer other than TEGNA; WTNZ, WFXG, WPGX, or WDFX-TV to an acquirer other than Lockwood; or WSWG to an acquirer other than Marquee, Defendants agree to cooperate with these prospective acquirers as contemplated in Paragraph IV(C) of the proposed Final Judgment.

D. Conditions Specific to Certain Divestiture Stations

The proposed Final Judgment also contains provisions that will ensure the efficient operation of the Divestiture Stations as they transition to new ownership and create new arrangements for their news programming. In the case of Lockwood as the acquirer of WFXG and/or WDFX-TV, Paragraph IV(I) of the proposed Final Judgment provides that, at the option of Lockwood, Defendants shall enter into an agreement with Lockwood to provide to WFXG and/or WDFX-TV substantially the same local news programming as the respective stations currently receive from other stations owned or operated by Raycom for a period of one year after the sale of WFXG and/or WDFX-TV, respectively, to Lockwood, with such agreement being subject to extensions for a total of up to one additional one year, at the approval of the United States, and at the option of Lockwood.

WFXG currently receives a portion of its news programming from Raycom's WTOC-TV in Savannah, Georgia. WDFX-TV currently receives its news programming from Raycom's WSFA in Montgomery, Alabama. Continuation of the provision of this news programming to WFXG and WDFX-TV for one year would provide Lockwood with enough time to take control of these stations, and make and implement plans for the replacement of this news programming with other sources of news. Allowing these transitional arrangements to be extended for up to one year provides a safety mechanism, in case Lockwood has not fully implemented its plans to replace the Defendants' news by the end of the one-year period.

In the case of Marquee as the Acquirer of WSWG, Paragraph IV(J) of the proposed Final Judgment provides that the transition services agreement contemplated by Paragraph IV(H) shall include, at the option of Marquee, an agreement by Defendants to provide to WSWG (with small exceptions) substantially the same local news programming as that station currently receives from other stations owned or operated by Gray for at least 90 days after the sale of WSWG.

WSWG currently receives its news programming from Gray's WCTV in the Tallahassee, Florida-Thomasville, Georgia, DMA. Marquee already operates an unaffiliated station in Albany, Georgia, which produces its own local news. Therefore, Marquee will likely require a relatively short transition period during which it continues to receive out-of-DMA news before implementing its plans for local news programming on WSWG. The agreement to continue supplying out-of-DMA news for at least 90 days is reasonably sufficient to allow Marquee to complete its transition.

E. Timeline for Divestitures, Appointment of Divestiture Trustee, and Conditions to Ensure Independent Operation of the Divestiture Stations Post-Divestiture

Under Paragraph IV(A) of the proposed Final Judgment, divestiture of each of the Divestiture Stations must occur within 90 calendar days after the filing of the Complaint, or five calendar days after notice of entry of the Final Judgment by the Court, whichever is later, to one or more acquirers acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed 90 calendar days in total, and shall notify the Court in such circumstances. Paragraph IV(B) of the proposed Final Judgment provides for the tolling of deadlines for divestitures that would otherwise be required to meet those deadlines, in the case where a divestiture requires certain FCC action but the FCC has not taken such action by the time the deadline would otherwise occur.

To provide for the possibility that Defendants do not accomplish all required divestitures within the periods set forth in Paragraph IV(A) and Paragraph IV(B) of the proposed Final

Judgment, Section V of the proposed Final Judgment provides that in such a case the Court shall appoint a Divestiture Trustee, selected by the United States and approved by the Court, to effect the divestitures. The proposed Final Judgment provides that if a Divestiture Trustee is appointed, Defendants shall pay the costs and expenses of the Divestiture Trustee. The Divestiture Trustee's compensation is to be structured so as to provide an incentive based on the price obtained and the speed with which the divestitures are accomplished. After the appointment of the Divestiture Trustee becomes effective, the Divestiture Trustee is required to file monthly reports with the United States and, as appropriate, the Court, setting forth the Divestiture Trustee's efforts to accomplish the required divestitures. If the Divestiture Trustee has not accomplished the required divestitures within six months after the Divestiture Trustee's appointment, the Divestiture Trustee must promptly file a report with the Court, which shall enter such orders as it deems appropriate to carry out the purpose of the Final Judgment, which may include extending the term of the Divestiture Trustee's appointment by a period requested by the United States.

To ensure that the Divestiture Stations are operated independently from Defendants after the divestitures, Paragraph XI(A) of the proposed Final Judgment provides that during the term of the Final Judgment Defendants shall not (1) reacquire any part of the assets required to be divested; (2) acquire any option to reacquire any part of such assets or to assign them to any other person; (3) enter into any local marketing agreement, joint sales agreement, other cooperative selling arrangement, or shared services agreement (except as provided in in Paragraph XI(A) or Paragraph XI(B)), or conduct other business negotiations jointly with any acquirer of any of the assets required to be divested with respect to those assets; or (4) provide financing or guarantees of financing with respect to the assets required to be divested.

The shared services prohibition does not preclude Defendants from continuing or entering into agreements in a form customarily used in the industry to (a) share news helicopters or (b) pool generic video footage that does not include recording a reporter or other on-air talent, and does not preclude Defendants from entering into any non-sales-related shared services agreement or transition services agreement that is approved in advance by the United States in its sole discretion. Additionally, Paragraph XI(B) provides that the restrictions of Paragraph XI(A) do not prevent Defendants from entering into agreements to provide news programming to the Divestiture Stations, provided that Defendants do not sell, price, market, hold out for sale, or profit from the sale of advertising associated with the news programming provided by Defendants under such agreements except by approval of the United States in its sole discretion.

F. Enforcement and Expiration of the Final Judgment

The proposed Final Judgment contains provisions designed to promote compliance and make enforcement of Division consent decrees as effective as possible. Paragraph XIII(A) provides that the United States retains and reserves all rights to enforce the provisions of the proposed Final Judgment, including its right to seek an order of contempt from the Court. Under the terms of this paragraph, Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar civil action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence, and Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance obligations with the standard of proof that applies to the underlying offense that the compliance commitments address.

Paragraph XIII(B) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment was drafted to restore all competition the United States alleged was harmed by the merger. Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of this Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIII(C) of the proposed Final Judgment further provides that should the Court find in an enforcement proceeding that the Defendants have violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, in order to compensate American taxpayers for any costs associated with the investigation of violations of, and the enforcement of, the proposed Final Judgment, Paragraph XIII(C) provides that in connection with any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved prior to litigation, that Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as any other costs including experts' fees, incurred in connection with that enforcement effort, including the investigation of the potential violation.

Finally, Section XIV of the proposed Final Judgment provides that the Final Judgment shall expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and

Defendants that the divestitures have been completed and that the continuation of the Final Judgment is no longer necessary or in the public interest.

G. Summary

The divestiture provisions of the proposed Final Judgment will eliminate the substantial anticompetitive effects of the merger in the licensing of Big 4 television retransmission consent and the sale of broadcast television spot advertising in each of the Overlap DMAs.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no *prima facie* effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry of the proposed Final Judgment upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the Federal Register.

Written comments should be submitted to:

Owen M. Kendler
Chief, Media, Entertainment, and Professional Services Section
Antitrust Division
United States Department of Justice
450 5th Street, N.W., Suite 4000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction to enable any party to the Final Judgment to apply to the Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe the Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Gray's merger with Raycom. The United States is satisfied, however, that the divestiture of assets required by the proposed Final

Judgment, together with the other restrictions contained in the proposed Final Judgment, will preserve competition in the licensing of Big 4 television retransmission consent and the sale of broadcast television spot advertising in the Overlap DMAs. Thus, the proposed Final Judgment would achieve all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

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 60-day comment period, 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
>
> (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 United States 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 set forth 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.

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

[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 review).

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.").

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

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Respectfully submitted,

/s/

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