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Docket # 97-55



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FEDERAL COMMUNICATIONS COMMISSION
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DEPARTMENT OF JUSTICE WILL NOT CHALLENGE EXTENSION OF VOLUNTARY PROGRAM ADDRESSING TELEVISION VIOLENCE

WASHINGTON, D.C. -- The Department of Justice's Antitrust Division said today it will not challenge a proposal by the Association of Independent Television Stations to continue a voluntary program of guidelines and viewer advisories for independent television stations in an effort to reduce the negative impact of violence on television.

The proposal would allow the association to continue the effort it initiated with the enactment of the Television Program Improvement Act of 1990, which granted a three year antitrust exemption for joint activities to develop and disseminate voluntary guidelines to address television violence. That exemption expired December 1, 1993.

Assistant Attorney General Anne K. Bingaman, in charge of the Antitrust Division, said the proposed activities are unlikely to be anticompetitive. The program will provide television viewers--particularly parents--and advertisers with valuable information that can enhance the demand for the industry's products, she said.

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The Department's position was stated in a business review letter from Bingaman to the association's president. The association is comprised of about 100 independent television stations throughout the country.

The proposal would allow the association and its members to discuss, collect and disseminate information on the effect of the guidelines program and to coordinate the production of a series of antiviolence messages.

The letter noted that the association's program is voluntary and no joint activity is intended to result in the boycott of any person. No station is required to adopt any policy, engage in any discussion or provide any information. Each independent station would continue to make its own program selection and editorial decisions.

Bingaman said the activities could be compared with the traditional practice of an industry agreeing on standards, a process that does not necessarily restrain competition and may have significant procompetitive benefits.

A file containing the business review request and the Department's response may be examined in the Legal Procedure Unit of the Antitrust Division, Room 3235, Department of Justice, Washington, D.C. 20530. After a 30-day waiting period, the documents supporting the business review will be added to the file.

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U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

NOV 29 1993

The Honorable Paul Simon
United States Senate
Washington, D.C. 20510

Dear Senator Simon:

I am writing in response to your letter of November 17, 1993, also signed by Representative Dan Glickman, requesting the views of the Department of Justice on the antitrust implications of collective efforts by persons in the television industry to address the effects of violence on television.

Your letter notes the expiration, on December 1, 1993, of the Television Program Improvement Act of 1990, which provided in part that "the antitrust laws shall not apply to any joint discussion, consideration, review, action, or agreement by or among persons in the television industry for the purpose of, and limited to, developing and disseminating voluntary guidelines designed to alleviate the negative impact of violence in telecast materials." This legislation was intended to address uncertainty regarding the application of the antitrust laws to such activities, apparently based largely on United States v. National Association of Broadcasters, 536 F. Supp. 149 (D.D.C., 1982) ("NAB"), an antitrust case brought by the Department that challenged certain standards in the NAB's Television code that restricted the sale of commercial advertising time. You note that given the expiration of the 1990 Act, there may again be uncertainty about the application of the antitrust laws to continuing collective efforts to address television violence.

Your letter describes some of the collective activities undertaken in the industry to address television violence during the last three years. We understand that industry representatives have met to discuss television violence and have developed a set of general guidelines and an advisory message program. You request the Department's guidance on the antitrust risks to the industry of continuing to engage in cooperative activities with the goal of reducing gratuitous violence on television.

The Department of Justice does not believe that the antitrust laws should present any barrier to the activities described in the Television Program Improvement Act of 1990 notwithstanding the coming expiration of that statute. During the consideration of the bills that led to the exemption, the Department expressed the view that the legislation dealt with major issues largely unconnected to the proper functioning of an unregulated and competitive economy, ~~see~~ letter to Chairman Jack Brooks from Deputy Assistant Attorney General John Mackey on H.R. 1391, June 12, 1989 (copy enclosed). The conditions of the exemption--that any guidelines be truly voluntary and that collective activity not result in the boycott of any person--led us to conclude that activities covered by the exemption were not likely to be anticompetitive. Indeed, as your letter suggests, the legislation was intended more to address antitrust uncertainty voiced by the industry than a belief that such activities in fact would violate antitrust law.

You request in particular the Department's interpretation of the NAB case, which apparently was the principal source of antitrust concern when the Television Program Improvement Act was under consideration. In the NAB case, the Department challenged under Section 1 of the Sherman Act certain television advertising standards in the NAB's Television Code. These provisions (1) limited the number of minutes of commercials per broadcast hour ("time standards"), (2) limited the number of commercial interruptions per program and the number of consecutive announcements per interruption ("program interruption standards"), and (3) prohibited the advertising of two or more products in a commercial shorter than sixty seconds, otherwise known as the "multiple product standard." The Code also contained a number of other television and programming standards that were not challenged.

In ruling on cross motions for summary judgment, the court held that item (3) above, the "multiple product standard," constituted a per se violation of the antitrust laws and granted summary judgment as to that standard to the government. It found the multiple product standard to be an artificial device which required advertisers to purchase more commercial television time than they might wish and in excess of what they would be able to purchase if free market conditions prevailed.

The court declined to apply the per se rule to items (1) and (2) above--the time and program interruption standards--citing unusual characteristics of television broadcasting that may be disruptive of the "assumed link between supply and price that underlies the per se treatment of supply restrictions." The court noted the scarcity of

broadcast frequencies, the inherent limit on the number of broadcast minutes, and the broadcasters' licensing obligation to operate in the public interest.

With respect to the rule of reason analysis required where a per se rule was inapplicable, the court found disputed issues of fact on whether the time standards actually affected the supply of commercial time and even if supply was affected, what effect that limitation would have on price. Likewise, the record was not sufficient to determine whether the program interruption standards fostered an anticompetitive standardization of station format or the likely economic effects of standardization in that instance. Therefore, summary judgment on items (1) and (2) above--the time and program interruption standards--was not granted.

After the court's decision on the summary judgment motions, the NAB case was settled by a consent decree that prohibited any code, rule, by-law, guideline or standard limiting or restricting (1) the quantity, length, or placement of non-program material appearing on broadcast television; or (2) the number of products or services presented within a single non-program announcement on commercial television.

The conduct that was at issue in the NAB case differs significantly from that covered by the expiring antitrust exemption in the Television Program Improvement Act. The government's basic contention in NAB was that the challenged commercial advertising restrictions had as their actual purpose and effect the artificial manipulation of the supply of commercial television time, with the end that the price of time was raised, to the detriment of both advertisers and the ultimate consumers of the products promoted on the air. Indeed, without access to an important advertising forum, smaller, newer, competitors in some product areas could be at a significant disadvantage. At the same time, with fewer advertising slots and high demand, the broadcasters could charge anticompetitive prices for commercial time.

In our view, the NAB case should not be read as prohibiting the kind of activities that the Television Program Improvement Act was enacted to encourage. Such activities may be likened to traditional industry standard-setting efforts that do not necessarily restrain competition and may have significant procompetitive benefits. Absent unequivocal anticompetitive purpose or effect, as the multiple product standard was found to have in NAB, product standard setting is evaluated under an antitrust rule of reason that balances any potential anticompetitive effects against procompetitive benefits. The Supreme Court observed in Allied Tube and Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) ("Allied Tube"), that

"(w)hen private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition ... those private standards can have significant procompetitive advantages. It is this potential that has led most lower courts to apply rule of reason analysis to product standard-setting by private associations." 486 U.S. at 500-01.

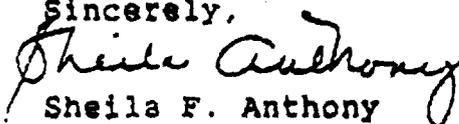
We believe that efforts to develop and disseminate voluntary guidelines to reduce the negative impact of television violence should fare well under the appropriate rule-of-reason antitrust analysis. The measures you describe the industry having taken since the passage of the Television Program Improvement Act and further comparable cooperative activities are in the Department's view unlikely to be found anticompetitive. They are not intended to, nor can we predict that they would have the effect of, significantly decreasing competition among broadcasters, cable operators or other television media, among program producers, or among advertisers. They entail voluntary guidelines, and the Supreme Court noted in Allied Tube that concerted efforts to enforce product standards face more rigorous antitrust scrutiny than efforts to agree upon such standards, 486 U.S. at 501, n. 6. We are aware of no indication that the measures already taken or those that may be taken in the future would be biased by any participants' economic interests in stifling product competition. The Television Program Improvement Act's protection did not extend to boycotts of any person, and we assume that further efforts by the industry to alleviate the negative impact of violence in telecast materials also would not entail such conduct.

Moreover, as the Supreme Court indicated in Allied Tube, potential procompetitive effects would be an important part of the antitrust analysis of voluntary television violence guidelines. Such guidelines could serve to disseminate valuable information on program content to both advertisers and television viewers. Accurate information can enhance the demand for, and increase the output of, an industry's products or services. For example, viewers, including particularly parents, may react to uncertainty about the nature of violence in television programming by reducing television viewing in their homes. Violent television programming is seen by many as distasteful or harmful, and reasonable voluntary industry efforts to alleviate such negative effects can be likened to reasonable safety standards that improve the quality of, and thus the demand for, an industry's products.

In sum, the Department does not believe that continuance of the activities that have been exempted from the antitrust laws by the Television Program Improvement Act--including measures already taken or comparable cooperative measures that may be taken in the future--should present substantial antitrust risks. Certainly, such conduct would not raise the direct commercial competitive concerns that were presented by the commercial advertising restrictions that the Department challenged in the NAB case.

We appreciate very much your concern with the negative effects of gratuitous television violence, and we hope our comments on the antitrust aspects of collective industry efforts to alleviate those effects will be helpful.

Sincerely,



Sheila F. Anthony
Assistant Attorney General

Enclosure