

Complaint

120 F.T.C.

IN THE MATTER OF

SUMMIT COMMUNICATIONS GROUP, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3623. Complaint, Oct. 20, 1995--Decision, Oct. 20, 1995*

This consent order prohibits, among other things, Summit and seven Wometco Cable TV companies from agreeing, attempting to agree or carrying out an agreement with any cable television provider to allocate or divide markets, customers, contracts or territories for cable television service in the incorporated and unincorporated areas of the Georgia counties of Cobb, Bartow, Dekalb, Walton, Gwinnett, Fulton, Douglas, Fayette, Coweta, Clayton, Henry, Rockdale, Newton and Cherokee. In addition, the consent order prohibits agreements to refrain from overbuilding any portion of any cable television system in these counties.

Appearances

For the Commission: *Jill M. Frumin.*

For the respondents: *Neal R. Stoll, Skadden, Arps, Slate, Meagher & Flom, New York, N.Y. and A. Douglas Melamed and Robert A. Hammond, III, Wilmer, Cutler & Pickering, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that the respondents named in the caption hereof, all corporations subject to the jurisdiction of the Commission, have violated and are violating the provisions of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Summit Communications Group, Inc. (hereinafter "Summit") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at

115 Perimeter Center Place, Suite 1150, Atlanta, Georgia. Time Warner Inc. (hereinafter "TWI") proposes to acquire Summit, at which time Summit will become a wholly-owned subsidiary of TWI.

PAR. 2. Respondent Wometco Cable TV of Georgia, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 5979 Fairburn Road, Douglasville, Georgia.

Respondent Wometco Cable TV of Cobb County, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 1145 Powder Springs Road, Marietta, Georgia.

Respondent Wometco Cable TV of Clayton County, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 6435 Tara Boulevard, Suite 22, Jonesboro, Georgia.

Respondent Wometco Cable TV of Conyers-Rockdale, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 1361 Iris Drive, Conyers, Georgia.

Respondent Wometco Cable TV of Fayette County, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 107 South Glynn Street, Fayetteville, Georgia.

Respondent Wometco Cable TV of Fulton County, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 6435 Tara Boulevard, Suite 22, Jonesboro, Georgia.

Respondent Wometco Cable TV of Henry County, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 6435 Tara Boulevard, Jonesboro, Georgia.

PAR. 3. Respondents described in paragraph two will hereinafter be collectively referred to as "Wometco." On or about December 6, 1994, U S WEST, Inc. (hereinafter "USW"), through its wholly-owned subsidiary Multimedia Cable, Inc., a Delaware corporation, acquired Wometco.

PAR. 4. The acts and practices of respondents, including those herein alleged, are in or affect commerce within the meaning of

Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 5. Except to the extent that competition has been restrained as alleged herein, Summit and Wometco have been, and are now, in competition between themselves in parts of unincorporated Cobb County, Georgia as providers of cable television services.

PAR. 6. On or about March 16, 1990, Summit entered into a license agreement with Asbury Village/Summit Limited Partnership (hereinafter "Asbury Village") to provide cable television services to Asbury Village Apartments, an apartment complex in unincorporated Cobb County, Georgia. Asbury Village Apartments is located in an area of unincorporated Cobb County where both Summit and Wometco have franchise authority to provide cable television service (hereinafter "dual franchise area"). Pursuant to the license agreement, sometime after March 16, 1990, Summit began pre-wiring units of the Asbury Village Apartments. At or about the same time period, Wometco, which had cable television facilities nearby, also began pre-wiring units of the Asbury Village Apartments.

PAR. 7. On or about April 26, 1990, officials of Summit and Wometco had telephone conversations concerning which of the two companies would provide service to Asbury Village Apartments. During these conversations, Summit and Wometco agreed that Wometco would provide service to Asbury Village, and Summit would not. On or about May 24, 1990, Summit and Wometco entered into an agreement whereby Summit assigned to Wometco its contract to serve Asbury Village Apartments, and Summit sold to Wometco, at cost, its wires and other equipment that had already been installed in the apartment complex. Sometime thereafter, Wometco and Summit requested that Asbury Village consent to the assignment.

PAR. 8. On or about August 21, 1990, Asbury Village agreed to consent to the assignment of the Summit contract only if Wometco agreed to assume all of Summit's obligations under the contract and to perform faithfully each and every duty and covenant imposed on Summit by the contract.

PAR. 9. During the course of the telephone conversations on or about April 26, 1990, Summit and Wometco officials reached an understanding concerning how the two companies should handle future situations similar to that at Asbury Village Apartments, *i.e.*, where both companies were attempting to serve the same apartment

complex or housing subdivision in the dual franchise area. An understanding was reached concerning which of the two companies would serve apartment complexes and/or housing subdivisions in the dual franchise area. From late April of 1990 until at least March 24, 1993, this understanding between Summit and Wometco was in operation.

PAR. 10. On or about March 24, 1993, Summit wrote a letter to Wometco concerning both companies' efforts to serve a housing subdivision called Manor Oaks, in the dual franchise area. In this March 24, 1993, letter, Summit attempted to persuade Wometco to abandon Wometco's plans to serve Manor Oaks and to sell its equipment at cost to Summit. Summit specifically referenced the Asbury Village situation, stating that from April of 1990 until March 24, 1993, Summit had "honored the understanding" that they had reached at that time. Summit attempted to persuade Wometco not to overbuild Summit's facilities. Despite the letter, Wometco continued to build cable into Manor Oaks, and Summit withdrew from the subdivision.

PAR. 11. Sometime after August 16, 1993, pursuant to the understanding referred to in paragraphs six through nine above, Wometco sold to Summit, at cost, its cable television facilities in two housing subdivisions called Grand Manor and Elan, both in the dual franchise area. On or about August 16, 1993, Wometco sought to sell to Summit its investment in Grand Manor and Elan. In both Grand Manor and Elan, Wometco had installed cable wires before Summit had. Wometco acknowledged that in the Elan subdivision "Summit had plant existing at the entrance and should have the right to be the provider." Subsequently, Wometco sold out to Summit, at cost.

PAR. 12. By engaging in the acts and practices described in paragraphs six through eleven, respondents have agreed not to compete in the dual franchise area.

PAR. 13. The agreement not to compete and acts and practices of the respondents, as herein alleged, have had the purpose or effect, or the tendency and capacity, to restrain competition unreasonably and to injure consumers in the following ways, among others:

A. Restraining competition between providers of cable television services in parts of unincorporated Cobb County, Georgia;

B. Depriving cable television subscribers in parts of unincorporated Cobb County, Georgia, of access to a competitively determined price and quality of cable television services.

PAR. 14. The agreement not to compete and the acts and practices of respondents, as herein alleged, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and respondents having been furnished thereafter with a copy of a draft complaint which the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondents with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Summit is a corporation organized, existing, and doing business under and by virtue of the laws of the State of

Delaware, with its office and principal place of business at 115 Perimeter Center Place, Suite 1150, Atlanta, Georgia.

Respondent Wometco Cable TV of Georgia, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 5979 Fairburn Road, Douglasville, Georgia.

Respondent Wometco Cable TV of Cobb County, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 1145 Powder Springs Road, Marietta, Georgia.

Respondent Wometco Cable TV of Clayton County, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 6435 Tara Boulevard, Suite 22, Jonesboro, Georgia.

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Respondent Wometco Cable TV of Fulton County is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 6435 Tara Boulevard, Suite 22, Jonesboro, Georgia.

Respondent Wometco Cable TV of Henry County, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business at 6435 Tara Boulevard, Suite 22, Jonesboro, Georgia.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Summit*" means Summit Communications Group, Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by Summit, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

B. "*Wometco*" means Wometco Cable TV of Georgia, Inc., Wometco Cable TV of Cobb County, Inc., Wometco Cable TV of Clayton County, Inc., Wometco Cable TV of Conyers-Rockdale, Inc., Wometco Cable TV of Fayette County, Inc., Wometco Cable TV of Fulton County, Wometco Cable TV of Henry County, Inc., their directors, officers, employees, agents and representatives, predecessors, successors and assigns, their subsidiaries, divisions, groups and affiliates controlled by Wometco, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

C. "*TWI*" means Time Warner Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by TWI, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

D. "*USW*" means U S WEST, Inc., its directors, officers, employees, agents and representatives, predecessors, successors and assigns, its subsidiaries, divisions, groups and affiliates controlled by USW, and the respective directors, officers, employees, agents, representatives, successors and assigns of each;

E. "*Commission*" means the Federal Trade Commission;

F. "*Cable operator*" means any partnership, sole proprietorship or corporation, including all of its subsidiaries, affiliates, divisions and joint ventures, that owns, controls or operates one or more cable television systems; "cable operator" includes the partners, directors, officers, employees, and agents of such partnership, sole proprietorship or corporation as well as the directors, officers,

employees, and agents of such partnership's, sole proprietorship's or corporation's subsidiaries, affiliates, divisions and joint ventures. The words "subsidiary," "affiliate," and "joint venture" refer to any firm in which there is partial (10% or more) or total ownership or control between corporations.

G. "*Cable television service*" means the delivery to the home of various entertainment and informational programming via a cable television system.

H. "*Cable television system*" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable television service, which includes video programming and which is provided to multiple subscribers within a community. The term does not include: (a) a facility that serves only to retransmit the television signals of one or more television broadcast stations; or (b) a facility that serves only subscribers in one or more multiple dwelling units under common ownership, control, or management, unless such facility or facilities uses a public right-of-way.

I. "*Relevant geographic area*" means the incorporated and unincorporated areas of the counties of Cobb, Bartow, Dekalb, Walton, Gwinnett, Fulton, Douglas, Fayette, Coweta, Clayton, Henry, Rockdale, Newton, and Cherokee, in the State of Georgia.

J. "*Overbuilding*" means instances in which two or more cable operators have the facilities to provide and are capable of providing cable television service to the same subscribers.

II.

It is further ordered, That Summit and Wometco each cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, combining or attempting to combine, entering into or attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, carrying out or attempting to carry out, or soliciting or attempting to solicit, any combination, agreement, or understanding, either express or implied, with any cable operator or other provider or potential provider of cable television service in any part of the relevant geographic area:

A. To allocate or divide markets, customers, contracts, or territories for cable television service in any part of the relevant geographic area. "Customers" includes, but is not limited to, residents of existing, newly-constructed, or future housing developments, subdivisions, apartment complexes, or hotels; and

B. To refrain from overbuilding any portion of any cable television system in any part of the relevant geographic area.

Provided that nothing contained in the foregoing paragraphs of this order shall be construed to prohibit TWI or USW from engaging in any lawful conduct or entering into any lawful agreement.

III.

It is further ordered, That Summit and Wometco shall:

A. Within thirty (30) days after the date this order becomes final, distribute a copy of the complaint and order to each of their directors, officers, and supervisory employees who are in any way involved in cable television service in the relevant geographic area;

B. For a period of three (3) years after the date this order becomes final, furnish a copy of the complaint and order to each of their new directors, officers, and to each of their supervisory employees in any way involved in cable television service in the relevant geographic area, at the time they become a director, officer, or supervisory employee;

C. For a period of three (3) years from the date this order becomes final, and within thirty (30) days after the date any entity becomes a majority-owned subsidiary of Summit or Wometco, provide a copy of the complaint and order to all directors, officers, and supervisory employees of such entity who are in any way involved in cable television service in the relevant geographic area.

IV.

It is further ordered, That Summit and Wometco:

A. Within sixty (60) days after the date this order becomes final, and annually for the next five (5) years on the anniversary of the date this order becomes final, and at other times as the Commission may require, shall each file a verified written report with the Commission

setting forth in detail the manner and form in which each has complied and is complying with this order;

B. For the purpose of determining or securing compliance with this order, shall permit any duly authorized representative of the Commission:

1. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Summit or Wometco, relating to any matters contained in this order; and

2. Upon five days' notice to Summit and Wometco, and without restraint or interference from them, to interview officers, directors, or employees of Summit and Wometco, relating to any matters contained in this order. Summit and Wometco, and the officers, directors, and employees, may have counsel present.

C. Shall notify the Commission at least thirty (30) days prior to any proposed change in Summit or Wometco affecting the provision of cable television service in the relevant geographic area, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change that may affect their compliance obligations arising out of this order.

V.

It is further ordered, That this order shall terminate on October 20, 2015.

STATEMENT OF THE COMMISSION

In this matter, the Commission has alleged that the respondents, Summit and Wometco, which were competing providers of cable television service, entered into a market allocation agreement. Such an agreement is *per se* illegal and, in this case, deprived cable television subscribers of a competitive marketplace.

The two respondents were Georgia-based firms, each of which offered cable television services in some or all of fourteen Georgia counties. Subsequent to the alleged illegal conduct, Wometco was

acquired by U.S. West, and after commencement of the Commission's investigation, Summit was acquired by Time-Warner. Thus, both Summit and Wometco are under the active control of major cable television firms whose managements were not implicated by the allegations of the Commission's complaint.

The consent order prevents these respondents from engaging in similar conduct in the fourteen counties in Georgia where either of the two firms had operations, a far broader area than the small area in one county where the parties had cable systems capable of competing for business. Under the unique circumstances of this proceeding, the Commission has concluded that relief may be limited in this fashion.

The Commission's policy is that where *per se* illegal conduct is found, it will seek the broadest possible relief, without geographic limitation. Boulder Ridge Cable TV, Docket No. C-3537 (Oct. 19, 1994). Only in extraordinary cases, such as this one, will it be appropriate to limit the scope of relief.

STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

I concur in the Commission decision to issue a complaint alleging that the respondents conspired to allocate the market for cable television services. Market allocation agreements, including this one, are *per se* unlawful. *Addyston Pipe and Steel Co. v. United States*, 175 U.S. 211 (1899).

I dissent from the decision to limit the cease and desist order against Summit Communications Group, Inc. (Summit) and the seven named Wometco cable systems to a small geographic area surrounding Atlanta, Georgia. Summit operates cable television systems outside the fourteen Georgia counties that are included in the geographic coverage of the order, and the order does nothing to prevent future violations at those systems. If, after the order is issued, Summit enters an identical market allocation agreement at a cable system outside these fourteen counties, the Commission's only recourse will be to initiate an administrative proceeding to obtain still another order.

Market allocation, like price fixing, has long been deemed *per se* unlawful, and no proof of market power is necessary to condemn the conduct. Nothing about the fourteen Georgia counties renders them uniquely susceptible to market allocation schemes. Since market

allocation is unlawful whenever and wherever it occurs, I see no reason to limit the prohibition in the order to a tiny geographic region.

The complaint and order set forth no rationale for drawing a line around these fourteen counties as the geographic metes and bounds of the order's coverage. The actual agreements alleged in paragraphs six through eleven of the complaint relate to the provision of the cable television service to the Asbury Village apartment complex and specific housing subdivisions. As alleged in paragraph thirteen of the complaint, the restraint of trade had its anticompetitive effect only in these unincorporated areas of Cobb County, Georgia. The absence of any apparent rationale is troubling. In future cases, it opens the door to unguided negotiations regarding the geographic scope of conduct orders.

This is the second consent agreement involving allegations of market allocation in which the Commission has limited the coverage of the order to a narrow geographic area. In B&J School Bus Service, Inc., Docket No. C-3425 (April 22, 1993), I dissented from the limitation on the geographic coverage of the order on the ground that in the rare case in which the Commission uncovers a flagrant *per se* violation such as bid rigging, price fixing or market allocation, it should take strong action to prohibit the participants in conspiracy from repeating the violation. I expressed concern that the Commission was signaling a new leniency toward *per se* antitrust violations. In accepting this second order with such a weak and limited remedy, the Commission appears to eliminate the possibility that the school bus order can be disregarded as an aberration.

Set Aside Order

120 F.T.C.

IN THE MATTER OF

CALIFORNIA MEDICAL ASSOCIATION

SET ASIDE ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-2967. Consent Order, April 17, 1979--Set Aside Order, Oct. 27, 1995*

This order reopens a 1979 consent order, which prohibited the medical association from participating in the creation or dissemination of fee schedules relating to physician compensation, and sets aside the consent order pursuant to the Commission's determination that the public interest requires reopening and setting aside the order because the order presents an obstacle to the respondent forming and operating a managed care subsidiary.

ORDER GRANTING PETITION TO REOPEN AND MODIFY
OR SET ASIDE CONSENT ORDER

On May 24, 1995, California Medical Association ("CMA"), filed its Petition To Reopen and Modify or Set Aside Consent Order ("Petition") in Docket No. C-2967, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. In its Petition, CMA requests that the Commission reopen the order and set aside or, in the alternative, modify provisions of the order that restrict the ability of CMA to develop and distribute a relative value study ("RVS"), as defined in the order.

CMA asserts in its Petition that changed conditions of law or fact warrant reopening the order and setting it aside or modifying it. The Petition was placed on the public record for thirty days; no comments were received. For the reasons described below, the Commission has determined that the order should be reopened and set aside.

I. BACKGROUND

The Commission's complaint alleged, among other things, that the preparation and circulation by CMA of relative value studies had the effect of establishing, maintaining or otherwise influencing the fees which physicians and other health care professionals charge for their professional services. The order, among other things, prohibits CMA from "directly or indirectly initiating, originating, developing,