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PRESS STATEMENT OF COMMISSIONER GLORIA TRISTANI

Approval of 32 Radio License Transactions in 26 Radio Markets by the Mass Media Bureau

The Bureau's approval of 32 license transactions in 26 radio markets relies on a simplistic antitrust-like analysis of competition and confounds the Commission's primary obligation to implement a federal broadcast communications policy that serves the public interest. Each of these license transfers brings about an increase, and in some cases an unprecedented increase, in market power concentration. Taken together they exemplify harmful levels of control of advertising revenues by both single owners and duopolies in local radio markets that can hardly lay claim to be supported, much less approved, by prior Commission cases or logic.[1] Today's approvals apparently initiate a new era where the Commission will routinely approve transactions resulting in *single owner revenue concentration levels over 50% and duopoly concentration levels as high as 100%.* The Bureau's retreat from the Commission's past practice is unjustified.

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[1] I am unable to locate a single case where the post-transaction duopoly market share has reached some of the levels approved here. The Bureau cites *Shareholders of AMFM, Inc.,* 15 FCC Rcd. 16062 (2000) for the proposition that duopoly concentrations of approximately 82% have been previously approved. While that figure appears in the *AMFM* decision at 16070, there is no analysis. The sole contention was the public interest standard was not violated because certain divestitures compelled by the Antitrust Division of the Department of Justice remedied the competition concerns presented by such high revenue concentrations. Unfortunately, the divestitures cited in the reported decision were *in different markets than those that contained the offending concentrations. See* 15 FCC Rcd. at 16070-71, n.23. In short, the citation to prior Commission authority appears to be citation to a precedent that never was. Finally, it cannot be overlooked that only a *single commissioner voted to approve both the outcome and the rationale. See* 15 FCC Rcd. At 16062 (noting Commissioners Tristani and Powell concurred and Commissioner's Ness and Furchgott-Roth dissented in part)

Many of today's approval letters cite *New Cities Communications Inc.,* 12 FCC Rcd. 3929 (1997) for the proposition that single owner advertising revenue levels of 52.4% are consistent with prior precedent. However, close reading of *New Cities* reveals that the Commission did not analyze the revenue concentration level for public interest harms, it simply said the Department of Justice did not find an antitrust violation and the post-transaction increase was marginally greater than had previously been approved. By this rationale the Commission has no principled public interest analysis, nor is there any numerical limit to the percentage of advertising revenue share a single owner may possess. This approach simply writes the public interest requirement out of the statute.

Undue economic concentration has an adverse impact on competition, diversity and localism. When a single competitor, for example, acquires sufficient market power through consolidation, it may likely exercise that power to increase advertising rates, deter entry, disadvantage rivals, or cause otherwise efficient rivals to exit from the market and thus deprive the consumer of independent voices, thereby limiting the range of information received by the listening public. Moreover, vigorous competition among market participants usually compels competitors to produce a better product, which directly benefits the listening public. These concerns are at the core of the Commission's statutory public interest mandate. The Bureau's action ignores that the public interest requires us to consider more than the competitive impact of proposed radio station transactions to avoid irreversibly adverse consequences of extremely concentrated radio markets.

While I agree the Bureau should act on these applications, some of which have been pending since 1998, most, if not all, of the cases should have been designated for evidentiary hearings under Section 309(e) of the Communications Act. Absent a better factual record upon which to base the decision, these approvals appear to flatly contravene the Commission's duty to ensure broadcast license transfers serve the public interest. It is not *any* action that we are obligated to undertake, it is action in the public interest. As the concentration in a particular market increases, our duty to scrutinize the public interest benefits should increase accordingly. Proper implementation of this Commission's obligation requires a more complete record and analysis.

No single factor defines the level of competition or potential competitive problems in radio markets. Without the fact gathering that takes place at a hearing, there is insufficient evidence to fairly consider or fulfill our statutory obligations. At a minimum these cases should each be subject to a hearing that collects evidence on the relevant markets, measures concentration, and evaluates the potential adverse competitive effects and the relationship of such effects to our public interest review. The hearing record should also include evidence on the potential for entry by new competitors, information regarding efficiencies that lead to demonstrable benefits to the listening public and other consumer benefits that may result from the transaction.

I. FACTS

Today's license transfers are in 26 separate radio markets and involve 32 separate transactions.[2] In 7 cases, Petitions to Deny the transactions were filed, including one in a non-Arbitron market. In 6 of the 7 cases, the top two revenue earning stations combined exceed 75% of the advertising revenue generated by that market. In 5 of the 7 markets, no third competitor has as much as 20% of the revenue and in one market, the third competitor has a mere 5.3%.[3]

There are 25 transactions in 22 radio markets where no Petitions to Deny were filed. In these markets the minimum share held by the top two revenue earning stations is 73.9% (Cheyenne, WY) *and in two markets the top two stations have 100%* (Casper, WY and Augusta,

[2] One transaction is in a non-Arbitron market. There are 5 transactions in duplicate markets (Santa Barbara, CA, Harrisonburg, VA, Great Falls, MT, Williamsport, PA, and Casper, WY)

[3] Santa Barbara, CA; Harrisonburg, VA (2 transactions); Mt. Sterling/Lexington, KY; and Utica/Rome, NY.

ME). In 10 of the 22 Arbitron markets, the top two stations control over 90% of the revenues. In 10 of the same 22 markets, the third competitor has less than 10% of the revenues and as little as 2.3%. None of the remaining 12 has over 20%. The highest single post merger revenue share is 67.3% (Beckley, WV).

II. APPLICABLE LAW

The Commission may grant a requested license transfer only if it determines that "the public interest, convenience and necessity will be served thereby." 47 U.S.C. § 310(d). Where broadcast licenses are concerned, the effects of a proposed transaction on the diversity of voices, local programming, and economic competition in a given market have long been core considerations. The license transfers at issue in this clutch of applications, with the exceptions of those in Harrisonburg, Va., and Utica, NY, do not implicate the ownership cap rules but nonetheless present levels of economic concentration that pose a threat to competition and the public interest principles that have guided this agency for many years. The transactions before the Bureau today may comply with the numerical station ownership limits but nonetheless may result in substantial and harmful economic concentration.[4] In high-concentration cases such as these, the Commission has previously found it:

> [H]as an independent obligation to consider whether a proposed pattern of radio ownership that complies with the local ownership limits would otherwise have an adverse competitive effect in a particular radio market and thus, would be inconsistent with the public interest. 47 U.S.C. § 309(a)(requiring the Commission to make a determination that the transfer or assignment of a broadcast license would be in the public interest).[5]

It is nonsensical to contend otherwise. The 1996 Act did not remove the Commission's statutory obligation to grant sales applications only if it can conclude that doing so would serve the public interest. Nor did it remove competitive impact as a component of the Commission's public interest review of broadcast sales applications under Section 310(d) of the Communications Act, any more than it removed the Department of Justice's or the Federal Trade

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[4] New entry into the commercial broadcasting industry is extremely difficult. In many local markets, there are no available frequencies to permit the entry of a new station. As a result, new entry as a constraint on the possible exercise of market power by incumbent radio stations is often ineffective. This structural characteristic of local commercial radio markets requires a careful scrutiny of any proposed aggregation of station capacity in a local market, even where small increments of market share are involved.

[5] *CHET-5 Broadcasting L.P.,* 14 FCC Rcd 13041, 13043 (1999). The courts have long agreed that competition is a component of the Commission's public interest review of broadcast applications. *See, e.g., FCC v. RCA Communications, Inc.,* 346 U.S. 86, 94 (1953)("There can be no doubt that competition is a relevant factor in weighing the public interest."); *Mansfield Journal Co. v. FCC,* 180 F.2d 28, 33 (D.C. Cir. 1950)("Monopoly in the mass communications of news and advertising is contrary to the public interest, even if not in terms proscribed by the antitrust laws."); *Rogers Radio Communications Services, Inc. v. FCC,* 593 F.2d 1225, 1230 (D.C. Cir. 1978)(The "effect on competition [is] clearly a proper factor for the Commission to consider under the public interest, convenience and necessity standard. . . .").

Commission's ("Antitrust Agencies") antitrust oversight of radio merger cases. Today's approvals baldly presume that the statutory public interest standard is met even where the approval results in injurious economic concentration.

> [O]ur jurisdiction [nor] our obligation with respect to competition in broadcast markets is coincident with that of the Antitrust Agencies. Rather, our interests in this area are complementary.[6]

The Commission has repeatedly said that its analysis of competitive effects is informed by antitrust principles but is not governed by them. The public interest standard, and the competitive analysis conducted thereunder, call for an examination of a larger field of facts than review to ascertain violations of the antitrust laws.[7]

III. PAST COMMISSION DECISIONS AND PRACTICES APPEAR TO HAVE BEEN IGNORED BY THE BUREAU

This Commission has previously followed a screening procedure where applications for license transfers are reviewed by the Bureau to determine whether they raise competitive concerns. Two calculations are undertaken. First, the post-merger share of radio revenues received by the applicant is calculated. Second, the post-merger share of the same revenues that would be controlled by the applicant and the second largest firm in the market is calculated. If the applicant's share is 50 percent or more, or if the two-firm share is 70 percent or more, the transaction poses a potential competitive risk. The Bureau then would seek public comment on the competitive impact of the transaction and indicate that the Commission would subject the case to further competitive analysis.[8] All but four of the cases at issue today were put on public notice pursuant to this procedure.

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[6] *Shareholders of Citicasters, Inc.*, 11 FCC Rcd 19135, 19143 (1996); The Department of Justice has recognized the complementary role played by the Commission. To the extent that discretionary decisions not to prosecute reflect the limited resources of the antitrust enforcement agencies, the FCC's review, which is not discretionary, provides a check against potential under-enforcement. *See* U.S. Department of Justice, International Competition Policy Advisory Committee, *Final Report*, at 150 and n. 167, 154 (February 28, 2000).

[7] *See United States v. FCC,* 652 F.2d 72, 81-82 (D.C. Cir. 1980)(The Commission's "determination about the proper role of competitive forces in an industry must … be based not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry.").

[8] The public notice listing any transaction identified by the screen includes the following language:
Note: Based on our initial analysis of this application and other publicly available information, including advertising revenue share data from the BIA database, the Commission intends to conduct additional analysis of the ownership concentration in the relevant market. This analysis is undertaken pursuant to the Commission's obligation under Section 310(d) of the Communications Act, 47 U.S.C. Section 310(d), to grant an application to transfer or assign a broadcast license or permit only if so doing serves the public interest, convenience and necessity. We request that anyone interested in filing a response to this notice specifically

Had the Bureau followed its ordinary practice in the subject cases, or expanded the factors to include those that have been occasionally used, including market capacity, the distribution of classes of stations and conditions of entry, these cases would still appear to have failed to pass public interest muster. Accordingly, a substantial and material question of fact exists whether any of these transactions would have had an adverse effect on competition in the local radio advertising market thereby irreparably harming listeners by reducing viewpoint diversity. It appears none of these cases would have likely cleared our well-settled public interest hurdle under Section 310(d) of the Communications Act. Designation for hearing pursuant to Section 309(e) of the Communications Act would have been the better disposition.

IV. UNANSWERED QUESTIONS

These approvals raise a significant question whether the FCC has a coherent approach to determine if the public interest is served when reviewing competitive concerns in the broadcast radio context. While not explicitly overthrowing our traditional analysis, many relevant questions have been overlooked here. With respect to radio transactions that present horizontal market power concerns, do we utilize a consistent definition of the relevant market, both in terms of the relevant product and geographic markets?[9] Do we have a consistent and logical methodology for identifying the market participants?[10] The approval letters released by the Bureau barely examined whether the transactions under review were likely to result in either unilateral or coordinated effects that enhance or maintain market power.[11] The approvals contain little or no discussion whether the proposed transactions may result in transaction-specific efficiencies such as cost reductions that can demonstrably lead to consumer benefits,

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address the issue of concentration and its effect on competition and diversity in the broadcast markets at issue and serve the response on the parties.

The Commission has used this screening method since August 1998. *See Public Notice Broadcast Applications,* Report No. 24303 (August 12, 1998); *Great Empire Broadcasting, Inc.,* 14 FCC Rcd 11145 (1999).

[9] *See e.g. Brown Shoe Co v. United States*, 370 U.S. 294, 324-25 (1962) (defining relevant product market in terms of reasonable interchangeability of a service or product and its substitute, while considering price, use, and quality); *United States v. FCC,* 652 F.2d 72, 97 (D.C. Cir. 1980); *Craig O. McCaw*, 9 FCC Rcd at 5845 ¶ 10, nn.27-28. With regard to the definition of the relevant geographic scope of relevant markets, see *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 359 (1963) (defining relevant geographic market as an area in which a buyer may purchase a product or service from alternative sources, or in which the presence of other sellers restrains prices charged to buyers).

[10] *See Merger Guidelines*, 57 Fed. Reg. at 41556-41557 § 1.3.

[11] *See, e.g. Philadelphia Nat'l Bank*, 374 U.S. at 363 ("[A] significant increase in the concentration . . . must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."). *See also Merger Guidelines* at 41558 §§ 2.1, 2.2; *New York v. Kraft General Foods*, 926 F. Supp. 321, 359 (S.D.N.Y. 1995); *Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap*, WT Docket No. 96-59, Report and Order, 11 FCC Rcd 7824 (1996).

productivity enhancements that flow through to listeners, or improved incentives for innovation that can lead to reasonably foreseeable benefits to the listening public,[12] and whether the transactions would support the general policies that underlie the 1996 Act. In the absence of hearings on these cases, it is difficult to see how the applicants have carried their burden to demonstrate the transactions serve the public interest, convenience and necessity. This Commission has departed without reason from its prior standards and has set the public interest adrift on uncharted seas.

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[12] *See Merger Guidelines* Section 4; *see, e.g., FTC v. University Health, Inc.*, 938 F.2d 1206, 1213 (11th Cir. 1991) (stating that defendants must show that acquisition would result in significant efficiencies that would benefit competition and the consumer).