NEWS

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FOR IMMEDIATE RELEASE
April 13, 2001

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PRESS STATEMENT OF COMMISSIONER GLORIA TRISTANI

Re: Summary Rejection of Petitions to Deny and Subsequent Approval of Radio License Transactions by the Mass Media Bureau[1]

The Commission's rejection of three Petitions to Deny and one informal objection filed against the license transfers approved today highlights again the unprincipled, incremental subversion of this Commission's obligation to ensure broadcast license transfers serve the public interest. Even when detailed objections are filed, and prior Commission-level precedent does not authorize approval of transactions with market control levels *found to exist as a matter of fact in the cases before it*, the Commission comforts itself by noting the unprecedented market share control is, "generally consistent" with prior decisions.[2]

Two of the four letter rulings cite *Shareholders of AMFM, Inc.*, 15 FCC Rcd. 16062 (2000) for the proposition that duopoly concentrations of 82.6% have been approved previously by the Commission. More particularly, the letter ruling in the Parkersburg, W.V. area case (File Nos. BAL/BALH-19990818GJ-GL, GO, BALH-19990909GF) cites *AMFM* as authority for approving a 83.7% level. Three points are relevant. First, precedent approving 82.6% is not precedent for 83.7%. Second, while the 82.6% figure appears in the *AMFM* decision at 16070, there is absolutely no public interest analysis supporting it. Third, only a *single commissioner voted to approve both the outcome and the rationale in that case.*[3] Citation to the *AMFM* case appears to be citation to a precedent that never was.

Two of the four letter rulings 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. But the same letter ruling cited above in the Parkersburg, W.V. area (File Nos. BAL/BALH-19990818GJ-GL, GO, BALH-19990909GF) cites *New Cities* as authority for approving a 54% level. A Commission case approving 52.4% is not precedent for approval of 54%. Moreover, close reading of *New Cities* reveals that the Commission did not analyze the revenue concentration level for public interest harms, it simply found the Department of Justice

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[1] The four letter rulings address license transfers in: Billings, Montana (File Nos. BAL/BALH-20001227AAJ-AAN); Topeka, Kansas area (File Nos. BALH-19990713GM-GN); Mt. Sterling, Kentucky (File No. BALH-2000202ABM); and the Parkersburg, WV area (File Nos. BAL/BALH-19990818GJ-GL, GO, BALH-19990909GF).

[2] *See Letter Ruling*, File No. 1800B3-JAM, at 3 (citing *Shareholders of AMFM, Inc.*, 15 FCC Rcd. 16062 (2000)(duopoly concentration of 82.6%).

[3] *See Shareholders of AMFM, Inc.*, 15 FCC Rcd. 16062 (2000)(noting Commissioners Tristani and Powell concurred and Commissioners Ness and Furchgott-Roth dissented in part)

did not find an antitrust violation and the post-transaction increase was marginally greater than levels approved in the past. Thus *New Cities* was itself a bootstrap case and today's ruling cites it in order to bootstrap the percentage even higher.

In the Billings, Montana case (File No. 1800B3-MFW) the Bureau rejects an objection by Fisher Radio Group to the sale of a five-station combination to Clear Channel Broadcast Licenses, Inc. ("Clear Channel"). Fisher complained that approval of the sale would result in an anti-competitive, market distorting outcome because it receives many of its "top rated syndicated radio programs" from a wholly owned subsidiary of Clear Channel.[4] Prior to obtaining the stations involved in the instant transaction, Clear Channel owned no stations in this market.[5] Fisher believes Clear Channel's programming subsidiary will terminate its contracts with Fisher to permit the stations Clear Channel is purchasing to carry the programs. Unlike the other cases, the gravamen of Fisher's objection is not that Clear Channel's post-transaction advertising revenue share is too high. Rather, Fisher complains that the vertical integration of its competitors with Clear Channel's programming subsidiary includes the power to control which stations in the market will receive the top-rated and top-selling programs. Fisher contends this scenario raises a question of material fact whether approval of the transaction serves the public interest under 47 U.S.C. §310(d). The letter ruling dismisses the objection because the Commission's rules, "do not limit the common ownership of a radio network or syndicated program supplier and broadcast stations," and Fisher had not "demonstrated that alternative program suppliers are not available."[6]

The disposition in this letter ruling answers the wrong legal question and imposes on Fisher a factual burden it cannot meet without a fact-finding hearing.[7] The question was not whether a Commission rule foreclosed the sale, but whether summary judgment in favor of Clear Channel, the party with the burden of persuasion under Section 310(d) of the Communications Act, was compelled by the record. Fisher's contention that creation of a potentially disabling market reality, in a market where its new competitor would own the maximum number of stations permitted by our rules[8] and control Fisher's access to high value programming, was at least subject to differing interpretations or inferences by a trier of fact. Fisher's contentions deserved more than summary rejection.

Today's rulings do not reflect a principled public interest analysis, nor is there any numerical limit to the percentage of advertising revenue share a single owner or a duopoly may possess. This approach is dangerously close to writing the public interest out of the statute. Designation for hearing under Section 309 of the Communications Act would be a partial remedy for the problems arising from the Commission's approach in these cases. Fidelity to the law, to the principle of *stare decisis,* and to the bounds of delegated authority, should foreclose Bureau action where concentration levels exist that have not been previously approved by the

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[4] *See File No.*1800B3-MFW at 2 (Fisher).
[5] *Id.*
[6] *Id.* at 3.
[7] It is erroneous to assume the Commission must chose only between approving or disapproving license transfers on the record before it. Designation for hearing under Section 309(e) of the Communications Act would permit an opportunity to base its decision on a complete, rather than partial, factual record.
[8] *Fisher,* at n.3.

full Commission. Describing ownership concentration levels that are *explicitly inconsistent* with prior cases as "generally consistent" with prior cases mocks the rule of law.

In an era of nearly uncontrolled consolidation in the radio industry, this Commission's failure to adhere to the simple dictates of prior decisions produces results that are both structurally and functionally at odds with the Communications Act. If the Commission wishes to alter its approach, it should do so after notice and an opportunity to comment. Stealthy use of the Bureau's delegated authority subverts the principles upon which our prior cases, and indeed our government, are based.

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