Before the
Federal Communications Commission
Washington, D.C. 20554

In The Matter of **Nassau Broadcasting II, LLC** Assignor And **Millennium Shore License Holdco, LLC** Assignee For Consent to Assignment of Licenses of WADB(AM), Asbury Park, NJ, WJLK-FM, Asbury Park, NJ, and WBBO(FM), Ocean Acres, NJ	)	File Nos. BAL/BALH-20010618AAN-AAP
Seashore Broadcasting Corp. Assignor And **Millennium Shore License Holdco, LLC** Assignee For Consent to Assignment of License of WOBM-FM, Toms River, NJ	)	File No. BAL-20010618AAU
North Shore Broadcasting Corp. Assignor And **Millennium Shore License Holdco, LLC** Assignee For Consent to Assignment of License of WOBM(AM), Lakewood Township, New Jersey	)	File No. BALH-20010618AAT

MEMORANDUM OPINION AND ORDER

Adopted: May 14, 2002 **Released: May 17, 2002**

By the Commission: Commissioner Copps dissenting and issuing a statement.

1. In this Order, we consider the above-captioned applications of Millennium Shore Holdco, LLC, an indirect wholly-owned subsidiary of Millennium Radio Group, LLC (collectively "Millennium") to acquire the licenses of the following stations: WADB(AM), Asbury Park, New Jersey, WBBO(FM), Ocean Acres, New Jersey, and WJLK-FM, Asbury Park, New Jersey (collectively, the "Nassau Stations"), from Nassau Broadcasting II, LLC ("Nassau"); WOBM-FM, Toms River, New Jersey, from Seashore Broadcasting Corp. ("Seashore"); and WOBM(AM), Lakewood Township, New Jersey, from North Shore Broadcasting Corp. ("North Shore") (collectively, all five stations are referred to as the "Monmouth Stations").[1] These applications are uncontested. Because these applications were pending when we adopted the Notice of Proposed Rulemaking in MM Docket No. 01-317 ("*Local Radio Ownership NPRM*"), we resolve the competitive concerns raised by the application pursuant to the interim policy adopted in that notice.[2] After reviewing the record, we find that grant of the applications is consistent with the public interest.

I. INTRODUCTION

2. For much of its history, the Commission has sought to promote diversity and competition in broadcasting by limiting the number of radio stations a single party could own or acquire in a local market.[3] In March 1996, the Commission relaxed the numerical station limits in its local radio ownership rule in accordance with Congress's directive in Section 202(b) of the Telecommunications Act of 1996. Since then, the Commission has granted thousands of assignment and transfer of control applications proposing transactions that complied with the new limits. In certain instances, however, the Commission has received applications proposing transactions that would comply with the new limits, but that nevertheless would produce concentration levels that raised significant concerns about the potential impact on the public interest.

3. In response to these concerns, the Commission concluded that it has "an independent obligation to consider whether a proposed pattern of radio ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local radio market and[,] thus, would be inconsistent with the public interest."[4] In August 1998, the Commission also began "flagging" public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concerns.[5]

4. On November 8, 2001, we adopted the *Local Radio Ownership NPRM*. We expressed

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[1] North Shore and Seashore are commonly-owned companies. Nassau, or its predecessor, has owned the Nassau Stations since 1996. Nassau has operated WOBM(AM) and WOBM-FM pursuant to a time brokerage agreement since July 1, 1996.

[2] *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861, 19894-97 ¶¶ 84-89 (2001).

[3] *See generally id*. at 19862-70 ¶¶ 3-18.

[4] *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13043 ¶ 8 (1999) (citing 47 U.S.C. § 309(a) and *KIXK, Inc.*, 13 FCC Rcd 15685 (1998)). *See also Shareholders of Citicasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19135, 19141-43 ¶¶ 12-16 (1996).

[5] *See* Public Notice, Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998). Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50 percent or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70 percent or more of the advertising revenues in that market. *See AMFM, Inc.*, 15 FCC Rcd 16062, 16066 ¶ 7 n.10 (2000).

concern that "our current policies on local radio ownership [did] not adequately reflect current industry conditions" and had "led to unfortunate delays" in the processing of assignment and transfer applications.[6] Accordingly, we adopted the *Local Radio Ownership NPRM* "to undertake a comprehensive examination of our rules and policies concerning local radio ownership" and to "develop a new framework that will be more responsive to current marketplace realities while continuing to address our core public interest concerns of promoting diversity and competition."[7] In the *NPRM*, we requested comment about possible interpretations of the statutory framework, including whether the new numerical station ownership limits definitively addressed the permissible levels of radio station ownership, whether they addressed diversity concerns only, or whether they established rebuttable presumptions of ownership levels that were consistent with the public interest. We also requested comment on how we should define and apply our traditional goals of promoting diversity and competition in the modern media environment. The *NPRM* also sought comment on how we should implement our policies toward local radio ownership.

5. In the *Local Radio Ownership NPRM*, we also set forth an interim policy to "guide [our] actions on radio assignment and transfer of control applications pending a decision in this proceeding."[8] Although we recognized the need to "handle currently pending radio assignment and transfer applications and to address any future applications filed" while the *NPRM* is pending, we disavowed any intent to prejudge the "ultimate decision" in the rulemaking and rejected any "fundamental" changes to our current policy pending completion of the rulemaking.[9]

6. Under our interim policy, "we presume that an application that falls below the [50/70] screen will not raise competition concerns" unless a petition to deny raising competition issues is filed. For applications identified by the 50/70 screen, the interim policy directs the Commission's staff to "conduct a public interest analysis," including "an independent preliminary competitive analysis," and sets forth generic areas of inquiry for this purpose.[10] The interim policy also sets forth timetables for staff recommendations to the Commission for the disposition of cases that may raise competitive concerns.

7. We decide the applications before us pursuant to our interim policy. Under our interim policy, we first conduct a competition analysis of the proposed transaction. Here, we find that the proposed transaction raises significant competitive concerns, but that certain factors mitigate any potentially adverse effects on listeners in the local Monmouth-Ocean radio market. In addition, we believe that the statewide radio network that Millennium proposes is likely to create benefits for listeners. In taking these and other factors into consideration, we find that the proposed transaction produces public interest benefits that outweigh the likely harm to competition. Therefore, we grant the applications to permit Millennium to acquire the Seashore, North Shore and Nassau stations in the Monmouth-Ocean metro.[11]

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[6] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 19.

[7] *Id.*

[8] *Id.* at 19894 ¶ 84.

[9] *Id.*

[10] *Id.* at 19895 ¶ 86.

[11] A metro is a metropolitan area defined by the Arbitron rating service, which is used by radio stations and radio advertisers in negotiating and determining advertising rates. Millennium is also the licensee of seven radio stations located elsewhere in New Jersey outside of the Monmouth-Ocean metro.

II. BACKGROUND

8. Millennium currently is not the licensee of any radio stations in the Monmouth-Ocean metro. Through its acquisition of the Monmouth Stations, Millennium would have an attributable interest in three FM stations and two AM stations in the Monmouth-Ocean metro. Millennium also holds an unexercised option to acquire WCHR-FM, Manahawkin, New Jersey, from Nassau in the event Nassau first acquires the station from Manahawkin Communications Corporation. The application to transfer control of Manahawkin Communications Corporation, licensee of WCHR-FM, from Great American Communications Corp. to Nassau is currently pending (File No. BTCH-19990913GI). Millennium's option to acquire WCHR-FM becomes exercisable the day following consummation of Nassau's acquisition of the WCHR-FM license, and expires 12 months thereafter. In addition, Millennium has the right to enter into a Time Brokerage Agreement to operate WCHR-FM after it exercises its option to acquire WCHR-FM.[12]

9. On July 23, 2001, the Commission issued a public notice indicating that the assignment applications for the Monmouth Stations had been accepted for filing.[13] The public notice also "flagged" the applications pursuant to the Commission's "50/70" screen. Under this screen, the Commission flags proposed transactions for further competition analysis if the transaction would result in one entity controlling 50 percent or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70 percent or more of the advertising revenues in that market.[14] Based on year 2001 revenue estimates from the BIA database, the five stations that Millennium proposes to own account for a 63.8 percent revenue share in the Monmouth-Ocean Arbitron metro.[15] Post-consummation, Millennium and Big City Radio-NYC, LLC, licensee of WWZY(FM), Long Branch, New Jersey, would collectively control 75.6 percent of the advertising revenue in the Monmouth-Ocean metro.

10. No comments or petitions to deny were filed in response to the flagged public notice. On January 17, 2002, the staff provided the parties an opportunity to update the record in light of competitive

[12] *See* Option Agreement between Nassau Broadcasting I, L.L.C., et al, and Millennium Radio Group, LLC, attached to Application to Assign Licenses for stations WJLK-FM, WADB(AM), WBBO(FM) from Nassau to Millennium (FCC Form 314) (File Nos. BAL/BALH-20010618AAN-AAP), dated June 18, 2001, Exhibit C at 6.

[13] *See* Public Notice, Broadcast Applications, Report No. 25032 (rel. July 23, 2001).

[14] *See generally Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 18. A flagged public notice 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 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.

[15] BIA is a communications and information technology investment banking, consulting, and research firm. BIA provides strategic funding, consulting and financial services to the telecommunications, Internet, and media/entertainment industries. BIA provides annual revenue estimates on a subscription basis and the Commission has a license to use this information. The data referred to herein as the "BIA 2001 Database" information was made available on March 12, 2002.

changes that might have occurred in the Monmouth-Ocean market and in light of our interim policy.[16] The staff received a response from Millennium and comments from Nassau urging the Commission to grant the applications.[17]

III. DISCUSSION

A. Framework for Analysis Under Interim Policy

11. Section 310(d) of the Communications Act of 1934, as amended (the "Communications Act"), requires the Commission to find that the public interest, convenience and necessity would be served by the assignment of the radio broadcast licenses for the Monmouth Stations to Millennium before the assignment may occur.[18] We are making that finding in this case pursuant to the interim policy laid out in the recently issued *Local Radio Ownership NPRM*.[19] Under the interim policy, we conduct a public interest analysis, including but not limited to an independent preliminary competition analysis of the proposed transaction based on publicly available information and information in the Commission's records.[20]

12. Under the interim policy, to decide whether a proposed assignment serves the public interest, we first determine whether it complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules, including our local radio ownership rules. If it does, we then consider any potential public interest harms of the proposed transaction as well as any potential public interest benefits to determine whether, on balance, the assignment serves the public interest.[21]

13. The Commission's analysis of public interest benefits and harms includes an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles. While an antitrust analysis, such as that undertaken by the Department of Justice or the Federal Trade Commission, focuses solely on whether the effect of a proposed merger "may be substantially to lessen competition"[22] in the advertising market, our focus is different.[23] Our analysis of radio license assignments is informed

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[16] Letter from Peter Doyle, Chief, Audio Services Division, Mass Media Bureau, to Richard Zaragoza, Esq., *et al*. (dated Jan. 17, 2001).

[17] Millennium Feb. 22, 2001 Response; Nassau Mar. 5, 2002 Comments.

[18] 47 U.S.C. § 310(d).

[19] *See Local Radio Ownership NPRM,* 16 FCC Rcd at 19894-97 ¶¶ 84-89.

[20] *Id*. at 19895-96 ¶ 86.

[21] *Id.* at 19895 ¶ 85; *see VoiceStream Wireless Corp.*, Memorandum Opinion and Order*,* 16 FCC Rcd 9779, 9789 ¶ 17 (2001); *see also Chet-5 Broadcasting, L.P.*, 14 FCC Rcd at 13043 ¶ 8 (holding that the Commission has "an independent obligation to consider whether a proposed pattern of radio station ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local market and thus would be inconsistent with the public interest").

[22] 15 U.S.C. § 18.

[23] Although the Commission's analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which allows the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies may find based solely on antitrust laws. *See FCC v. RCA Communications,* 346 U.S. 86, 96-97 (1953) ("To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained

by how those antitrust experts look at competition issues, yet our authority arises out of the Communications Act, which is not concerned solely with the potential impact of economic concentration on advertisers, but ultimately seeks to maximize the utility that the public derives from the public airwaves. The Commission's public interest evaluation is therefore not limited to competition concerns but necessarily encompasses the "broad aims of the Communications Act."[24] These broad aims include, among other things, ensuring the existence of an efficient, nationwide radio communications service available to everyone and promoting locally oriented service and diversity in media voices.[25] Our public interest analysis therefore includes assessing whether the transfer will affect the quality of radio services or responsiveness to the local needs of the community,[26] and whether it will result in the provision of new or additional services to listeners.[27]

14. Thus, under our interim policy, where a proposed transaction raises concerns about economic concentration, we will consider evidence that the particular circumstances of a case may mitigate any adverse impact that might otherwise result, as well as any evidence of benefits to radio listeners that might result from the proposed transaction. Ultimately, it is the potential impact of the transaction on listeners that will determine whether we can find that, on balance, grant of a particular radio station assignment or transfer of control application serves the public interest.

B. Local Radio Ownership Rules

15. The Commission's local radio ownership rules restrict the number of radio stations in the same service and the number of stations overall that may be commonly owned in any given local radio market.[28] A local radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned.[29] Under the rules, as amended by the Telecommunications Act of 1996, in a local radio market with 45 or more commercial radio stations, a single entity may own up to eight commercial radio stations, no more than five of which

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through experience, and by more flexible procedure."). *See also RCA Communications,* 346 U.S. at 94; *United States v. FCC*, 653 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (The Commission's "determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry."); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff'd on recon.,* 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger); *Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agency to "analyze proposed mergers under the same standards that the Department of Justice . . . must apply.").

[24] *See AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3168-69 ¶ 14 (1999); *WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18030-31 ¶ 9 (1998) ("*Worldcom-MCI Order*").

[25] For example, the Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (*quoting United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

[26] *See Deregulation of Radio*, Report and Order, 84 FCC 2d 968, 994-97 (1981); *Sixth Report and Order*, Docket No. 8736, 1 RR 91:559, :624 (1952).

[27] *See*, *e.g.*, *Worldcom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9.

[28] 47 C.F.R. § 73.3555(a).

[29] *Id.*; *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368 (1996).

are in the same service; in a market with 30 to 44 commercial radio stations, one owner may hold up to seven commercial radio stations, no more than four of which are in the same service; in a market with 15 to 29 stations, a single owner may own up to six stations, no more than four of which are in the same service; and in a market with 14 or fewer stations, one owner may hold up to five stations, no more than three of which are in the same service, except that no single entity may control more than 50 percent of the stations in such a market.[30]

16. Millennium's proposed acquisition of the Monmouth Stations is consistent with the numerical limits in our local radio ownership rules. Millennium's multiple ownership showing indicates that, using the Commission's current definition of "radio market,"[31] the transaction creates six radio markets.[32] In all six of these radio markets, Millennium would be in compliance with the numerical limits of our current ownership rules upon consummation of the proposed transaction. The first radio market is defined by the principal community contours of WOBM(AM) and Millennium's currently-owned WKXW(FM), Trenton, New Jersey, and includes more than 45 commercial radio stations. As such, a single licensee may hold an attributable interest in up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM). If Millennium acquires WOBM(AM), it will have an attributable interest in 2 stations (1 AM/1FM) in market number one.

17. The second radio market is defined by the principal community contours of WOBM(AM), WADB(AM), WOBM-FM and WBBO(FM), and includes at least 19 commercial radio stations. In such a market, a single licensee may hold an attributable interest in up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM). If Millennium acquires WOBM(AM), WADB(AM), WOBM-FM and WBBO(FM), it will have an attributable interest in 4 stations (2 AM/2 FM) in market number two.

18. The third radio market is defined by the principal community contours of WJLK-FM, WOBM(AM) and WADB(AM), and includes at least 17 commercial radio stations. A single licensee may hold an attributable interest in up to 6 commercial radio stations in this size market, not more than 4 of which are in the same service (AM or FM). If Millennium acquires WJLK-FM, WOBM(AM) and WADB(AM), it will have an attributable interest in 3 stations (2 AM/1 FM) in market number three.

19. The fourth radio market is defined by the principal community contours of WOBM(FM), WBBO(FM) and Millennium's currently-owned WFPG(AM), Atlantic City, New Jersey, and includes at least 24 commercial radio stations. A single licensee may hold an attributable interest in up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM). If Millennium acquires WOBM(FM) and WBBO(FM), it will have an attributable interest in 3 stations (1 AM/2 FM) in

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[30] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), § 202(b)(1); 47 C.F.R. § 73.3555(a)(1).

[31] *See Definition of Radio Markets*, Notice of Proposed Rule Making, 15 FCC Rcd 25077, 25078 (2000) ("*Radio Market Definition NPRM*"). Under our current methodology, "we evaluate whether a proposed transaction complies with our ownership rules by first determining the boundaries of each market created by the transaction. Thus, we look to all stations that will be commonly owned after the proposed transaction is consummated and group these stations into 'markets' based on which stations have mutually overlapping signal contours. A market is defined as the area within the combined contours of the stations to be commonly owned that have a common overlap." *Id*.

[32] The contours of the Monmouth Stations, combined with the contours of Millennium's other stations in New Jersey create six "radio markets" for purposes of the Commission's multiple ownership rules using current methodology. *See* Application to Assign Licenses for stations WJLK-FM, WADB(AM), WBBO(FM) from Nassau to Millennium (FCC Form 314) (File Nos. BAL/BALH-20010618AAN-AAP), dated June 18, 2001, Exhibit 15.

market number four.

20. The fifth radio market is defined by the principal community contours of WOBM(AM), WBBO(FM), WADB(AM) and Millennium's currently-owned WFPG(AM), Atlantic City, New Jersey, and includes nearly 40 commercial radio stations. Therefore, a single licensee may hold an attributable interest in up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM). If Millennium acquires WOBM(AM), WBBO(FM) and WADB(AM), it will have an attributable interest in 4 stations (3 AM/1 FM) in market number five.

21. The sixth radio market is defined by the principal community contours of WBBO(FM) and Millennium's currently-owned WFPG(AM) and WFPG-FM, Atlantic City, New Jersey, and includes at least 24 commercial radio stations. A single licensee may hold an attributable interest in up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM). If Millennium acquires WBBO(FM), it will have an attributable interest in 3 stations (1 AM/2 FM) in market number six.

C. Public Interest Analysis Under Interim Policy

22. In the interim policy, we stated that, consistent with precedent, we will continue to examine the potential competitive effects of proposed radio station combinations. Competition analysis requires us to define at the outset the relevant product and geographic markets in which the radio stations compete. We must also determine the market shares and concentration levels that the proposed transaction would produce. Ultimately, we must weigh the potential competitive benefits and harms, as well as other public interest benefits and harms, that the proposed transaction is likely to produce to determine if, overall, grant of the underlying application would be consistent with the public interest.

23. *Relevant Product Market*. As with any competition analysis, we must first define the relevant product and geographic markets. Under our interim policy, we presume that the relevant product market is radio advertising.[33] Both Millennium and Nassau seek to rebut this presumption. Millennium submitted an economic analysis conducted by BIA (the "BIA Economic Analysis") that suggests that local newspapers, the local cable systems, and outdoor advertising should be included in the relevant product market.[34] According to the BIA Economic Analysis provided by Millennium, the advertising revenues of two daily newspapers in Monmouth and Ocean counties, the *Asbury Park Press* and the *Ocean City Observer*, should be considered in the market analysis.[35] According to Nassau, the relevant product market includes "newspapers cable advertising and even the yellow pages/directory advertising outlets for local advertisers."[36]

24. We find that neither Millennium nor Nassau has rebutted the presumption that radio advertising is the relevant product market. Millennium's and Nassau's arguments consist merely of conclusory assertions that other forms of media advertising are available to Monmouth-Ocean market advertisers. Under standard competition analysis, however, alternative media would be included in the relevant product market only if their presence would preclude a hypothetical monopolist of radio

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[33] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19895 ¶ 86.

[34] BIA Economic Analysis (attached as Exhibit B to Millennium Feb. 22, 2002 Response) at 5. The BIA Economic Analysis is based partially on information and conversations with officers of Nassau and Millennium.

[35] BIA Economic Analysis (attached as Exhibit B to Millennium Feb. 22, 2002 Response) at 5.

[36] Nassau Mar. 5, 2002 Comments at 8.

advertising from profitably raising prices by a "small but significant and nontransitory" amount.[37] Nassau and Millennium fail to make this showing.

25. *Relevant Geographic Market*. Millennium and Nassau also seek to rebut the presumption in our interim policy that the relevant geographic market for competition analysis is the relevant Arbitron metro market. Millennium argues that, as measured by contour coverage and actual listening, the Nassau stations operate in a geographic and competitive market that is much larger than the Arbitron-defined Monmouth-Ocean metro market.[38] Millennium points out that part of the metro is an "embedded" market that is part of the New York City Arbitron market.[39] Additionally, Millennium attaches a DataWorld contour study that shows 59 stations with "reliable" signal coverage over portions of the counties of Monmouth and Ocean.[40] Nassau asserts that the DataWorld contour study together with other evidence regarding the stations to which people listen, "demonstrate how divorced an inquiry focused solely on the Arbitron market definition of stations is from the reality of the marketplace."[41]

26. As in the case of product markets discussed above, to determine the relevant geographic market, standard antitrust analysis evaluates whether a hypothetical monopolist in a particular geographic area could profitably raise prices by a "small but significant and nontransitory" amount.[42] In markets such as radio advertising, where individually negotiated contracts facilitate price discrimination, determining the relevant geographic market is more complicated.[43] Here, assuming a single firm monopolized the radio advertising market in the Monmouth-Ocean metro and raised its prices, certain types of advertisers, predominantly regional and national advertisers, may find certain out-of-market radio stations, particularly certain New York stations, sufficient alternatives.[44] Given that a large majority of the Monmouth-Ocean audience listens to out-of-market stations, regional or national radio advertisers are unlikely to be dependent on Monmouth-Ocean radio stations to reach their targeted audience. Therefore, a Monmouth-Ocean monopolist would find it unprofitable to charge supracompetitive prices. On the other hand, local Monmouth-Ocean advertisers, *i.e.*, those seeking to focus their advertising on potential customers located in the Monmouth-Ocean metro, would likely not find most New York stations acceptable alternatives because such advertisers would have to pay significantly higher rates in these larger markets without reaching a significantly larger share of the target audience. Because the issue of the relevant geographic market is complex in this case, and because we find that the proposed transaction is consistent with the public interest even under the presumed Arbitron market definition, we assume without deciding that the relevant geographic market is the Monmouth-Ocean Arbitron metro.

27. *Market Participants*. In addition to the Nassau and Seashore stations, the following

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[37] *See*, *e.g.*, *Horizontal Merger Guidelines*, issued by U.S. Department of Justice & Federal Trade Commission, April 2, 1992, revised April 8, 1997, §§ 1.1, 1.12 ("*Horizontal Merger Guidelines*").

[38] Millennium Feb. 22, 2002 Response at 17.

[39] *Id*. and BIA Economic Analysis at 9. We note that Monmouth County is considered by Arbitron to be in the Monmouth-Ocean metro market as well as the New York metro market.

[40] Millennium Feb. 22, 2002 Response at 18 and DataWorld contour study (attached as Exhibit C to Millennium Feb. 22, 2002 Response).

[41] Nassau Mar. 5, 2002 Comments at 9.

[42] *See Horizontal Merger Guidelines* § 1.2.

[43] *See id.* § 1.22.

[44] We note that the Monmouth-Ocean metro is located near the Philadelphia and New York metros, two of the largest metros in the country.

commercial band radio stations are reported by BIA as having the Monmouth-Ocean metro as their home market: (1) WWZY(FM), Long Branch, New Jersey, licensed to Big City Radio-NYC, LLC; (2) WRAT(FM), Point Pleasant, New Jersey, licensed to The Sentinel Publishing Co.; (3) WJRZ(FM), Manahawkin, New Jersey, licensed to Jersey Shore Broadcasting Corp.; (4) WBHX(FM), Tuckerton, New Jersey, licensed to Beach Haven Communications, Inc.; and (5) WHTG-AM/FM, Eatontown, New Jersey, licensed to Press Communications LLC.

28. Millennium argues that numerous out-of-market stations, including many New York metro stations, should be counted as alternative outlets for listeners as well as for local advertisers.[45] The BIA Economic Analysis identifies nineteen out-of market stations that generate revenue from the Monmouth-Ocean market. The BIA Economic Analysis estimates that the nineteen out-of-market stations generate an estimated $24,869,000 in revenue from Monmouth-Ocean advertisers and should, therefore, be counted as market participants.[46] We consider Millennium's argument concerning these stations in our discussion below of market share and market concentration.

29. *Market Share and Market Concentration*. According to the BIA 2001 Database, radio stations that are home to the Monmouth-Ocean metro generate $22,950,000 in radio advertising revenues. Using BIA 2001 Database information, the pre-merger market structure in the Monmouth-Ocean metro is as follows:[47]

Licensee	Market Revenue	Market Share
Nassau	$9,700,000	42.3%
Seashore[48]	$4,950,000	21.6%
Big City Radio	$2,700,000	11.8%
Jersey Shore Broadcasting Corp.*	$2,100,000	9.2%
Sentinel Publishing Co.*	$2,000,000	8.7%
Press Communications	$1,300,000	5.7%
Beach Haven Communications*	$200,000	0.9%
Total market revenue	$22,950,000	100%

Based on the above BIA 2001 Database information, the proposed transaction would consolidate the two largest radio groups under Millennium's ownership, thereby increasing the largest group's share of revenues in the Monmouth-Ocean Arbitron from 42.3 percent to 63.8 percent. Under the Herfindahl-Hirshman Index ("HHI"), this represents an increase in HHI of 1823, and a post-merger HHI of 4406.

[45] BIA Economic Analysis at 11.

[46] Millennium Response at 19; BIA Economic Analysis at 9-11. According to BIA, these stations are: WABC-AM and WPLJ-FM, New York, owned by ABC Radio Inc.; WOR-AM, New York, owned by Buckley Broadcasting; WAXQ-FM, WLTW-FM, WHTZ-FM, WKTU-FM and WTJM-FM, New York, all owned by Clear Channel Communications; WQHT-FM, WRKS-FM and WQCD-FM, New York, owned by Emmis Communications; WXRK-FM, WFAN-AM, WCBS-AM/FM and WNEW-FM, New York, owned by Infinity Broadcasting; WBLS-FM, New York, owned by Inner City Broadcasting; WQXR-FM, New York, owned by New York Times Co.; and WPAT-FM, New York, owned by Spanish Broadcasting.

[47] Radio stations with no reported revenue are not included in this chart. The names of the licensees marked with an asterisk (*) have been edited to reflect the licensee names shown in the Commission's databases. These changes have no effect on the relative market shares of the market participants.

[48] The Seashore figures include the Seashore and North Shore stations.

30. The BIA Economic Analysis presents market data that are not directly comparable to the figures presented in the Table above, which reflect BIA revenue 2001 data.[49] Millennium provides revenue figures for total station revenue for the six stations it would own post-merger (including out-of-market WKXW(FM)) as being $16,645,000.[50] Millennium then argues, based on estimates in the BIA Economic Analysis, that the asserted $24,869,000 in revenues earned by the nineteen out-of-market stations from Monmouth-Ocean advertisers should be counted in determining market share and market concentration.[51] With these adjustments, Millennium's post-merger market share would be 33.1 percent, and the post-merger HHI would be 1,774 with a change in HHI of 516.[52]

31. Millennium's assertion that nineteen out-of-market stations generate an estimated $24,869,000 in revenue from Monmouth-Ocean advertisers is more significant than its proposed adjustment to its own stations' revenues because this revenue figure results in a post-merger share of approximately 33 percent.[53] Both the list of out-of-market stations that compete for Monmouth-Ocean advertisers and their estimated revenues from Monmouth-Ocean advertisers ultimately derive from BIA, with information provided from conversations with employees of Nassau and Millennium.[54] In addition, Nassau has provided evidence that specific businesses in Monmouth-Ocean have advertised on competing in-market stations and out-of-market stations in New York.[55]

32. Our analysis suggests that the advertising rates charged by stations in the New York metro would likely exceed, on average, the rates charged by stations in the Monmouth-Ocean metro and that this rate differential limits the degree to which advertisers would substitute stations in the New York metro for stations in the Monmouth-Ocean metro. While this barrier to substitutability is not absolute and some advertisers may find out-of-market radio stations acceptable substitutes for in-market stations, the evidence on this record does not convince us that we should attribute any of the revenue earned by New York metro stations to the Monmouth-Ocean market. After considering the evidence submitted in the record, we conclude that we should give limited weight to the potential competitive influence of out-of-market stations in our public interest analysis.

33. *Potential for harm to advertisers and listeners*. We find that proposed post-merger concentration levels raise potential competitive concerns. The proposed transaction would combine the two highest revenue generating stations in the Monmouth-Ocean metro to create a new station group that

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[49] At the time Millennium filed its Response on February 22, 2002, the most recently available BIA data was for 2000. As such, Millennium's statements and those contained in the BIA Economic Analysis pertain to 2000 BIA data and interviews conducted with employees of Nassau and Millennium. *See* n.34, *supra*. In contrast, the revenue information provided in the Table above reflects BIA 2001 data.

[50] BIA Economic Analysis at 11. Therein, BIA notes that actual revenues for the Monmouth-Ocean stations, as provided to BIA by the current licensees, were 0.3 percent lower than the BIA 2000 database estimates previously relied on. *Id*. at 11, n.6. Given that It is not possible to give a parallel figure based on 2001 BIA data because In the BIA Economic Analysis, BIA also states that, according to local personnel, WKXW(FM) generates $887,000 in revenues from the Monmouth-Ocean metro. *Id*. at 11, n.7.

[51] *Id.* at 19; BIA Economic Analysis at 10, Table 2 and at 13.

[52] BIA Economic Analysis at 12-13.

[53] The BIA Economic Analysis is based partially on information and conversations with officers of Nassau and Millennium. *Id*. at 3, n.2.

[54] S*ee* n. 34, *supra*.

[55] Nassau Mar. 5, 2002 Comments, Exhibit I, Declaration of Shari Brown Lynch.

could have a market share of nearly 64 percent. The proposed transaction also produces a significant increase in market concentration, yielding a post-merger HHI of 4,406 with an increase in HHI of 1,823. We believe that this concentration level raises "significant competitive concerns."[56]

34. Under our interim policy, we consider this post-merger concentration level in connection with the specific circumstances of this case to determine the potential impact of the proposed transaction on the public. As we have previously stated, HHI calculations "must be carefully interpreted with[in] the context of the factual circumstances of any individual case," and require the consideration of, among other things, any "possible adverse effects on listeners in the local radio market."[57] In this case, we find that several factors mitigate any adverse impact on listeners that otherwise could result from the concentration levels produced by the proposed transaction, thus diminishing our public interest concerns.

35. As we noted above, Millennium seeks to alleviate the competitive concerns raised by the proposed transaction by arguing that nineteen New York stations compete in the Monmouth-Ocean metro, such that Millennium's post-merger market share and concentration levels are lower than those arrived at by looking only at the stations home to the Monmouth-Ocean metro. Specifically, if we fully accepted Millennium's argument, Millennium's post-merger market share would be 33 percent, and the post-merger HHI would be 1,774, representing a change in HHI of 516.[58] As indicated above, generally, we do not agree with Millennium's and Nassau's proposed finding based on the record we have before us. While we acknowledge that Millennium's post-merger market share and concentration level may be overstated by the BIA 2001 Database information, we find that any discrepancy is not significant to our analysis, and we are not convinced that New York stations compete to a substantial degree for advertising revenues in the Monmouth-Ocean metro.

36. We find, however, that the low in-market station listening share in the Monmouth-Ocean metro does mitigate the potential harm to national and regional advertisers and listeners that could result from the proposed transaction. Stations in the Monmouth-Ocean metro capture only 28.6 percent of the Monmouth-Ocean audience, with the remaining 71.4 percent of listeners choosing to listen to out-of-market stations.[59] According to the BIA Economic Analysis, 35 out-of-market radio stations have enough Monmouth-Ocean listeners to meet minimum reporting standards.[60] Furthermore, the BIA 2001 Database indicates that some of these out-of-market stations have listening shares and formats that are comparable to those of most Monmouth-Ocean stations. Moreover, only three out-of-market stations are owned by Millennium.[61] For national and regional advertisers in particular, the degree to which out-of-market stations attract Monmouth-Ocean listeners indicates that those advertisers can reach Monmouth-Ocean listeners without purchasing advertising from radio stations in the Monmouth-Ocean metro. As a result, these advertisers are unlikely to be significantly adversely affected by the proposed transaction.

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[56] *See Horizontal Merger Guidelines* § 1.51(c).

[57] *Great Empire Broadcasting, Inc.*, 14 FCC Rcd 11145, 11151 ¶ 16 (1999).

[58] Millennium Feb. 22, 2002 Response at 19; BIA Economic Analysis at 10-13. These HHI figures assume that we adopt all of Millennium's proposed adjustments to the BIA 2001 data, *see* ¶ 30, *supra*, but that we do not adopt Nassau's arguments in favor of a larger list of market participants.

[59] Based on Fall 2001 Arbitron ratings information, Millennium's in-market stations account for a 15.7 percent listening share in the Monmouth-Ocean metro.

[60] BIA Economic Analysis at 7.

[61] Millennium owns three out-of-market stations that account for a 6.7 percent listening share in the Monmouth-Ocean metro.

37. Local advertisers, *i.e.*, advertisers seeking to focus their advertising on potential customers within the Monmouth-Ocean metro, are less likely to have the same competitive alternatives as national and regional advertisers. These advertisers may not find it cost effective to pay generally higher out-of-market advertising rates to reach a target audience that is located in the Monmouth-Ocean metro, and thus these advertisers may be subject to supracompetitive rates post-transaction to the extent that the dominant players in the market can effectively price discriminate against these advertisers. Generally, because we believe that the economic incentives inherent in a fully functioning competitive market are the most effective way to maximize listener benefits, the potential harm to these advertisers implicates our public interest concerns.

38. However, as noted previously, our ultimate concern is the effect a proposed transaction will have on listeners.[62] Here, we find that the relatively high proportion of Monmouth-Ocean listeners who listen to out-of-market stations lessens our concern about any potential harm to listeners. The BIA 2001 Database indicates that Monmouth-Ocean is the home market of 12 commercial and nine non-commercial radio stations. In contrast, the BIA 2001 Database lists 50 out-of-market stations, 32 of which had a reportable listening share in the Monmouth-Ocean metro in Fall 2001.[63] Monmouth-Ocean residents appear willing to take advantage of these listening choices. While Monmouth-Ocean home stations in the aggregate captured 28.6 percent of the Monmouth-Ocean audience, the aggregate listening share for out-of-market stations was 71.4 percent.[64] Nor is out-of-market listenership so fractionalized as to diminish its influence; to the contrary, the first, second, and fourth largest stations in Monmouth-Ocean in terms of listening share are out-of-market stations.[65] We find that the large number of out-of-market stations and their relative success among Monmouth-Ocean listeners, and the ease with which Monmouth-Ocean listeners can switch to other commercial radio stations, will constrain the incentive and ability of Millennim to harm listeners by diminishing program quality or quantity. We recognize, of course, that this constraint operates only to the extent that Monmouth-Ocean listeners find the programming of out-of-market stations to be adequate substitutes for in-market stations' programming. While this assumption may be reliable for most entertainment programming, it may be less so with respect to locally oriented broadcast material, which is unlikely to be provided by stations primarily serving a much larger, adjacent market. In any event, however, we believe that the potential benefits to Monmouth-Ocean listeners from the type of local service proposed by Millennium in connection with its New Jersey network[66] outweigh any risks posed by the transaction. Indeed, we would expect the New Jersey oriented programming of Millennium's network to benefit listeners throughout New Jersey, a state uniquely underserved by broadcast media. This, along with the substantial public interest benefits we describe below, leads us to conclude that the proposed transaction serves the public interest.

39. We give little weight to Millennium's argument concerning new entry into the market.[67] While WCHR-FM is a recent new entrant to the market, there is an application pending to transfer control of the entity holding the WCHR-FM license to Nassau, and Millennium has an option to purchase this station in the event Nassau acquires it.

[62] *See* ¶ 14, *supra*.

[63] BIA 2001 Database information.

[64] *Id.*

[65] These stations are, respectively, ABC Radio's WABC-AM, Millennium's WKXW(FM) and Infinity's WXRK(FM). *See*, BIA 2001 Database.

[66] *See infra* at ¶¶ 40-43.

[67] BIA Economic Analysis at 14.

40. *Efficiencies and other public interest benefits.* Millennium argues that the proposed transaction will produce unique and substantial efficiencies and public interest benefits for listeners and advertisers in the Monmouth-Ocean market.[68] Primarily, Millennium seeks to create a "new, statewide, news and informational radio network to provide New Jersey residents with a viable and worthwhile alternative to the New York City stations in terms of news, information, and priorities that are relevant to New Jersey residents and their local governments."[69] Millennium points out that "there is no local New Jersey-based newspaper or newspaper chain that covers the whole state" and "very few television stations are licensed to New Jersey."[70] Millennium further argues that while there are many radio stations in the state, many are under separate ownership and cover only a small portion of the state.[71] Millennium argues that to create a radio network that reaches the entire state of New Jersey, Millennium needs to operate the five Nassau stations in conjunction with its seven existing radio stations that are located outside of the Monmouth-Ocean metro.[72] Millennium believes a group of this size will substantially increase competition by improving the ability of Nassau's Monmouth-Ocean stations to compete with New York-based media.[73]

41. Millennium argues that listeners will benefit by having access to award-winning station WKXW(FM), which is owned by Millennium and is the only New Jersey station providing 24-hour coverage of New Jersey news, traffic, weather and information.[74] Millennium expects to integrate WKXW(FM)'s news department with the Nassau stations to "greatly improve local news programming" at those stations.[75] Millennium asserts that "immense public interest benefits will accrue to New Jersey residents, public officials and advertisers by creating a truly statewide delivery system with Millennium's Atlantic City and Trenton area stations and the Nassau stations to provide 24-hour in-depth coverage of news, traffic, weather and information specifically oriented to New Jersey listeners."[76]

42. Millennium expects to create substantial efficiencies through group operation of the Nassau stations. Millennium expects to consolidate engineering, traffic, accounting, administrative, sales and general management functions through common operation of the twelve-station New Jersey group. Millennium argues that these efficiencies will permit it to offer the first New Jersey only, statewide news and information radio network, to increase the quality and amount of public service announcements, and to offer advertisers a much more cost efficient alternative to reach New Jersey residents.[77] Millennium further argues that advertisers will benefit from the transaction because they will be able to take advantage of the state-wide radio network that Millennium plans to implement.[78] Advertisers who want

[68] Millennium Feb. 22, 2002 Response at 8-17. *See also* Declaration of Charles Banta, Manager and member of the Advisory Board of Millennium Radio Group, LLC (attached as Exhibit A to Millennium Feb. 22, 2002 Response).

[69] Millennium Feb. 22, 2002 Response at 9.

[70] *Id.* at 14.

[71] *Id.*

[72] *Id*. at 10.

[73] *Id*. at 9.

[74] *Id.* at 11.

[75] *Id.* at 12.

[76] *Id.*

[77] *Id*. at 16-17.

[78] *Id*. at 13.

to reach the entire state of New Jersey will be able to negotiate a single rate with a single media entity rather than negotiating with individual stations.[79]

43. After reviewing the record, we agree that the proposed combination will provide certain public interest benefits that, despite our concerns for the competitive effects of the proposed transaction, warrants grant of the underlying applications. In the television context, we have long recognized that New Jersey's proximity to large media markets such as New York and Philadelphia have left New Jersey "in need of additional television coverage, particularly with respect to local news and public affairs."[80] In this case, Millennium asserts that it has established a nearly-statewide radio network designed to meet the news and public affairs needs of New Jersey residents and that the proposed transaction will enable it to complete its radio footprint over the entire state. The evidence in the record indicates that the Monmouth Stations and their listeners should benefit as a result of being part of that news network, and through their affiliation with WKXW(FM). In addition, the proposed transaction will likely produce certain efficiencies that will provide greater resources to Millennium as it completes its news network. In sum, we find that the public interest benefits of this transaction are substantial and likely enough to outweigh our concerns that the proposed transaction will produce competitive harms in the Monmouth-Ocean metro.

IV. CONCLUSION

44. We find that based on the record before us, the benefits cited by Millennium are real and substantial. In particular, as a result of Millennium's operation of these stations, listeners in the Monmouth-Ocean area are likely to receive substantially improved programming, which is geared to local interests and local concerns. They should also benefit from Millennium's proposal to create a New Jersey radio network covering the entire state. Based on the foregoing analysis, we find no substantial and material questions of fact as to the effect of the proposed transaction on competition that would warrant further inquiry.[81] We find that the public interest benefits discussed above outweigh the potential competitive harms that may result from this transaction. In addition, we have reviewed the assignment applications and find that Millennium is qualified. We therefore find that grant of the applications is consistent with the public interest, convenience and necessity.

V. ORDERING CLAUSES

45. ACCORDINGLY, IT IS ORDERED, That the application to assign the licenses of WADB(AM), Asbury Park, New Jersey (File No. BALH-20010618AAO), WBBO(FM), Ocean Acres, New Jersey (File No. BALH-20010618AAP), and WJLK-FM, Asbury Park, New Jersey (File No. BALH-20010618AAN), from Nassau Broadcasting II, LLC to Millennium Shore Holdco, LLC IS GRANTED.

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[79] *Id.*

[80] *New Jersey Coalition for Fair Broadcasting v. FCC*, 574 F.2d 1119, 1122 (D.C. Cir. 1978) (describing Commission rulemaking proceedings to promote television service in New Jersey); *see also*, *e.g.*, *Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841, 5866 (¶ 40) (1996).

[81] Millennium and Nassau each also challenged our interim policy on statutory grounds and fairness grounds. Because we grant these applications, we do not need to reach these issues.

46. IT IS FURTHER ORDERED, That the application to assign the license of WOBM-FM, Toms River, New Jersey (File No. BALH-20010618AAU), from Seashore Broadcasting Corp. to Millennium Shore Holdco, LLC IS GRANTED.

47. IT IS FURTHER ORDERED, That the application to assign the license of WOBM(AM), Lakewood Township, New Jersey (File No. BALH-20010618AAT), from North Shore Broadcasting Corp., to Millennium Shore Holdco, LLC IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

DISSENTING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

In the Matter of Nassau Broadcasting II and Millennium Shore License Holdco,
Seashore Broadcasting Corp and Millennium Shore License Holdco,
North Shore Broadcasting Corp and Millennium Shore License Holdco,

I cannot support the grant of these transactions, which would result in one owner owning five stations in the Monmouth, New Jersey area, with a total of 63.8% of the advertising revenues in the market.

The majority notes that the concentration of ownership resulting from this transaction raises "significant competitive concerns," but finds that this level of concentration is mitigated by the fact that most listeners in the area listen to out-of-market stations.

While most listeners may listen to out-of-market stations, those stations do not provide the local coverage that makes radio unique. Each radio station has an obligation to serve the needs of its local community – and each community has a right to be served. This is an obligation that the FCC has traditionally taken very seriously. Without locally based stations serving the community, who will cover local news and public affairs? What station will cover the next mayoral race? Who will cover school closings or local civic events?

In addition, the fact that the stations in the Monmouth area draw a low in-market listening share does not give me great comfort about the competitiveness of this market. Rather, it raises additional concerns for me about the continued viability of the competing stations in the market. It is unlikely that any owner in this market will be able to compete with the market power that will accrue to the Millennium stations. In addition, the stations in this area do not generally draw out-of-market advertising revenues, and thus the other stations in the market will not be able to make up for revenues lost to the Millennium stations due to their increased market power.

The grant of this transaction based upon the availability of out-of-market stations to listeners in the Monmouth area does not take into account the unique local characteristics of radio or the effect of the loss of advertising on local radio stations. The grant of these transfers raises my concerns about the future of local radio, and I cannot grant these transfers absent a hearing.