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

In the matter of	)	
	)	
Solar Broadcasting Company, Inc.	)	
Assignor	)	File Nos. BAL/BALH-19990204EB-EC
	)	
and	)	
	)	
Cumulus Licensing Corp.	)	
Assignee	)	
	)	
For Consent to Assignment of Licenses of WSTH-FM, Alexander City, AL and WDAK(AM), Columbus, GA	)	
	)	
	)	
Cumulus Licensing Corp.	)	
Assignor	)	
	)	File Nos. BAL/BALH-20000728ACS-ACX
and	)	
	)	
Clear Channel Broadcasting Licenses, Inc.	)	
Assignee	)	
	)	
For Consent to Assignment of Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City, AL, WPNX(AM), Phenix City, AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 21, 2002 **Released:** March 19, 2002

By the Commission: Chairman Powell and Commissioners Abernathy and Martin issuing separate statements; Commissioner Copps dissenting and issuing a statement.

1. In this order, we consider the above-captioned applications of Clear Channel Broadcasting Licenses, Inc. ("Clear Channel") to acquire the licenses of stations WMLF(AM) and WVRK(FM), Columbus, Georgia, WPNX(AM) and WGSY(FM), Phenix City, Alabama, WAGH(FM), Ft. Mitchell, Alabama, and WBFA(FM), Smiths, Alabama (the "Cumulus Stations") from Cumulus Licensing Corp. ("Cumulus") ("Clear Channel Application"). 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 these applications pursuant to the interim policy adopted in that notice.[1] After reviewing the record, we find that grant of these applications is consistent with the public interest. We also dismiss, pursuant to Cumulus' request, the above-captioned applications of Cumulus to acquire the licenses of stations WDAK(AM), Columbus, Georgia, and WSTH-FM, Alexander City, Alabama (the "Solar Stations") from Solar Broadcasting Company, Inc. ("Solar") ("Solar Application"). These transactions are closely related and petitions raise issues concerning both the Clear Channel and Solar Applications. Accordingly, we have consolidated these proceedings to facilitate an expeditious resolution of any outstanding issues.

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.[2] 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."[3] 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.[4]

4. On November 8, 2001, we adopted the *Local Radio Ownership NPRM*. We expressed 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.[5] 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."[6] 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

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

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

[3] *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)). S*ee also Shareholders of Citicasters, Inc*., Memorandum Opinion and Order, 11 FCC Rcd 19135, 19141-43 ¶¶12-16 (1996).

[4] *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).

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

[6] *Id.*

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."[7] 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.[8]

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 competitive 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.[9] 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 Clear Channel Application 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 there is no substantial and material question of fact that would warrant further inquiry regarding the effect of the transaction proposed in the Clear Channel Application on economic competition in the Columbus market. Clear Channel currently owns no stations in the Columbus market and proposes to acquire an existing combination of six stations from Cumulus. As such, the proposed assignment is likely to have little or no effect on radio competition in the Columbus market. Even if we were to treat the two stations in the Columbus market that Clear Channel programs pursuant to a local marketing agreement ("LMA") in the competition analysis of the proposed transaction, we would find no substantial and material question of fact regarding the competitive effect of this transaction.[10] Although the eight station combination may control approximately half of the estimated radio advertising revenues in the Columbus metro, Columbus will continue to have at least three large competitors and most Clear Channel stations will compete with a station in a similar format in the Columbus metro. Moreover, we believe that the acquisition may produce economies of sufficient size that program quality will improve, reflecting the application of the substantial management and financial resources that a large scale station group can supply. Such economies also may increase the capacity of the broadcast group to deepen its commitment to community service and otherwise advance our goal of localism in radio broadcasting.

II. BACKGROUND

8. On December 17, 1998, Cumulus entered into an asset purchase agreement to acquire stations WDAK(AM), Columbus, Georgia and WSTH-FM, Alexander City, Alabama from Solar ("Solar

[7] *Id.* at 19894 ¶ 84.

[8] *Id*.

[9] *Id.* at 19895 ¶ 86.

[10] Clear Channel currently programs the Solar Stations pursuant to a LMA. On February 13, 2001, Solar and Clear Channel filed applications to assign the licenses of the Solar Stations from Solar to Clear Channel. *See* File Nos. BAL-20020213AAO and BALH-20020213AAP. By public notice of March 1, 2002, the Commission accepted the applications for filing and flagged the applications pursuant to the Commission's "50/70" screen. *See* n. 4, *infra*; *see also* Public Notice, Broadcast Applications, Report No. 25182 (rel. March 1, 2002). These applications will be addressed by separate order.

APA"), and executed a local marketing agreement with Solar ("Solar LMA") to begin programming the Solar Stations. Solar and Cumulus then filed the Solar Application with the Commission to assign the Solar stations to Cumulus. Seventeen months after filing the Solar Application, Cumulus and Clear Channel filed the Clear Channel Application, which proposes to assign Cumulus's existing group of six stations to Clear Channel. Subsequently, Cumulus assigned its rights and obligations under the Solar LMA and the Solar APA to Clear Channel. Cumulus also entered into an LMA with Clear Channel under which Clear Channel programs the Cumulus Stations (the "Clear Channel LMA"). Thus, while Clear Channel owns no stations in the Columbus, Georgia radio metro,[11] it currently programs both the six Cumulus Stations and the two Solar Stations. Finally, Cumulus has assigned to Clear Channel an option to acquire the assets, including authorizations, of a proposed new FM broadcast station in Cusseta, Georgia, which is located near Columbus.[12] On December 6, 2001, Cumulus requested that the Commission dismiss the Solar Application because Cumulus no longer was a party to an agreement to acquire the Solar Stations.[13]

9. On March 8, 1999, the Commission issued a public notice indicating that the Solar Application had been accepted for filing.[14] The public notice also "flagged" the Solar Application 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% or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of the advertising revenues in that market.[15] Based on Year 2000 revenue estimates from the BIA[16] database, the two stations that Cumulus proposes to own account for an 10.6 percent revenue share in the Columbus Arbitron metro. Post-consummation, Cumulus would control 52.8 percent of the advertising revenue in the Columbus market and Cumulus and Davis Broadcasting, Inc. ("Davis") would collectively control 77.9 percent of the advertising revenue in the Columbus metro. On August 11, 2000, the Commission issued a public notice indicating that the Clear Channel Application had been accepted for filing.[17] The Clear Channel Application was not flagged because the application proposes to assign

[11] A metro is a metropolitan area defined by Arbitron rating service and used by radio stations and radio advertisers.

[12] The application for a construction permit for that proposed station is still pending. *See* File No. BPH-19930701ME.

[13] Pursuant to the Second Amendment to the Solar APA executed in January 2001, Cumulus agreed to dismiss the Solar Application, and upon Clear Channel's request, Solar and Clear Channel will file a new application seeking consent to the assignment of the Solar Stations from Solar to Clear Channel.

[14] *See* Public Notice, Broadcast Applications, Report No. 24443 (rel. March 8, 1999).

[15] *See generally Local Radio Ownership NPRM,* 16 FCC Rcd 19861, 19870 ¶ 18 (rel. Nov. 9, 2001). 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.

[16] 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.

[17] *See* Public Notice, Broadcast Applications, Report No. 24796 (rel. August 11, 2000).

an existing combination of stations which controls only 42.2 percent of the advertising revenue in the Columbus market.

10. Davis[18] filed petitions to deny the Solar and Clear Channel Applications.[19] Davis also seeks termination of two local marketing agreements pursuant to which Clear Channel currently programs the Solar and Cumulus Stations.[20] Davis alleges in its petitions that allowing the licensee of the six Cumulus stations to program the two Solar stations pursuant to an LMA or allowing all eight stations to be commonly owned would have anti-competitive effects on the local advertisers in the Columbus metro.[21] Davis argues that based on 1999 BIA revenue data, the Solar and Cumulus Stations have a combined 54.2% share of the radio advertising revenue.[22] Davis notes that, as a result of Clear Channel's proposed acquisition of the Cumulus Stations and the Solar LMA, Clear Channel would control four of the top ten stations in the metro.[23] Davis argues that advertisers would be unable to "buy around" the Solar and Cumulus stations.[24] Common control of these eight stations, Davis alleges, will result in increased advertising prices and harm to competition.[25]

11. In its petition to deny the Solar Application, Davis claims that Cumulus engaged in anti-competitive behavior by using predatory prices and multi-station joint sales packages when it programmed the two Solar stations pursuant to the Solar LMA in addition to the six stations it owns. Specifically, Davis claims that Cumulus's prices were dramatically undercutting the market. Davis claims that as a result of Cumulus's advertising rates, radio stations will be forced to close, as advertisers "buy around" them.[26] As for its claim of predatory pricing, Davis submits the following definition: "[W]hen a company that controls a substantial market share lowers its prices to drive out competition so that it can charge monopoly prices, and reap monopoly profits, at a later time."[27] Davis also notes the Supreme Court's definition: "predatory pricing exists when prices charged by an entity with market power are below an appropriate measure of its costs and there is a 'dangerous probability' that it will recoup its investment in below-cost prices."[28]

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[18] Davis is the licensee of stations WFXE(FM), WOKS(AM), and WEAM (AM) Columbus, Georgia, and WKZI(FM), Greenville, Georgia.

[19] While we grant Cumulus's request to dismiss the Solar Application and dismiss as moot Davis's petition to deny the Solar Application, we will address the character qualification issues raised by Davis in its petition to deny the Solar Application.

[20] On August 16, 1999, Davis filed a Petition for Order to Terminate Local Marketing Agreement and Request for Expedited Action in the Solar Application proceeding. On September 14, 2000, Davis filed a Petition to Deny Assignment Applications, to Terminate Local Marketing Agreement and for Other Relief which included both the Clear Channel Application proceeding and the Solar LMA in the caption.

[21] Davis originally argued that grant of the Solar Application would result in Cumulus obtaining excessive market power in the Columbus metro. Due to the subsequent business transactions between Cumulus and Clear Channel, we address Davis's allegations of ownership concentration in the Columbus radio metro as they relate to the Clear Channel Application.

[22] Davis's September 11, 2000, Petition to Deny Assignment Applications, to Terminate Local Marketing Agreement, and for Other Relief ("Davis Petition to Deny II") at 11.

[23] Davis's April 7, 1999, Petition to Deny ("Davis Petition to Deny I") at 6.

[24] Davis Petition to Deny I at 5-8.

[25] Davis Petition to Deny I at 5-8 and Davis Petition to Deny II at 11.

[26] Davis's Reply in the Solar Application proceeding at 59.

[27] Davis's Reply in the Solar Application proceeding at 58.

[28] *Id*. (citations and footnotes omitted).

12. The Davis petitions to deny also allege that Cumulus has engaged in a pattern of conduct that should result in its disqualification as a Commission licensee.[29] Davis claims that the Solar and Clear Channel LMAs resulted in unauthorized transfers of station control to Cumulus and Clear Channel. Davis asserts that Solar and Cumulus misrepresented facts in the Solar Application and that Cumulus misrepresented facts in an unrelated proceeding involving the assignment of stations in the Topeka, Kansas radio metro. Finally, Davis contends that the Commission cannot act on the Clear Channel Application because the full and complete agreement between Cumulus and Clear Channel was not filed and made available for public comment for a 30-day period.[30]

13. The Rainbow/PUSH Coalition filed an informal objection against the Solar Application.[31] In addition to reiterating Davis's arguments concerning the anti-competitive effects of the proposed sales, the Rainbow/PUSH Coalition alleges in its informal objection to the Solar Application that the proposed transaction would negatively affect the African American community in Columbus, Georgia.

14. In opposition, Cumulus first claims that the Commission lacks the statutory authority to consider in its review of broadcast assignment and transfer applications, such information as market concentration, audience share, or revenue share.[32] Cumulus argues that Section 202(b) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), deprives the Commission of any discretion beyond a determination of whether a proposed transaction complies with the numerical limits in the radio ownership rules.

15. Substantively, Cumulus and Clear Channel dispute Davis's allegations that the proposed transaction will negatively affect competition in the Columbus radio metro.[33] Cumulus and Clear Channel assert that the Clear Channel Application merely seeks consent to transfer an existing radio station combination from Cumulus to Clear Channel and that this will not increase ownership concentration in the market or impact competition or diversity. They argue that the assignment of the Solar LMA did not require prior Commission consent and that the mere transfer of existing time brokerage arrangements does not impact competition or diversity. Clear Channel contends that it is merely assuming Cumulus's position in the market, as Cumulus previously owned the six Cumulus stations and programmed the two Solar stations pursuant to the Solar LMA. Cumulus and Clear Channel assert that the Commission need not consider the competitive implications of common ownership of the Cumulus and Solar stations at this time and that such consideration is appropriate only when assignment applications which propose common ownership of the Cumulus and Solar stations are filed.

16. Cumulus claims that, contrary to Davis's allegations regarding anti-competitive behavior, most of Cumulus's advertising sales are for individual stations.[34] Nonetheless, Cumulus argues that multi-station joint sales packages are not prohibited by Commission's rules or policies. Cumulus states that it prices such packages competitively, and that they have "real pro-competitive benefits for

[29] Davis Petition to Deny I at 8-12 and Davis Petition to Deny II at 3-10.

[30] Davis Petition to Deny II at 14-15.

[31] We treat Rainbow/PUSH's letter as an informal objection pursuant to 47 C.F.R. §73.3587. It was filed after the deadline for petitions to deny. *See* 47 C.F.R. §73.3584(a).

[32] Cumulus May 12, 1999 Opposition to Petition to Deny and Informal Objection at 3-9.

[33] *See, e.g.*, Cumulus May 12, 1999 Opposition to Petition to Deny and Informal Objection at 9-34; Cumulus October 10, 2000 Opposition to Petition to Deny Assignment Applications, to Terminate Local Marketing Agreement, and for Other Relief at 5-12; and Clear Channel October 10, 2000 Opposition to Petition to Deny Assignment Applications, to Terminate Local Marketing Agreement, and for Other Relief at 3-6.

[34] *See, e.g.*, Cumulus May 12, 1999 Opposition to Petition to Deny and Informal Objection at 14-15.

advertisers by taking advantage of economies of scale and enhancing the efficiency with which advertisers target and reach listeners."[35] Cumulus also argues that Davis failed to prove the required elements of predatory pricing.[36] Finally, Cumulus asserts it is fully qualified to assign its Columbus station licenses to Clear Channel.

17. On November 16, 2001, the Mass Media Bureau sent an inquiry letter to the parties requesting additional information be provided for the record in order to fully assess the transaction for its effect on the public interest. The inquiry letter sought additional economic data for the following nine categories: Product Market Definition; Geographic Market Definition; Market Participants; Market Concentration; Potential Adverse Competitive Effects; Conditions of Entry; Efficiencies; and Public Interest Benefits. Cumulus and Clear Channel submitted additional information, and Davis filed a response to Cumulus's and Clear Channel's submissions.

III. DISCUSSION

A. Framework for Analysis Under Interim Policy

18. 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 Cumulus's radio broadcast licenses to Clear Channel before the assignments may occur.[37] We are making that finding in this case pursuant to the interim policy laid out in the recently issued *Local Radio Ownership NPRM*.[38] 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.[39]

19. 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.[40]

20. 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"[41] in the advertising market, our focus is different.[42] Our analysis of radio license

[35] Cumulus Response to Reply in Solar Application proceeding at 25.

[36] *Id* at 24-28.

[37] 47 U.S.C. § 310(d).

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

[39] *Id*. at 19895-96 ¶ 86.

[40] *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.,* Memorandum Opinion and Order, 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").

[41] 15 U.S.C. § 18.

assignments is informed 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."[43] 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.[44] 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,[45] and whether it will result in the provision of new or additional services to listeners.[46]

21. 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

22. 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.[47] A local radio market is defined by the area encompassed by the mutually

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(...continued from previous page)

[42] 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 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.").

[43] *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*").

[44] 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)).

[45] *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).

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

[47] 47 C.F.R. § 73.3555(a).

overlapping principal community contours of the stations proposed to be commonly owned.[48] 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 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% of the stations in such a market.[49]

23. We find that Clear Channel's proposed acquisition of the six Cumulus stations is consistent with the numerical limits in our local radio ownership rules.[50] Clear Channel's multiple ownership showing indicates that, using the Commission's current definition of "radio market," the transaction creates six radio markets.[51] Markets 1-4 are each composed of 47 radio stations, and markets 5 and 6 are each composed of 37 radio stations. In markets 1-4, a single licensee may, therefore, own up to 8 stations, not more than 5 of which are in the same service (AM or FM). In markets 5 and 6, a single licensee may, therefore, own up to 7 stations, not more than 4 of which are in the same service (AM or FM). If the proposed transaction is approved and consummated, Clear Channel will own in market 1, 3 stations (1 AM/2 FM); in market 2, 4 stations (2 AM/2 FM); in market 3, 2 stations (2 FM); in market 4, 8 stations (3 AM/5 FM); in market 5, 7 stations (3 AM/4 FM); and in market 6, 2 stations (2 FM). The transaction therefore complies with the multiple ownership rules.

C. Public Interest Analysis Under Interim Policy

24. Initially, we note that Clear Channel currently owns no stations in the Columbus market. In the Clear Channel Application, Cumulus proposes to assign to Clear Channel an existing station combination in the Columbus market. As such, the proposed assignment is likely to have little or no effect on radio competition in the Columbus market. The transfer of an existing station combination does not increase ownership concentration and such transfers are generally approved by the Commission unless the transaction under consideration is otherwise contrary to the public interest.[52] Therefore, absent any other interests in the Columbus market, current Commission policy would require no further competition review.

25. Davis, however, argues that allowing Clear Channel to own the six Cumulus Stations and to program the two Solar Stations pursuant to an LMA would have anti-competitive effects. Davis notes that, if combined, the Solar and Cumulus stations had a 54.25 percent share of radio advertising revenue in the Columbus market in 1999, according to BIA data. For the reasons set forth below, even if we were to consider the effect of the Solar LMA in deciding whether the Clear Channel Application is in the public interest, we still would find that there is no substantial and material question of fact regarding the effect of the proposed transaction on competition in the Columbus market. We therefore do not need to

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

[49] *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).

[50] 47 C.F.R. § 73.3555.

[51] *See Definition of Radio Markets*, Notice of Proposed Rule Making, 15 FCC Rcd 25077 (2000).

[52] *See, e.g.*, *Shareholders of AMFM, Inc.*, 15 FCC Rcd 16,062, 16,069 (2000), *citing Shareholders of Jacor Communications, Inc.*, 14 FCC Rcd 6867 (M.M. Bur. 1999) (transfer of an existing radio station combination does not increase ownership concentration or raise a substantial and material question of fact as to the effect of the proposed transfer on competition and diversity).

decide the issue of whether the LMAd stations should be included.

26. *Product Market Definition*. For competition analysis our initial presumption is that the relevant product market is "radio advertising." Clear Channel asserts that their radio stations across the country face vigorous competition for advertising from all media.[53] Clear Channel states that there is no radio advertiser in Columbus that does not have an economical alternative to radio advertising.[54] Davis on the other hand, asserts that radio is an advertising market.[55]

27. While Clear Channel acknowledges that some advertisers might not have alternatives, Clear Channel maintains that this fact is not sufficient to establish a radio advertising market. Clear Channel states that it could not raise rates because advertisers would buy time on other radio stations or different media outlets such as television, cable billboards and newspaper.[56] Furthermore, Clear Channel states that the Commission's presumption is weaker in small markets like Columbus because in small markets radio stations do not focus narrowly on specific demographic groups but adjust their formats to reach wide audiences.[57]

28. According to Davis Broadcasting, overwhelmingly, the competition it experiences for advertising dollars is head-to-head competition with other radio broadcasters.[58] Davis recognizes that some advertisers may switch some of their radio advertising to other media in response to higher radio advertising prices but that other advertisers have no options.[59] Davis also points out that Clear Channel has not offered any studies or empirical data to support their position.[60]

29. We find insufficient evidence in the record to persuade us that our initial presumption regarding the product market is incorrect. In its enforcement of the antitrust laws, the Department of Justice (DOJ), looking at the advertising market, has taken the position that radio advertising constitutes a separate market,[61] finding that advertisers find value in certain of radio's unique attributes.[62] Neither party has supplied studies or empirical evidence that persuades us to alter our initial presumption described in the *Local Radio Ownership NPRM*. For the purpose of competition analysis for the instant transaction, we find that radio advertising is the relevant product market.

30. *Geographic Market Definition*. Arbitron identifies Chattahoochee and Muscogee Counties in

[53] Letter on behalf of Clear Channel Broadcast Licenses (Clear Channel Letter) at 1-2.

[54] Id at 2

[55] Letter on behalf of Davis Broadcasting Inc. of Columbus (Davis Letter) at 8.

[56] Clear Channel Letter at 3.

[57] *Id.*

[58] Davis Letter at 8.

[59] *Id*.

[60] *Id*.

[61] U.S. Dep't of Justice & FTC, *1992 Horizontal Merger Guidelines*, §§ 1.1, 1.2 (revised 1997) (*1992 Merger Guidelines*). In settlements requiring divestiture, the DOJ concluded that the sale of advertising time on radio stations constitutes the relevant market for antitrust purposes. *See, e.g*. Competitive Impact Statement, *United States v. CBS Corporation and American Radio Systems Corporation*, Case No. 98CV00819 (D.D.C. March 31, 1998); Competitive Impact Statement, *United States v. Hicks, Muse, Tate & Furst Inc.*, Case No. CV 98-2422 (March 31, 1998); Competitive Impact Statement, *United States v. Jacor Communications, Inc. and Citicasters, Inc*., Case No. C-1-96-757 (S.D. Ohio, August 5, 1996); Competitive Impact Statement, *United States v. American Radio Systems Corporation and EZ Communications, Inc.*, Case No. 97CV405 (D.D.C. March 20, 1997).

[62] Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets at 20.

Georgia and Russell County in Alabama, as comprising the Columbus, Georgia Arbitron metropolitan area. Our initial presumption for economic analysis is that the relevant geographic market is the Columbus, Georgia Arbitron metro. Clear Channel responds that the Arbitron markets are arbitrarily drawn and do not accurately reflect the areas in which Clear Channel competes for advertising revenue.[63] Clear Channel notes that in the Columbus metro, some stations listed in the market actually have cities of license outside the metro.[64]

31. Davis maintains that the entire radio industry has been built around and is dependent on Arbitron definitions for decades and still is. Davis states that Arbitron ratings and market definitions are long-standing industry standard research tools.[65] Davis asserts that an evidentiary hearing to develop a full record is required for both the product and geographic market definition.[66]

32. We find insufficient evidence in the record to persuade us that our initial presumption regarding the geographic market is incorrect. The parties have offered no alternative geographic area. There is no other nearby Arbitron metro and Columbus, GA is the largest city in the area. Neither party has supplied studies or empirical evidence that adds to our understanding of the geographic market. For the purpose of competition analysis of radio mergers, we find the Columbus, GA Arbitron metro is the relevant product market.

33. *Market Participants*. Our preliminary competition analysis, using the BIA database, identified 16 commercial stations and three non-commercial stations in the Columbus metro. BIA identifies seven out-of-market stations that receive listening share in the Columbus metro, two of which are owned by Clear Channel.

34. Clear Channel maintains that BIA does not provide an accurate list of market participants for purposes of a proper competition analysis.[67] According to Clear Channel, BIA's method of estimating station revenues makes the accuracy of the BIA radio station list suspect and dictates against using it as the sole indicator of market participants. Clear Channel notes that WBFA(FM) and WSTH(FM), deemed by Arbitron to be in-market stations, are licensed to cities outside the three counties identified as the geographic market.[68] Davis, however, states that WSTH(FM) should be considered an in-market station. It is located just 10-15 miles from Columbus, Georgia and is a Class C facility.

35. While Clear Channel maintains that the stations identified by BIA as participants in the Columbus, GA metro is inaccurate, it does not provide an alternative list of market participants. With regard to Clear Channel's argument that WSTH(FM) and WBFA(FM) are licensed to cities outside the geographic market, it is not uncommon for stations located just outside of a metro, that cover a significant portion of a that metro and achieve an audience share in that metro, to request that they be included in an Arbitron metro to assist them in the sale of radio advertising. Analysis of signal contours suggests that all of the participants identified provide substantial coverage of the Columbus, GA metro, [including WBFA(FM)] and are likely competitors for radio advertising. WSTH(FM) and WIOL(FM) cover smaller portions of the Columbus, GA metro than the other 14 commercial stations in the metro, but both receive substantial amounts of listening by Columbus radio listeners. We find that all 16 commercial station identified using the BIA database should be considered market participants for the purposes of this

[63] Clear Channel Letter at 3-4.

[64] *Id.* at 4.

[65] Davis letter at 7.

[66] *Id*. at 10-11.

[67] Clear Channel Letter at 4.

[68] *Id*.

analysis. Additionally, out-of-market station WRLD(FM),[69] which achieves significant audience shares in Columbus, may be an effective advertising alternative for some Columbus advertisers.

36. *Market Shares.* If we take into account the Solar LMA, our preliminary competition analysis using the BIA database shows that Clear Channel's proposed transaction would increase the market share of the largest station group from 42.2 percent to 52.8 percent.[70] We note that this 52.8 percent share of advertising revenue, while not insignificant, is comparable to levels previously approved in other Commission cases.[71] Further, the combined advertising revenue of Clear Channel and Davis, at 77.9 percent, is less than that previously approved by the Commission.[72]

37. Clear Channel notes that BIA emphasizes that revenue figures are "just estimates." Also, Clear Channel notes that BIA does not differentiate between revenue earned from in-market sources and revenue earned from out-of-market sources and thus often overestimates revenues.[73] Clear Channel asserts that BIA overstates its stations' revenues by approximately 10 percent.[74] The overstatement is due in large part to including the revenues earned by WSTH(FM) from outside the Columbus area. Similarly, WVRK earns a significant portion of its revenues from outside Columbus.[75]

38. Davis claims that while BIA may misestimate stations' revenues, it does so equally for all stations, harming no station in particular.[76] With regard to Clear Channel's proposed acquisition of the Cumulus Stations, and its attributable interest in the Solar Stations pursuant to the Solar LMA, Davis argues that 1999 BIA market data indicate that the advertising revenue share of the eight stations was 54.2%. Davis claims that Clear Channel's attributable interest in the eight stations will have adverse anti-competitive effects and violates the public interest. In its petition to deny the Solar Application, Davis argues that Cumulus would dominate the Columbus market, and cited 1998 BIA revenue figures indicating that Cumulus would control 48.5% of the radio advertising revenue and 37.3% of the audience share, and would own four of the top ten stations in the market.

39. The *Horizontal Merger Guidelines* suggest that market shares should be calculated using the best indicator of firms' future competitive significance.[77] Revenue shares using 2000 revenue estimates may overstate Clear Channel's current advertising share and future potential market share. WIOL(FM) is owned by Woodfin Group and recently changed format. It received a measurable listening share for the

[69] WRLD(FM) is not identified with any Arbitron metro.

[70] The eight stations operated by Clear Channel account for 52.8% revenue share; Davis' stations receive a 25.2% revenue share, McClure Broadcasting's stations receive a 22.0% revenue share.

[71] *See NewCity Communications, Inc.*, 12 FCC Rcd 3929 (1997) (approving transaction that would result in proposed assignee controlling 52.4 percent of radio advertising revenues in the market).

[72] *See AMFM, Inc.*, 15 FCC Rcd 16062, 16070 (2000) (approving transaction in Akron, Ohio and Cedar Rapids, Iowa, where the post-merger advertising share of the top two groups in the market would be 82.6 percent and 80.8 percent, respectively).

[73] *See, e.g.,* Clear Channel Letter at 4.

[74] Clear Channel Letter at 5. Clear Channel indicates that BIA overstates their stations' revenues by approximately 10 percent due in large part to including the revenues earned by WSTH(FM) from outside the Columbus area. Without revenue data for stations in the relevant market, we cannot calculate market shares that reflect Clear Channel's asserted overstatement of its revenues.

[75] *Id*.

[76] Davis Letter at 11.

[77] U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, Section 1.41 (Issued: April 2, 1992; Revised April 8, 1997).

first time in Spring 2001. It is now the third highest rated station [tied with Clear Channel's WBFA(FM)] in the Columbus, GA metro based on total-day shares for persons twelve and older. This new format and ratings performance may increase WIOL's ability to sell advertising in the Columbus, GA metro. In addition, WRLD(FM) is an out-of-market station owned by McClure Broadcasting (McClure owns three stations in the Columbus, GA metro). WRLD received a 5.5 percent listening share in the Columbus metro in Spring 2001.[78] Without additional investment in sales forces, McClure could offer this station to Columbus advertisers as an alternative to Clear Channel stations. Both WIOL(FM) and WRLD(FM) may offer some Columbus advertisers an alternative that is not represented in the BIA 2000 revenue estimates. While current BIA data suggest that the proposed eight station combination accounts for more than 50 percent of 2000 revenues, audience share data and the likely potential of revenues for Woodfin's WIOL(FM) and McClure's and McClure's WRLD(FM) suggests that the eight station combination may account for appreciably lower percentage of Columbus metro advertising.

40. *Market Concentration.* Our interim policy recognizes the Herfindahl-Hirschman Index ("HHI") as a measure of market concentration but finds that the HHI may not be entirely appropriate when applied to the commercial radio industry.[79] Our preliminary competition analysis using the BIA database shows that the proposed combination of stations in the relevant geographic market results in an HHI equal to 3,904 with a change in the HHI equal to 893, although the BIA data, as discussed above, may overstate actual market shares and consequently inflate the measured HHIs.[80]

41. Clear Channel asserts that the HHI inaccurately indicates market concentration. As discussed above, Clear Channel believes the product market definition used in calculating the HHIs is wrong, the geographic market definition is wrong, and the BIA revenue figures are wrong.[81] Davis maintains that Clear Channel's argument is based on its "personal rejection" of the radio advertising market, the Arbitron Columbus geographic market and BIA's revenue data.[82]

42. While the HHI may provide useful information regarding the potential unilateral and coordinated effects of a proposed merger, any measured HHI must be carefully interpreted within the full context of the factual circumstances of the proposed merger. Factors considered in interpreting the significance of any measured HHI include, but are not necessarily limited to: the existence of other viable competitors post-merger; the dominance of strong signals; the possibility of additional entry in the metro; efficiencies created by the merger; and possible adverse effects on listeners in the local radio market.[83]

43. *Potential Adverse Competitive Effects.* In determining potential adverse competitive effects, we consider evidence concerning the potential lessening of competition by (1) coordinated behavior among competing firms and (2) unilateral effects attributable to the behavior of the post-merger firm.

[78] WRLD(FM)' rating share was tied for fifth amongst stations in the Columbus, GA metro.

[79] *See Great Empire Broadcasting, Inc.*, 14 FCC Rcd 11145, 11150 (1999). The following radio mergers that included settlements with the DOJ attest to the Department's recognition that an HHI over 1,800 may not necessarily imply adverse competitive consequences in a local radio market. *See, e.g.,* Final Judgment in *United States v. CBS Corporation and American Radio Systems Corporation,* Case No. 98CV00819 (D.D.C. June 30, 1998); Final Judgment in *United States v. Hicks, Muse, Tate & Furst, Inc.,* Case No. CV 98-2422, (E.D.N.Y. Aug. 17, 1998); Final Judgment in *United States v. EZ Communications, Inc. and Evergreen Media Corp.,* Case No. 97CV00406 (D.D.C. Jun. 17, 1997); Final Judgment in *United States v. Westinghouse Electric Corporation,* Case No. 96 CV02563 (D.D.C. Mar. 10, 1997); Final Judgment in *United States v. Jacor Communications, Inc.,* Case No. C-1-96-757 (S.D. Ohio, Dec. 31, 1996).

[80] Using revenue estimates from the BIA database produces the results presented here.

[81] Clear Channel Letter at 5.

[82] Davis Letter at 14.

[83] *Great Empire Broadcasting, Inc.*, 14 FCC Rcd at 11148 ¶ 16.

We will also consider evidence concerning the effect on competition, if any, that may have resulted from pre-existing local marketing agreements, time brokerage agreements, or joint sales agreements between the parties.

44. Clear Channel asserts that the "proposed acquisition by Clear Channel of the Cumulus stations and its LMA of the Solar stations involve combinations of stations, which Clear Channel already operates under local marketing agreements. Essentially, this means that the proposed transaction will not alter the competitive situation in the Columbus market."[84] Clear Channel asserts that in any event, operating these stations as a group is not anticompetitive. It claims that robust competition in the Columbus radio market has increased radio advertising volume and decreased rates.[85] Clear Channel states that it has encouraged a variety of formats. In order to appeal to a wider demographic, Clear Channel tries to find unique programming niches.[86] Clear Channel notes that after the transaction, Columbus will continue to have three large competitors and that every Clear Channel station competes with a station in the same format; indeed, often, the competitors have higher ratings.[87] Clear Channel states that in Columbus, advertising revenue has increased steadily for the past several years and rates are lower by at least 25% on average than they were before the joint operation of these stations in 1998.[88] Clear Channel asserts that the combination has received praise from advertisers because the group operation has made it more efficient to buy time while keeping rates from rising.[89]

45. In its petition to deny the Solar Application (Solar Reply), Davis argued that Cumulus would dominate the Columbus market. As a result of Cumulus' control over the radio market, Davis argues that advertisers would be unable to "buy around" the stations, which would allow Cumulus to raise prices and harm competition.

46. We agree with Clear Channel that after the transaction, Columbus will continue to have at least three large competitors.[90] Most Clear Channel stations compete with a station in a similar format.[91] Often, the competitors have higher ratings.[92] While Davis asserts that advertisers will not be able to "buy around" the subject stations, no evidence is presented regarding advertisers that will be harmed. In fact, most stations that are programmed by Clear Channel in the Columbus metro have format alternatives offered by either Davis or McClure. Davis, Woodfin and McClure have popular stations that offer advertisers an alternative to similarly programmed Clear Channel stations.

47. Davis believes Clear Channel has "the means and motivation to abuse market position by manipulating inventory and leveraging multi-station packaging to have the same bottom line impact of increased rates, but without an explicit unit price increase." According to Davis, Clear Channel could discount rates by 50% if a buyer purchases its entire 8-station group and gives Clear Channel 100% of its radio budget. Alternatively, Clear Channel could give away a spot on a weak station if the advertiser

[84] Clear Channel Letter at 5.

[85] *Id*. at 6.

[86] *Id*.

[87] *Id*.

[88] *Id*.

[89] *Id*. at 7.

[90] Clear Channel, Davis and McClure each have a number of stations serving the Columbus, GA metro that offer advertisers purchasing alternatives.

[91] Davis Letter at 18-23.

[92] *Id*. citing Arbitron Spring 2001 ratings information.

buys one on a strong station.[93] Davis states that while packaging seems like a good deal, its result is to both raise prices for the advertiser while lowering the cost-per-point in the market, thereby driving down competitors' rates. Davis believes this is because Clear Channel can internally manipulate its inventory pricing to allocate higher unit pricing to its stronger stations (the ones the advertiser wants), and give lower prices for its poorer stations. "If the weaker station would not have been purchased at all in a truly competitive market (there are minimum performance benchmarks), then any revenue allocated to a weaker station is, in essence, a rate increase."[94] According to Davis, issues of anti-competitive behavior are raised when a dominant position is acquired not through quality but by leveraging the ownership of over half the stations in the market to generate revenue where it is not merited. Davis states that revenue gains through leveraging hinder the ability of smaller groups to compete head-to-head on format, audience share or advertising cost-per-points.

48. Davis indicates that under certain circumstances packaging becomes anti-competitive and that those circumstances are present here. Davis asserts that evidence of unfair and anti-competitive practices is that while Clear Channel controls 50% of the top ten stations by revenue, it controls 70% of the top ten stations by "power ratio" – revenue divided by audience share. [95] Some of the differences are quite large. Davis cites for example, the fact that Davis station WFXE(FM) has almost 4 times the number of listeners but just 5% more revenue than Clear Channel's highest earning station WVRK(FM). Davis contends this is a textbook example of the FCC's findings in "When Number One is Not Enough: The Impact of Advertising Practices on Minority-Owned & Minority-Formatted Broadcast Stations."[96]

49. In the Solar Reply, Davis also claims that Cumulus engaged in predatory pricing citing an example of radio spots being sold at a substantial discount on a cost-per-point basis.[97] In Cumulus' Reply to the Petition to Deny the Solar Application, Cumulus argues that Davis fails to prove the required elements regarding predatory pricing claims. Cumulus asserts that the required elements regarding predatory pricing are that advertising prices are 1) below an appropriate measure of costs, and 2) that there is a dangerous probability that Cumulus will be able to recoup its investment in the future.

50. We agree with Cumulus, and disagree with Davis, that evidence regarding packaging of advertising availabilities and discounts for bulk buying does not *per se* demonstrate predatory pricing behavior. Without supporting cost information and an explanation of how these discounts can be recouped in the future, competitive motives are as likely as non-competitive motives as an explanation for these activities. Packaging is not itself illegal or anti-competitive, as Davis acknowledges, and can be valuable to media buyers. Volume discounts and joint-sales of advertising on multiple stations by group owners are common practices in radio markets. While Clear Channel may operate stations that earn more revenue per rating point than other stations in the market, that is not necessarily due to the unilateral market power of the firm. The power ratio is influenced by a number of factors, including the value of a particular demographic group associated with a station and its format. The fact that Clear Channel can sell a larger package of stations may also increase revenues, which can affect the power ratio. Also,

[93] *Id*. at 16.

[94] *Id*.

[95] *Id*. at 17.

[96] In 1998 then-FCC Chairman William Kennard was presented with the study "When Number One is Not Enough: The Impact of Advertising Practices on Minority-Owned & Minority-Formatted Broadcast Stations" and conducted a forum on the impact of advertising practices on minority-owned and minority-formatted broadcast stations. Immediately following the release of the study, Chairman Kennard joined high-level representatives from the broadcasting, advertising and civil rights communities to discuss the study's findings and plan future actions.

[97] Davis provides information on packages that were offered to and accepted by various advertisers that indicate radio advertising discounts on a cost-per-point basis were being offered to advertisers who bought advertising on more than one Clear Channel station. See e.g., Solar Reply at 56-58.

stations that receive a larger share of national advertising could have a higher power ratio than similar stations with little or no national advertising. The evidence in the record supports the conclusion that advertising rates are lower than rates charged before the LMAs began the joint operation of the eight-station group.[98]

51. Davis states that there is a long-standing hierarchy among media buyers, especially national buyers: they prefer the top 5 to 10 stations in the market. Davis suggests that the FCC needs to investigate how advertising on Clear Channel's lowest rated stations (with shares of 1 and 2) are sold to national buyers to get better than expected revenues.[99]

52. We disagree with Davis that an investigation into the national advertising market is necessary for us to resolve this case. Clear Channel owns over 1,200 radio stations throughout the United States. While no specific information has been provided, it is not surprising that some advertisers would be attracted to a new national network of owned stations that can provide national coverage through a single purchase. While national advertising can be purchased in other ways, the transaction costs associated with dealing with a single firm are likely to be smaller than when dealing through multiple contracts or representatives. Some of these advertising spots may be aired on stations that previously were unattractive due to the transaction costs associated with negotiation.

53. Davis argues that further evidence of market power resides within each format. Davis asserts that Clear Channel is usually not the stronger station but it obtains more revenue than it should for its audience size. It argues "There are anti-competitive factors at work here that cannot be explained away by a better sales staff and capitalizing on efficiencies."[100] Davis cites for example, in the Gospel Format, Clear Channel's WPNX is the weakest of three and is an AM station, with one-seventh the audience share of no.2 (0.7 vs. 4.8) but has half the revenues. Davis believes it should not do so well against two considerably stronger competitors.

54. Again we disagree that this evidence establishes a substantial and material question of fact regarding Clear Channel's exercise of market power. Revenues from outside the Columbus metro, including national revenues, can cause a station to outperform its Columbus rating and reduce the amount of unsold inventory. A reduction in unsold inventory due to packaging can also account for increased revenues. While market power may also explain revenue disparities between stations in the same format in some markets, it is unlikely that a single station in a format that delivers 0.7 percent of the available audience will be able to impose unilateral price increases.

55. Davis asserts that Clear Channel's new Internet sales division will allow it to further leverage its power by pressuring advertisers to buy bundles of Internet and on-air media buys.[101] Clear Channel's SFX Division has recently become the exclusive promoter at the Columbus Civic Center. Davis notes that Clear Channel states in its annual report that it leverages SFX's promotional platform for the benefit of its radio stations leading to a "symbiotic relationship . . . which will lead to increased profitability." Davis believes that Clear Channel will leverage its dominant position at the market's largest entertainment venue to leverage advertisers, possibly at higher rates.[102] Davis acknowledges, however, that the recent nature of these relationships makes any finding regarding their impact highly

[98] Clear Channel Letter at 6 and Solar Reply at 56-58.

[99] *Id*. at 19-20.

[100] *Id*. at 20.

[101] *Id*. at 23.

[102] *Id*. at 24.

speculative.[103] Given the highly speculative nature of the allegations, the evidence in the record is insufficient to raise a substantial and material question of fact regarding the potential harms associated with vertical arrangements in the radio industry.

56. *Conditions of Entry*. Clear Channel asserts that several stations have entered the Columbus market in the past few years.[104] Clear Channel maintains that there is at least one opportunity to move a new FM station into the market.[105] Davis asserts that conditions of entry are highly restrictive.[106] Davis notes that Clear Channel's argument that stations can move into the market recognizes that stations outside the core market can be relevant to competition within the market, which is inconsistent with its position that its station WSTH should not be considered in assessing Clear Channel's share of the revenues in the Columbus market.[107] Davis states that while Clear Channel refers generally to "one opportunity" to move a new FM station into the market, the only opportunity of which Davis is aware is the Cusseta construction permit which Clear Channel has the option to purchase.[108] Davis alleges that Cumulus illegally paid off the principals of the applicant, became the real party in interest, and obtained an assignable option to designate the ultimate owner, thus ensuring that it could not go to a competitor. It has now assigned that option to Clear Channel.[109]

57. In addition to reiterating Davis' anti-competitive arguments, the Rainbow/PUSH Coalition alleges in its informal objection to the Solar Application that the proposed transaction would negatively affect the African American community in Columbus, GA: "Cumulus's overwhelming market dominance would profoundly inhibit Davis' ability to survive and serve the African American community effectively" and "would make it all but impossible for any new African American entrant in the market to succeed."[110]

58. We agree with Davis and Rainbow/PUSH that timely and sufficient entry from new facilities is unlikely in the Columbus metro. However, two existing stations may have some potential to increase market share and offset any potential competitive harms in the Columbus metro. As noted previously, WIOL(FM) owned by Woodfin Group and WRLD(FM) an out-of-market station owned by McClure Broadcasting receive significant listening shares but have no attributable revenue in the Columbus, GA metro for 2000. These two stations may offer some Columbus advertisers an alternative in the future that is not represented in the BIA 2000 revenue estimates.

59. *Efficiencies and other public interest benefits.* In general, the record on efficiencies must show that such efficiencies are both merger-specific and cognizable, as indicated in our interim analytical framework. Evidence asserting that the transactions will produce public interest benefits should be of sufficient scope and specificity to show how the proposed transactions will produce such benefits and how those benefits will flow to listeners or advertisers

60. Clear Channel asserts that overhead costs have been reduced dramatically by consolidating station operations at one facility. Rent payments have decreased, and certain backroom functions have

[103] Davis Letter at 24.

[104] Clear Channel Letter at 7.

[105] *Id*.

[106] Davis Letter at 25.

[107] *Id*.

[108] *Id*.

[109] *Id*. at 25-26. We address these allegations regarding the Cusseta construction permit, *infra*, at ¶¶79-83.

[110] Rainbow/Push comments at 2.

been consolidated. Cost savings have totaled hundreds of thousands of dollars.[111] Davis acknowledges that there are several beneficial economies of scope and scale to having multiple stations in a market. However, it asserts that some practices by a dominant group foster anti-competitive behavior.[112]

61. Clear Channel asserts that some of the cost savings have been used to offer higher pay to certain employees, allowing the stations to hire better talent,[113] and that other savings have been used to upgrade equipment.[114] Clear Channel also states that the Columbus stations have been able to become more involved with community service events, noting that the stations are involved in almost every significant charity event in Columbus.[115]

62. Davis asserts that there is a link between the harm that its business has experienced and harm to listeners. Davis states that it will be difficult to sustain current operations in the face of the unfair and anti-competitive business practices of Clear Channel.[116]

63. We find that co-location of facilities may produce some efficiencies that may pass-through to listeners and advertisers. We conclude that it is likely that the merger will produce cost-savings that may potentially benefit listeners and advertisers, although it is unclear to what extent such benefits will be shared among shareholders, listeners, and advertisers.

64. *Conclusion.* In the absence of more specific factual evidence, Davis' general allegations that Cumulus or Clear Channel have engaged in anti-competitive behavior fail to raise a substantial and material question of fact sufficient to warrant further inquiry. Davis has not submitted evidence that advertisers will be unable to "buy around" the eight-station group, and thus, such alleged behavior will result in increased, monopoly prices.[117] In fact, there is substantial evidence that most Clear Channel stations face a direct format competitor in the Columbus metro. Davis fails to offer sufficient evidence or point to any specific conduct to support its claim that Cumulus or Clear Channel engages in any anti-competitive activity. Absent additional evidence in the record, we decline to find that the mere fact of offering advertising in packages, or of offering advertisers discounts for buying spots on multiple stations, is anticompetitive.[118] Indeed, such practices may be efficient and procompetitive.[119]

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[111] Clear Channel Letter at 7.

[112] Davis Letter at 26.

[113] Clear Channel Letter at 8.

[114] *Id*.

[115] *Id*.

[116] Davis Letter at 28.

[117] *See Louis C. DeArias, Receiver,* 11 FCC Rcd 3662, 3666 (1996) (allegation that group owner engaged in anticompetitive conduct by refusing to accept advertising from a competitor did not warrant further inquiry, where conduct had not been found to violate antitrust laws).

[118] For example, if advertisers were forced to buy advertising spots in packages, our analysis might be different.

[119] Davis cites generally to its exhibits containing declarations of former Cumulus employees to support its argument that Cumulus' stations typically sell advertising in packages and engage in predatory pricing practices, and cites to certain text in the Cumulus Opposition to Petition to Deny in the Solar Application proceeding ("Cumulus Opposition") as containing alleged misrepresentation and lack of candor on these issues. *See* Davis Reply to Oppositions in the Solar Application proceeding at 65-66. Our review of the Cumulus text specifically cited by Davis leads us to conclude that, while it may contain certain unsupported assertions, characterizations or opinions about Cumulus' station practices, we do not find that Cumulus has directly stated it does not engage in packaging. On the basis of the evidence presented by Davis, we do not find that Cumulus' arguments rise to the level of misrepresentation or lack of candor marked by an intent to deceive the Commission.

65. We also find that Davis failed to establish that Cumulus or Clear Channel engages in predatory pricing. Absent information regarding Clear Channel's costs or its ability to recoup its losses, Davis' argument is purely speculative. Clear Channel's pricing of advertising is consistent with common practices of group owners in competitive markets. Under the circumstances present here, and in the absence of an adjudicated violation or any concrete evidence to establish the use of predatory pricing, we find Davis fails to raise a substantial and material question of fact to warrant further inquiry.

66. In our analysis above, we find that Davis has failed to establish any specific competitive harms that will result from the operation of the eight-station combination in Columbus, GA. Therefore, we find Davis's assertion that alleged competitive harms require termination of the Solar LMA to be without merit.

67. We also find that Rainbow/PUSH has failed to offer any factual evidence to support its allegation that the proposed transaction will prevent competitors, specifically African-Americans, from effectively competing in the market.[120] Therefore, under the circumstances presented, including the lack of any substantiated evidence of anti-competitive conduct or negative effects toward African-Americans in the radio metro, we find no substantial and material question of fact as to the anti-competitive effects of the proposed transaction to warrant further inquiry.

68. Therefore, we find that, due to the specific competitive characteristics of the Columbus metro market, it is unlikely that the proposed transaction will result in competitive harm. Additionally, as noted *infra* at ¶ 36, Clear Channel's market share and the combined market share Clear Channel and Davis, the top two competitors in the Columbus market, will be comparable to levels previously approved by the Commission. We also find that the proposed combination may provide certain public interest benefits that, in light of our finding that the proposed transaction will not result in public interest harms, warrant grant of the underlying application. For the reasons set forth above, we find no substantial and material questions of fact as to the effect of the proposed transaction on economic competition that would warrant further inquiry.

D. Disqualification and Other Allegations

69. In its petitions to deny, Davis alleges that Cumulus engaged in a pattern of misconduct that renders it disqualified to be a Commission licensee. Specifically, Davis argues that (1) there has been a disqualifying transfer of control of the Solar Stations from Solar to Cumulus and now Clear Channel under the terms of the Solar LMA; (2) there has been a disqualifying transfer of control of the Cumulus Stations from Cumulus to Clear Channel under the terms of the Clear Channel LMA; (3) Solar and Cumulus misrepresented facts in the Solar Application with regard to their interests in applications for construction permits for new FM broadcast stations in Cusseta, Georgia, which is close to Columbus; and (4) Cumulus misrepresented advertising revenue to the Commission in a separate proceeding involving the assignment of stations to Cumulus in the Topeka, Kansas radio metro.

70. Davis later reasserted these allegations in an informal objection it filed against another Cumulus transaction, in which Cumulus proposed to assign to Clear Channel the licenses for 22 radio stations in several Midwestern states ("Midwestern Application").[121] The Mass Media Bureau denied

[120] To the extent that Rainbow/PUSH alleges that relaxation of the numerical limits in the radio rules adopted pursuant to the Telecommunications Act of 1996 negatively impact minority ownership in radio, we note that this issue is beyond the scope of this proceeding. The Commission recently sought comment on the effects of the 1996 revisions to the radio ownership rules. *See, Radio Ownership Notice, supra.*

[121] File Nos. BAL/BALH-20000728ACY-ADT. The Solar and Clear Channel Applications were contractually related to the Midwestern Application because the July 17, 2000 purchase agreement for the Midwestern Stations ("Midwestern Agreement") contained various provisions relating to the Solar and Clear Channel transactions. Specifically, at closing of the Midwestern transaction, Cumulus would assign to Clear Channel its rights and (continued....)

Davis's informal objection and granted the Midwestern Application on September 25, 2000. In doing so, the Bureau also considered Davis's allegations of disqualifying conduct previously raised in the petitions to deny the Solar and Clear Channel Applications and found that there was no substantial and material question of fact to warrant Cumulus's disqualification.[122] On October 27, 2000, the Commission denied Davis's request for a stay of the Bureau's grant of the Midwestern Application.[123] In the Stay Order, the Commission agreed with the Bureau decision, stating that "the staff's conclusion that Davis did not raise a substantial and material question of fact regarding Cumulus's basic qualifications to be a Commission licensee was well founded."[124] However, neither the Stay Order nor the Midwestern Letter reached any of Davis's allegations other than whether they presented disqualification issues warranting further inquiry. We now address whether Davis's allegations raise issues that Cumulus engaged in non-disqualifying misconduct warranting further inquiry.

1. Unauthorized Transfer of Control

71. We find that the facts alleged by Davis, even if considered true, do not establish a *prima facie* case that Solar, Cumulus, or Clear Channel engaged in an unauthorized transfer of control of the Solar or Cumulus Stations. Under Section 310(d) of the Communications Act and Section 73.3540 of the Commission's rules, no broadcast authorization may be transferred without the Commission's prior consent. In determining whether a premature transfer of control has occurred, we traditionally look beyond the legal title to see whether a new entity or individual has obtained the right to determine the basic operating policies of the stations.[125] Although a licensee may delegate certain functions to an agent or employee on a day-to-day basis, ultimate responsibility for essential station matters, such as personnel, programming and finances, is nondelegable. We have consistently held that a licensee's participation in a local marketing agreement does not *per se* constitute a premature transfer of control.[126] In the end, the question of whether *de facto* transfer of control occurred is fact specific and must be considered on a case-by-case basis.

72. *Solar LMA and APA*. Davis claims control was illegally transferred from the licensee (Solar) to the broker (Cumulus) pursuant to specific provisions of and amendments to the Solar LMA and the Solar APA: (1) the 15-year term of the Solar LMA; (2) the $1.5 million one time LMA fee in addition to Cumulus's reimbursement of Solar's operating expenses; (3) additional payments from Cumulus to Solar which total 80 percent of the purchase price;[127] and (4) Cumulus's right to assign its obligations and

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obligations under the Solar APA and the Solar LMA. If the Clear Channel Application remained pending, Cumulus and Clear Channel would enter into the Clear Channel LMA, Cumulus would assign all assets (except FCC authorizations) for the Cumulus Stations to Clear Channel, and Clear Channel would pay up-front to Cumulus 80% of the purchase price for the Cumulus Stations.

[122] *See September 25, 2000 letter from Linda Blair, Chief, Audio Services Division, Mass Media Bureau to John Griffith Johnson, Jr., Esq., et. al*. (1800B3-MG) ("Midwestern Letter").

[123] See *In the Matter of the Applications of Cumulus Licensing Corp (Assignor) and Clear Channel Broadcasting Licenses, Inc. (Assignee) for Consent to Assignment of WGBF(AM), Evansville, IN, et. al*., 16 FCC Rcd 1052 (2001) ("Stay Order").

[124] *Id.* at 1055.

[125] *See WHDH, Inc.*, 17 FCC 2d 856, 863 (1969), *aff'd sub nom. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[126] *See e.g. WGPR, Inc.*, 10 FCC Rcd 8140 (1995), *vacated on other grounds sub nom, Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998); *Roy R. Russo, Esq.*, 5 FCC Rcd 7586 (1990).

[127] The December 1998 Solar APA stated that the purchase price was $3 million and that Cumulus would pay: (1) $75,000 "no later than January 5, 1998;" (2) twenty-four monthly payments of $8,333.33, beginning upon execution of the APA, for a total of $200,000, as consideration for its agreement not to compete; and (3) $2,725,000 at closing. (continued....)

rights under the LMA to a third party without the prior approval of Solar.[128] Davis claims that the LMA fee and reimbursement of operating expenses are exorbitant and are, in reality, advance payments under the Asset Purchase Agreement for the Solar Stations. In total, Davis claims Cumulus has paid Solar over $3.9 million of the $4.5 million purchase price. Davis claims that Cumulus's ability to assign its rights to a third-party without prior approval from the licensee, abdicates Solar's ultimate responsibility over the Solar Stations.

73. Cumulus claims that the terms of the Solar LMA are consistent with all statutory and regulatory requirements. Cumulus disputes Davis's argument that upfront payments of a significant portion of purchase price amounts to *prima facie* evidence of an unauthorized transfer of control.

74. The facts alleged by Davis do not establish a *prima facie* case that Cumulus and Solar engaged in an unauthorized transfer of control.[129] Many of the terms of the LMA are similar to terms that previously have been found to be acceptable. The Solar LMA contains an express retention by Solar of ultimate authority over programming, finances, and personnel, as our cases require.[130] Solar is required to employ a general manager and at least one full-time employee to assist the general manager, neither of whom may have an employment, consulting, or other material relationship with Cumulus.[131] Thus, absent evidence to the contrary, Solar retains authority to discharge its obligations as licensee. The LMA payments, a $1.5 million one time LMA fee and reimbursement of operating expenses, do not demonstrate, by themselves, that an unauthorized transfer of control has taken place.[132] We do not conclude that because Solar's only source of income under the LMA is an upfront payment and reimbursement of expenses, Solar has abdicated its control over finances.[133] Although Cumulus paid approximately 80 percent of the total $3 million purchase price, it did so over a period of approximately 2 years[134] and this alone does not raise a substantial and material question of fact regarding whether there has been an unauthorized transfer of control, particularly in light of Solar's express retention of ultimate authority over programming, finances, and personnel in the Solar LMA.[135] Finally, while Davis contends that 15 years is an atypically lengthy term for an LMA, he overstates the effect of such a term. The

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A July 2000 amendment to the Solar APA states that: (1) Cumulus had paid $128,109.31 for the purchase of a transmitter and associated equipment for installation at the stations on behalf of the seller and that such amount shall be credited toward the purchase price for the stations; (2) within 5 business days, Cumulus would pay Solar a deposit of $1.5 million to be credited toward the purchase price; and (3) no later than January 5, 2001, Cumulus shall pay Solar a deposit of $500,000 which would be credited toward the purchase price for the stations.

[128] *See* July 14, 2000 amendment to Solar LMA.

[129] *See, e.g., Manahawkin Communications Corporation,* Memorandum Opinion and Order, FCC 01-377 (released December 28, 2001).

[130] *See, e.g.*, Solar LMA at ¶¶ 3, 5.1, 7, 9 and Appendix A.

[131] Solar LMA at ¶ 3; *see Roy R. Russo*, 5 FCC Rcd at 7587.

[132] *See WGPR, Inc.,* 10 FCC Rcd at 8145 (no unauthorized transfer of control under an LMA that provided for annual payments of $1 million over two years, renewable for two more years); *see also Choctaw Broadcasting Corporation*, 12 FCC Rcd 8534, 8543 (1997); *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 715 (1981).

[133] *Id.*

[134] *See infra* note 119.

[135] *See WGPR, Inc.,* 10 FCC Rcd at 8142; *Choctaw Broadcasting Corporation*, 12 FCC Rcd 8534, 8543 (1997); *see also Letter to David D. Burns, Esq., et. al*. (MD-1800E1) (Chief, Video Services Division, Mass Media Bureau, February 17, 1999) (finding no unauthorized transfer of control where buyer paid seller over 90 percent of the purchase price prior to Commission grant of the assignment application).

Commission did note that we "may" question a licensee's control of a station subject to an "unreasonably lengthy" LMA.[136] Given our finding that the LMA contains provisions that guarantee Solar's retention of ultimate control over programming, personnel, and finances, and given that Davis has failed to present any evidence that Solar has failed properly to exercise that control, we do not find that the length of the LMA is itself a sufficient indicator that such control has been transferred to Cumulus.[137]

75. While we do not find an unauthorized transfer of control has occurred, we do note our concern with the provision allowing Cumulus to assign its rights and interests under the Solar LMA to a third party without the prior consent of Solar, the licensee. We have recently found a very similar provision objectionable, and we remain concerned that such a provision could undermine a licensee's right to control station programming.[138] In that case, the Commission conditioned the grant of a transfer of control application upon the parties amending the LMA to delete the provision. Here, we note that a conditional grant will not be necessary because the parties have already amended the Solar LMA to delete this provision.[139]

76. *Clear Channel LMA and APA.* Davis also claims that execution of the Clear Channel LMA has resulted in an unauthorized transfer of control. He objects to the following Clear Channel LMA terms: (1) Clear Channel will buy from Cumulus all non-licensed assets, including broadcast equipment and real estate; (2) Clear Channel will receive all revenues generated from advertising broadcast on the Cumulus Stations during programming supplied to the stations by Clear Channel; (3) Cumulus will receive only reimbursement of expenses; and (4) the LMA is for an eight-year term, with an automatic eight-year renewal. Clear Channel also asserts that terms of the July 17, 2000 Binding Agreement for Purchase of Radio Stations and the subsequent September 6, 2000 Asset Purchase Agreement ("Clear Channel APA") have resulted in an unauthorized transfer of control, specifically the provision that Clear Channel will make an upfront payment of 80 percent of the purchase price. Davis claims these provisions of the Clear Channel LMA and APA violate the public interest and amount to an unauthorized purchase of the Cumulus Stations.

77. Cumulus and Clear Channel state that Davis failed to consider the business and economic justifications for the upfront payments. They state that the monetary payments are consistent with assets and rights conferred to both Solar and Clear Channel. For payments rendered, Clear Channel obtained all non-licensed assets of the Cumulus Stations, including broadcast equipment and real estate, and obtained rights to receive advertising revenues, which, in itself amounts to a substantial portion of the purchase agreement.

78. We find that Davis has failed to establish a *prima facie* case that control passed from Cumulus to Clear Channel. The Commission has previously held that acquisition of a substantial amount of a station's assets does not constitute a premature transfer of control, as long as the licensee has a legal

[136] *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, 6402 (1992).

[137] *See Letter to Brian M. Madden, Esq.*, 6 FCC Rcd 1871 (Mass Media Bureau 1991) (approving time brokerage agreement of ten years' duration with year-to-year renewal options thereafter).

[138] *See Edwin L. Edwards, Sr. (Transferor) and Carolyn C. Smith (Transferee), et. al.*, Memorandum Opinion and Order and Notice of Apparent Liability, FCC 01-336 (released December 10, 2001).

[139] In January 2001, the parties executed a Second Amendment to the Solar LMA, which *inter alia*, modified two provisions. The term of the LMA was modified to ten years with an automatic renewal for one year every year thereafter, "unless either party provides the other party with written notice of termination not later than 120 days prior to the end of the initial ten (10) year period or the current one (1) year period. The Term may be earlier terminated in accordance with the provisions set forth in this Agreement." The parties also deleted in its entirety the section giving the broker the right to assign the LMA without prior approval from the licensee.

right to use the assets to operate the station. The same holds true for the lease-back arrangements.[140] Cumulus's right to use the assets to operate the station under the terms of its contract with Clear Channel also is consistent with past decisions.[141] We also do not find the financial arrangement at issue *per se* impermissible.[142] As with the Solar LMA, under the Clear Channel LMA, Cumulus expressly retains ultimate authority over programming, finances, and personnel at its stations.[143] Moreover, as noted above, the duration of the LMA by itself, is not evidence of an unauthorized transfer of control. As noted above, payment of a large portion of the purchase price up front alone does not demonstrate that an unauthorized transfer of control has taken place, particularly in light of Cumulus's express retention of ultimate authority over programming, finances, and personnel in the Clear Channel LMA and the fact that Cumulus obtained substantially all of the station assets other than the licenses. Davis asserts that Cumulus has misrepresented facts to the Commission when Cumulus stated that the upfront payment was paid in part for the right to receive advertising revenue during the term of the Clear Channel LMA.[144] Although the Clear Channel LMA provides that Clear Channel will reimburse Cumulus for the operating expenses and does not include other payment provisions, this fact alone does not present a substantial and material question of fact that Clear Channel misrepresented the purpose of the upfront payment or intentionally mislead the Commission or concealed facts.[145] Cumulus timely filed the Binding Agreement for Purchase of Radio Stations, the Clear Channel APA and the Clear Channel LMA with the Commission and Cumulus made statements regarding the purpose of the upfront payment when these contracts were on file at the Commission.[146] The Binding Agreement for Purchase of Radio Stations and the Clear Channel APA, which were both executed prior to the Clear Channel LMA, provide for an upfront payment of 80 percent of the purchase price for the Cumulus Stations. This upfront payment provision, which immediately follows provisions regarding an LMA and the assignment of assets to Clear Channel, is silent as to the how the upfront payment is allocated and does not preclude Cumulus's explanations in that regard. In sum, there is no evidence to suggest that the Solar and Clear Channel LMAs and APAs, either in form or practice, violated the Commission's existing rules and practices or

[140] *See American Music Radio*, 10 FCC Rcd at 8772-73 (unauthorized transfer of control has not occurred when a broker, pursuant to an LMA, buys station equipment or a site from which to operate the station, as long as the licensee has a legal right of access to equipment and site); *see also Syracuse Channel 62, Inc.,* 60 RR 2d 1161, 1166 (1986) ("The fact that another entity holds actual title to the equipment being utilized by the station is neither noteworthy nor significant.").

[141] *See WGPR*, 10 FCC Rcd at 8141 (approving lease-back from broker to licensee to extent necessary to operate station).

[142] *Id.* at 8145 (reimbursement of expenses to the licensee as the sole source of funding pursuant to terms of an LMA is a contractual arrangement and does not necessarily abdicate the licensee's control over finances); *see also Roy R. Russo, Esq.*, 5 FCC Rcd 7586, 7587.

[143] *See Roy R. Russo*, 5 FCC Rcd at 7587; *see also American Music Radio,* 10 FCC Rcd at 8771.

[144] *See* Davis Reply to Oppositions at 6-11.

[145] *See Fox Broadcasting*, 93 FCC 2d 127, 129 (1983); *Garrett, Andrews, & Letizia, Inc.*, 86 FCC 2d 1172, 1180 (Rev. Bd. 1981) mod. on other grounds, 88 FCC 2d 620 (1981) (burden on petitioner to demonstrate motive to deceive or conceal because Commission will not infer improper motive from application errors, inconsistencies or omissions accompanied by speculation that lacks factual support); *see also Greater Muskegon Broadcasters, Inc.*, 11 FCC Rcd 15464 (1996).

[146] *See WWOR-TV, Inc.*, 6 FCC Rcd 193, 206 (1990) (we do not infer an intent to deceive when an applicant has disclosed information on the public record); *see also Intercontinental Radio, Inc*., 98 F.C.C. 2d 608, 639-40 (Rev. Bd. 1984) (submission of inaccurate statement does not indicate intent to deceive when accurate information previously supplied by party is a matter of record); *Superior Broadcasting of California*, 94 F.C.C. 2d 904, 910 (Rev. Bd. 1983) (intent to deceive difficult to infer where facts are on public record and easily attainable by parties).

resulted in Cumulus or Clear Channel exercising *de facto* control.[147]

2. Allegations of Lack of Candor and Misrepresentation

79. *Cusseta, Georgia Proceeding*. Davis asserts that both Solar and Cumulus, in their respective portions of the Solar Application, incorrectly answered the questions that asked whether they had "any interest in or connection with…a broadcast application pending before the FCC." Davis argues that Solar and Cumulus conspired to deceive the Commission by concealing interests in pending applications for construction permits for a new FM broadcast station in Cusseta, Georgia which is located near Columbus, Georgia. Davis alleges that Solar failed to disclose its ownership interest in Cusseta Broadcasting Corporation ("CBC"), one of two mutually exclusive applicants for a construction permit for a new FM broadcast station in Cusseta.[148] Davis additionally asserts that Cumulus failed to disclose its option to acquire the assets of a proposed new FM broadcast station in Cusseta, including authorizations, from Signature Broadcasting Ltd. ("SBL"), the other mutually exclusive applicant for a new FM broadcast station construction permit in Cusseta.[149]

80. Solar acknowledges that its sole shareholder, Alan M. Woodall, Jr. ("Woodall"), is currently the sole shareholder of CBC. In January 1999, Woodall exercised an option to acquire CBC.[150] Solar states that the exclusion from the Solar Application of Woodall's ownership interest in CBC was an inadvertent error and that it did not intend to deceive the Commission. Cumulus states that it did not have an interest in SBL's application for a construction permit for a station in Cusseta and that it only had an option to acquire the proposed Cusseta station and an obligation to lend funds to SBL for working capital purposes, if SBL's construction permit application was granted. Cumulus argues that this did not constitute a cognizable interest for purposes of the Commission's broadcast station ownership rules and policies. Cumulus also asserts that it was not required to disclose the Memorandum of Understanding with SBL. Nonetheless, Cumulus filed with the Commission a copy of the Memorandum of Understanding between Cumulus and SBL and amended the Solar Application to show acquisition of this construction permit would comply with the numerical limits of the Commission's radio ownership rules.

81. We find that the specific facts alleged by Davis do not establish a *prima facie* case that Solar or Cumulus made disqualifying misrepresentations in the Solar and Clear Channel Applications or that grant of the Clear Channel Application would be contrary to the public interest. Solar's failure to disclose Woodall's ownership interest in an applicant for a construction permit for a new FM broadcast

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[147] In the *Local Radio Ownership NPRM* (*see* n. 8 and ¶ 11, *supra*), the Commission seeks comment on the appropriate regulatory treatment of LMAs and time brokerage agreements ("TBAs"). The Commission noted, "We have recognized that LMAs and TBAs permit the broker to exercise a 'degree of influence' over the brokered station, and they can have a similar effect on competition as common station ownership in cases where the brokering station controls a significant portion of the sale and pricing of brokered station's advertising inventory." *Local Radio Ownership NPRM*, 16 FCC Rcd 19861, at ¶ 80.

[148] File No. BPH-19930701MG. The Solar APA requires as a condition of closing that Solar/CBC dismiss CBC's application for the Cusseta construction permit. On August 13, 1999, CBC filed a request to dismiss its application. Davis filed an Opposition to CBC's Request. CBC's request for dismissal remains pending.

[149] File No. BPH-19930701ME. Pursuant to a January 23, 1998 Memorandum of Understanding, Cumulus agreed to pay SBL $250,000, to acquire in its own name the equipment needed to operate the proposed Cusseta station and lease it to SBL, and to lend SBL the working capital necessary to build and commence operations of the proposed Cusseta station. SBL agreed to grant Cumulus an assignable option to acquire the Cusseta station's assets, exercisable after the station commences broadcasting but no later than one year after broadcasting begins. The purchase price for the station assets is $300,000 plus Cumulus's assumption of SBL's indebtedness to Cumulus. Under the Memorandum of Understanding, SBL and Cumulus also agreed to enter into a TBA under which Cumulus will have the right to program the proposed Cusseta station.

[150] *See* May 12, 1999 Amendment to Solar Application.

station in Cusseta, while in error, was not disingenuous or lacking in candor. Solar admits to incorrectly answering "no" to the question that asked whether it had any interest in or connection with a broadcast application pending before the FCC. Solar had no motive to conceal Woodall's interest in CBC's application for a construction permit at Cusseta. Pursuant to the terms of the Solar APA, dismissal of CBC's application was required prior to consummation of the sale of the Solar Stations. Had Solar correctly answered the Solar Application question, CBC's application for a construction permit at Cusseta might have been dismissed due to a major change in that application. However, since dismissal of that application is required by the Solar APA, there was no motive for Solar to protect or conceal Woodall's interest in the CBC application for a construction permit at Cusseta. Davis's assertions that Solar had motive to conceal its interest in CBC's application to cover illicit conduct related to that application and the Cusseta proceeding are without merit. When the Solar Application was filed, there were no allegations that Woodall had engaged in misconduct in the Cusseta proceeding. Additionally, we find, *supra* at ¶86, that no substantial and material questions of fact regarding Solar's basic qualifications have been raised in the Cusseta proceeding. All other issues raised against Woodall regarding CBC's application will be addressed in the context of the Cusseta proceeding. Finally, the terms of the Solar APA which was filed with the Solar Application require dismissal of CBC's application for a construction permit at Cusseta prior to consummation of the sale of the Solar Stations. This indicates that Solar had an interest in CBC's application or at least had the ability to facilitate its dismissal. We generally will not find an actionable lack of candor when the allegedly concealed fact has been supplied and is a matter of Commission record.[151] We conclude that Solar's mistake, absent evidence of an intent to deceive, does not rise to the level of an intentional misrepresentation.[152] Solar's interest in an applicant for a construction permit in Cusseta in no way affects the grantability of the Clear Channel Application.

82. As for Cumulus, we first note that under our existing practices and policies, Cumulus did not have an obligation to disclose its unexercised option to purchase the assets of a proposed station in answering question 4(g) of the Solar Application.[153] Although Cumulus responded yes to the question regarding whether it had any interest in or connection with a broadcast application pending before the FCC, it did not identify its option or other agreements regarding the proposed Cusseta station.[154] Davis claims that Cumulus had reason to conceal its option to acquire the proposed Cusseta station to avoid additional economic scrutiny from the Commission and to either operate the proposed Cusseta station using SBL as a front or to keep the proposed Cusseta station dark in order to further stifle competition. However, even assuming *arguendo* that Cumulus incorrectly answered this application question, Davis has not made the necessary *prima facie* showing that Cumulus intended to deceive or mislead the Commission regarding its interest in SBL's application for a construction permit in Cusseta.[155] We find

[151] *See, e.g., Valley Broadcasting*, 4 FCC Rcd 2611, 2614-15 (Rev. Bd. 1989).

[152] *See Greater Muskegon Broadcasters, Inc.*, 11 FCC Rcd 15464 (1996).

[153] The question on former Form 314 (August 1995 ed.), the form at issue here, asks whether the applicant has "other existing attributable interest in any broadcast station, including the nature and size of such interest." An option is not considered an attributable interest under the Commission's rules. 47 C.F.R. § 73.3555, n.2(f), ("options should not be attributed unless and until conversion is effected"), and the staff has not, therefore, required that they be reported as "broadcast interests" on application forms. While question 15 of Section II requires disclosure of "future ownership rights," including "options," that question is only relevant to interests in the stations being assigned. Moreover, SBL's application for a construction permit for a station in Cusseta has not yet been granted and no construction permit has been issued.

[154] *See* FCC Form 314 (August 1995 ed.), Section II, Question 9.

[155] *See Fox Broadcasting*, 93 FCC 2d 127, 129 (1983); *Garrett, Andrews, & Letizia, Inc.*, 86 FCC 2d 1172, 1180 (Rev. Bd. 1981) mod. on other grounds, 88 FCC 2d 620 (1981) (burden on petitioner to demonstrate motive to deceive or conceal because Commission will not infer improper motive from application errors, inconsistencies or omissions accompanied by speculation that lacks factual support); *see also Greater Muskegon Broadcasters, Inc.*, 11 FCC Rcd 15464 (1996).

Davis's allegations in this regard to be merely speculative. Initially, we note the incipient nature of Cumulus's interest in SBL's application for a construction permit for a station in Cusseta. Currently, SBL's application is still pending, a construction permit has not been issued, there is no station to purchase or broker, and, although there is an agreement to enter into a TBA, SBL and Cumulus have not executed a TBA. Even if the Commission grants SBL's construction permit application and Cumulus (or Clear Channel) exercises the option to purchase the station, Cumulus would need prior Commission approval of the transaction. We note that Cumulus has shown that its acquisition of the construction permit for SBL's proposed Cusseta station would comply with the numerical limits of the Commission's local radio ownership rules. Additionally, the Memorandum of Understanding at ¶ 6 states that SBL "will submit a copy of this Memorandum of Understanding to the FCC" and Cumulus asserts that SBL did so.[156] We generally will not find an actionable lack of candor when the allegedly concealed fact has been supplied and is a matter of Commission record.[157] Finally, we note that accuracy in filings made to the Commission is an extremely important matter. We caution the parties to this proceeding to take care to ensure that Commission filings made in the future are accurate and complete.

83. Davis makes numerous other allegations concerning the actions of Solar and Cumulus in connection with the two applications for a new construction permit at Cusseta. Davis argues that both Solar and Cumulus engaged in disqualifying conduct with respect to those applications, including making illegal payments to the Cusseta applicants, lacking candor in failing to disclose their respective interests in CBC and SBL, and being the undisclosed real parties in interest in those construction permit applications. We have examined Davis's allegations in this regard and we find that no substantial and material questions of fact regarding Solar's or Cumulus's basic qualifications have been raised in the Cusseta proceeding. However, we do not reach any questions presented in the Cusseta proceeding other than whether they raise disqualifying issues warranting further inquiry. All other issues will be addressed when we act on the Cusseta construction permit applications which remain pending.[158]

84. *Topeka, Kansas Assignment Application.* Davis's assertion that Cumulus misrepresented facts to the Commission in a separate proceeding involving the assignment of stations in the Topeka, Kansas radio metro is without merit. In the Midwestern Letter and the Stay Order, the staff and the Commission rejected Davis's argument that Cumulus made disqualifying misrepresentations in that unrelated transaction, where it proposed to acquire two radio stations in the Topeka area. (File Nos. BALH-990713GM-GN). The parties to the Topeka transaction were in dispute over the accurate local advertising revenue figures for the Topeka radio metro. The dispute centered on the discrepancy between "estimated figures" reported in BIA Publications, Inc.'s Media Access Database and lower "actual revenue figures" submitted to the Commission by Cumulus. In the Stay Order, the Commission concluded that Davis failed to make a *prima facie* case that Cumulus misrepresented facts in the Topeka proceeding and that Cumulus had submitted detailed and thorough documentation to support the lower "actual revenue figures."[159] The staff subsequently granted the application to assign the two radio stations in the Topeka area and denied the petition to deny that application, noting that it is not uncommon for

[156] Cumulus has submitted a copy of a letter dated February 24, 1998 from SBL to the Secretary of the Commission which covers a copy of the Memorandum of Understanding for filing with the Commission. *See* Attachment G to Cumulus's May 12, 1999 Opposition to Petition to Deny and Informal Objection. While the letter is incomplete insofar as it fails to indicate a file number or facility identification number, nevertheless it appears that SBL attempted to file the document with the Commission approximately a month after it was executed and it appears that Cumulus believes that SBL did so pursuant to its contractual obligation.

[157] *See, e.g., Valley Broadcasting*, 4 FCC Rcd 2611, 2614-15 (Rev. Bd. 1989).

[158] We will not prohibit the assignment to Clear Channel of Cumulus's option to purchase SBL's proposed Cusseta station. We find that Davis's arguments regarding the validity of that option are more appropriately addressed in the Cusseta proceeding.

[159] *See* Stay Order, 16 FCC Rcd at 1058.

parties in a pending sales transaction to submit "actual revenue figures" for the Commission to review, in addition to the "estimated" figures reported by BIA.[160]

3. Full Agreement Between Cumulus and Clear Channel

85. Davis argues that the Commission cannot act on the Clear Channel Application because the full and complete agreement between Cumulus and Clear Channel was not filed and made available for public comment for a 30-day period.[161] Davis contends that the applicants should be required to file copies of the final agreements regarding the transactions proposed in the Clear Channel Application. Cumulus and Clear Channel submitted a Binding Agreement for Purchase of Radio Stations with the Clear Channel Application. The parties amended the Clear Channel Application and submitted an Asset Purchase Agreement after the 30-day period for filing petitions to deny had closed.[162] However, because the Asset Purchase Agreement does not materially alter the terms of the Binding Agreement, we find no reason to extend the period for filing petitions to deny.[163] Additionally, despite Davis's assertions to the contrary, we find that all necessary documents regarding the Clear Channel Application have been filed and that there is no evidence that Cumulus or Clear Channel deliberately withheld any documents from the Commission with wrongful intent.

IV. CONCLUSION

86. Therefore, as we find that there is no substantial and material question of fact regarding whether there has been an unauthorized transfer of control, regarding Cumulus's or Solar's basic qualifications, or regarding whether any specific competitive harms will result from grant of the Clear Channel Application, we deny Davis's petitions to terminate the Solar and Clear Channel LMAs and its petition to deny the Clear Channel Application. In view of the foregoing, we find that the parties are qualified to be Commission licensees and that, as explained above, grant of the Clear Channel Application would serve the public interest, convenience and necessity.

87. Accordingly, IT IS ORDERED, That Davis Broadcasting, Inc.'s Petition to Deny the application to assign the licenses of stations WDAK(AM), Columbus, Georgia, and WSTH-FM, Alexander City, Alabama from Solar Broadcasting Company, Inc. to Cumulus Licensing Corp. IS DISMISSED;

88. IT IS FURTHER ORDERED, That Davis Broadcasting, Inc.'s August 16, 1999, Petition for Order to Terminate Local Marketing Agreement and Request for Expedited Action IS DENIED;

89. IT IS FURTHER ORDERED, That The Rainbow/PUSH Coalition's Informal Objection to the application to assign the licenses of stations WDAK(AM), Columbus, Georgia, and WSTH-FM, Alexander City, Alabama from Solar Broadcasting Company, Inc. to Cumulus Licensing Corp. IS DISMISSED;

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[160] *See April 13, 2001 Letter from Linda Blair, Chief, Audio Services Division, Mass Media Bureau to J. Brian DeBoice, Esq., et. al.* (Ref. No. 1800B3-ALB).

[161] In support of this assertion, Davis cites "Section II, Question 3b of the Application" and 47 U.S.C. §§ 309(b) and (d).

[162] On September 13, 2000, the parties filed an Asset Purchase Agreement which was executed on September 6, 2000.

[163] *See generally, Report and Order in MM Docket Nos. 98-43 and 98-149*, 13 FCC Rcd 23056 (1998), *recon. granted in part and denied in part*, 14 FCC Rcd 17525 (1999).

90. IT IS FURTHER ORDERED, That the application to assign the licenses of stations WDAK(AM), Columbus, Georgia and WSTH-FM, Alexander City, Alabama from Solar Broadcasting Company, Inc. to Cumulus Licensing Corp. IS DISMISSED;

91. IT IS FURTHER ORDERED, That Davis Broadcasting, Inc.'s Petition to Deny the application to assign the licenses of stations WMLF(AM) and WVRK(FM), Columbus, Georgia, WPNX(AM) and WGSY(FM), Phenix City, Alabama, WAGH(FM), Ft. Mitchell, Alabama, and WBFA(FM), Smiths, Alabama from Cumulus Licensing Corp. to Clear Channel Broadcasting Licenses, Inc., to Terminate Local Marketing Agreement and for Other Relief IS DENIED;

92. IT IS FURTHER ORDERED, That the application to assign the licenses of stations WMLF(FM), Columbus, Georgia, WPNX(AM), Phenix City, Alabama, WAGH(FM), Ft. Mitchell, Alabama, WBFA(FM), Smiths, Alabama, WGSY(FM), Phenix City, Alabama, and WVRK(FM), Columbus, Georgia from Cumulus to Clear Channel IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Application of Gowdy FM 95, Inc. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KCGY(FM), Laramie, WY, and Application of Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KOWB(AM), Laramie, WY;

Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM) Starkville, MS, and Application of Charisma Broadcasting Co. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WKOR(AM) Starkville, MS, and Application of Bravo Communications, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WSMS(FM), Artesia, MS, and Applications of Radio Columbus, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WJWF(AM) and WMBC(FM), Columbus, MS;

Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C. For Consent to the Assignment of the Licenses of WCHR(AM), Trenton, NJ and WNJO(FM), Trenton, NJ;

Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City AL, WPNX(AM), Phenix City AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL; and

Application of Air Virginia and Clear Channel Radio Licenses, Inc. For Consent to the Assignment of the License of WUMX(FM), Charlottesville, VA.

Today, we act on five of the oldest and most difficult radio assignment cases pending before us. Guided by the Communications Act, Commission precedent, and the Interim Policy we adopted in the Local Radio Ownership NPRM, we find in four of these cases that the license assignments are consistent with the public interest, and therefore we grant the applications. Relying on this guidance in our review of the license assignment in Charlottesville, Virginia, however, we cannot find based on the record before us that the license assignment is consistent with the public interest. Therefore, as required by the Communications Act, we designate that application for hearing.

Each of the five cases we decide today present difficult policy issues that arise from the increasing levels of concentration that have occurred in the radio market since 1996, when Congress significantly relaxed the limits on ownership of radio stations in a local market. A genuine concern about increased levels of concentration led the Commission to start "flagging" certain cases. Despite the Commission's attempts, this ad hoc process too often led to inconsistent decision-making and delays in processing applications. To remedy this problem, and "to undertake a comprehensive examination of our rules and policies concerning local radio

ownership," we adopted the *Local Radio Ownership NPRM* .[164] This proceeding will address difficult questions which to date have remained unresolved.

We recognized, however, that a final decision in the Local Radio Ownership proceeding would take time, and that too many radio assignment cases have been pending for too long. Accordingly, we established an Interim Policy , to provide greater transparency to the review process and to "guide our actions on radio assignment and transfer of control applications pending a decision in this proceeding."[165] Under this policy, in addition to examining whether the proposed assignment complies with the Communications Act and the Commission's rules, we conduct a competitive analysis of the proposed transaction and examine the potential impact of concentration in advertising markets. Our public interest analysis does not stop there, however. Unlike antitrust agencies, which focus solely on whether the effect of a proposed merger "may be substantially to lessen competition,"[166] the Commission must examine other factors. Indeed, the Communications Act compels us to consider the broad aims of "ensuring the existence of an efficient, nationwide radio communications service"[167] and promoting locally oriented service and diversity in media voices.

In short, the Communications Act does not permit the Commission to turn a deaf ear to radio listeners. Thus, while our competitive analysis is informed by antitrust principles, our ultimate obligation is to consider the potential benefits and harms of the transaction on the listening public. Where we find evidence that a proposed transaction will benefit listeners, we must weigh that factor against the potential harm to advertisers in determining whether the transaction is consistent with the public interest. We must also examine whether particular or unique circumstances of a market might mitigate the potential harm from such high levels of concentration. But where we cannot find an overall benefit to listeners or mitigating factors, we have no basis on which to conclude that the transaction will serve the public interest. In those cases, we must designate the application for hearing.

As stated, in four of the cases before us, the Commission found that, on balance and for different reasons, grant of the applications served the public interest. In Trenton, for example, we found that the "in market" stations capture only 36.7% of the Trenton audience, while the remaining 63.3% listen to "out of market stations." Moreover, thirty "out of market stations" have enough Trenton listeners to meet BIA reporting data. We also found that, through its operation of WNJO (under an LMA agreement), the applicant has considerably improved the station's performance through improved local news, weather and information.

In Cheyenne the record showed that the relevant geographic market is not the Cheyenne Arbitron metro because among other things, one of the tallest mountains in the area significantly limits the reach of the radio station signals of the assignor and assignee into each other's service areas. Thus, we concluded that the stations do not today, nor will they in the future, compete for

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[164] *See, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001).

[165] *Id.* at 19894 (¶ 84).

[166] 15 U.S.C. § 18.

[167] 47 U.S.C. § 151.

advertising. In Columbus, Georgia, we found that significant format and radio advertising competition from three large radio station groups, one new entrant, and one out-of market radio station would continue to exist after the transaction. Finally, in Columbus-Starkville, Mississippi, we found that the potential for competitive harm was outweighed by the significant public interest benefits to listeners, including greater access to locally generated radio programming.

In Charlottesville, however, no public interest benefits or mitigating circumstances were presented that would outweigh the high level of concentration that the proposed transaction would produce. Indeed, on the record before us, the only significant evidence presented was that the transaction would create a market in which the top two owners would have a combined 94.2% market share. This level of concentration, in the absence of any countervailing considerations or public interest benefits, is simply too significant for us to conclude that, on balance, the transaction is consistent with the public interest. Accordingly, in this case, we designate, as we must, the assignment application for hearing to determine whether grant would serve the public interest, convenience and necessity.

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN ABERNATHY

Re: *Application of Gowdy FM 95, Inc and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KCGY(FM), Laramie, WY, and Application of Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KOWB(AM), Laramie, WY;*

Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM) Starkville, MS, and Application of Charisma Broadcasting Co. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WKOR(AM) Starkville, MS, and Application of Bravo Communications, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WSMS(FM), Artesia, MS, and Applications of Radio Columbus, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WJWF(AM) and WMBC(FM), Columbus, MS;

Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C. For Consent to the Assignment of the Licenses of WCHR(AM), Trenton, NJ and WNJO(FM), Trenton, NJ;

Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City AL, WPNX(AM), Phenix City AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL; and

Application of Air Virginia and Clear Channel Radio Licenses, Inc. For Consent to the Assignment of the License of WUMX(FM), Charlottesville, VA.

I support today's decisions granting four of the five oldest pending radio merger applications and setting one for hearing. I recognize that these cases have raised particularly difficult issues, but that is not a reason for failing to resolve them in a timely manner. I am pleased that, by today's decisions, we are finally able to provide answers to the applicants – some of whom have been waiting for years. Regardless of the outcome, the Commission owes it to consumers and the industry to provide prompt and clear answers to regulatory questions. I look forward to working with my colleagues to resolve the other pending radio applications and the outstanding Notice of Proposed Rulemaking.

STATEMENT OF COMMISSIONER MICHAEL J. COPPS ON RADIO TRANSFER APPLICATIONS

In the Matter of Golden Triangle Radio, Inc., Charisma Broadcasting Co., Bravo Communications, Inc., Radio Columbus and Cumulus Licensing Corp. (Columbus, MS)

In the Matter of Solar Broadcasting Company, Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses Inc. (Columbus, GA)

In the Matter of Great Scott Broadcasting and Nassau Broadcasting (Trenton, NJ)

In the Matter of Air Virgina, Inc. and Clear Channel Radio Licenses, Inc. (Charlottesville, VA)

In the Matter of Gowdy FM 95 and Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. (Laramie, WY)

I have struggled to find the public interest in the grant of these transfers. Given the levels of market concentration – both of advertising and audience share – that will result from these transactions, I can support the grant of only one of the five transfers at issue here. That one transaction arises in a unique geographic circumstance, in which the potential harm to competition was not significant and was outweighed by the benefits of the transaction. In the other four cases, however, I find evidence of significant anticompetitive effects. I could not support grant of these transfers absent additional information on the public interest benefits. I support the decision of the Commission to send one of these five transfers to hearing, and would have sent another three to hearing as well.

I am troubled by the trend toward greater and greater consolidation of the media as exemplified by these transactions. I am further troubled by the Commission's acceptance of these levels of concentration in radio, particularly in the smaller radio markets at issue here. The five transactions before us here would each result in levels of concentration that are greater than that approved by the Commission in the past, and are potentially harmful to competition. Given the small markets at issue here, the effects of extreme concentration are that much more pernicious.

Each transaction presents slightly different issues regarding the acceptable levels of concentration in a market, the definition of a local radio market, or the attribution of local marketing agreements for the purposes of competitive analysis. The one transaction I am able to support, albeit hesitantly, involves the transfer of the Gowdy stations in Laramie, Wyoming to Clear Channel Broadcasting, Inc. While I am tremendously concerned about the unprecedented levels of market domination Clear Channel has achieved in radio markets throughout the country – including in Cheyenne, Wyoming – the transaction before the Commission does not appear to increase Clear Channel's dominance in this market. Due to the unique topography of the area, the Laramie stations deliver marginal signals into Cheyenne. This geographic anomaly permits

the substitution of separate geographic markets for Cheyenne and Laramie, in lieu of the presumptive Arbitron market definition, thus I support the transfer of these licenses from the Gowdy licensees to Clear Channel.

Speaking generally, however, these transactions, taken together with the dozens of transactions approved by the Bureau last year, result in the Commission's adoption of an unacceptable standard for concentration in local radio markets. The amount of concentration in the markets at issue here is potentially very harmful to competition, to the listening public and to America's deeply held values of localism and diversity.

As I have often stated, Congress directed us to look to the public interest as we review transactions. Congress told the Commission that it may grant a broadcast license transfer only if "the public interest, convenience and necessity will be served thereby."[168] Competition is, and always has been, an essential part of the public interest, and I believe that a competitive analysis is an important part of the public interest in a particular transaction.[169]

I don't think that my faith in competition is particularly radical. In fact, it is a cardinal principle underlying the 1996 Act. In these relatively small radio markets, the anticompetitive effects of such high levels of concentration are likely to be especially pronounced. When one or two owners wield this much power in a particular market, they can make it impossible for independent stations to survive or even compete.

When it comes to transfers of broadcast licenses, our analysis must go beyond competitive analysis, to the effects of the transfer on factors unique to broadcasting – localism and diversity. This is consistent with Commission precedent, in which we have found that we have "an independent obligation to consider whether…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." [170]

Neither is this a radical position. As a market-based democratic society, we value independent voices in the media. For a robust marketplace of ideas to survive, *each community* must have a diversity of sources of information available to its members – not just a *variety* of formats, but *diversity* of formats and of ownership. As consolidation of market power makes it

[168] 47 U.S.C. § 310(d).

[169] *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. . . .").

[170] *CHET-/5 Broadcasting L.P.,* 14 FCC Rcd 13041, 13043 (1999).

harder and harder for independent stations to compete, local markets lose the diversity so essential to the free exchange of ideas in their community.

No single factor necessarily defines whether a particular transaction is in the public interest. Nevertheless, when harm to competition is likely to result from the grant of an application, it behooves the Commission to assure itself with as much certainty as is possible, that despite the harm to competition, each transaction will nonetheless serve the public interest, convenience and necessity. In order to make this determination where such high concentration levels will result, without clear evidence of strong public interest benefits, as in four of the cases before us today and discussed below, I am convinced that we must further examine the issues at a hearing.

SEPARATE STATEMENT
OF COMMISSIONER KEVIN J. MARTIN

Re: Application of Gowdy FM 95, Inc and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KCGY(FM), Laramie, WY, and Application of Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KOWB(AM), Laramie, WY;

Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM) Starkville, MS, and Application of Charisma Broadcasting Co. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WKOR(AM) Starkville, MS, and Application of Bravo Communications, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WSMS(FM), Artesia, MS, and Applications of Radio Columbus, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WJWF(AM) and WMBC(FM), Columbus, MS;

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Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City AL, WPNX(AM), Phenix City AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL; and

Application of Air Virginia and Clear Channel Radio Licenses, Inc. For Consent to the Assignment of the License of WUMX(FM), Charlottesville, VA.

I – as well as everyone at the Commission – am concerned about the increasing levels of concentration of radio station ownership that has taken place during the last five years.

Last November, the Commission issued a NPRM undertaking a comprehensive review of how the Commission should assess radio license transfer applications. At that time, I expressed my dismay at the length of time many of these applications had been pending at the Commission. I am heartened that today, we are ruling on the five oldest applications (all pending for over 16 months).

All of the pending transfer applications comply with the structural ownership limits created by Congress in §202(b) of the 1996 Telecommunications Act. I continue to believe such structural limits should make our review of proposed mergers easier, not more complicated. I thus expressed my reluctance last November in agreeing to an interim policy that continued – and expanded upon – the practice of flagging particular transfers for a more detailed analysis, when they would be below the statutory ownership limit. Nevertheless, I voted for the NPRM because it fairly raised the issue of what our policy should be with respect to assessing radio transfers, and it included timing deadlines that would ensure timely action on the pending applications. Today's actions on the oldest applications are a direct result of those deadlines. I am extremely pleased that we finally are providing the parties with resolution.

Each of the applications listed above was subjected to a comprehensive competitive analysis as set forth in the interim guidelines. I agree with the majority of my colleagues that the factors weigh against granting Clear Channel's acquisition of Air Virginia's radio license in Charlottesville, VA. Based on the record before us, I am unable to conclude that this transfer would serve the public interest. I therefore vote to set this application for hearing.