

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

In Re Applications of	)	
	)	
Golden Triangle Radio, Inc.	)	
(Assignor)	)	File Nos. BAL/BALH-19980922EA-EC
and	)	
Cumulus Licensing Corp.	)	
(Assignee)	)	
	)	
For Consent to the Assignment of the Licenses of	)	
WKOR-FM, Columbus, MS, WMXU(FM) and	)	
WSSO(AM), Starkville, MS	)	
	)	
Charisma Broadcasting Co.	)	File No. BAL-19980922EK
(Assignor)	)	
and	)	
Cumulus Licensing Corp.	)	
(Assignee)	)	
	)	
For Consent to the Assignment of the License of	)	
WKOR(AM), Starkville, MS	)	
	)	
Bravo Communications, Inc.	)	File No. BALH-19980922ED
(Assignor)	)	
and	)	
Cumulus Licensing Corp.	)	
(Assignee)	)	
	)	
For Consent to the Assignment of the License of	)	
WSMS(FM), Artesia, MS	)	
	)	
Radio Columbus, Inc.	)	File Nos. BAL/BALH-19981028EC-ED
(Assignor)	)	
and	)	
Cumulus Licensing Corp.	)	
(Assignee)	)	
	)	
For Consent to the Assignment of the Licenses of	)	
WJWF(AM) and WMBC(FM) Columbus, MS	)	
	)	

**ORDER ON RECONSIDERATION**

**Adopted: November 22, 2004**

**Released: March 3, 2005**

By the Commission: Commissioners Copps and Adelstein dissenting and issuing separate statements.

1. On April 18, 2002, T&W Communications, Inc. ("T&W") filed a Petition for Reconsideration ("Petition") of the Commission's grant of the seven above-captioned assignment of

license applications and denial of T&W's Petition to Deny.<sup>1</sup> Cumulus Licensing Corp. ("Cumulus"), Golden Triangle Radio, Inc., Charisma Broadcasting Co., and Bravo Communications, Inc., four of five applicants in this proceeding, filed a joint Opposition on May 1, 2002.<sup>2</sup> For the reasons set forth below, we deny T&W's Petition.

2. Cumulus, which had been operating all seven of the subject stations pursuant to Local Marketing Agreements for three years, applied to acquire them from their respective licensees. Cumulus owned no stations in the Columbus-Starkville-West Point, Mississippi area at the time. T&W timely filed a petition to deny the applications, arguing that a grant would cause undue concentration of control of advertising in the market. The competition aspects of the transaction were analyzed using BIA data for the Columbus-Starkville-West Point Arbitron metropolitan area ("Metro").<sup>3</sup> T&W now complains that the Commission "failed to give proper weight" to T&W's arguments<sup>4</sup> but presents no new evidence or argument as to why the applications should be denied. We briefly address T&W's arguments, which we reject as repetitious or otherwise without merit. We reaffirm our original decision, finding that grant of the above-captioned applications serves the public interest.

3. T&W argues that for purposes of applying the Commission's multiple ownership rules, which limit the number of stations that can be commonly controlled in a market, we should have defined the market based on the Metro in which the radio stations compete for advertising.<sup>5</sup> We disagree. The local radio ownership rule then in effect specifically provided that the radio market is to be defined by the contours of the stations at issue,<sup>6</sup> a point T&W recognizes. Although the Commission adopted in mid-2003 a geography-based methodology for stations in Arbitron-rated markets,<sup>7</sup> it did not do so until long after the Commission released (on March 19, 2002) its *Memorandum Opinion and Order* approving the sale of the subject stations. We do not generally apply changes in ownership rules retroactively so as to

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<sup>1</sup> Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp., for Consent to the Assignment of the Licenses of WKOR-FM, Columbus, MS, et al., 17 FCC Rcd 5373 (2002) ("*Memorandum Opinion and Order*").

<sup>2</sup> Cumulus Licensing Corp., Golden Triangle Radio, Inc., Charisma Broadcasting Co., Bravo Communications, Inc., Opposition to Petition for Reconsideration (May 1, 2002).

<sup>3</sup> At the time the applications were filed in 1998, the stations were not assigned by Arbitron to any metro, according to BIA data. As explained in the *Memorandum Opinion and Order*, 17 FCC Rcd at 5375, Arbitron established the Columbus-Starkville-West Point Metro in 1999. Although the applications were not flagged when they were announced by Public Notice as accepted for filing, the proposed transaction and T&W's competition-based arguments were evaluated pursuant to the Interim Policy then in effect, see *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets* ("*Local Radio Ownership NPRM*"), 16 FCC Rcd 19861, 19894-97 (2001), using BIA data for the new Metro. See *Memorandum Opinion and Order*, 17 FCC Rcd at 5379-5387. The Commission terminated the Interim Policy effective June 2, 2003. See *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 13813 (2003) ("*Ownership Report and Order*"), *aff'd in part and remanded in part*, *Prometheus Radio Project, et al. vs. F.C.C.*, 373 F.3d 372 (3d Cir. 2004), *stay modified*, No. 03-3388 (Sept. 3, 2004).

<sup>4</sup> See, e.g., Petition at i, 6, 21.

<sup>5</sup> Petition at 6-8.

<sup>6</sup> See 47 C.F.R. § 73.3555(a).

<sup>7</sup> See *Ownership Report and Order*, *supra*, 18 FCC Rcd at 13725-30. The *Notice of Proposed Rule Making* included in the *Ownership Report and Order* seeks comment on developing a geography-based methodology to evaluate local radio ownership in markets not rated by Arbitron, and that proceeding remains pending.

require divestiture of existing combinations, and we did not do so when we revised the local radio rule.<sup>8</sup> Thus, examining the subject transaction under the contour-based methodology set forth in the local radio ownership rule in effect at the time of the Commission's decision, we affirm our finding that the transaction complies with the local radio ownership rule. Furthermore, notwithstanding whatever shortcomings or "flaws" the contour overlap methodology may have,<sup>9</sup> application of the methodology did not undermine our public interest finding in this case. As discussed further below,<sup>10</sup> under the Interim Policy, we carefully analyzed the competitive effects of the proposed radio station combination in the Columbus-Starkville Arbitron Metro, and concluded that any risk of anticompetitive harm was outweighed by the significant public interest benefits of the transaction.<sup>11</sup>

4. T&W next argues that in evaluating the competition issues in this case under the Interim Policy, we should have either ruled that WSYE(FM) was not a participant in the Metro, as defined by Arbitron, or designated the applications for hearing on this question.<sup>12</sup> Although we did not resolve the issue of whether WSYE(FM) should be deemed a Metro participant, we found that grant of the applications served the public interest even if WSYE(FM) were not considered a participant in the Metro.<sup>13</sup> Because we accepted T&W's position *arguendo*, and because resolving the question in T&W's favor would not affect the outcome, the issue does not raise a substantial and material question of fact, and it need not be either definitively resolved or set for hearing.

5. T&W argues that we failed to use the Herfindahl-Hirschman Index ("HHI") in considering the potential competitive harms that might result from granting the applications.<sup>14</sup> The HHI -- a mathematical formula that conveniently encapsulates in a single number all of the competitors' market shares, giving greater weight to larger shares in order to give an indication of the concentration of the market<sup>15</sup> -- is but one of several screening devices used by the Department of Justice ("DOJ") to measure relative market concentration. In the *Memorandum Opinion and Order*, we thoroughly considered the market shares of the various participants in the Metro (*i.e.*, the concentration of the market),<sup>16</sup> and T&W does not contend otherwise. Having done so, our failure to explicitly set forth the HHI in the *Memorandum Opinion and Order* is not a reason to reconsider our decision.<sup>17</sup> Moreover, as we have previously observed, an HHI above a certain level "may not necessarily imply adverse competitive

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<sup>8</sup> See *Ownership Order*, *supra*, 18 FCC Rcd at 13807-09. See also *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 802-815 (upholding Commission decision to require divestiture of newspaper/broadcast combinations only in egregious cases).

<sup>9</sup> Petition at 6-7.

<sup>10</sup> See also *supra* note 3.

<sup>11</sup> See *Memorandum Opinion and Order*, 17 FCC Rcd at 5378-87. See also *Local Radio Ownership NPRM*, 16 FCC Rcd at 19894-97.

<sup>12</sup> Petition at 8. BIA data reported that Arbitron listed WSYE(FM) as an "out of market" station with listenership in the Metro.

<sup>13</sup> *Memorandum Opinion and Order*, 17 FCC Rcd at 5382-83.

<sup>14</sup> Petition at 12-14.

<sup>15</sup> See *FTC v. Heinz*, 246 F.2d 708, 716 n.9 (D.C. Cir. 2001).

<sup>16</sup> See *Memorandum Opinion and Order*, 17 FCC Rcd at 5382-83.

<sup>17</sup> Moreover, the staff had already indicated its awareness of the HHI, which was explicitly stated in a letter to the parties, discussing the staff's preliminary assessment of the Metro and affording the parties an opportunity to supplement the record regarding competition issues. See Letter to William Freedman, Esq., *et al.* (MMB Nov. 15, 2001).

consequences in a local radio market.”<sup>18</sup> In this case, particularly when viewed in the context of all the other relevant factors, including conditions of market entry and certain public interest benefits,<sup>19</sup> the post-transaction HHI of 3602, with a change in the HHI of 985, as alleged by T&W, does not cause us to change our conclusion regarding the degree of concentration in the Metro or of the transaction as a whole.

6. T&W argues that we should have concluded that the various radio stations’ market shares in, and the structure of, the Metro carry a high risk of competitive harm.<sup>20</sup> T&W repeats the arguments it made previously. In short, T&W contends that we should not allow a transaction where the advertising revenue share held by applicants would total 53 percent. As we stated in the *Memorandum Opinion and Order*, however, a 53 percent revenue share is comparable to shares in other cases where we found the transactions to be in the public interest.<sup>21</sup> Generally, we analyze all of the potential harms and benefits of a transaction to determine whether, on balance, granting the application would serve the public interest.<sup>22</sup> Here, we acknowledged that the degree of market concentration might carry some risk of competitive harm, but found significant public interest benefits arising from the transaction to outweigh that risk.<sup>23</sup> T&W has not proffered any evidence of actual competitive harm since the applications were granted. We are therefore not persuaded to alter our decision to grant the applications rather than designate them for hearing.<sup>24</sup>

7. T&W argues that we incorrectly found that a small amount of entry was possible. The Applicants had argued that two new stations were possible in the Columbus-Starkville market. T&W states, as it did previously, that we cannot know when or if a new Class C3 FM station will be built in the Metro, nor can we know when or if the upgrade of WKBB(FM)’s facilities will be accomplished. These possibilities existed, however, as of our grant of the Applications. Moreover, since the filing of T&W’s Petition, the new Class C3 FM station, WQJB(FM) at State College, MS, has been built,<sup>25</sup> and the upgrade of WKBB(FM) from a Class A to a Class C3 station has been completed.<sup>26</sup> We thus affirm our conclusion regarding new entry.

8. T&W repeats its allegations that Cumulus has a strategy of “overwhelming small competitors by offering advertising packages and discounts” and argues that we should find Cumulus’ actions to be anticompetitive. T&W has neither raised new arguments in its Petition nor presented any new evidence in support of this claim. We again refuse to find, absent additional evidence, that the mere fact of offering advertising in packages, or of offering advertisers discounts for buying spots on multiple stations, is

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<sup>18</sup> See *Great Empire*, 14 FCC Rcd at 11150-51.

<sup>19</sup> See *Memorandum Opinion and Order*, 17 FCC Rcd at 5384-85, 5387. See also *infra* ¶ 7.

<sup>20</sup> Petition at 8-12.

<sup>21</sup> *Memorandum Opinion and Order*, 17 FCC Rcd at 5383 (citing as an example *Shareholders of Citicasters, Inc.*, 11 FCC Rcd at 19141-43). See also, e.g., *Solar Broadcasting and Clear Channel Broadcasting Licenses, Inc.*, 17 FCC Rcd 5467 (2002); *Nassau Broadcasting II, LLC, and Millennium Shore License Holdco, LLC*, 17 FCC Rcd 9001 (2002).

<sup>22</sup> See *Memorandum Opinion and Order*, 17 FCC Rcd at 5376-78.

<sup>23</sup> *Id.* at 5383, 5387.

<sup>24</sup> In the *Ownership Report and Order*, we explained that we were adopting a revised local radio ownership rule that addresses competition through use of a geographic methodology. See 18 FCC Rcd at 13713-30. The revised rule reflects our decision to “rely, where possible, on measures other than . . . advertising [shares]” to evaluate competition. *Id.* at 13642.

<sup>25</sup> See FCC File No. BLH-20020925ABR.

<sup>26</sup> See FCC File No. BLH-20040513AAR.

anticompetitive.

9. Finally, T&W again argues that we should investigate Cumulus for unauthorized control of the radio stations at issue. We disagree. In the *Memorandum Opinion and Order*, we examined the evidence, found no material questions of fact, and concluded that control of the stations was not prematurely ceded from the licensees to Cumulus. T&W also repeats its argument that we should not have considered the benefits claimed by Cumulus because they were not transaction-specific. We reject this as well. As we explained in the *Memorandum Opinion and Order*, just as we considered the harms to competition that might result from common ownership and control even though the stations were already being operated jointly through LMAs, we considered the potential benefits. We again find T&W's proposed approach particularly inappropriate because, in many cases, applicants operate stations under LMAs only while they await our review of a proposed transaction.<sup>27</sup>

10. ACCORDINGLY, IT IS ORDERED that the Petition for Reconsideration filed April 18, 2002, by T&W Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>27</sup> See *Memorandum Opinion and Order*, 17 FCC Rcd at 5385.

**DISSENTING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

*Re: 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;*

This Order denies a Petition for Reconsideration of an Order we released in 2002. I dissent to this Order for the same reasons I dissented to the underlying Order.

This transaction, along with four others decided at the same time, also highlights what had been an important part of the Commission's merger review process. When a merger or acquisition provided one corporation with 50 percent or two corporations with 70 percent of the revenue in a market, the Commission conducted an analysis of the impact in the specific market. After conducting this market-specific analysis, the Commission unanimously sent one of these five transactions to a hearing. The Commission, however, has now eliminated this additional analysis even for mergers that result in high levels of concentration. It is particularly ironic that the Commission took this step at a time when the courts have faulted the Commission for not adequately taking into account the structure of particular markets.

**DISSENTING STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN**

*Re: 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;*

I dissent to this Order on Reconsideration, which affirms the Commission's approval of seven license transfers in the Columbus, Mississippi area market in February 2002. I was not a member of the Commission at that time, but in being asked to reconsider the approval, I believe the decision was wrong.

As the Order states, the Commission found that the seven stations involved in these license transfers would have a combined radio advertising revenue share of more than 50%, and that "the degree of market concentration might carry some risk of competitive harm." Indeed, the petitioner seeking reconsideration claims that the Herfindahl-Hirschman Index (HHI) for this market post-merger indicates that it would be highly concentrated, and would increase by a factor that suggests that the merger would be likely to create or enhance market power.

The Commission found, however, that this competitive harm was outweighed by public interest benefits. The Order does not enumerate these benefits. The original order, however, states that Cumulus, having operated these stations through LMAs for several years, has realized certain cost efficiencies as a result of the joint operations. Although Cumulus apparently has produced more local programming through the LMAs, the original order provides as one example of the efficiencies realized the fact that "[o]perations have been consolidated so that one newsperson provides news for all seven stations."

Facts like these raise serious questions about the harm to competition, diversity, and localism that the transaction would impose. I believe that this transaction at a minimum warrants further inquiry. I therefore dissent from the decision not to reconsider the approval of these license transfers without a hearing.

I also share Commissioner Copps' concern about the elimination of what had been an important aspect of the Commission's review of radio transactions. Previously, when a proposed combination resulted in one corporation having a 50 percent or two corporations having a 70 percent advertising revenue share in a given market, the Commission flagged the transaction for more rigorous analysis. Failure to continue this process in highly concentrated markets falls short of fulfilling our obligation to protect the public interest.