

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

In The Matter of The Application of
Voice in the Wilderness Broadcasting, Inc.,
Assignor
and
Clear Channel Broadcasting Licenses, Inc.,
Assignee
For Consent to Assignment of License of
KCOL-FM, Groves, Texas
MB Docket No. 02-272
File No. BALH-20010814AAU

HEARING DESIGNATION ORDER

Adopted: September 4, 2002

Released: September 5, 2002

By the Commission:

1. In this order, we consider the unopposed above-captioned application for the assignment of the license of station KCOL-FM (formerly KTFA(FM)), Groves, Texas from Voice in the Wilderness Broadcasting, Inc. ("Voice in the Wilderness") to Clear Channel Broadcasting Licenses, Inc., a subsidiary of Clear Channel Communications, Inc. (collectively, "Clear Channel"). Because this application was pending when we adopted the Notice of Proposed Rulemaking in MM Docket No. 01-317, we consider the competition concerns raised by this application pursuant to the interim policy adopted in that notice. As discussed more fully below, we cannot find on the record that grant of this application is consistent with the public interest. Accordingly, pursuant to Section 309(e) of the Communications Act of 1934, as amended ("the Communications Act"), we hereby designate the application for hearing.

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

2 47 U.S.C. § 309(e).

3 In making our determination to designate this application for hearing, we have also considered certain data and arguments presented by Cumulus Licensing Corp. ("Cumulus") with regard to its application for assignment of the license of KAYD-FM (formerly KLOI(FM)), Silsbee, Texas, which is in the same Arbitron "metro" as KCOL-FM. (A "metro" is a metropolitan area defined by the Arbitron rating service, which is used by radio stations and radio advertisers in negotiating and determining advertising rates.) Clear Channel and Cumulus have in their respective cases presented sometimes conflicting data and arguments with regard to competitive conditions in this particular metro market. To the extent that the data and arguments presented by Cumulus have a specific bearing on our analysis of the competitive impact of the instant Clear Channel transaction, we consider them herein. In a separate order being released today, we also designate for hearing Cumulus's application.

## 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.<sup>4</sup> In March 1996, the Commission relaxed the numerical station limits in its local radio ownership rules in accordance with Congress's directive in Section 202(b) of the Telecommunications Act of 1996.<sup>5</sup> 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 raise 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."<sup>6</sup> 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.<sup>7</sup> Under this policy, the Commission flags 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.<sup>8</sup> The public notice for a flagged transaction indicates that the Commission intends to subject the proposed transaction to further competition review and seeks comments from the public on that issue.<sup>9</sup>

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

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<sup>4</sup> See *Local Radio Ownership NPRM*, 16 FCC Rcd at 19862-70 ¶¶ 3-18.

<sup>5</sup> See 47 C.F.R. § 73.3555(a)(1); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) § 202(b)(1).

<sup>6</sup> *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13043 ¶ 8 (1999) (citing 47 U.S.C. § 309(a) and *KIXK, Inc.*, 13 FCC Rcd 15685 (1998)). See also *Shareholders of Citicasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19135, 19141-43 ¶¶ 12-16 (1996).

<sup>7</sup> See Public Notice, Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998).

<sup>8</sup> See *AMFM, Inc.*, 15 FCC Rcd 16062, 16066 ¶ 7 n.10 (2000).

<sup>9</sup> See generally *Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 18. A flagged public notice includes the following language:

Note: Based on our initial analysis of this application and other publicly available information, including advertising revenue share data from the BIA database, the Commission intends to conduct additional analysis of the ownership concentration in the relevant market. This analysis is undertaken pursuant to the Commission's obligation under Section 310(d) of the Communications Act, 47 U.S.C. Section 310(d), to grant an application to transfer or assign a broadcast license or permit only if so doing serves the public interest, convenience and necessity. We request that anyone interested in filing a response to this notice specifically address the issue of concentration and its effect on competition and diversity in the broadcast markets at issue and serve the response on the parties.

applications.<sup>10</sup> 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.”<sup>11</sup> In the *NPRM*, we requested comment about possible interpretations of the statutory framework, including whether the new numerical station ownership limits definitively addressed the permissible levels of radio station ownership, whether they addressed diversity concerns only, or whether they established rebuttable presumptions of ownership levels that were consistent with the public interest. We also requested comment on how we should define and apply our traditional goals of promoting diversity and competition in the modern media environment. The *NPRM* also sought comment on how we should implement our policies toward local radio ownership.

5. In the *Local Radio Ownership NPRM*, we also set forth an interim policy to “guide [our] actions on radio assignment and transfer of control applications pending a decision in this proceeding.”<sup>12</sup> 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.<sup>13</sup>

6. Under our interim policy, “we presume that an application that falls below the [50/70] screen will not raise competition concerns” unless a petition to deny raising competition issues is filed. For applications identified by the 50/70 screen, the interim policy directs the Commission’s staff to “conduct a public interest analysis,” including “an independent preliminary competitive analysis,” and sets forth generic areas of inquiry for this purpose.<sup>14</sup> The interim policy also sets forth timetables for staff recommendations to the Commission for the disposition of cases that may raise competition concerns.

## II. BACKGROUND

7. On August 14, 2001, the applicants filed an application proposing to assign the license of station KCOL-FM (formerly KTFA(FM)) from Voice in the Wilderness to Clear Channel. Clear Channel currently programs KCOL-FM pursuant to a Local Marketing Agreement (“LMA”). Clear Channel also owns four stations in the Beaumont-Port Arthur, Texas Arbitron metro (“Beaumont metro”):<sup>15</sup> KIOC(FM), Orange, Texas; KKMY(FM), Orange, Texas; KLVI(AM), Beaumont, Texas; and KYKR(FM), Beaumont, Texas.<sup>16</sup> Through its proposed acquisition, Clear Channel would own four FM stations and one AM station in the Beaumont metro. Two other FM stations and two other AM stations in the Beaumont metro are currently owned by Cumulus Licensing Corp. (“Cumulus”). As noted above, Cumulus has pending an application to buy another FM station in the Beaumont metro, KAYD-FM (formerly KLOI(FM)), Silsbee, Texas.

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<sup>10</sup> *Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 19.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 19894 ¶ 84.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 19895 ¶ 86.

<sup>15</sup> *See supra* note 3.

<sup>16</sup> The licensee of these stations is Capstar TX Limited Partnership, a Clear Channel subsidiary.

8. On August 22, 2001, the Commission issued a public notice indicating that the application had been accepted for filing.<sup>17</sup> The public notice also “flagged” the application pursuant to the Commission’s “50/70” screen. Based on Year 2001 revenue estimates from Clear Channel, Cumulus and the BIA database,<sup>18</sup> the five stations that Clear Channel proposes to own in the Beaumont Arbitron metro account for a 58.7 percent revenue share. The top two groups in the Beaumont metro, Clear Channel and Cumulus, would collectively own 9 of the 17 commercial radio stations home to the metro, would own six of the seven commercial FM stations and operate the seventh pursuant to an LMA, and would account for 92.7 percent of the local advertising revenues and 95.3 percent of the listeners of the Beaumont metro commercial radio stations.

9. There were no comments filed in response to the public notice that flagged the above-captioned application. The Mass Media Bureau sent an inquiry letter on March 15, 2002, providing Clear Channel and Voice in the Wilderness an opportunity to update the record in light of competitive changes that had occurred in the Beaumont market and in light of the interim policy.<sup>19</sup> Clear Channel filed its response on April 4, 2002.<sup>20</sup> We designate the application for hearing based on the record before us.

### III. DISCUSSION

#### A. Framework for Analysis Under Interim Policy

10. Section 310(d) of the Communications Act requires the Commission to find that the public interest, convenience and necessity would be served by the assignment of Voice in the Wilderness’s radio broadcast license to Clear Channel before the assignment may occur.<sup>21</sup> Under the interim policy set forth in our *Local Radio Ownership NPRM*, 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.<sup>22</sup>

11. 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

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<sup>17</sup> Public Notice, Broadcast Applications, Report No. 25054 (rel. August 22, 2001).

<sup>18</sup> Clear Channel and Cumulus have each provided revenue figures for 2001. *See infra* ¶ 23. 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. Unless otherwise specified, references throughout this document to BIA data refer to the year 2001 data made available to the public on June 4, 2002.

<sup>19</sup> Letter from Peter Doyle, Chief, Audio Services Division, Mass Media Bureau, to Christopher L. Robbins, Wiley, Rein & Fielding, and A. Wray Fitch, III, Gammon & Grange (dated March 15, 2002).

<sup>20</sup> Letter from Christopher L. Robbins, Wiley Rein & Fielding LLP, to Peter H. Doyle, Chief, Audio Services Division, Mass Media Bureau (April 4, 2002) (“Clear Channel Letter”).

<sup>21</sup> 47 U.S.C. § 310(d).

<sup>22</sup> *Local Radio Ownership NPRM*, 16 FCC Rcd. at 19895-96 ¶ 86.

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.<sup>23</sup>

12. 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" in the advertising market,<sup>24</sup> our focus is different.<sup>25</sup> Our analysis of radio license 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."<sup>26</sup> 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.<sup>27</sup> Our public interest analysis therefore includes assessing whether the transfer will affect the quality of radio services or

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<sup>23</sup> *Id.* at 19895 ¶ 85; see *VoiceStream Wireless Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 9779, 9789 ¶ 17 (2001); see also *Chet-5 Broadcasting, L.P.*, 14 FCC Rcd at 13043 ¶ 8 (holding that the Commission has "an independent obligation to consider whether a proposed pattern of radio station ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local market and thus would be inconsistent with the public interest").

<sup>24</sup> 15 U.S.C. § 18.

<sup>25</sup> 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 (1<sup>st</sup> Cir. 1993) (public interest standard does not require agency to "analyze proposed mergers under the same standards that the Department of Justice . . . must apply.").

<sup>26</sup> See *AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3168-69 ¶ 14 (1999); *WorldCom, Inc.*, Memorandum Opinion & Order, 13 FCC Rcd 18025, 18030-31 ¶ 9 (1998) ("*WorldCom-MCI Order*").

<sup>27</sup> 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)).

responsiveness to the local needs of the community,<sup>28</sup> and whether it will result in the provision of new or additional services to listeners.<sup>29</sup>

13. 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 to radio listeners 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**

14. 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.<sup>30</sup> A local radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned.<sup>31</sup> 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 percent of the stations in such a market.<sup>32</sup>

15. We find that Clear Channel's proposed acquisition of KCOL-FM is consistent with the numerical limits in our local radio ownership rules. Clear Channel's multiple ownership showing indicates that, using the Commission's current definition of "radio market,"<sup>33</sup> the transaction creates one radio market, composed of 86 radio stations. In this market, a single licensee may, therefore, own up to eight radio stations, not more than five of which are in the same service (AM or FM). If Clear Channel acquires KCOL-FM, it will own six stations (four FM and two AM) in the market. The transaction therefore complies with the local radio ownership rules.

### **C. Public Interest Analysis Under Interim Policy**

16. Having concluded that the proposed transaction is consistent with the numerical limits set forth in our ownership rules, we turn now to our competition analysis. Here, we find that the proposed transaction would create a market in which Clear Channel would account for a 58.7 percent revenue

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<sup>28</sup> 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).

<sup>29</sup> See, e.g., *WorldCom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9.

<sup>30</sup> 47 C.F.R. § 73.3555(a).

<sup>31</sup> *Id.*; see *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368 (1996).

<sup>32</sup> 47 C.F.R. § 73.3555(a)(1); see Telecommunications Act of 1996, § 202(b)(1).

<sup>33</sup> See *Definition of Radio Markets*, Notice of Proposed Rule Making, 15 FCC Rcd 25077 (2000).

share, and the top two group owners (Clear Channel and Cumulus) would own six of the seven commercial FM stations in the Arbitron metro, program the seventh pursuant to an LMA, and have a combined share of the local radio advertising market of 92.7 percent. Based on the record before us, we find that Clear Channel has failed to demonstrate particular circumstances in this market sufficient to overcome a concern that this level of economic concentration in this market would harm the public interest. To the extent that Clear Channel presents generic arguments challenging the parameters of our current competition analysis, we will address such concerns in the context of the *Local Radio Ownership NPRM* and will not consider them here. Rather, we look to determine whether there are unique facts that persuade us that grant of this assignment application would serve the public interest despite the increase in market power it would apparently create. On this basis, we are unable to conclude that the public interest would be served by a grant of this application. Accordingly, under Section 309(e), we must designate this matter for hearing.

17. In order to set the stage for the hearing in this case, we set forth in detail below the specific market conditions that lead to our conclusion that the level of economic concentration in this market in the wake of this transaction would be contrary to the public interest. We recognize that Clear Channel may elect to forego a hearing at this time and instead wait until the conclusion of the rulemaking proceeding where we will consider the generic arguments it has presented.

18. *Radio Advertising as the Relevant Product Market.* Pursuant to our interim policy, we presume that the relevant product market is radio advertising.<sup>34</sup> However, we consider evidence from the parties that the relevant product market in a specific case includes other forms of media advertising or should be based on listenership rather than advertising. Clear Channel asserts that radio advertising is not the relevant product market, stating that all of its radio stations face vigorous competition from all media, not just other radio stations.<sup>35</sup> In support, Clear Channel attaches two statements by an economist it hired, Professor Jerry Hausman.<sup>36</sup> Hausman's statements, however, do not discuss the particular situation in Beaumont but rather the radio industry as a whole. As stated above, we will address such generalized arguments in the pending *Local Radio Ownership NPRM*, not in individual cases decided under our interim standards. Because Hausman does not address the Beaumont market with any particularity, and because Clear Channel provides no other evidence to support its assertion that the relevant product market is broader than radio advertising in the Beaumont metro, for purposes of this order, we continue to assume that radio advertising is the relevant product market.

19. *The Arbitron Metro as the Relevant Geographic Market.* Pursuant to our interim policy, we presume that the relevant geographic market is the Arbitron metro.<sup>37</sup> However, we consider evidence from the parties that the relevant geographic market in a specific case may be larger, smaller, or otherwise different from the Arbitron metro. Clear Channel asserts that "in general, Arbitron market areas are arbitrarily drawn and do not accurately reflect the geographic areas in which Clear Channel's stations compete for advertising revenue."<sup>38</sup> Clear Channel also states that the number of stations in a metro constantly changes and a station has significant control over its "home market" designation.<sup>39</sup> Clear

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<sup>34</sup> *Local Radio Ownership NPRM*, 16 FCC Rcd at 19895 ¶ 86.

<sup>35</sup> Clear Channel Letter at 2.

<sup>36</sup> *Id.* at Exh. 2 ("Hausman Statements").

<sup>37</sup> *Local Radio Ownership NPRM*, 16 FCC Rcd at 19895 ¶ 86.

<sup>38</sup> Clear Channel Letter at 2.

<sup>39</sup> *Id.* at 3.

Channel states that these flaws are especially apparent in Beaumont, which cannot be considered in isolation from the Houston market.<sup>40</sup> However, Clear Channel offers no alternative geographic market definition.<sup>41</sup> Accordingly, for purposes of this order, we continue to assume that the Arbitron metro, in this case, the Beaumont-Port Arthur, Texas metro, represents the appropriate geographic market.

20. *Market Participants.* Current BIA data show 17 commercial and two non-commercial “in-market” stations in the Beaumont metro. BIA also identifies 24 out-of-market commercial stations that have some listeners in the Beaumont metro (although their current share may be zero). Clear Channel argues that it is incorrect to include as market participants only those stations designating the relevant Arbitron metro as their “home.”<sup>42</sup> Clear Channel states that while Beaumont has 17 “home” stations, 19 radio stations with the Houston-Galveston metro (“Houston metro”) as their home have a reportable share in the Beaumont metro.<sup>43</sup> Clear Channel argues, moreover, that four of these Houston home stations are licensed to communities that lie in the Beaumont metro, and one more is located in Winnie, Texas, just outside the Beaumont metro boundaries.<sup>44</sup> Clear Channel also argues that two other of these Houston home stations, KQBU-FM and KRTX-FM (now KLAT-FM), are licensed to Hispanic Broadcasting Corp. which has a sales representative dedicated to selling advertising in the Beaumont area.<sup>45</sup> Finally, because Clear Channel disputes that the relevant product is radio advertising, it disputes that the only market participants are radio stations.<sup>46</sup> Clear Channel does not, however, provide any evidence as to what impact other media might have, or what other media companies we should consider as participants in the Beaumont metro.

21. According to the most recent BIA data, 15 commercial out-of-market stations had a reportable share in the Beaumont metro in the latest rating period; of these, seven had a reportable share of 1.0 or greater in Beaumont. However, Clear Channel and Cumulus together own three of the stations with shares of 1.0 or greater, including the top rated out-of-market station, KRWP(FM), owned by Cumulus. For ease of analysis, the out-of-market stations that garner some listeners in the Beaumont metro can be divided into two groups: the four stations that are licensed to localities within the Beaumont metro (cited by Clear Channel),<sup>47</sup> and the eleven stations licensed to localities in other metros. With regard to the first group, in Cumulus’s proceeding to acquire KAYD-FM, Cumulus argues – in contradiction to Clear Channel’s assertions -- that Cumulus’s KRWP(FM) is in fact *not* a participant in

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<sup>40</sup> *Id.*

<sup>41</sup> For example, although Clear Channel argues that several stations that designate the Houston metro as their home should be considered participants in the Beaumont market, it does not contend that the proper geographic market is a greater Houston-Beaumont area.

<sup>42</sup> Clear Channel Letter at 3.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* The stations listed by Clear Channel are: KRWP(FM), Beaumont, Texas; KQQK(FM), Beaumont, Texas; KQBU-FM, Port Arthur, Texas; KTJM(FM), Port Arthur, Texas; and KRTX-FM (now KLAT-FM), Winnie, Texas.

<sup>45</sup> *Id.* Clear Channel has a non-attributable interest in the Hispanic Broadcasting Corp. It owns 26% of the company’s outstanding common stock in the form of convertible non-voting stock; no principal of Clear Channel sits on the Board of Directors of the Hispanic Broadcasting Corp. or serves as an officer of the company. See Application for Consent to Assignment of Broadcast Station License, Attachment 13.

<sup>46</sup> Clear Channel Letter at 3.

<sup>47</sup> See text accompanying note 44. The four stations are: KRWP(FM), Beaumont, Texas; KQQK(FM), Beaumont, Texas; KQBU-FM, Port Arthur, Texas; and KTJM(FM), Port Arthur, Texas.

the Beaumont market although licensed to a community within the Beaumont metro.<sup>48</sup> Cumulus argues that KRWP(FM) targets advertisers in Houston, and that advertisers seeking to reach Beaumont listeners would not use KRWP(FM) but would instead use Cumulus station KTCX(FM), which has the same Urban format as KRWP(FM) but “significantly lower” rates.<sup>49</sup> Since Cumulus owns and operates KRWP(FM), we tend to give credence to its argument that the station does not target advertisers in the Beaumont market. Cumulus also contends – again, in contrast to Clear Channel’s arguments -- that the three other Houston metro home stations that are located within the Beaumont metro also focus their advertising efforts on Houston.<sup>50</sup> Clear Channel has not presented sufficient evidence to overcome our presumption that these four out-of-market stations are not market participants in the Beaumont metro. Clear Channel will, of course, have an opportunity at the hearing to present additional evidence to the contrary.

22. With regard to the second group of out-of-market stations that gain listening share in the Beaumont metro (the eleven stations not licensed to communities in the Beaumont metro), only with respect to KQBU(FM) and KRTX(FM), owned by Hispanic Broadcasting Corp., does Clear Channel provide any evidence as to the stations’ advertising practices, advertising rates, the amount of local Beaumont advertising they broadcast, or whether the stations even compete for local advertising. Indeed, Clear Channel does not even provide such information for its own Houston metro home station, KTRH(AM). With regard to stations KQBU(FM) and KRTX(FM), Clear Channel does not state whether the Beaumont businesses to which Hispanic Broadcasting Corp. seeks to sell advertising<sup>51</sup> are attempting to reach Beaumont metro listeners by advertising on the stations, in which case the stations should be included as market participants in the Beaumont metro, or whether the businesses are attempting to reach Houston metro listeners, in which case the stations should not be considered Beaumont metro participants. Moreover, of the eleven stations in this second group, BIA data indicate that only five have ratings of 1.0 or greater, and of those five, Cumulus owns one and Clear Channel owns one.<sup>52</sup> These two stations therefore do not present competitive alternatives to Clear Channel’s and Cumulus’s Beaumont metro stations under any circumstances. For all these reasons, as well as the ones stated in the previous paragraph, we are unable to conclude on the record before us that the market participants in the Beaumont metro include more than the in-market stations listed in the BIA and Arbitron databases.<sup>53</sup>

23. *Market Share and Concentration.* Under the interim policy, we presume that BIA revenue share estimates accurately reflect actual market shares. Clear Channel asserts that BIA significantly overstates the revenues earned by the Beaumont stations Clear Channel operates: in contrast to the \$7.125 million reported by BIA, Clear Channel states that the actual revenues are just under \$6.0 million, including \$167,000 earned from the LMA of station KCOL-FM.<sup>54</sup> In Cumulus’s proceeding to acquire

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<sup>48</sup> Letter from Bruce D. Ryan and Kathrine L. Calderazzi, Paul, Hastings, Janofsky & Walker LLP, to Peter H. Doyle, Chief, Audio Services Division, Media Bureau (April 12, 2002) (“Cumulus Letter”) at 7.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> See text accompanying note 45.

<sup>52</sup> Cumulus owns KYKZ(FM) and Clear Channel owns KTRH(AM).

<sup>53</sup> We recognize that further evidence developed at a hearing may show that certain out-of-market stations are indeed participants in the Beaumont metro market. The evidence currently before us, however, is insufficient to make that showing.

<sup>54</sup> Clear Channel Letter at 4.

KAYD-FM, Cumulus states that BIA overestimated the revenues for KAYD-FM and that the figure is actually \$342,000, rather than \$500,000.<sup>55</sup> Cumulus further states in that proceeding that the BIA estimates of its other stations' revenues are slightly underestimated and are \$3.47 million rather than \$3.15 million.<sup>56</sup>

24. Clear Channel also argues that BIA's revenue estimates for the total market are incorrect. Clear Channel states that BIA counts a station's revenues only for its home market. Thus, BIA data for the Beaumont metro do not include any advertising revenue that might be earned from Beaumont advertisers by the five stations mentioned above that designate Houston as their home market but which are licensed to communities in or near the Beaumont metro.<sup>57</sup> Clear Channel asserts that, in fact, a number of Beaumont businesses advertise on these five stations.<sup>58</sup> Clear Channel argues that if all of these stations' revenues were included, Clear Channel's percentage of radio advertising revenues would be only 35.8 percent.<sup>59</sup> Clear Channel's argument that out-of-market stations might gain some Beaumont advertising does not support its argument that *all* of the revenues from those stations should be included when determining market shares. To the contrary, it is more likely that most of the revenues earned by stations that designate Houston as their home metro are earned from Houston advertisers and other advertisers attempting to reach Houston listeners. Clear Channel provides no evidence as to what percentage of these stations' revenues should be attributed to Beaumont. Moreover, as stated above, Cumulus disagrees that its station KRWP(FM) should be included in the Beaumont metro market at all, and claims that the other three Houston home stations that are licensed to communities within the Beaumont metro also focus their efforts on the Houston metro.

25. Clear Channel further asserts that Beaumont stations earn advertising revenues from out-of-market businesses, and that these revenues should not be included when calculating market shares. For example, Clear Channel states that its stations earn 12% of their revenue from out-of-market businesses.<sup>60</sup> Revenues earned from out-of-market advertisers, however, are properly included if the advertisers are attempting to reach Beaumont listeners. For example, Houston sports teams would be out-of-market advertisers that might attempt to reach Beaumont listeners by advertising on Beaumont radio stations. Clear Channel also provides no estimate as to the revenues earned by other Beaumont metro stations from out-of-market advertisers. Therefore, even were we to accept Clear Channel's argument and exclude revenues earned from out-of-market advertisers, Clear Channel has not provided sufficient evidence that its percentage share of the local advertising revenues would change. We therefore find no reason on the record to assign less than all of the revenues earned by Clear Channel's Beaumont metro stations to the Beaumont metro market.

26. Accepting *arguendo* Clear Channel's and Cumulus's total revenue figures for their own stations in place of those provided by the BIA database, the revenue and listening audience figures for the Beaumont metro are as follows:<sup>61</sup>

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<sup>55</sup> Cumulus Letter at 8-9 & n.9.

<sup>56</sup> *Id.*

<sup>57</sup> *See supra* note 44 and accompanying text.

<sup>58</sup> Clear Channel Letter at 3-4.

<sup>59</sup> *Id.* at 5.

<sup>60</sup> *Id.* at 4.

<sup>61</sup> Due to rounding, percentages in the table may not add precisely.

Owner	2001 Market Revenue	2001 Market Share	Fall 2001 Audience Share
Clear Channel	\$5,827,000	57.1%	22.9 (37.1% of in-market listenership)
KCOL-FM	<u>\$ 167,000</u>	<u>1.6%</u>	<u>7.9</u> (12.8% of in-market listenership)
	\$5,994,000	58.7%	30.8 (49.8% of in-market listenership)
Cumulus	\$3,470,000	34.0%	28.1 (45.5% of in-market listenership)
KAYD-FM	<u>\$ 342,000</u>	<u>3.4%</u>	<u>1.7</u> ( 2.7% of in-market listenership)
	\$3,812,000	37.4%	29.8 (48.2% of in-market listenership)
<u>Others</u>	<u>\$ 400,000</u>	<u>3.9%</u>	<u>1.2</u> ( 1.9% of in-market listenership)
In-market total	10,206,000	100.0%	61.8%
<i>Out-of-market stations</i>			
Clear Channel			1.7
Cumulus			7.5
Cox Radio			5.0
Hispanic Broadcasting			5.0
Others			<u>3.2</u>
Out-of-market total			22.4%
Ratings unaccounted for:			15.8%*

\*This may include listeners of non-commercial stations, which are not rated by Arbitron, or listeners of commercial stations that are not rated by Arbitron.

27. Our competition analysis using BIA data, as modified by Clear Channel's and Cumulus's figures for their own stations, shows that the proposed transaction would increase Clear Channel's share of the radio advertising revenues in the Beaumont market from 57.1 percent to 58.7 percent, and would increase Clear Channel's share of the in-market listenership from 37.1 percent to 49.8 percent. Clear Channel's proposed acquisition of KCOL-FM would eliminate the independence of the third highest rated station in the Beaumont market. The transaction would therefore entrench a duopoly market in the Beaumont metro, with the top two owners (Clear Channel and Cumulus) owning six of the seven commercial FM stations, programming the seventh station through an LMA, having a combined share of 92.7 percent of the in-market advertising revenues, and having 95.3 percent of the audience share attributable to in-market commercial stations.

28. The post-transaction level of market concentration and the change in concentration resulting from a transaction affect the degree to which a transaction raises competition concerns. Market concentration is often measured by the Herfindahl-Hirschman Index ("HHI"). In concentrated markets, the United States Department of Justice presumes that mergers raising the HHI more than 100 points "raise significant competitive concerns" and "are likely to create or enhance market power or facilitate its exercise."<sup>62</sup> Clear Channel argues that the HHI figures calculated by the staff are incorrect because the Commission has improperly analyzed the product market, the geographic market, the market participants

<sup>62</sup> *Horizontal Merger Guidelines*, § 1.51, U.S. Dept. of Justice and the Federal Trade Comm'n (rev'd 1997) ("*Horizontal Merger Guidelines*").

and the market shares.<sup>63</sup> As stated above, however, we find no reason in this case to vary from the presumptions in our interim policy that radio advertising is the relevant product market and that the relevant Arbitron metro, here Beaumont-Port Arthur, Texas, is the appropriate geographic market,<sup>64</sup> and we have discussed Clear Channel's arguments about market participants above.<sup>65</sup> Although we believe that mechanical application of the *Horizontal Merger Guidelines* may provide misleading answers to competition issues in the context of local radio transactions, as a general matter, sufficiently large HHIs establish a *prima facie* case in antitrust suits.<sup>66</sup> Based on BIA data as modified by Clear Channel's and Cumulus's own data for their respective stations, Clear Channel's proposed combination of stations would result in an HHI of 4623 in the Beaumont radio advertising market with a change in the HHI of 181. We conclude that Clear Channel has failed to present sufficient evidence to rebut the presumption that this HHI describes a highly concentrated market.

29. *Existing Facilities/Barriers to Entry.* Where market share and concentration data suggest the potential for competition concerns, we examine the number, class, and signal contour of all existing stations in the radio market to determine their competitive significance. We recognize that there may be AM and FM facilities with good capacity, albeit low current advertising revenues, and our analysis considers the potential for these stations to provide effective competition in the future. In some cases there may be a sufficient number of such facilities remaining outside the largest group's (or two largest groups') control to provide a competitive challenge. That is not the case here. If this transaction were approved, in the Beaumont metro there would be seven commercial radio stations -- all in the AM service and each individually owned -- that would not be controlled or operated by the two largest groups.<sup>67</sup> The stations include five Class B stations, one Class C station, and one Class D station. According to the most recent BIA database, only two of these stations have reported listenership and only three have any estimated revenues. Based on this record, it is unlikely that any of these stations will offer a viable competitive challenge in the future.

30. We also consider evidence regarding the possibility of entry by new stations, as well as any barriers to entry, and the timeliness, likelihood, and sufficiency of entry to counter any potential market power. In other words, we will examine whether new stations or stations that are not currently market participants would be able and likely to enter the market and prevent a price increase or other anticompetitive actions. Clear Channel generally argues that radio stations are subject to changes in a variety of ways. Accordingly, Clear Channel states, it is impossible to predict what further modifications might be possible or what opportunities for entry might arise in the future.<sup>68</sup> Based on our review of the record, we conclude that while there is in theory some possibility of entry into a market, there is no evidence that any entry is likely to occur here or that it would be sufficient to be able to counteract any anticompetitive effects that might result from the assignment of KCOL-FM to Clear Channel.<sup>69</sup>

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<sup>63</sup> Clear Channel Letter at 5.

<sup>64</sup> See *supra* ¶¶ 18-19.

<sup>65</sup> See *supra* ¶¶ 20-22.

<sup>66</sup> *FTC v. Heinz*, 246 F.3d 708, 716 (D.C. Cir. 2001).

<sup>67</sup> In addition to owning four stations outright, Cumulus currently operates KAYD-FM pursuant to an LMA and is seeking approval to purchase the station, as noted above.

<sup>68</sup> Clear Channel Letter at 6.

<sup>69</sup> As discussed below, Clear Channel also argues -- in the context of unilateral and coordinated effects -- that stations can easily change format and that, therefore, format is not a barrier to mobility. As Clear Channel

31. *Potential Adverse Competitive Effects: Unilateral Effects and Coordinated Effects.* Under the interim policy, relevant evidence concerning the potential adverse competitive effects of a proposed transaction may include direct proof of adverse competitive effects or facts that demonstrate that structural conditions (e.g., a high market share and significant barriers to entry) will facilitate the exercise of market power. In evaluating the potential adverse competitive effects of a proposed transaction, under the interim policy, we also consider the effect on competition, if any, that may have resulted from a pre-existing LMA or joint sales agreement (“JSA”) between the applicants.

32. Clear Channel contends that the acquisition of KCOL-FM will have no competitive effect because Clear Channel already programs and sells the commercial advertising of KCOL-FM through an LMA.<sup>70</sup> Clear Channel states that regardless whether it sells advertising as the station’s owner or through an LMA, its sales decisions and pricing power remain the same.<sup>71</sup> Clear Channel also asserts that it has not used its supposed market power to raise rates “in an anticompetitive fashion.” In fact, Clear Channel states, advertising rates on Clear Channel’s Beaumont stations have remained relatively constant since the LMA went into effect.<sup>72</sup> We are not persuaded by these arguments. This is the first opportunity the Commission will have had to consider any anticompetitive effects because we do not currently review LMAs when they are executed. There is no substantial evidence on the record in this case from which we might conclude that no adverse effects have resulted from the aggregation of economic power attributable to Clear Channel’s LMA relationship. For example, Clear Channel also notes that advertising rates depend on the economy,<sup>73</sup> and Clear Channel does not state whether radio advertising rates have remained steady in similar markets or have, in fact, decreased as the economy worsened.<sup>74</sup>

33. Clear Channel argues that concerns about coordinated behavior between radio owners are misplaced.<sup>75</sup> Clear Channel argues that radio is a differentiated product, and that therefore any anticompetitive effects are likely to result from unilateral action, not coordination among stations.<sup>76</sup> Moreover, Clear Channel asserts that empirical data show that barriers to mobility do not exist, because radio stations can change format easily, and thus any station’s attempt to raise prices would be met by a format change.<sup>77</sup> Clear Channel provides no data or argument, however, specific to the Beaumont market. As stated above, we will address Clear Channel’s general arguments in the pending rulemaking proceeding.<sup>78</sup>

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recognizes, however, the question at issue here is whether new stations can enter the market, not whether existing facilities can “enter” a different demographic market by changing format.

<sup>70</sup> Clear Channel Letter at 5.

<sup>71</sup> *Id.* at 5.

<sup>72</sup> *Id.* at 6.

<sup>73</sup> *Id.*, Declaration of Vesta Brandt ¶ 6.

<sup>74</sup> Moreover, Clear Channel’s stated failure to raise rates in an anticompetitive fashion during the pendency of its application does not negate the possibility that it would be able to take anticompetitive actions after the transaction is approved.

<sup>75</sup> Clear Channel Letter at 5-6.

<sup>76</sup> *Id.*; Hausman Statements.

<sup>77</sup> Clear Channel Letter at 6; Hausman Statements.

<sup>78</sup> *Local Radio Ownership NPRM*, 16 FCC Rcd at 19882-84 ¶¶ 47, 50.

34. Clear Channel's acquisition of KCOL-FM would give Clear Channel control of the highest rated independent radio station in the Beaumont metro. It would entrench what is essentially a duopoly in the Beaumont metro. The market is highly concentrated and, as noted above, there is no evidence that entry sufficient to restrain anticompetitive behavior is likely. This market structure increases the risk of coordinated behavior leading to inefficient price discrimination, division of advertising accounts, and lower quality programming. As the D.C. Circuit has stated, "[t]he combination of a concentrated market and barriers to entry is a recipe for price coordination. Where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to . . . achieve profits above competitive levels. The creation of a durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices. . . . Tacit coordination 'is feared by antitrust policy even more than explicit collusion, for tacit coordination, even when observed, cannot be easily controlled directly by the antitrust laws. It is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur.'"<sup>79</sup>

35. *Efficiencies and Public Interest Benefits.* Under the interim policy, we consider evidence of economic efficiencies that the proposed transaction would produce and public interest benefits the proposed transaction would provide for listeners or advertisers, such as improvements in the quality, scope, and quantity of community responsive programming, improved community service, and the furtherance of localism. Parties asserting that a proposed transaction will produce efficiencies and other public interest benefits are required to show both how the transaction will produce those benefits and how those benefits will flow through to listeners or advertisers. To be cognizable, efficiencies must be *transaction specific, i.e.*, "efficiencies likely to be accomplished with the proposed transaction and unlikely to be accomplished in the absence of either the proposed transaction or another means having comparable anticompetitive effects."<sup>80</sup> Any claimed efficiencies resulting from a radio transaction should be substantiated and susceptible to verification by the Commission. Efficiencies that are vague, speculative, and unverifiable will not be considered in evaluating the competitive effects of the proposed transaction. Transaction-specific efficiencies that lower the marginal cost of production relative to one-time reductions in fixed costs are weighted much more heavily than fixed cost reductions as possible offsets to potential adverse effects on listeners and advertisers resulting from the transaction. Transaction-specific efficiencies that lower the marginal cost of production are likely to flow-through as benefits to listeners and advertisers in the form of improved programming and lower advertising prices, while reductions in fixed costs will not provide the same financial incentive for such flow-through of benefits. Any profit-maximizing firm, including a monopolist, will reduce the price of output in response to a reduction in the marginal cost of production. Reductions in fixed cost for the same firm will provide no incentive for such reductions in output price that would otherwise flow through transaction-specific benefits to listeners and advertisers.

36. Clear Channel cites a number of efficiencies and public interest benefits that will result from its operation and ownership of KCOL-FM. Clear Channel contends that the acquisition will result in operating efficiencies through the sharing of facilities, engineering and administrative personnel, and the consolidation of accounting, traffic and receptionist duties. It estimates that total savings are approximately \$16,000 per month.<sup>81</sup> Clear Channel also argues that advertisers will receive (and through

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<sup>79</sup> *FTC v. Heinz*, 246 F.3d at 724-25 (quoting 4 Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law*, ¶ 901b2 at 9 (rev. ed. 1998)) (other quotations and citations omitted).

<sup>80</sup> See *Horizontal Merger Guidelines*, Section 4.

<sup>81</sup> Clear Channel Letter at 6.

the LMA have received) a better product for the same price. It claims that the acquisition will allow advertisers to receive a high quality advertising product not typically delivered in a small market: the Beaumont stations can call upon Clear Channel's vast expertise in developing advertising product, and advertisers have the option of using "big-market talent" to produce their spots.<sup>82</sup> Clear Channel also asserts that news and weather coverage will improve on KCOL-FM because the station has access to the Clear Channel cluster of stations.<sup>83</sup> For example, the morning drive time personality on KCOL-FM now uses information from Clear Channel's news/talk station in Beaumont. KCOL-FM also shares the cost of a full-time weather reporter, which Clear Channel asserts provides a valuable service especially during hurricane season.<sup>84</sup> Finally, Clear Channel states that it has been very active in the local community, and that KCOL-FM now is involved in Clear Channel's community activities.<sup>85</sup> Clear Channel appears to be using its current LMA arrangement with KCOL-FM to realize cost savings (at least some of which are savings of marginal costs) and to invest in programming and improved equipment. We find that the transaction would provide some public benefits. At the same time, the potential competitive harms here are substantial. We find the record in this proceeding insufficient to enable us to conclude that the claimed public interest benefits and efficiencies of this transaction outweigh the potential for competitive harm.

#### IV. CONCLUSION

37. On the basis of the information before us, as explained above, we are unable to make the required finding that the public interest, convenience and necessity will be served by granting the above-captioned application in light of the questions raised in the context of our competition analysis. Accordingly, we will designate the assignment application for hearing to determine, pursuant to Section 309(e) of the Communications Act, and based on the evidence to be adduced at hearing, whether the public interest, convenience and necessity will be served by the grant of the application.

#### V. ISSUES TO BE DETERMINED AT HEARING

38. Implementing our analytical framework described in the foregoing paragraphs, we direct the Administrative Law Judge ("ALJ") to examine in an evidentiary hearing the particular circumstances of the Beaumont-Port Arthur, Texas metro to determine whether the factual assumptions in Section III.C. above are correct. We further direct the ALJ to determine, in light of his or her conclusions, whether the transaction is likely to cause any anticompetitive harms, and to determine what, if any, public benefits would accrue from this transaction. Finally, we direct the ALJ to apply these findings to determine whether, on balance, grant of the application would serve the public interest. The ALJ should address the following specific issues.

39. Issue 1: *Product Market Definition*. Following our analytical framework and the *Horizontal Merger Guidelines*, the ALJ shall receive testimony, studies, and other relevant economic evidence that allows the determination of the relevant commercial radio product in the Beaumont metro. In the alternative, parties may stipulate that the relevant product market is "radio advertising," the presumptive product market definition in our analytical framework.

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<sup>82</sup> *Id.* at 6-7.

<sup>83</sup> *Id.* at 1.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 2.

40. Issue 2: *Geographic Market Definition*. Following our analytical framework and the *Horizontal Merger Guidelines*, the ALJ shall receive testimony, studies, and other relevant economic evidence that allows the determination of the relevant commercial radio geographic market. In the alternative, parties may stipulate that the relevant geographic market is the Beaumont metro.

41. Issue 3: *Market Participants*. Given the findings with respect to Issues 1 and 2, the ALJ shall receive testimony and other relevant economic evidence that identifies all firms that participate in the relevant product and geographic markets. Following the general methodology prescribed in the *Horizontal Merger Guidelines*, firms not currently producing or selling the relevant product in the relevant geographic market may be included if their inclusion reflects a probable supply response in reaction to a hypothetical increase in the price of the relevant product. Such firms are “uncommitted entrants” and may be induced to enter the relevant product and geographic markets within one year and without the expenditure of significant sunk costs of entry and exit in response to a small but significant and non-transitory increase in the price of the relevant product. If the parties stipulate that the relevant product and geographic markets are “radio advertising” and the “Arbitron metro,” respectively, then market participants would include all operating commercial radio stations in the Beaumont metro plus any “dark” stations that might be expected to become operational in response to a small but significant and non-transitory increase in the price of radio advertising.

42. Issue 4: *Market Shares*. The ALJ shall receive testimony or other economic evidence that will facilitate the calculation of market shares for all firms identified as market participants (see Issue 3) based on total sales generated within the relevant geographic market for the most recent year for which data are available. If uncommitted entrants may be expected to enter within a year, in response to a small but significant and non-transitory price increase in the relevant product, then such forecast market shares may also be included. In the alternative, parties may stipulate that market shares will be calculated using the most recent revenue data available in the BIA database.

43. Issue 5: *Market Concentration*. The extent of market concentration depends on the number of firms in the market and their respective market shares. Our analytical framework 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. The ALJ shall receive testimony, studies, or other relevant economic evidence to determine the appropriate measure of market concentration in the Beaumont metro. In the alternative, the parties may stipulate that the market shares developed in the record pursuant to Issue 4 will be taken as the indicator of market concentration.

44. Issue 6: *Potential Adverse Competitive Effects*. Following our analytical framework and the *Horizontal Merger Guidelines*, the ALJ shall receive testimony, studies and other relevant economic evidence that evaluates the nature and extent of any lessening of competition that might result from the transaction in the relevant product and geographic markets. 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-transaction firm should be developed. Both the examination of the issue and the ALJ’s opinion will be informed by the findings developed with respect to Issues 1-5.

45. Issue 7: *Conditions of Entry*. The ALJ shall receive testimony, studies, and other relevant economic evidence concerning the conditions of entry into the relevant product and geographic markets in the Beaumont metro. A transaction is unlikely to create or enhance market power, or facilitate its exercise, if entry into the radio market is sufficiently easy such that market participants, following the transaction, could not profitably maintain an increase in the price of the relevant product following the transaction. In general, the development of the record addressing conditions of entry in the Beaumont

metro should follow our analytical framework and the *Horizontal Merger Guidelines*. Thus, evidence concerning the timeliness, likelihood, and sufficiency of entry in the Beaumont metro are essential to reaching a judgment with respect to the efficacy of market entry as a way to offset potential adverse competitive effects that may be identified in the record pursuant to Issue 6. In the alternative, parties may stipulate that entry is so difficult such that it is unreasonable to view it as a factor that may have significant effect as an offset to any increase in market power resulting from the transaction.

46. Issue 8: *Efficiencies*. The ALJ shall receive testimony, studies, and other relevant economic evidence with respect to possible efficiencies that the transaction may produce. In general, the record on efficiencies must show that such efficiencies are both transaction-specific and cognizable as indicated in our analytical framework and the *Horizontal Merger Guidelines*.

47. Issue 9: *Public Interest Benefits*. The ALJ shall receive testimony, studies, and other relevant evidence that documents public interest benefits that the instant transaction will provide listeners and advertisers in the Beaumont metro. Such public interest benefits shall be in addition to efficiencies, if any, documented in the record pursuant to Issue 8 and must be benefits that would not otherwise be realized but for the instant transaction. To count as a public interest benefit, efficiencies must be shown to “flow through” in a measurable way to listeners or advertisers or both. Public interest benefits other than efficiencies may include improvements in the quality, scope, and quantity of community-responsive programming; improved community service; and other commitments to strengthen programming and advertising services that support our long-standing policy of localism in broadcasting. The record on this issue should be of sufficient scope and specificity to enable the ALJ to reach a judgment whether the public interest benefits specific to the transaction are sufficiently certain to result from the transaction and quantitatively and qualitatively substantial enough to offset the adverse effects, if any, of the transaction on competition in the Beaumont metro.

## VI. ORDERING CLAUSES

48. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act, the application to assign the license of station KCOL-FM, Groves, Texas, from Voice in the Wilderness Broadcasting, Inc. to Clear Channel Broadcasting Licenses, Inc. IS DESIGNATED FOR HEARING. Unless the parties timely file the joint election to defer as set forth in Paragraph 51 below, the hearing shall be at a time and place to be specified in a subsequent Order, on the following issue:

To determine, in light of the evidence to be presented in the hearing, whether the public interest, convenience and necessity would be served by the grant of the above-captioned assignment application (File No. BALH-20010814AAU).

49. IT IS FURTHER ORDERED, That pursuant to Section 309(e) of the Communications Act, the burden of proof with respect to both the introduction of evidence and the issue specified in this Order shall be upon Voice in the Wilderness and Clear Channel, the applicant parties in this proceeding.

50. IT IS FURTHER ORDERED, That the Commission’s Consumer and Government Affairs Bureau, Reference Information Center, SHALL SEND copies of this Order to all parties by certified mail, return receipt requested.

51. IT IS FURTHER ORDERED, That, in the event the parties elect to defer further consideration of the application to assign the license of Station KCOL-FM, Groves, Texas, from Voice in the Wilderness Broadcasting, Inc. to Clear Channel Broadcasting Licenses, Inc. in accordance with the

interim policy, Voice in the Wilderness and Clear Channel SHALL FILE a joint election to defer consideration of the application. Such election SHALL BE FILED within 20 days of the mailing of this Order pursuant to Paragraph 50 above.

52. IT IS FURTHER ORDERED, That within 15 days of the mailing of this Order pursuant to Paragraph 50 above, the parties may amend their application or file such other information with the Media Bureau as they deem relevant to ameliorate the competition concerns identified in this Order.

53. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, Voice in the Wilderness and Clear Channel, pursuant to Sections 1.221(c) and 1.221(e) of the Commission's Rules, in person or by their respective attorneys, SHALL FILE in triplicate, A WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Such written appearance shall be filed within 20 days of the mailing of this Order pursuant to Paragraph 50 above. Pursuant to Section 1.221(c) of the Commission's rules, if the parties fail to file an appearance within the specified time period, the assignment application will be dismissed with prejudice for failure to prosecute.

54. IT IS FURTHER ORDERED, That the applicants, pursuant to Section 311(a)(2) of the Communications Act and Section 73.3594 of the Commission's rules, SHALL GIVE NOTICE of the hearing within the time and in the manner prescribed, and SHALL ADVISE the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's rules.

55. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order SHALL BE SERVED on the counsel of record appearing on behalf of the Chief, Enforcement Bureau. Parties may inquire as to the identity of such counsel by calling the Investigations and Hearings Division of the Enforcement Bureau at (202) 418-1420. Such service SHALL BE ADDRESSED to the named counsel of record, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 3-B431, Washington, D.C. 20554.

56. IT IS FURTHER ORDERED, That the application to assign the license for station KCOL-FM, Groves, Texas, from Voice in the Wilderness Broadcasting, Inc. to Clear Channel Broadcasting Licenses, Inc. WILL BE HELD IN ABEYANCE PENDING THE OUTCOME OF THIS PROCEEDING.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary