

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

In The Matter of The Application of)	
)	
Whitehall Enterprises, Inc.)	
Assignor)	MB Docket No. 02-284
)	
And)	
)	File No. BAL-20010817AAH
Clear Channel Broadcasting Licenses, Inc.)	
Assignee)	
)	Facility ID No. 72276
For Consent to Assignment of License of)	
WAAM(AM), Ann Arbor, MI)	

HEARING DESIGNATION ORDER

Adopted: September 16, 2002

Released: September 18, 2002

By the Commission:

1. In this order, we consider the unopposed, above-captioned application to assign the license of station WAAM(AM), Ann Arbor, Michigan, from Whitehall Enterprises, Inc. (“Whitehall”) to Clear Channel Broadcasting Licenses, Inc. (“Clear Channel”). Because the application was pending when we adopted the Notice of Proposed Rulemaking in MM Docket No. 01-317, we consider the competition concerns raised by the application pursuant to the interim policy adopted in that notice.¹ 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”),² we hereby designate the application for hearing.

I. INTRODUCTION

2. For much of its history, the Commission has sought to promote diversity and competition in broadcasting by limiting the number of radio stations a single party could own or acquire in a local market.³ In March 1996, the Commission relaxed the numerical station limits in its local radio ownership rules in accordance with Congress’s directive in Section 202(b) of the Telecommunications Act of 1996.⁴ 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

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 See *Local Radio Ownership NPRM*, 16 FCC Rcd at 19862-70 ¶¶ 3-18.

⁴ 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).

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.”⁵ 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.⁶ 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.⁷ 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.⁸

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.⁹ 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.”¹⁰ 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 *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).

⁶ See Public Notice, Broadcast Applications, Report No. 24303 (Aug. 12, 1998).

⁷ See *AMFM, Inc.*, 15 FCC Rcd 16062, 16066 ¶ 7 n.10 (2000).

⁸ 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.

⁹ *Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 19.

¹⁰ *Id.*

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.”¹¹ 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.¹²

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.¹³ 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 17, 2001, the applicants filed the above-captioned application to assign the license of station WAAM(AM) from Whitehall to Clear Channel. Clear Channel currently sells the advertising on WAAM(AM) pursuant to a December 2001 Joint Sales Agreement (“JSA”). Clear Channel is currently the licensee of four stations in the Ann Arbor, Michigan Arbitron metro (“Ann Arbor metro”):¹⁴ WCAS(AM), Saline, Michigan,¹⁵ and WQKL(FM), WTKA(AM), and WWWW(FM), Ann Arbor, Michigan. Through its proposed acquisition of WAAM(AM), Clear Channel would own three AM stations and two FM stations in the Ann Arbor metro.

8. On September 4, 2001, the Commission issued a public notice indicating that the subject application had been accepted for filing.¹⁶ The public notice also “flagged” the application pursuant to the Commission’s “50/70” screen. Based on Year 2001 revenue estimates from the BIA database,¹⁷ the five stations that Clear Channel proposes to own account for a 94.9 percent revenue share in the Ann Arbor metro. Post-consummation, Clear Channel and Ave Marie Foundation¹⁸ would collectively control 99.0 percent of the advertising revenue in the Ann Arbor metro. These figures indicate that Clear Channel essentially would have a monopoly position in the Ann Arbor metro.

¹¹ *Id.* at 19894 ¶ 84.

¹² *Id.*

¹³ *Id.* at 19895 ¶ 86.

¹⁴ 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.

¹⁵ The WCAS(AM) call sign was recently changed to WHNE(AM), effective July 5, 2002. For consistency, this document will use the former call sign WCAS(AM).

¹⁶ See Public Notice, Broadcast Applications, Report No. 25062 (rel. September 4, 2001).

¹⁷ 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 August 22, 2002.

¹⁸ BIA identifies Ave Marie Foundation as the owner of one station, WDEO(AM), Ann Arbor, Michigan, in the Ann Arbor metro. Commission records show that the licensee of WDEO(AM) is Word Broadcasters, Inc. Throughout this *Order*, we use the BIA data.

9. No comments were filed in response to the public notice that flagged the above-captioned application. On January 29, 2002, the staff sent an inquiry letter, providing Whitehall and Clear Channel an opportunity to update the record in light of the interim policy and any competitive changes that might have occurred in the Ann Arbor market.¹⁹ Clear Channel responded by letter dated February 19, 2002.²⁰

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 Whitehall's radio broadcast license to Clear Channel before the assignment may occur.²¹ 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.²²

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 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.²³

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,²⁴ our focus is different.²⁵ Our analysis of radio license assignments is informed by

¹⁹ Letter from Peter H. Doyle, Chief, Audio Services Division, Mass Media Bureau, to Christopher L. Robbins, Esq., *et al.* (dated January 29, 2002).

²⁰ Letter from Christopher L. Robbins, Esq., Counsel for Clear Channel Broadcasting Licenses, Inc., to Peter H. Doyle, Chief, Audio Services Division, Mass Media Bureau (dated February 19, 2002) ("Clear Channel Response").

²¹ 47 U.S.C. § 310(d).

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

²³ *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").

²⁴ 15 U.S.C. § 18.

²⁵ 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 FCC v. 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

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."²⁶ 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.²⁷ 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,²⁸ and whether it will result in the provision of new or additional services to listeners.²⁹

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 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.³⁰ 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.³¹ 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

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.").

²⁶ 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*").

²⁷ 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)).

²⁸ 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).

²⁹ See, e.g., *Worldcom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9.

³⁰ 47 C.F.R. § 73.3555(a).

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

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.³²

15. We find that Clear Channel's proposed acquisition of WAAM(AM) 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,"³³ the transaction creates five radio markets which are each comprised of at least 63 radio stations. Therefore, in each of these markets, a single licensee may own up to eight stations, not more than five of which are in the same service (AM or FM).³⁴ If the proposed transaction is approved and consummated, Clear Channel will own 6 stations (4 AM/2 FM) in Market 1; 6 stations (3 AM/3 FM) in Market 2; 7 stations (4 AM/3 FM) in Market 3; 8 stations (4 AM/4 FM) in Market 4; and 8 stations (3 AM/5 FM) in Market 5. The proposed 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 to our competition analysis. Here, we find that the proposed transaction would create a market in which Clear Channel's share of the local radio advertising market would be 94.9 percent, and the combined market share of the top two group owners in the market, Clear Channel and Ave Marie Foundation, would be 99.0 percent. Clear Channel's post-transaction revenue share indicates Clear Channel essentially would have a monopoly position in the Ann Arbor metro with the potential unilaterally to increase local advertising rates. 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 determine whether there are facts unique to this transaction which 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 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.³⁵ Standard competition analysis provides that where there is price discrimination, we look at those buyers that do not consider other media to be

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

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

³⁴ 47 C.F.R. § 73.3555(a)(1).

³⁵ *Local Radio Ownership NPRM*, 16 FCC Rcd at 19895 ¶ 86.

good substitutes for radio advertising.³⁶ 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.³⁷ Clear Channel “stresses that all of its radio stations face vigorous competition for advertising revenues from all media, not just other radio stations.”³⁸ However, Clear Channel provides no evidence to support its assertion that the relevant product market is broader than radio advertising in the Ann Arbor metro. Accordingly, 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. Determining the relevant geographic market may be complicated in a product market such as radio advertising, where individually negotiated contracts facilitate price discrimination.³⁹ Therefore, 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 “Arbitron market areas are arbitrarily drawn and do not accurately reflect the geographical areas in which Clear Channel’s stations compete for advertising revenue.”⁴⁰ Clear Channel states that this is especially true for Ann Arbor, which is more properly considered as part of the larger Detroit market.⁴¹

20. We treat as a geographic market an area where radio advertisers who seek to reach the listening audience only in that area will likely face the same competitive alternatives. We believe that, in most cases, the Arbitron metro, or its functional equivalent, is the relevant geographic market for assessing the competitive effects of a proposed transaction.⁴² To date, we have consistently used this market definition in evaluating the competitive effects of radio mergers.⁴³ While Clear Channel challenges the presumption that the Arbitron metro is the relevant geographic market for conducting the instant analysis and argues that Ann Arbor is part of the larger Detroit market, it offers no specific evidence that advertisers desiring to reach listeners only in the Ann Arbor metro would use Detroit or other out-of-

³⁶ See, e.g., *Horizontal Merger Guidelines*, issued by U.S. Department of Justice & Federal Trade Commission, April 2, 1992, revised April 8, 1997, §§ 1.1, 1.12 (“*Horizontal Merger Guidelines*”). Staff and the United States Department of Justice (“DOJ”) analysis of radio transactions suggests that existing buyers of radio advertising differ significantly in their likelihood of switching to other media in response to a “small but significant and non-transitory” price increase for radio advertising.

³⁷ Clear Channel Response at 2.

³⁸ *Id.*

³⁹ See *Horizontal Merger Guidelines* § 1.22.

⁴⁰ Clear Channel Response at 2.

⁴¹ *Id.*

⁴² Our presumption regarding the Arbitron metro is consistent with the approach taken by the antitrust authorities. The DOJ has, in reviewing radio mergers, generally relied on the Arbitron metro as the appropriate geographic market. The DOJ recognized that stations outside Arbitron metros achieve listening share within the Arbitron metro and that firms within an Arbitron metro advertise on stations in adjacent Arbitron metros. While these observations suggest that some competition for radio advertising may extend beyond the geographic area defined by the Arbitron metro, the DOJ has consistently decided that stations outside the Arbitron metro would not provide effective competition in the local advertising market.

⁴³ Use of this definition appears consistent with the three factors that we believe are particularly critical in determining a relevant geographic market, namely, (1) industry recognition, (2) geographic coverage of broadcast signals, and (3) customer demand.

market stations for this purpose. Clear Channel also contends that some Detroit metro radio stations compete for advertising in Ann Arbor.⁴⁴ While we address this issue in more detail in the following section, participation of some Detroit stations in the Ann Arbor metro does not by itself establish that the relevant geographic market is part of the larger Detroit metro. Businesses that view listeners in the Ann Arbor metro - but not those in the Detroit metro - to be potential customers may not consider most out-of-market stations to be good substitutes for stations home to the Ann Arbor metro. Additionally, most stations that are home to the Detroit metro likely charge rates significantly higher than the rates charged by stations home to the Ann Arbor metro. Under these circumstances, we find no persuasive reason to vary from the interim policy presumption that the Arbitron metro represents the appropriate geographic market.

21. *Market Participants.* Current BIA data show that seven commercial and three noncommercial stations have their home market in the Ann Arbor metro. This includes, in addition to Clear Channel's four stations, and WAAM(AM) for which Clear Channel has a JSA, the following two commercial band radio stations: (1) WDEO(AM), Ypsilanti, Michigan, owned by Ave Marie Foundation,⁴⁵ and (2) WSDS(AM), Salem Township, Michigan, owned by Koch Broadcasting Corp. The three noncommercial educational stations listed in the Ann Arbor metro are: WCBN-FM and WUOM(FM), Ann Arbor, Michigan, both owned by the University of Michigan, and WEMU(FM), Ypsilanti, Michigan, owned by Eastern Michigan University. BIA lists 33 out-of-market stations that have historically received some listenership in the Ann Arbor metro (although their current audience share may be zero), four of which are Canadian stations. Only 23 of these out-of-market stations have a reportable audience share in the current rating period in the Ann Arbor metro and Clear Channel owns eight of them. Of these eight, six are located in the Detroit metro and two are located in the Toledo, Ohio metro. The out-of-market stations not home to the Detroit metro are either owned by Clear Channel or have no audience share in the Ann Arbor metro.

22. Clear Channel asserts that BIA does not provide an accurate list of market participants and that the Commission should not restrict its competition analysis to stations listed as home to the Ann Arbor market. Clear Channel states that a substantial number of people in the Ann Arbor market listen to radio stations that are home to a different market, most notably Detroit.⁴⁶ Clear Channel states that 26 Detroit metro stations have listeners in the Ann Arbor metro.⁴⁷ Clear Channel further contends that three Detroit metro stations have an Ann Arbor listening share that is higher than the highest-rated station home to the Ann Arbor metro, Clear Channel's WWWW(FM).⁴⁸ In addition, Clear Channel notes that two other Detroit metro stations, including one Canadian station, have a listening share higher than Clear Channel's WQKL(FM), the second highest-rated Ann Arbor home station.⁴⁹ Clear Channel contends that three of its Ann Arbor stations, WTKA(AM), WQKL(FM) and WWWW(FM), have a larger audience outside of the Ann Arbor metro than within it.⁵⁰ Clear Channel maintains that some Detroit metro stations that have

⁴⁴ Clear Channel Response at 3 and Declaration of Ray Nelson, Market Manager for Clear Channel's Ann Arbor stations, at ¶3 ("Nelson Declaration").

⁴⁵ As noted *supra* note 18, the Commission's database lists Word Broadcasters, Inc. as the licensee of WDEO(AM).

⁴⁶ Clear Channel Response at 2-3.

⁴⁷ *Id.* at 3. While Clear Channel describes these 26 stations as having a reportable listening share in Ann Arbor, they have apparently included stations with a current audience share of zero. *See supra* ¶ 21.

⁴⁸ Clear Channel Response at 3.

⁴⁹ *Id.*

⁵⁰ Clear Channel states that three of its Ann Arbor stations have a Monday-Sunday persons 12+ "cume" (an Arbitron term for the estimated number of persons who listen to a station a minimum of 5 minutes in a quarter hour within the

a significant audience share in Ann Arbor garner advertising revenue there as well. Clear Channel estimates that the Detroit metro stations having the greatest impact in the Ann Arbor metro collect approximately \$2.475 million from Ann Arbor advertisers.⁵¹ The declaration of Clear Channel's market manager for its Ann Arbor stations, Ray Nelson ("Nelson Declaration"), identifies three other stations that, "although they do not meet the minimums to be listed in the Ann Arbor Arbitron, do, in fact, sell commercial time" in the Ann Arbor metro.⁵²

23. A radio station may participate in a market even if its city of license is located outside of the counties that make up the market, as long as the station's advertising customer base, contours, listening audience, and other relevant factors indicate that it "currently produces or sells" in the relevant market or is an "uncommitted entrant" in that market.⁵³ Here, assuming a single firm monopolized the radio advertising market in the Ann Arbor metro and raised its prices, the evidence suggests that certain types of advertisers, predominantly regional and national advertisers, may find certain out-of-market radio stations, particularly certain Detroit stations, to be sufficient alternatives.⁵⁴ A large majority of the Ann Arbor audience listens to out-of-market stations.⁵⁵ As such, it is not likely that an attempt by a radio station in the Ann Arbor metro to charge regional or national radio advertisers supracompetitive prices would be profitable. Such advertisers are not dependent on Ann Arbor radio stations to reach their target audience, which is not limited to customers in the Ann Arbor metro, and out-of-market stations may be sufficient alternatives for them. On the other hand, local Ann Arbor advertisers, *i.e.*, those seeking to focus their advertising on potential customers located in the Ann Arbor metro, would likely not find most Detroit stations acceptable alternatives, because these advertisers would have to pay significantly higher rates and would not reach a significantly larger share of their target audience.

24. Staff analysis suggests that Detroit stations that also have a significant audience in the Ann Arbor metro would likely charge significantly higher rates than Ann Arbor stations for delivering Ann Arbor audiences. For example, WJR(AM), home to the Detroit metro, has a relatively large Ann Arbor audience but Ann Arbor residents make up less than 10 percent of the station's total audience. Similarly, Ann Arbor listeners make up less than five percent of out-of-market station WWJ(AM)'s total audience. None of the out-of-market stations identified by Clear Channel or the Nelson Declaration has a large (greater than 20 percent) share of its audience in Ann Arbor. Conversely, based on Fall 2001 ratings information, none of the Ann Arbor metro stations has a reportable share in any metro other than the Ann Arbor metro. Therefore, while some Ann Arbor advertisers may be willing to pay high advertising rates to advertise on Detroit metro stations in order to reach large audiences in Detroit, Ann Arbor, and

rated market (cumulative or unduplicated estimates)) of 60,100 in Ann Arbor and a cume of 159,400 in the Detroit market based on Spring 2001 ratings. *Id.*

⁵¹ Specifically, according to Clear Channel, revenue estimates for Detroit stations in the Ann Arbor metro are as follows: WJR(AM), \$700,000; WWJ(AM), \$650,000; WYCD(FM), \$250,000; WRIF(FM), \$250,000; WDTJ(FM), \$100,000; WOMC(FM), \$125,000; WXYT(AM), \$100,000 and CIMX(FM), \$300,000. Nelson Declaration ¶ 3.

⁵² WHMI-FM, WQTE(FM) and WKHM(AM) are identified as potential market participants. Nelson Declaration ¶ 3.

⁵³ See *Horizontal Merger Guidelines* §§ 1.31, 1.32. Under the *Horizontal Merger Guidelines*, an uncommitted entrant is a firm that is likely to enter the market "within one year and without the expenditure of significant sunk costs of entry and exit, in response to a 'small but significant and nontransitory' price increase." *Id.* § 1.32.

⁵⁴ We note that the Ann Arbor metro is located adjacent to and partially surrounded by the Detroit metro.

⁵⁵ In-market commercial stations account for approximately 10.4% of the total Ann Arbor listenership. Out-of-market commercial stations account for approximately 60% of the total Ann Arbor listenership. Noncommercial stations, which are not rated by Arbitron, and/or commercial stations that do not receive sufficient listenership to be rated by Arbitron, may account for the remaining Ann Arbor audience share.

surrounding areas, most local Ann Arbor advertisers would not find large, Detroit metro stations to be adequate substitutes for smaller Ann Arbor stations.

25. The Nelson Declaration asserts that “many Detroit radio stations have sales teams dedicated to selling commercial time in Ann Arbor.”⁵⁶ Clear Channel and Nelson, however, supply no evidence to support this assertion. They provide no information concerning the amount of advertising broadcast, the rates, or the advertising strategies employed by the out-of-market stations. Nor do they identify any local advertisers using Detroit metro stations. Recent Arbitron audience information identifies eight Clear Channel out-of-market stations that receive a reportable listening share in the Ann Arbor metro. Yet Clear Channel provides no information regarding the level at which these stations participate in the Ann Arbor advertising market nor revenue estimates for these stations. Presumably, Clear Channel would possess the relevant information regarding its own stations’ participation in the Ann Arbor metro. That these stations were not included in Clear Channel’s response suggests that they and, similarly, other out-of-market stations, do not significantly meet the needs of local Ann Arbor advertisers. Given the likelihood of higher advertising rates on out-of-market stations and the other factors discussed above, we find no persuasive reason to vary from the market participants identified by BIA.

26. *Market Share and Market Concentration.* Under the interim policy, we presume the BIA revenue share estimates accurately reflect actual market shares. According to BIA, radio stations that are home to the Ann Arbor metro generated \$4,900,000 in radio advertising revenues in 2001. Using BIA data, the market structure in the Ann Arbor metro is as follows:⁵⁷

	Market Revenue	Market Share	In-Market Audience Share ⁵⁸
Clear Channel	\$4,225,000	86.2%	84.6%
WAAM(AM)	\$ 425,000	8.7%	15.4%
	\$4,650,000	94.9%	100%
Ave Marie Foundation	\$ 200,000	4.1%	0%
<u>Koch Broadcasting Corp.</u>	<u>\$ 50,000</u>	<u>1.0%</u>	<u>0%</u>
Total market revenue	\$4,900,000	100%	100%

27. Our competition analysis using BIA data shows that the proposed transaction would increase Clear Channel’s market share of the radio advertising revenues in the Ann Arbor metro from 86.2 percent to 94.9 percent, and Clear Channel’s in-market listening share increases from 84.6 percent to 100 percent. Clear Channel’s proposed acquisition of WAAM(AM) would eliminate Clear Channel’s largest competitor: among the independent stations in the metro, WAAM(AM) has the most advertising revenues and audience share. The proposed transaction would also result in the top two owners (Clear Channel and Ave Marie Foundation) having a combined share of 99.0 percent of the in-market advertising revenues.

28. Clear Channel argues that BIA’s estimates are unreliable, noting that BIA gave the Ann Arbor market a one-star “cautious confidence” rating because the estimates were based only on BIA’s sources.⁵⁹ Clear Channel states that the actual revenue garnered by Clear Channel’s existing cluster of

⁵⁶ Nelson Declaration ¶ 3.

⁵⁷ Reserved band noncommercial radio stations are not included in the chart.

⁵⁸ See *supra* note 55.

⁵⁹ Clear Channel Response at 4.

stations in Ann Arbor in 2000 was \$3.5 million, rather than the higher estimate provided by BIA of \$4.8 million.⁶⁰ For purposes of this order, we refer to Year 2001 BIA data. Even when applying Year 2000 BIA data and Clear Channel's reported figures for that year, however, Clear Channel's post-transaction market share would be 93.9 percent.

29. Clear Channel also states that BIA's method of counting a station's revenue only in its home market fails to account for the amount of advertising revenue garnered in the Ann Arbor metro by Detroit metro stations that have a significant audience share in the Ann Arbor metro. Clear Channel asserts that, because BIA does not differentiate between revenue earned from in-market and out-of-market sources, it often incorrectly estimates the revenue earned by a particular station.⁶¹ Clear Channel provides its own estimates of advertising revenue earned in the Ann Arbor market by eight out-of-market stations, but provides no evidence as to how these figures were determined.⁶² Additionally, Clear Channel provides no information regarding the actual revenues earned by its own out-of-market stations. We find, based on this record, that the appropriate revenue share and concentration data for purposes of our analysis in this case include the in-market stations only.

30. 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."⁶³ Clear Channel argues that that "the HHI calculation accurately reflects market concentration only if the correct product and geographic markets are defined and the correct market participants are included."⁶⁴ Clear Channel submits that, for the reasons indicated above, the markets are not properly defined and the market participants are not accurately identified. 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 Ann Arbor, is the appropriate geographic market, and we have discussed Clear Channel's arguments about market participants above. Although we believe that mechanical application of the *Horizontal Merger Guidelines* may provide misleading answers to competitive issues in the context of local radio transactions, as a general matter, sufficiently large HHIs establish a *prima facie* case in antitrust suits.⁶⁵ Our preliminary competition analysis indicates that the transaction at hand represents an increase in HHI of 1,496 and a post-transaction HHI of 9,023.⁶⁶ Using either Year 2001 BIA data or adjusted Year 2000 figures including the revised revenues provided by Clear Channel for their Ann Arbor stations, shows that the proposed combination of stations would result in an HHI of more than 8800 in the Ann Arbor radio advertising market, with an increase in the HHI of approximately 1,450 or more. Clear Channel has failed to present sufficient evidence to rebut the

⁶⁰ Clear Channel Response at 4 and Nelson Declaration at ¶ 3. *See also supra* note 51.

⁶¹ Clear Channel Response at 3.

⁶² Clear Channel Response at 3 and Nelson Declaration at ¶3. Nelson, Vice President and Market Manager of Clear Channel's radio stations in the Ann Arbor market, provides his estimates of the revenue earned by eight out of market stations. *See supra* note 51.

⁶³ *Horizontal Merger Guidelines*, § 1.51.

⁶⁴ Clear Channel Response at 4.

⁶⁵ *FTC v. Heinz*, 246 F.3d 708, 716 (D.C. Cir. 2001).

⁶⁶ Using revised 2000 revenue estimates, the increase in HHI would be 1,458 and the post-transaction HHI would be 8,843.

presumption that this HHI describes a highly concentrated market.

31. *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 metro 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 Ann Arbor metro there would be only two commercial radio stations that would not be owned by Clear Channel: WDEO(AM) and WSDS(AM), both Class B AM stations. BIA data show that these two stations currently have no reported listenership. Based on this record, it is unlikely that these two stations will offer a viable competitive challenge in the future.

32. 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 by the dominant station(s) in the market. 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 asserts that, because radio station facilities are subject to change *via* minor technical modifications that upgrade, downgrade, or relocate transmitters, as well as through petitions to change a station's community of license, it is impossible to predict what modifications may result from such changes or what opportunities may arise in the future for a station to enter the Ann Arbor metro.⁶⁷ Clear Channel does not argue that there are any vacant allotments available for new stations to enter the market. While new entry and station relocation are possible in some radio markets, there is no basis on this record to conclude that timely entry would be likely and sufficient in this market to restrain the exercise of market power.

33. *Potential Adverse Competitive Effects: Unilateral 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 pre-existing Local Marketing Agreements ("LMAs") or JSAs. Clear Channel asserts that given the extent to which Ann Arbor is embedded in the larger Detroit market, Clear Channel has not, nor could it, raise advertising rates in an anticompetitive fashion. Clear Channel's arguments against unilateral market power rest on their product and geographic market definitions, which, for purposes of this order, we reject (as discussed above in paragraphs 18 through 20).

34. Clear Channel also contends that its acquisition of WAAM(AM) will have no competitive effect because Clear Channel currently sells the commercial advertising of WAAM(AM) pursuant to a JSA which became effective in December 2001.⁶⁸ Clear Channel argues that, "for purposes of an economic competition analysis, the transaction under review is a "non-event."⁶⁹ Clear Channel asserts that regardless of whether it sells advertising as the station's owner or through a JSA, its sales decisions and

⁶⁷ Clear Channel Response at 5.

⁶⁸ *Id.*

⁶⁹ *Id.*

pricing power remain the same.⁷⁰ Clear Channel also asserts that it has not used its supposed market power to raise rates “in an anticompetitive fashion” and that advertising rates on WAAM(AM) have not increased since it began selling commercial advertising on that station.⁷¹ 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 or JSAs when they are entered. Moreover, 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 JSA relationship.

35. Clear Channel’s acquisition of WAAM(AM) would eliminate the most significant competitor and Clear Channel would have, as noted above, an effective monopoly in the Ann Arbor metro. Post-transaction, Clear Channel would own both of the non-reserved band FM stations in the metro, all of the commercial stations licensed to Ann Arbor, and would have 94.9 percent of the in-market advertising revenues, as well as 100 percent of the audience share attributable to in-market stations. Also, as noted above, the Ann Arbor metro is highly concentrated and there is no evidence that entry sufficient to restrain anticompetitive behavior is likely. This market structure increases the risk of unilateral behavior leading to inefficient price discrimination, the ability to raise unilaterally radio advertising rates, and lower programming quality.

36. *Efficiencies and other 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 to 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.”⁷² 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.

37. Clear Channel maintains that the acquisition of WAAM(AM) will result in operating efficiencies, through sharing facilities, engineering, and administrative personnel and through the consolidation of certain backroom functions such as accounting, traffic and receptionist duties.⁷³ Clear

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² See *Horizontal Merger Guidelines*, § 4.

⁷³ Clear Channel Response at 6 and Nelson Declaration at ¶5.

Channel also argues that advertisers will receive (and through the JSA 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 Ann Arbor 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.⁷⁴ Clear Channel also states that they plan to operate WAAM(AM) as a full service news/talk station with an emphasis on local news and information and a larger percentage of time devoted to live programming.⁷⁵ Clear Channel asserts that this will benefit Ann Arbor listeners "enormously."⁷⁶ Clear Channel asserts that it will provide local coverage of breaking news, weather-related or other emergencies, and school closings targeted specifically at the Ann Arbor audience and that, operated as a stand alone station, WAAM(AM) cannot provide this service.⁷⁷ Clear Channel notes that Ann Arbor does not have any local television stations and has as its main source of local news an afternoon newspaper, the Ann Arbor News. Clear Channel states that it has been very active in the local community, that each station in its cluster of existing stations sponsors a charity, and that it will make sure that WAAM(AM) serves the local community through the sponsorship and promotion of local activities, organizations and charities.

38. The record in this proceeding neither quantifies the magnitude of the transaction-specific efficiencies nor clarifies whether the efficiencies are properly attributable to one-time changes in fixed cost or to permanent reductions in marginal cost that provide a financial incentive to flow-through such efficiencies as benefits to listeners and advertisers. Additional specificity and documentation of claimed efficiencies should be developed during the hearing of this case. We find that the transaction may provide some public interest benefits such as an increase in the provision of local news to Ann Arbor residents. At the same time, the potential competitive harms here are very 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

39. On the basis of the information before us, we are unable to make the required finding that the public interest, convenience and necessity will be served by granting the subject 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,⁷⁸ 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

40. 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 Ann Arbor, Michigan market to determine whether the factual assumptions in Paragraphs 16 through 38 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

⁷⁴ Clear Channel Response at 6.

⁷⁵ Clear Channel Response at 1.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 47 U.S.C. § 309(e).

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.

41. 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 Ann Arbor metro. In the alternative, parties may stipulate that the relevant product market is “radio advertising,” the presumptive product market definition in our analytical framework.

42. 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 Ann Arbor metro. Arbitron identifies Washtenaw County, Michigan as comprising the Ann Arbor metro.

43. 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 Ann Arbor 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.

44. 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 under 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.

45. 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 have certain shortcomings 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 Ann Arbor 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.

46. 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 should be developed 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. Both the examination of the issue and the ALJ's opinion will be informed by the findings developed with respect to Issues 1-5.

47. 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 Ann Arbor 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 Ann Arbor metro should follow our analytical framework and the *Horizontal Merger Guidelines*. Thus, evidence concerning the timeliness, likelihood, and sufficiency of entry in the Ann Arbor 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.

48. 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*.

49. 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 Ann Arbor 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 Ann Arbor metro.

VI. ORDERING CLAUSES

50. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act, the application to assign the license of station WAAM(AM), Ann Arbor, Michigan from Whitehall Enterprises, 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 53 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. BAL-20010817AAH).

51. 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 Whitehall Enterprises, Inc. and Clear Channel Broadcasting Licenses, Inc., the applicant parties in this proceeding.

52. 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.

53. IT IS FURTHER ORDERED, That, in the event the parties elect to defer further consideration of the application to assign the license of Station WAAM(AM), Ann Arbor, Michigan, from Whitehall Enterprises, Inc. to Clear Channel Broadcasting Licenses, Inc. in accordance with the interim policy, Whitehall Enterprises, Inc. and Clear Channel Broadcasting Licenses, Inc. 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 52 above.

54. IT IS FURTHER ORDERED, That within 15 days of the mailing of this Order pursuant to Paragraph 52 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.

55. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, Whitehall 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 52 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.

56. 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.

57. 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.

58. IT IS FURTHER ORDERED, That the application to assign the license for station WAAM(AM), Ann Arbor, Michigan from Whitehall Enterprises, 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