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December 19, 2001

VIA HAND DELIVERY

Peter H. Doyle, Chief
Audio Services Division
Mass Media Bureau, Room A267
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

RE: WDAK(AM), Columbus, GA (Facility ID #60764)
WSTH-FM, Alexander City, AL (Facility ID #60763)
File Nos. BAL/BALH-19990204EB-EC

WMLF(AM), Columbus, GA (Facility ID #36685)
WVRK(FM), Columbus, GA (Facility ID #39457)
WGSY(FM), Phenix City, AL (Facility ID #66668)
WPNX(FM), Phenix City, AL (Facility ID #32383)
WAGH(FM), Ft. Mitchell, AL (Facility ID #43093)
WBFA(FM), Smiths, AL (Facility ID #60656)
File Nos. BAL/BALH-20000728ACS-ACX

Dear Mr. Doyle:

On December 6, 2001, Clear Channel[1] and Cumulus filed responses to the Commission's letter dated November 16, 2001, requesting additional information

[1] Defined terms that are not newly stated herein are those used in the FCC November 16 Letter.

regarding the above-numbered proceedings ("FCC November 16 Letter"). Davis Broadcasting Inc., of Columbus ("DBI"), successor in interest to Davis Broadcasting, Inc., respectfully submits these comments in response to the Clear Channel and Cumulus submissions as provided at page 6 of the FCC November 16 Letter, and submits documentation and analyses of the impact of the Cumulus/Clear Channel superduopoly in the Columbus, Georgia metro/market.

I. Introduction

The FCC November 16 Letter concludes: "On the basis of the information before us, we are currently unable to make the required finding that the public interest, convenience and necessity will be served by granting the captioned applications." The Clear Channel and Cumulus responses contain no information sufficient to alter that conclusion. To the contrary, they further demonstrate the existence of substantial and material questions of fact that preclude the required finding. The FCC must hold evidentiary hearings to resolve those questions.

II. Comments on Cumulus' Response

The thrust of Cumulus' Response is, not to provide the information the Commission requested, but to try to change the dimensions of the Commission's request. Now in full retreat from the record compiled with respect to the Solar Application and Solar LMA, Cumulus announces that it has requested dismissal of the Solar Application and pleads that this should profoundly change the Commission's request. Instead of analyzing the eight-station concentration in Columbus that has been before the FCC in these proceedings since February 1999, the Commission, says Cumulus, should ignore the record on which the FCC November 16 Letter is based, and the reality of the concentration that exists in the Columbus market, and pretend that the case involves only a six-station concentration.

The Commission must reject Cumulus' invitation to engage in fiction over fact. The FCC November 16 Letter is clear that the Commission is rightly concerned about the effect on competition of Clear Channel's ability to concentrate the market power of the eight Columbus stations included in the Letter's caption. Not only does the FCC November 16 Letter make clear that the relevant competition issue before the Commission is the market concentration in Columbus including the Solar LMA, the Commission has said so directly. The Commission's intention that the eight-station Columbus concentration including the Solar LMA be considered in this proceeding is described in detail on pages 11-13 of the letter dated August 29, 2001, from Howard A.

Topel, Esq., to Roy J. Stewart, Esq., that is part of the record in this case ("August 29 Topel Letter").

The FCC November 16 Letter at page 2 also addresses Clear Channel's acquisition from Cumulus of an option to acquire a construction permit for a ninth station in the Columbus Market. Neither Cumulus nor Clear Channel addresses this matter, even though, as shown below, it is highly relevant to the information requested in the FCC November 16 Letter. Cumulus' flight from the Solar Application does not make the reality and relevance of the facts before the Commission disappear.

That is particularly so because all pleadings from the Solar Application and Solar LMA proceedings have been specifically incorporated by reference into the Clear Channel Application proceeding at pages 3-6 of DBI's Petition to Deny filed on September 11, 2000. Withdrawal of the Solar Application thus does not remove those pleadings and the record they contain from the Commission's consideration of the Clear Channel Application that remains pending. Consideration of that record remains highly relevant and extremely important for several reasons:

First, the record raises substantial and material questions of fact concerning Cumulus' misconduct and qualifications to be a licensee in Columbus, which must be resolved in hearing before action permitting it to assign the Cumulus Stations to Clear Channel can be allowed. The outstanding questions, involving misrepresentations and lack of candor, real party in interest, illegal settlement and settlement payments, statutory and rules violations, are summarized on pages 7-9 of the August 29 Topel Letter and addressed in depth in the incorporated pleadings.[2]

Second, in addition to their independent relevance concerning Cumulus' qualifications as assignor, many of the outstanding questions bear directly on the market concentration issue about which the FCC November 16 Letter inquires. For example, the warehousing of the Cusseta construction permit resulting from Cumulus' takeover as real party in interest to the applicant, illegal settlement of the application for the permit, and assignable purchase option, which have now been assigned to Clear Channel and prevented anyone else from acquiring that facility and using it to compete with first Cumulus and now Clear Channel, is highly relevant to the conditions of entry criterion about which the FCC November 16 Letter inquires. Concerns that large group owners have abused the already generous ownership limits by warehousing frequencies to keep them from the grasp of potential competitors are widespread and have been presented to the FCC in several proceedings. Here, the proof is clear. Similarly, Cumulus'

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[2] *See, e.g. Reply to Oppositions to Petition to Deny*, Davis Broadcasting, Inc. (filed June 29, 1999) ("June 1999 Reply"), at Section III.

misrepresentations and lack of candor to persuade the Commission that it priced, marketed, sold, and managed the eight stations in the Columbus concentration at issue independently of each other, and the anti-competitive practices in which the record shows it engaged, are directly relevant to determining whether permitting such concentration serves the public interest. The relevant record for making that determination is a continuum that begins with Cumulus' establishment and conduct of the eight-station concentration while DBI's objections to the Commission were pending, and proceeds with the record of Clear Channel's assumption and conduct of that concentration to date. A complete evidentiary record on these matters is essential.

Third, the record directly raises in the Columbus Application proceeding the eight-station concentration issue that Cumulus now seeks to avoid by withdrawing the Solar application.

Cumulus' argument at pages 2-3 of its response that the Commission's *Further Notice of Proposed Rule Making,* FCC 01-329 released November 9, 2001 ("*Notice*") signifies that the anti-competitive effects of the Solar LMA should not be considered before that proceeding is concluded is erroneous. The Commission was explicit at page 36 (¶86) of the *Notice* that, under the Interim Policy it has adopted, "In asking for or receiving evidence of potential adverse competitive effects, the staff should consider the effect on competition, if any, that may have resulted from a pre-existing LMA, TBA, or JSA between the applicants. Clear Channel's assumption of Cumulus' Solar LMA is effectively a pre-existing LMA by which Clear Channel now executes the market power that Cumulus previously executed. As the Commission aptly stated in the *Notice,* page 33 (¶81), "If we ignore economic realities, what purpose would our competitive analysis serve?" Contrary to Cumulus' wish, the Commission did not intend the Interim Policy it adopted in the *Notice* to be an exercise in the unreality that market power that actually exists and is exercised does not and is not.

The Commission is to be commended for recognizing the long delays that the captioned and similar applications have experienced and establishing procedures to expedite their disposition. Because of the numerous, serious, and unique issues involved; the existence of substantial and material questions of fact that require designation for hearing; and the clear intention of the *Notice* and FCC November 16 Letter that the actual eight-station concentration in Columbus including the Solar LMA be considered, Cumulus' plea that the Clear Channel Application be treated as involving only a six-station concentration and granted on delegated authority must be rejected. The draft order that the staff is to distribute to the Commission pursuant to the *Notice* within 90 days of the *Notice's* adoption must address all of the issues that DBI has raised and should recommend designation for hearing on all of them. And, while the *Notice* provides that the hearing designation order shall afford the applicants the opportunity to

elect to defer the hearing on the market concentration issue pending resolution of the pending rulemaking proceeding on that subject, *Id.* at 37 (¶88), no such election is afforded for the misrepresentation, lack of candor, real party in interest, and illegal settlement and rules and statutory violation issues, which involve well established bodies of law. In light of the lengthy prior delays and recognized need to expedite these proceedings, the required hearings on all but the market concentration issue should commence immediately upon release of the designation order, with immediate trial of the concentration issue also depending on the election the applicants make.

III. Comments on Clear Channel's Response

For the record, DBI supports vigorous competition – specifically head-to-head competition that is on the merits of a station's audience strength and format in a market. DBI does not, however, support unfair competition that is present when a superduopoly in a small market uses its dominance in several categories to generate revenue it otherwise would not have received, and certainly does not deserve.

Chairman Powell recently announced the creation of a Media Ownership Working Group that will "*be tasked with developing a solid factual and analytical foundation for media ownership regulation. The findings of this Group will provide an empirical and analytical basis for the FCC to achieve its long-standing goals of promoting diversity, localism, and competition in the media.*"[3] This step by the Chairman is commended because it is critically important for the Commission, as the expert agency regulating the broadcasting industry, to fully evaluate the practical impact of its policies, regulations and economic theories since the passage of the 1996 Telecommunications Act and the massive consolidation that followed.

There is no better opportunity than the transaction at present for the Commission, in a real-world laboratory environment, to take the time to investigate the short and long-term influence of one of the country's biggest consolidators in a small market. Before the FCC repeals entirely, modifies or expands any of its rules, it must first recognize and understand the consequences of such rules in large *and* small markets, on large *and* small broadcasters, on group owners *and* independent stations, *and* on minority owned broadcasters. Only then can the Chairman's priority of "policymakers having a clear and informed understanding of the current state of the market" be fulfilled.[4]

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[3] FCC News, *FCC Chairman Michael Powell Announces Creation of Media Ownership Working Group*, rel. October 20, 2001, at 1 (emphasis added). [Exhibit 5]

[4] *Id.*

Since early 1999, DBI has argued that Cumulus' ownership and/or control since December 1998 of the programming and sales of eight stations in the nation's 178th largest market has had a detrimental competitive impact on the remaining small group-owned and stand-alone radio stations in the Columbus market and the public interest. It has submitted documents and filings that provide evidence to this effect. Today, Cumulus is still a national behemoth. Clear Channel, however, makes Cumulus look like a group of low power FM stations given its dominance in various advertising or advertising related categories: (1) national ownership of more than 1100 radio stations; (2) its ability to leverage and control national sales revenue through its owned and operated national rep firm, the Katz Media Group, which is the largest media representation firm in the United States *and* Clear Channel Radio Sales, which is the Katz organization dedicated to Clear Channel stations; (3) development of a national Internet sales and marketing division to tie-in with its local stations; (4) and its acquisition of SFX Entertainment and the recent entry of Clear Channel Entertainment into the Columbus, Georgia market as the primary concert promoter at the Columbus Civic Center. The civic center is the market's largest performance venue.

Moreover, it is undisputed that Clear Channel will cross-promote and use all of its media and media-related properties to provide maximum profit to its shareholders.[5] Unlike Cumulus, which falsely and misleadingly stated that it sells its stations independently,[6] Clear Channel has not made such an absurd claim, and instead has unabashedly heralded the benefits of its corporate culture and strategy.

> ***"The opportunities for synergies among Katz [Media Group] and the other Clear Channel divisions are explosive – and in the very early stages. . . Clear Channel is leveraging the power of the cluster to sell more spots on smaller stations with traditionally less demand."***[7]

Therefore, this is not the simple transfer from one group owner to another group owner as Cumulus so casually states. Cumulus Response, at 1.

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[5] *See, e.g.*, Clear Channel Reports Third Quarter 2001 Results, <http:www.clearchannel.com>. [Exhibit 8]

[6] *See, e.g.*, June 1999 Reply, at 43-66.

[7] Clear Channel Communications, Inc. 2000 Shareholder Report, at 14-15 (Feb. 26, 2001) (emphasis added) ("Clear Channel Shareholder Report"). [Exhibit 7]

> ***"Quite frankly, no one is bigger, better or more intense than Clear Channel's radio division."***[8]

IV. Comments on FCC Issue Categories

In response to the nine (9) issue categories enumerated in the FCC November 16 Letter, the relevant positions that Davis will be taking are these: (1) radio advertising is a relevant product market definition for the FCC to consider, (2) BIA provides relevant revenue data for the FCC to consider in determining whether substantial and material questions of fact requiring hearings are presented, (3) Arbitron geographic market definitions are relevant for making that determination, (4) the eight-station concentration in Columbus has adverse competitive effects, (5) conditions of entry into the market are highly restrictive due to the finite number of channels, their infrequent availability, and Cumulus/Clear Channel's warehousing of a frequency available for a new station, (6) efficiencies in sales activities resulting from the concentration are anticompetitive, (7) the concentration harms the public interest, (8) substantial and material questions of fact exist that require a hearing.

I have been involved in broadcasting for over twenty-eight (28) years and have served in several executive and management positions throughout my career, including local and national sales (e.g., ABC Spot Sales Division). I currently oversee the sales efforts for all of DBI radio stations.

A. BIA and Arbitron Data are Long-Standing Industry Tools and are Appropriate for the FCC's Analysis

From the onset, it is important to address the relevancy and importance of BIA and Arbitron data. Clear Channel disputes the value and relevancy of BIA revenue data because the data are only "estimates." Clear Channel Response, at 4. Likewise, its concern about Arbitron information is similar in regards to geographic market. *Id.* at 5. BIA revenue data and Arbitron ratings and market definitions are long-standing industry standard research tools, and are totally relevant to the FCC's analysis of market concentration and the anti-competitive impact of a merger or acquisition. For the record, the multi-billion dollar broadcasting and advertising industries have been built on, relied on, and depended on such estimates of revenue, program performance and market areas for decades.[9]

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[8] *Id.*, at 14 (emphasis added).

[9] For example, radio and television program ratings reported by the two major research companies, Arbitron Inc. and ACNielsen, respectively, are generated for hundreds of

DBI is very limited to what actual revenue and share data it can obtain from its competitors about their performance in the market. Therefore, it too relies on industry-standard research tools and measurements as a starting point for analyzing market trends and developments. *And so should the Commission for its threshold analysis and consideration in determining whether substantial and material questions of fact requiring hearings are present.*

ISSUE 1: Product Market Definition

Radio advertising is the proper relevant product market definition for the Commission to consider. The unique attributes of radio advertising described in the *Notice* are real. *Notice*, at 19 (¶42). It is also important to recognize that not *all* radio advertisers may switch advertising vehicles given higher prices, and if they do switch – it may only be a portion of their designated radio budget. [10] Some advertisers have no options in switching advertising vehicles once their marketing strategy is developed and creative is produced. This is one reason why the Department of Justice has determined that radio is the relevant product market. *See Notice*, at 19 (¶42). Clear Channel has not offered any studies or empirical data to find otherwise.

Overwhelmingly, the competition DBI experiences for advertising dollars is direct head-to-head competition with other radio broadcasters. The generalized assertions and

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markets by measuring a relatively small sample size of viewers or listeners in the market (for both diary and meter collection methodologies), and thus are in reality weighted *estimates* of a program's performance in a market. This includes both electronic overnight ratings and traditional ratings books. Additionally, a station's program "avails" submitted to an advertiser/client provide historical program or time-period ratings information (based on *estimated* usage of the TV or radio, *estimated* share and *estimated* ratings performance) with the station's own *estimate* of its projected program ratings delivery during the time-period of the advertiser/client's buy – which is in reality an *estimate based on estimates*. Post-buy analyses that measure how well a media buy performed are based on *estimated* program delivery based on overnights or ratings books. Additionally, makegoods for a station's under-delivery are calculated off a program's *estimated* ratings delivery.

[10] *See* Clear Channel Response, at 2 n.2 (citing to Competitive Impact for Clear Channel merger with AMFM Inc. ("*some* local and national advertisers *may* switch *some of their advertising* to other media rather than absorb a price increase in radio advertising time.") (emphasis added.)).

anecdotal statements of Jim Martin that Clear Channel submits are grossly insufficient to support Clear Channels' argument that for purposes of this specific inquiry the Commission should abandon the considered and established conclusion of both the DOJ and Commission concerning the proper product market definition.

Indeed, a major cause of rate increase limitations to which Mr. Martin alludes has nothing to do with other media, but stems from the fact that Cumulus, managed by Mr. Martin himself, operated its market concentration in Columbus, by making a practice of giving away bonus spots and dumping its large advertising inventories at bargain basement rates,[11] thereby conditioning radio advertisers to expecting an entitlement to pay less than fair market rates. This practice is extremely predatory against smaller broadcasters, who have less inventory than an eight-station group owner and lack the deep resources to withstand sub-market selling that a superduopoly has.

Clear Channel further adds that the radio advertising market presumption is weaker for small markets because there are fewer radio stations in smaller markets, the stations tend to be formatted to reach wider audience demographics. Clear Channel Response, at 3 (citing in support FCC's *Notice* at ¶42). Nonsense. First, DBI finds no such support of this statement from the FCC as cited. The FCC, however, explicitly states that one attribute of radio is the ability to target specific demographic groups. *Notice*, at 19 (¶42). Radio (unlike TV which has a variety of formats) maintains a specific format throughout the broadcast day, and "therefore tends to attract a loyal audience following. Radio is useful to advertisers interested in *targeting specific consumers* and taking advantage of the local appeal of the medium." [12] There is no discussion of market size. Additionally, there is no indication of a multi-format for any of Cumulus/Clear Channel stations in the numerous BIA Reports for Columbus, GA, which list the formats as reported by the stations themselves.

Concentration in the radio product market is a true and reliable indicator of anti-competitive conditions that violate the public interest. Consideration of concentration in that market is fully appropriate for the Commission to employ as its benchmark for

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[11] In this regard, Opposition To "Motion To Strike or, in the Alternative, For Leave to File Response To Reply to Oppositions to Petition to Deny" Davis Broadcasting, Inc. (filed October 1, 1999) ("October 1999 Opposition."

[12] *When Being No. 1 is Not Enough: The Impact of Advertising Practices On Minority-Owned & Minority-Formatted Broadcast Stations*, Civil Rights Forum on Communications Policy, Commissioned Study by the Office of Communications Business Opportunities, Federal Communications Commission, Attachment A: Overview of Media Planning, at 6 (rel. Jan. 13, 1999) ("FCC Discrimination in Advertising Study"). [Exhibit 6].

determining whether substantial and material questions of fact requiring evidentiary inquiry at hearing are present. To the extent a party such as Clear Channel wishes to maintain that other factors such as other media ameliorate the effect of its concentration in the radio advertising market, it may do so by submitting detailed specific evidence at the hearing to support its position, subject to the applicable rebuttal, cross-examination, and discovery rights of the petitioner. Such an inquiry naturally must include the extent of the sponsoring party's own control and influence over other media that enable it to leverage such concentration into a larger revenue share than its performance merits. Clear Channel has shown no such evidence here. The concentration in the Columbus radio market that the FCC November 16 Letter describes makes a substantial case that such concentration violates the public interest. Clear Channel's Response leaves that case completely unanswered. An evidentiary hearing to develop a full record is required.

ISSUE 2: Geographic Market Definition

Similarly unfounded and unsupported is Clear Channel's contention that the Commission should not recognize the Arbitron metro markets as the primary geographic market definition to determine whether substantial and material questions of anti-competitive market concentration exist that require evidentiary inquiry. While Clear Channel's negative opinions of Arbitron must be taken with a grain of salt as a public interest statement in view of Clear Channel's well publicized private commercial disputes with Arbitron, it suffices in any event that the entire radio sales industry has been built around and dependant on Arbitron market definitions for decades and still is. To suggest that the FCC should not weigh this accepted industry source heavily is ludicrous.

The fact that certain stations in a market have contours that outreach other stations in the market does not negate the validity of the Arbitron definitions. Such stations are still able to sell heavily in the market based on the coverage they have there, to attract additional sales from the core of the market based on their coverage of extended populations and areas, and to attract sales from the extended areas based on their coverage of the market core. The inclusion of such stations in the core geographic market defined by Arbitron is established and relied upon nationwide, and superficial analyses like Clear Channel's advance nothing.

Where an Arbitron defined market is involved, the Commission should use that market to determine the presence of substantial and material questions of anti-competitive concentration that require evidentiary scrutiny at a hearing. Once again, to the extent a party such as Clear Channel wishes to maintain that other factors such as coverage beyond the core market ameliorate the effect of its concentration in that market, it may do so by submitting detailed specific evidence at the hearing to support its position, subject

to the applicable rebuttal, cross-examination, and discovery rights of the petitioner. Such an inquiry must be based on specific hard evidence regarding the sources and amounts of the relevant stations' advertising and their effect on market concentration calculus, not on superficial generalities as Clear Channel has offered. Clear Channel has shown no such evidence here. An evidentiary hearing to develop a full record is required.[13]

ISSUE 3: Market Participants

As discussed above, Clear Channel disputes BIA's market revenue report because it is just an estimate. BIA may be off in its stations' revenue estimate; but it is off equally for all stations, harming no one station in particular. All revenue is reported on all stations, in all radio markets. Therefore, Columbus is not an exception to the rule.

DBI does not submit that the information from BIA or Arbitron are absolute and cannot be rebutted, or supplemented by additional sources. BIA and Arbitron data are merely benchmarks and should be disputed and rebutted in a more fact-intensive inquiry – the very reason why a hearing is necessary for this transaction.[14] Significantly, neither Cumulus nor Clear Channel offered rebuttal evidence illustrating why BIA is wrong.

ISSUE 4: Market Shares

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[13] As for potential anomolous results, arising largely from the fact that some communities are not within an Arbitron defined geographic market, DBI submits that in those communities the market contour approach be used but based on accepted service area definitions (60 dbu contour for FM and 0.5 mv/m contour for AM) instead of city grade contours. The use of city grade contours has created the anomalous result that single markets have been unrealistically broken into several markets when, in fact, the stations involved all provide service and sell advertising throughout the market. This has enabled large group owners to acquire extra stations in markets that we believe Congress did not intend to allow. By using Arbitron definitions where applicable, and actual recognized service area contours elsewhere, the Commission in all cases will be using realistic and recognized measures of the areas within which service is provided and advertising sold, in lieu of the fictions that currently govern. In this case, the Arbitron market should be used.

[14] In fact, Clear Channel and Cumulus agree with DBI that a fact-based inquiry is important. Clear Channel Letter, at 2 (market definition is a fact-intensive inquiry. Cumulus is supportive of Clear Channel's position.

Clear Channel postures that the Commission's review in this area is baseless because it has been operating the Cumulus and Solar Stations for over a year, and thus the net result of this transaction is "no change in the advertising revenue results." Clear Channel Letter, at 5. The flaw in Clear Channel's argument is its assumption that the Commission already approved the eight-station market concentration that Clear Channel holds. That is not so. To the contrary, that market concentration has been the subject of these Commission proceedings since February 1999, and the Commission has never addressed it. Rather, as previously indicated, the Commission has determined that these are the proceedings in which that issue will be resolved. The Commission has expressed in the *Notice* its regret that resolution of such issues have been long delayed. But the fact that such delay granted first Cumulus and then Clear Channel a free ride to operate a market consolidation that the Commission acknowledges cannot be found on the record to serve the public interest does not require the permanent entrenchment of that concentration.

As previously noted, the relevant inquiry here involves the continuum of market concentration beginning with Cumulus' expansion from a six-station to an eight-station concentration and continuing through Clear Channel's assumption and operation of that concentration to date. Neither Clear Channel nor Cumulus has submitted anything to improve the record that the Commission has already found to be inadequate for a grant. In fact, the relevant facts overwhelmingly demonstrate the existence of substantial and material questions that require evidentiary hearing.

Revenue Growth of Cumulus/Clear Channel Eight station Group - 1999 to 2000

Calendar year 1999 was the first full year that the Cumulus/Clear Channel eight-station group was operating since the commencement of Cumulus' Solar LMA in December 1998. There was an immediate impact on the overall market share of the Cumulus/Clear Channel, DBI and McClure groups:

Group Owner (# of stations)	Market Share[15]		
	1999	**2000**	**-/+**
Cumulus/Clear Channel (8)	33%	53%	**+61%**

[15] BIA Market/Station Revenue Summary, 1997-2000, Sources: BIA Investing in Radio, 2001, 2000, and 1998; Radio Stations Listed By Owner, 1999, BIA Research, Inc. ("BIA Market/Station Revenue Summary"). [Exhibit 2]

Davis Broadcasting (4)*	20%	25%	**+25%**
McClure Broadcasting (3)	47%	22%	**-53%**

* DBI did not acquire WEAM until 2001, however, this BIA Market/Revenue analysis was organized to track the historical revenue share of the three group-owners in Columbus by the stations they own and/or control today.

Cumulus increased by twenty (20) percentage points year-to-year, an overall increase of 61% in market share in just one year! DBI, gratefully shows an increase in market share as well, up 25%. However, given DBI's dominant audience share over several Cumulus/Clear Channel stations, it would have performed better if not for unfair competition. McClure did not fare as well. And competing against Clear Channel in 2001 is a whole different story.

WSTH Should Be Considered an In-Market Station

Clear Channel claims further that the BIA figure is overstated by 10% because of revenue obtained by WSTH, allegedly an out-of-the market station. Clear Channel Response, at 4-5. In essence, Clear Channel argues that revenue from WSTH should be ignored in the Commission's analysis of the share of the Columbus market. Clear Channel's argument is unreasonable and contrary to market norms for the following reasons.

WSTH is located in the Auburn-Opelika-LaGrange area, which is a mere 10-15 miles from Columbus, GA., comparable to Alexandria, Virginia's distance from the District of Columbia. It is a tough argument to call WSTH "out-of-market."[16]

It is desirable for a Class C facility, given its superior signal strength, to receive revenue from outside the market, in some cases due to advertisers with multiple locations, i.e. McDonalds, K-Mart, banks etc. In fact, that is why broadcasters prefer a C class signal. Clear Channel markets the superior strength of WSTH as an advantage over its weaker competitors in the market. Thus, Clear Channel cannot have it both ways, ownership of a strong C class station with a competitive advantage for the purpose of generating both in- and out-of-market revenue, *and* then have the FCC disregard its out-of-market revenue upon its evaluation of concentration and market power.

Furthermore, the FCC should conduct an inquiry to define what exactly does Clear Channel mean when it claims that a "substantial portion of its revenue" is out-of

[16] *See* McClure Broadcasting Comments, at 2 (April 1999). [Exhibit 12]

market? Clear Channel Response, at 5. How much is "in-market" and how much is "out of market?" How are these revenues split between local and national advertisers? Clear Channel has not disputed that WSTH receives revenue from in-market advertisers, but it appears to downplay the amount of this revenue.

If WSTH is wrongly classified as an in-market station by BIA, then the Commission should also investigate what egregious and unfair tactics are used to enable WSTH, as a supposedly *non-competitive* out-of-market station, to generate in-market revenue. Such displacement of in-market revenue from other in-market stations to an out-of-market station does not serve the public interest well. Additionally, the ability to generate revenue from advertisers in the market from a station that does not place a 70 dBu signal over the market, as claimed by Clear Channel Response at 5, may be another indicator of Clear Channel's abuse of market power to generate revenue it does not deserve.

ISSUE 5: Market Concentration

Again, Clear Channel disputes the use of the HHI as a standard tool to measure market concentration, but offers no rebuttable evidence or alternative rationale in its place. Clear Channel Response, at 5. Clear Channel's argument is based entirely on its personal rejection of the radio advertising product market, the Arbitron Columbus geographic market, and BIA revenue data. Since the Commission should not reject those established industry tools, Clear Channel's further rejection of the HHI standard is without foundation.

The HHI also is a recognized probative means of measuring potentially dangerous market concentration. It is thus proper and prudent for the Commission to consider it in determining whether substantial and material questions requiring evidentiary hearing are present. As the *Notice* states in note 100, a market with an HHI above 1800 is deemed highly concentrated. The FCC November 16 Letter indicates at page 4 without subsequent dispute by Clear Channel that the Clear Channel Application and Solar LMA produce an HHI of 3,904, making Columbus a super highly concentrated market. The *Notice* further states that an acquisition that increases the HHI by more than 100 points is deemed likely to create or enhance market power or facilitate its exercise. The FCC November 16 Letter indicates again without subsequent dispute by Clear Channel that the increase from a six-station concentration to the eight-station concentration involved in Columbus increases the HHI by almost 900 points, ringing super alarms.

Standing alone, the HHI measures of concentration are so high as to require further evidentiary hearings regarding the effect of the eight-station concentration on the

public interest. When those measures are considered together with the other evidence of anti-competitive concentration in this record, the Commission's statutory duty to hold such hearing is absolute.

ISSUE 6: Potential Adverse Competitive Effects

Clear Channel's current eight-station concentration in Columbus has adverse competitive effects that are in full force today. This transaction is hardly a "non-event" for the FCC's competitive and market concentration analysis. Indeed, there is much to consider.

First, an absence of a finding by DOJ Anti-trust Division whether this transaction raises a danger of anti-competitive conduct is not a ringing endorsement by the DOJ that Clear Channel's acquisition application should be granted by the FCC. Thus, the DOJ's actions should not carry increased weight in the FCC's independent evaluation of whether this acquisition is in the public interest. The DOJ has long-recognized that the FCC has broader policy objectives in its evaluation of concentration, competition and what impact they have on the public interest.[17]

Second, an analysis of market power *or* the structure of the market has been used to determine the likely consequences of anti-competitive conduct.[18] In evaluating either market power or structural analysis of the market, the FCC should focus on the characteristics of the product *and* the industry that produces the product. It is especially important for the FCC to understand fully the intangible nature of broadcast commercial product, and how there are several ways to affect the unit rate of a spot and thus increase total revenue. Not all such practices are anti-competitive or unlawful. However certain practices can be anti-competitive, particularly when conducted by the largest group owner in the market and without transparency. A superduopoly like Cumulus and Clear Channel, have the means and motivation to abuse market position by manipulating inventory and leveraging multi-station packaging to have the same bottom line impact of increased rates, but without an explicit unit price increase.

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[17] CommDaily, December 14, 2001, at 2 (Statement of Charles James, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, before the PLI/FCBA 19th Annual Institute on Telecommunications Regulation and Policy Conference, December 13, 2001) ("Statement of Charles James "). [Exhibit 9]

[18] E. Thomas Sullivan and Jeffrey L. Harrison, *Understanding Antitrust and Its Economic Implications*, (Mathew Bender 3rd ed. 2000) (1998), at 114.

For example, there are two such scenarios in the Columbus market presently that provide an example of undue leverage and packaging of stations by Clear Channel:

> **Scenario A –** Clear Channel will discount its rates 50% if a buyer purchases the entire 8-station group and gives Clear Channel 100% of the radio budget.
>
> **Scenario B –** Buy one stronger station, get a weaker station for free.

Why is this form of leverage and packing by Clear Channel unfair or harmful to competitors or consumers?

In general, many media buyers, especially smaller advertisers and their agencies, have expressed concerns about combined sales staffs, forced packing of multiple stations (radio and TV) that are very diverse and reach different target audiences, and the potential of such practices to ultimately increase prices for commercial time.[19]

At first glance, these scenarios look like a good deal for both the buyer and Clear Channel, providing a discount to media buyers and an increase in revenue to Clear Channel. Upon further review, both of these scenarios ultimately raise prices for a media buyer and at the same time serve to lower the cost-per-point ("CPP") in the market, a predatory pricing practice harmful to each competitor. Clear Channel is the only one that really benefits.

Under both scenarios, Clear Channel has the ability to internally manipulate its inventory pricing to allocate higher unit rate pricing on its stronger stations (the station(s) the buyer really wants or the station(s) that reaches the buyers target audience), and then either put the remaining money toward or bonus the weaker station(s) in the group. If the weaker station would not have been purchased at all in a truly competitive market (there are minimum performance benchmarks), then any revenue allocated to a weaker station is in essence, a rate increase. Clear Channel has control of most of the commercial inventory in the market and it will bonus to keep its real rates high. Because of the intangible nature of the broadcast commercial product, such giveaways are easy to do without detection.

> "The buyer will be concerned about whether the format of a particular station appeals to consumers who use their products or can be persuaded to use their

[19] *See, e.g. Fear Factor*, Broadcasting & Cable TV Fax, Dec. 10, 2001, at 2. [Exhibit 11]

products. *If not, the station will be excluded from the buy or bought for a lower price.*" [20]

Third, it is not anti-competitive to have a dominant station(s) in the market, a station that has achieved a strong audience rating/share and thus, can receive a dominant share of market revenue commensurate with its program performance, the quality of its product. Neither the Commission, nor the DOJ, should punish a broadcaster for doing well and success should not be a disincentive. However, issues of anti-competitive behavior are raised when a dominant position is acquired, not through quality, but by control of almost half of the commercial stations (producers) in a market and such dominance is leveraged to generate revenue in areas where it is not merited because of weak audience performance or weak signal compared to competitive stations. Such revenue related to audience distortions hinder the ability for smaller groups and stand-alone stations to compete head-to-head on format, audience share or advertising CPPs against the dominant broadcaster. In sum, quality is not rewarded – only quantity. This is the core meaning of an abuse of market power and Cumulus and Clear Channel are the poster children.

Moreover, Clear Channel's dominant national position in radio, controlling 1,170 radio stations across the country, a dominant entertainment venue and concert promotion company in Columbus, a newly created national sales division for Internet tie-ins with its local stations, *plus* ownership and control of its own national rep firm, raise serious concerns about its use of market dominance by sheer size and scope as opposed to quality (i.e., audience performance).

For the record, DBI does *not* assert that that packing and leveraging of broadcast properties or programs should be *per se* illegal or anti-competitive. Such packaging is a fundamental and necessary part of the broadcasting sales industry, providing valuable ways for a broadcaster to manage and maximize its ever changing inventory, and all of its programming throughout the broadcast day. The benefit to media buyers is also valuable, providing lower transaction costs and creative ways to meet budget goals. However, under certain circumstances packaging becomes anti-competitive.[21] Such circumstances are present here.

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[20] FCC Discrimination in Advertising Study, Appendix A: Overview of Media Planning, at 9 (emphasis added).

[21] Statement of Charles James/DOJ ("Companies should have 'opportunity to compete efficiently' as long as they 'do so without hurting others' efficiency'").

PRIMA FACIE EVIDENCE OF UNFAIR AND ANTI-COMPETITIVE PRACTICES

DBI has closely examined the BIA Financial market data submitted with the FCC November 6 Letter. In fact, it has attached two additional BIA reports that supplement the FCC's chart providing ranking of the same data by revenue and power ratio.[22] The analysis of the supplemental charts and historical BIA Reports, shows several disturbing trends in the performance of superduoploy Cumulus/Clear Channel[23] that raise substantial and material questions of fact because they provide a good indicator that the revenue success in the now-178th largest market is due to other factors, not just because of a good sales staff and some cost efficiencies. Such trends must be investigated further by the FCC.

Analysis of BIA Station Data By Revenue and Power Ratio [24]

TABLE A – TOP 10 RANKED STATIONS IN COLUMBUS, GA BY REVENUE

Mrkt Rev. Rank	Call Letters/Licensee	2000 Revenue (000)	Spr. 01 Rtg Shr	Power Ratio (PR)	PR Rank
#1	WFXE Davis Broadcasting	1875	19.7	0.73	# 11
#2	**WVRK Clear Channel**	**1800**	**5.2**	**1.98**	**# 2**
#3	**WGSY Clear Channel**	**1200**	**5.5**	**1.39**	**# 4**
#4	WCGQ McClure	1200	4.2	1.56	# 5
#5	WKCN McClure	1100	5.5	1.35	# 3

[22] BIA Station Data, Columbus, GA Market, *Ranked by Revenue* - BIA Database 11/05/2001; and 2) *Ranked by Power Ratio,* BIA Database 110/5/2001 ("BIA Station Data Rankers"). [Exhibit 1].

[23] From this point forward, unless designated, we will use the "Cumulus/Clear Channel" name combination to identify collectively the former and current operators of Cumulus' six-station group and its LMA's for the two Solar stations resulting in the eight-station super duopoly over the past three years. Cumulus's LMA of the Solar station was effective December 1998; and Clear Channel's LMA of all 8 (Cumulus/Solar combined) stations was effective in early October 2000.

[24] Source: BIA Station Data Rankers.

DBI recognizes that the BIA Audience share reported here are for persons 12+ and that there may be a measurable difference in the performance of pertinent adult demos (i.e., A18-49 or M18-34) for each station.

Mrkt Rev. Rank	Call Letters/Licensee	2000 Revenue (000)	Spr. 01 Rtg Shr	Power Ratio (PR)	PR Rank
#6	**WSTH Clear Channel**	**1100**	**4.2**	**2.03**	**# 1**
#7	**WAGH Clear Channel**	**925**	**6.9**	**1.03**	**# 8**
#8	**WBFA Clear Channel**	**800**	**6.2**	**0.74**	**# 10**
#9	WKZJ Davis Broadcasting	500	2.4	1.15	# 7
#10	WRCG McClure	300	3.5	0.39	# 14

Clear Channel controls 50% of the top ten ranked stations by revenue, holding the #2, 3, 6, 7, and # 8 positions. Its command of revenue based on audience share, defined as "power ratio" is significantly better – commanding 70% of the top ten stations *plus* the #1 station in the market. Rank positions: #1, 2, 4, 6, 8, 9, and 10. WDAK, tied for the worst performing commercial station in the market, ranks # 6, and WPNX, which is at the bottom of the revenue rank, is # 9. (*See* BIA Station Rankers, Exhibit 1, for all stations. The above chart is only the top ten rank by revenue.)

DBI's WFXE outdelivers Clear Channel's WVRK by 278% in audience share (19.7 v. 5.2), however, WVRK almost ties WFXE's revenue ($1875 v. $1800). In fact, Clear Channel's WVRK and WGSY, the #2 and #3 stations in the market for revenue, respectively, generate more revenue combined than WFXE ($1875 for WFXE and $1800 and $1200 = $3000 for Clear Channel). This is significant because WVRK and WGSY's shares combined (5.2 and 5.5 = 10.7) only deliver 54% of WFXE's audience share (19.7).

This transaction is a text-book example of the FCC's own findings in its market entry barriers study of "*When Number One is Not Enough: The Impact of Advertising Practices On Minority-Owned & Minority Formatted Broadcast* Stations", worthy of the FCC's further investigation on its own merits to determine whether there are discriminatory practices present against minority-owned and minority-formatted stations.

There is a long-standing hierarchy in the purchase of radio commercial time by media buyers, especially national media buyers. Buyers prefer to purchase the top 5-10 stations in a market (depending on the size of the market).[25] Lower ranked stations may or may not participate in a buy depending on several variables; pricing of the top ranked stations, size of media budget requiring more stations to increase cumulative audience reach, relationship between the buyer and the sales account executive and/or sales

[25] In a truly competitive market, national media buyers/clients require a minimum RTG/SHR audience delivery to be *purchased*, as in money is exchanged specifically for commercial time on that station. Bonus spots that are offered by the station are usually accepted by the buyer regardless of their RTG/SHR.

manager, and most importantly, whether the lower performing stations are part of a group.

Given the above practices of the media buying industry, further investigation by the FCC is needed to determine if and how Clear Channel's lowest performing stations in audience share, WPNX (2.1), WDAK. (1.0), and WMLF (1.0) are sold to national buyers given the better than expected revenue performance.

BIA Analysis By Format

In brief, the following head-to-head format analysis illustrates that there is not much head-to-head competition in Columbus, GA. In all but one format (Adult Contemporary for Spring 2001 only), Clear Channel stations have the weaker audience delivery compared to its smaller group competitors – and in some instances by large margins. Despite competing against top ranking and/or dominant audience share stations, Clear Channel consistently generates market revenue that is not commensurate nor in proportion with its audience performance in the majority of formats. Its market power is derived by its sheer size and ability to leverage and package combined efforts in sales, marketing and promotional operations (locally and nationally) in ways that are not transparent. In reality, Clear Channel's entry in Columbus, GA has hindered, if not eviscerated, true competition. There are anti-competitive factors at work here that cannot be explained away by a better sales staff and capitalizing on efficiencies.

This is *prima facie* evidence that Clear Channel has abused its dominance as the largest group operator in Columbus, GA.

TABLE B - URBAN/URBAN ADULT CONTEMPORARY FORMAT

Mrkt Rev. Rank	Call Letters/Licensee	Spr. 00 Rtg Share[26]	Spr. 01 Rtg Share	2000 Revenue (000)	Power Ratio (PR)	PR Rank
#1	WFXE Davis Broadcasting	18.0	19.7	1875	0.73	3
#7	WAGH Clear Channel	5.9	6.9	925	1.03	2
#9	WKZJ Davis Broadcasting	2.9	2.4	500	1.15	1
#11	WOKS Davis Broadcasting	5.9	4.8	300	0.44	4

Davis Broadcasting, Inc.'s (DBI) WFXE is the #1 station in the market for audience share, however it does not deliver revenue commensurate with its audience performance given a power ratio of 0.73. DBI's WKZJ performs much better in audience/revenue

[26] Investing in Radio 2001, 1st Edition, BIA Research, Inc. [Exhibit 3]

ratio although it has considerably lower share, but as a group DBI's has not been able to capitalize on its overall audience strength in this format. However, Clear Channel's only urban station competing with three other similar formatted stations delivers more revenue than DBI's WKZJ and WOKS combined ($925 v. $800 ($500+300)), also performing an above index power ratio of 1.03. In the Spring 2000 Book, both WAGH and WOKS delivered identical 5.9 shares, but Clear Channel's WAGH still outdelivered DBI's WOKS by $625K (208%) in revenue.

TABLE C – GOSPEL FORMAT

Mrkt Rev. Rank	Call Letters/Licensee	Spr. 00 Rtg Share	Spr. 01 Rtg Share	2000 Revenue (000)	Power Ratio (PR)	PR Rank
#11	WOKS Davis Broadcasting	5.9	4.8	300	0.44	2
#12	WEAM Davis Broadcasting[27]	4.8	5.5	300	0.44	2
#13	WPNX Clear Channel	0.7	2.1	150	0.79	1

DBI's WEAM and WOKS are by far the dominant stations in the Gospel format outdelivering in share Clear Channel's WPNX by 162% and 129%, respectively, in the Spring 2001 Book. In fact, WOKS has a broader appeal to advertisers given its Urban/Old/Gospel mix. Nonetheless, Clear Channel's WPNX (an AM station!) outperforms both stations by almost double in power ratio– illustrating that it receives more than its fair share of advertising dollars commensurate with its audience share. An even more drastic scenario is present when you compare Clear Channel WPNX's 0.7 share in the Spring 2000 Book, to WOKS' 5.9 and WEAM's 4.8. Given the hierarchy usually present in the purchase of radio stations and formats based on market rank in audience share, WPNX should not have performed in revenue as well as it did in 2000 with less than a 1 share against two considerably stronger competitors, particularly in the same format– and definitely not on national buys!

TABLE D – COUNTRY FORMAT

Mrkt Rev. Rank	Call Letters/Licensee	Spr. 00 Rtg Share	Spr. 01 Rtg Share	2000 Revenue (000)	Power Ratio (PR)	PR Rank
#5	WKCN McClure Broadcasting	6.6	5.5	1100	1.35	2
#6	WSTH Clear Channel	4.4	4.2	1100	2.03	1

[27] DBI just acquired WEAM in 2001. It was owned previously by a stand-alone licensee in the market.

McClure's WKCN outdelivered Clear Channel by 31% in the Spring 2001 Book (5.5 v. 4.2) and 37% in the Spring 2000 Book (6.6 v. 4.4), but Clear Channel still equaled it in revenue, achieving a much higher power ratio (2.03).

TABLE E – ADULT CONTEMPORARY FORMAT (AC)

Mrkt Rev. Rank	Call Letters/Licensee	Spr. 00 Rtg Share	Spr. 01 Rtg Share	2000 Revenue (000)	Power Ratio (PR)	PR Rank
# 3	WGSY Clear Channel	5.1	5.5	1200	1.39	2
# 4	WCGQ McClure Broadcasting	6.6	4.2	1200	1.56	1

The Spring 2001Book shows McClure's WCGQ as the slightly weaker station in audience share, but nonetheless equaling Clear Channel's WGSY in revenue and delivering a stronger power ratio than WGSY (1.56 v. 1.39). However, the Spring 2000 Book provides an opposite view with WCGQ with a 6.6 share compared to Clear Channel's 5.1. Here again, Clear Channel station outperforms or equals the stronger competitor in revenue.

TABLE F – NEWS, TALK, AND SPORTS/SPORTS FORMAT

Mrkt Rev. Rank	Call Letters/Licensee	Spr. 00 Rtg Share	Spr. 01 Rtg Share	2000 Revenue (000)	Power Ratio (PR)	PR Ratio
# 10	WRCG McClure Broadcasting	5.5	3.5	300	0.39	2
# 14	WDAK Clear Channel	1.1	1.0	150	1.16	1

McClure's WRCG is by far the number 1 news/talk and sports station in the market, out-delivering Clear Channel's WDAK in audience share by 250% (3.5 v. 1.0) in Spring 2000. But Clear Channel performs much better in revenue commensurate with its audiences share – delivering a power ratio of 1.16 compared to 0.39 for McClure. Significantly, in the Spring 2000 Book, WRCG outperformed WDAK by 450% in share (5.5 v. 1.0) and yet Clear Channel's revenue is almost half of McClure's. Again, a 1.0 share is an audience share performance that does not normally merit generating such revenue and getting on national buys.

TABLE G – ROCK/CLASSIC ROCK FORMAT

Mrkt Rev. Rank	Call Letters/Licensee	Spr. 00 Rtg Share	Spr. 01 Rtg Share	2000 Revenue (000)	Power Ratio (PR)	PR Ratio
# 3	WVRK Clear Channel	6.3	5.2	1800	1.98	1
# 19	WIOL Woodfin Group	N/A	6.2	N/A	N/A	N/A

It is undetermined how WIOL, the one family-owned stand alone station remaining in the market, has fared since its on-air debut in Spring 2001 with a 6.2 share – the third best performance in the market! Its classic rock format outperformed Clear Channel's WVRK by 19%. Nonetheless, it is highly unlikely that it will come close to Clear Channel's $1800K in revenue for 2000 – another disadvantage for small competitors and a clear illustration of how difficult it is to enter this market, perform well and receive a fair share of the advertising revenue.

This transaction requires and deserves further investigation by the Commission and also another look by the Department of Justice.

Clear Channel's Recent Development of National Internet Sales Division Will Further Exacerbate the Anti-Competitive Consequences of its Dominance in Columbus, GA

The newly formed Clear Channel Radio Interactive Radio will provide sales, marketing, and technical expertise for Clear Channel's local radio stations, moving such efforts from the hands of local stations to a coordinated effort nationally. The division is expected to help local stations drive online revenue.[28] DBI is concerned that additional undue leverage will be placed on national and local media buyers to purchase a combination of on-air and Internet media buys, further expanding the reach of Clear Channel.

Clear Channel Entertainment's Potential for Discriminatory Practices in the Columbus, GA Radio Market

> "Our entertainment division produces, promotes and presents events in music, theatre, family entertainment and motor sports. We consider this acquisition and our entry into live entertainment to be *natural extension of our existing radio operations and a critical part of our long-term strategy*. . . Ultimately, this will

[28] John Martin is the new VP/GM of Clear Channel Radio Interactive, M Street Daily, Monday, Dec. 17, 2001, at 1. [Exhibit 10]

> allow us to *leverage our combined marketing and promotional strength* to help our customers sell their products and services."[29]

In August 2001, Clear Channel Entertainment and its SFX Division entered the Columbus, GA market via a multi-year operating agreement with the Columbus Civic Center. SFX manages and exclusively promotes a variety of concert and entertainment vehicles at the largest performing venue in the market. As Clear Channel has recognized, concert and entertainment venues are a very important part of a radio station's sales and promotional strategy, and have a direct impact on its ability to build listeners, its ability to serve advertisers, and its ability to promote its product and brand. Radio sales revenue is especially tied to the success of a station's promotional efforts – one is very dependent on the other.

In order for Clear Channel to live up to its promise of "combined marketing and promotional strength" and maximize shareholder value, it must tie-in its own radio stations with Columbus Civic Center events at the exclusion of non-Clear Channel radio stations in the market.

> ***"The ability to leverage SFX' promotional platform for the benefit of Clear Channel's radio stations and vice-versa results in a symbiotic relationship between SFX and the radio division which will lead to increased profitability."***[30]

Clear Channel, with a dominant 8 stations and a wide variety of formats, has the ability to cross-promote any music genre, without the need to use another competitor in the market, albeit one with a stronger audience share. If allowed, Clear Channel will also leverage its dominant position in the Columbus, GA radio market and its dominant position at the market's largest entertainment venue the entertainment and concert industry to leverage advertisers, potentially at higher rates. Surely, this practice is not to the long-term benefit of competitive stations, advertisers and listeners alike – not to mention the performing artists who will not be featured on the top station in any respective format.

Sufficient time has not passed for DBI to collect evidence of Clear Channel Entertainment's likely exclusionary practices in concert booking and selecting promotional media partners in favor of its own affiliated radio stations. Frankly, such information would be closely held by Clear Channel and not obtainable by DBI. Therefore, the FCC must seek such information as a part of its full inquiry.

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[29] Letter to Shareholders, Lowry Mays, Chairman and Chief Executive Officer, at 6, Clear Channel Shareholder Report.

[30] Clear Channel Shareholder Report at 38.

ISSUE 7: Conditions of Entry

Conditions of entry into the market are highly restrictive due to the finite number of channels, their infrequent availability, and Cumulus/Clear Channel's improper warehousing of a frequency available for a new station. The difficulty of entry into radio broadcasting are accurately expressed in paragraph 46 of the *Notice*. The high barriers to entry provide Clear Channel with additional protection from competition that makes approval of the eight-station Columbus concentration that much more dangerous to the public interest, and are an additional reason why a full evidentiary inquiry is needed.

Clear Channel's Response to the FCC November 16 Letter's inquiry on this point is a short paragraph that, typically, speaks in generalities while providing no specific information that could remotely alter the conclusion reached that the required public interest finding cannot be made. An interesting curiosity about Clear Channel's generalities, however, is its contention that the Commission should consider the unnamed move-in stations to which it alludes, thus recognizing that stations outside the core market can be relevant to the evaluation of concentration within the market. That of course is directly inconsistent with Clear Channel's erroneous contention that WSTH should not be considered in assessing the revenue concentration in the Columbus market. The faster the doubletalk, the greater the need for a hearing to determine all the real and relevant facts.

A particularly egregious factor requiring such inquiry is the unlawful conduct that Cumulus employed to "lock up" the only known potentially new frequency in the Columbus market so that no competitor could ever hold it. In this regard, Clear Channel's Response refers generally "one opportunity" to move a new FM station into the market, without identifying that opportunity at all. The one such opportunity of which DBI is aware is the Cusseta construction permit to which the FCC November 16 Letter refers.

The record on Cumulus' conduct concerning that permit is fully set forth in the June 1999 Reply and October 1999 Opposition that are part of the record now before the Commission. In a nutshell, Cumulus secured a stranglehold on that permit by illegally paying off the principals of the applicant in a proceeding that only could be lawfully settled through a comprehensive settlement when no such settlement was reached; paying those principals an illegal profit to control all aspects of the application and proposed

station; becoming the undisclosed real party in interest to that application; improperly settling the proceeding in which it was undisclosed with the similarly undisclosed real party in interest to a competing applicant; and obtaining an assignable option that gave it the right to designate the ultimate owner of the station if it did not exercise the option itself, thereby insuring that the station could not fall into the hands of a worthy competitor. Through Cumulus' exercise of its control over the permit by its assignment of the Cusseta option to Clear Channel, Clear Channel now holds the fruits of this poisonous tree. The public interest surely demands a full investigation of these matters with respect to both the individual violations alone and the plain anti-competitive behavior behind such warehousing of a potentially valuable competing frequency.

The public interest also requires an inquiry into the extent to which growth of Clear Channel's position will block the ability of DBI and McClure to become stronger competitors. The public interest is not served by permitting Clear Channel to increase its market share when doing so is likely to cause the Commission to prevent DBI and McClure from strengthening their positions due the aggregate market share that Clear Channel would hold with either an enhanced DBI or McClure group.

The FCC should also consider "quality of entry." In addition to the difficulties of a new license to enter the Columbus market given Cumulus' and now Clear Channel's warehousing a construction permit for the past years, there is a major issue whether that new entrant can be a truly viable competitor in a market with Clear Channel. If DBI and McClure, two group owners, are having problems with generating revenue even though they have maintained solid program shares, as well as finding and keeping employees, a stand alone licensee (and most certainly a minority owner) will not be able to maintain and survive.

ISSUE 8: Efficiencies

DBI acknowledges that there are several benefical economies of scale and scope for a broadcaster with multiple stations in one market. This is a legitimate and recognized economic benefit to a horizontal merger or acquisition. The issue is, however, not whether there are efficiencies or not, but whether such efficiencies and economies of scale and scope also benefit the public. DBI submits that certain practices when implemented by the dominant group in a market foster anti-competitive behavior and in turn, disserve the public interest.

For example Clear Channel discusses how it has streamlined station operations into one facility, consolidation of back room functions, and purchased bulk office supplies to reduce costs – all serving to increase efficiencies and the competitiveness of

the stations. Clear Channel, at 7. Significantly, any discussion on how it has merged its management and sales, marketing and promotional staffs, combined the sales efforts of all eight stations, structured its owned and operated national rep firm, and developed synergies and cross–promotional opportunities with its nationally dominant entertainment and concert promotion division (SFX Entertainment), is conveniently and conspicuously absent. This absence should be of particular concern to the Commission given Cumulus' (Clear Channel's predecessor party in interest) hollow and misleading claims that the transaction should be granted because its stations maintained separate sales staffs, separate managers and allegedly competed against each other. *See* June 1999 Reply at 43-66 and October 1999 Opposition.

Clear Channel makes no such disingenuous assertion. It unabashedly packages, cross-promotes, leverages all of its corporate media and entertainment properties.[31] Nonetheless, a further inquiry by the Commission is necessary to ascertain how Clear Channel actually conducts its sales operations, management of inventory, issuance of makegoods, and promotional events, both nationally and locally.

ISSUE 9: Public Interest Benefits

The Commission asks how this transaction would benefit listeners or advertisers. Commission November 16 Letter, at 5. DBI considers both groups its "consumers" because it offers two different products:

1. Advertisers – they purchase radio commercial time.
2. Listening Public – they listen to programming.

The impact on one consumer group has a direct impact on the other consumer group.

" The FCC has long recognized that advertisers play a vital role in a station's financial success or failure. Advertising dollars are critical to a commercial station's ability to make a profit to pay its employees, retire debt from the station purchase, earn money to acquire other stations, and offer quality programming to its audience. *Thus, advertising*

[31] *See, e.g.*, Clear Channel Shareholder Report, at 6 ("We have created a platform of highly complementary media and entertainment assets that we believe is unparalleled, one that will provide new and innovative ways for our clients to market their products and services and continued growth for our Company").

practices have a profound effect on a station's ability to serve their community of license." [32]

DBI has an obligation to serve not only its entire community, but also the African-American community, a community often neglected by the other radio stations in the market. As President of DBI, and the sole minority broadcast owner in the market, I fulfill this responsibility with professional *and* personal pride.

Fortunately, DBI has not had to reduce its community activity, PSA time, or other drastic measures to compensate for a shift in the competitive radio market. Other stations, however, have not been as fortunate.[33]

But it will be difficult to sustain our current operations if there is a continuing trend of unfair and anti-competitive advertising practices. Such practices will ultimately take its toll on all of the non-Clear Channel stations. Surely, no advertiser, listener or the radio industry in general is truly served by such a result.

CONCLUSION

For the foregoing reasons, the subject applications should be designated for hearing on all of the issues requested by DBI. Please continue to serve copies of FCC correspondence, actions, or other documents regarding these proceedings to Howard Topel, Esq., and S. Jenell Trigg, Esq., Leventhal, Senter & Lerman P.L.L.C., who remain Davis' record counsel with respect to the other issues (misrepresentations/lack of candor, real party in interest, illegal settlement and settlement payments, statutory and rules violations) raised in the pending pleadings.

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[32] FCC Discrimination in Advertising Study, Section I, at 3 (citations omitted).

[33] McClure Broadcasting Comments, at 1 (April 1999).

Peter H. Doyle, Chief
December 19, 2001

I declare under penalty of perjury that the foregoing statements are true to the best of my knowledge and belief.

Respectfully submitted,

Gregory A. Davis
President and CEO

cc: Howard A. Topel, Esq.
Rev. Jesse L. Jackson, Sr.
John Griffith Johnson, Jr.
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