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

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In The Matter of The Application of	)	
	)	
Sheldon Broadcasting, Ltd.	)	
Assignor	)	
	)	MB Docket No. 02-137
and	)	
	)	
Clear Channel Broadcasting Licenses, Inc.	)	
Assignee	)	File No. BALH-20010813AAM
	)	
For Consent to Assignment of License of	)	
KLFX(FM), Nolanville, Texas	)	
	)	
	)	

HEARING DESIGNATION ORDER

Adopted: June 5, 2002 **Released: July 10, 2002**

By the Commission:

1. In this order, we consider the unopposed above-captioned application for the assignment of the license of station KLFX(FM), Nolanville, Texas from Sheldon Broadcasting, Ltd. ("Sheldon") to Clear Channel Broadcasting Licenses, Inc. ("Clear Channel"). Because this application was pending when we adopted the Notice of Proposed Rulemaking in MM Docket No. 01-317 ("*Local Radio Ownership NPRM*"), we consider the competitive concerns raised by this 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 rule in accordance with Congress's directive in Section 202(b) of the Telecommunications Act of 1996.[4]

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

[2] 47 U.S.C. § 309(e).

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

[4] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), § 202(b); 47 C.F.R. § 73.3555(a)(1).

Since then, the Commission has granted thousands of assignment and transfer of control applications proposing transactions that complied with the new limits. In certain instances, however, the Commission has received applications proposing transactions that would comply with the new limits, but that nevertheless would produce concentration levels that raised significant concerns about the potential impact on the public interest.

3. In response to these concerns, the Commission concluded that it has "an independent obligation to consider whether a proposed pattern of radio ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local radio market and[,] thus, would be inconsistent with the public interest."[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]

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.[7] 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."[8] In the *NPRM*, we requested comment about possible interpretations of the statutory framework, including whether the new numerical station ownership limits definitively addressed the permissible levels of radio station ownership, whether they addressed diversity concerns only, or whether they established rebuttable presumptions of ownership levels that were consistent with the public interest. We also requested comment on how we should define and apply our traditional goals of promoting diversity and competition in the modern media environment. The *NPRM* also sought comment on how we should implement our policies toward local radio ownership.

5. In the *Local Radio Ownership NPRM*, we also set forth an interim policy to "guide [our] actions on radio assignment and transfer of control applications pending a decision in this proceeding."[9] 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.[10]

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[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, Rep. No. 24303 (Aug. 12, 1998). Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50 percent or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70 percent or more of the advertising revenues in that market. *See AMFM, Inc.*, 15 FCC Rcd 16062, 16066 ¶ 7 n.10 (2000).

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

[8] *Id.*

[9] *Id.* at 19894 ¶ 84.

[10] *Id.*

6. Under our interim policy, "we presume that an application that falls below the [50/70] screen will not raise competition concerns" unless a petition to deny raising competitive issues is filed. For applications identified by the 50/70 screen, the interim policy directs the Commission's staff to "conduct a public interest analysis," including "an independent preliminary competitive analysis," and sets forth generic areas of inquiry for this purpose.[11] The interim policy also sets forth timetables for staff recommendations to the Commission for the disposition of cases that may raise competitive concerns.

II. BACKGROUND

7. On August 13, 2001, Clear Channel and Sheldon filed an application proposing to assign the license of station KLFX(FM) from Sheldon to Clear Channel. Clear Channel currently is the licensee of two stations in the Killeen-Temple, Texas Arbitron metro:[12] KASZ(FM), Gatesville, Texas and KIIZ(FM), Killeen, Texas. Through its proposed acquisition, Clear Channel would own three FM stations in the Killeen-Temple metro. Four other FM stations and one AM station in the Killeen-Temple metro are owned by Cumulus Licensing Corp. ("Cumulus").

8. On August 22, 2001, the Commission issued a public notice indicating that the application had been accepted for filing.[13] The public notice also "flagged" the application pursuant to the Commission's "50/70" screen. Under this screen, the Commission flags proposed transactions for further competition analysis if the transaction would result in one entity controlling 50 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.[14] Based on Year 2001 revenue estimates from the BIA database,[15] Clear Channel proposes to commonly control the top two stations in the Killeen-Temple metro in terms of both advertising revenue and listenership. The three stations that Clear Channel proposes to own account for a 52.7 percent revenue share and a 50.3 percent listening share. Post-consummation, Clear Channel and Cumulus would collectively control 98.2 percent of the advertising revenue and have a 100 percent listening share in the Killeen-Temple metro.

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[11] *Id.* at 19895 ¶ 86.

[12] 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.

[13] *See* Public Notice, Broadcast Applications, Report No. 25054 (rel. August 22, 2001).

[14] *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.

[15] 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 March 12, 2002.

9. On January 17, 2002, the staff provided Clear Channel an opportunity to update the record in light of competitive changes that had occurred in the Killeen-Temple market and in light of the interim policy.[16] Clear Channel filed its response on February 7, 2002.[17] We designate the application for hearing based on this record.

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 Sheldon's radio broadcast licenses to Clear Channel before the assignment may occur.[18] 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.[19]

11. 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,[20] our focus is different.[21] Our analysis of radio license assignments is informed by how those antitrust experts look at competition issues, yet our authority arises out of the Communications Act, which is not concerned solely with the potential impact of economic concentration on advertisers, but ultimately seeks to maximize the utility that the public derives from the public airwaves. The Commission's public interest evaluation is therefore not limited to

[16] Letter from Peter Doyle, Chief, Audio Services Division, Mass Media Bureau, to Christopher L. Robbins, *et al.* (dated Jan. 17, 2002).

[17] Letter from Elizabeth E. Goldin to Peter H. Doyle, Chief, Audio Services Division, Mass Media Bureau (Feb. 7, 2002) ("Clear Channel Letter").

[18] 47 U.S.C. § 310(d).

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

[20] 15 U.S.C. § 18.

[21] Although the Commission's analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which allows the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies may find based solely on antitrust laws. *See FCC v. RCA Communications,* 346 U.S. 86, 96-97 (1953) ("To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure."). *See also RCA Communications,* 346 U.S. at 94; *United States v. FCC,* 653 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (The Commission's "determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry."); *Teleprompter-Group W,* 87 FCC 2d 531 (1981), *aff'd on recon.*, 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger); *Equipment Distributors' Coalition, Inc. v. FCC,* 824 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agency to "analyze proposed mergers under the same standards that the Department of Justice . . . must apply.").

competition concerns but necessarily encompasses the "broad aims of the Communications Act."[22] 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.[23] 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,[24] and whether it will result in the provision of new or additional services to listeners.[25]

12. Thus, under our interim policy, where a proposed transaction raises concerns about economic concentration, we will consider evidence that the particular circumstances of a case may mitigate any adverse impact to radio listeners that might otherwise result, as well as any evidence of benefits to radio listeners that might result from the proposed transaction. Ultimately, it is the potential impact of the transaction on listeners that will determine whether we can find that, on balance, grant of a particular radio station assignment or transfer of control application serves the public interest.

B. Local Radio Ownership Rules

13. 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.[26] 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.[27] Under the rules, as amended by the Telecommunications Act of 1996, in a local radio market with 45 or more commercial radio stations, a single entity may own up to eight commercial radio stations, no more than five of which are in the same service; in a market with 30 to 44 commercial radio stations, one owner may hold up to seven commercial radio stations, no more than four of which are in the same service; in a market with 15 to 29 stations, a single owner may own up to six stations, no more than four of which are in the same service; and in a market with 14 or fewer stations, one owner may hold up to five stations, no more than three of which are in the same service, except that no single entity may control more than 50 percent of the stations in such a market.[28]

14. We find that Clear Channel's proposed acquisition of the KLFX(FM) is consistent with the numerical limits in our local radio ownership rules. Clear Channel's multiple ownership showing

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

[23] 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)).

[24] *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).

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

[26] 47 C.F.R. § 73.3555(a).

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

[28] *See supra* Note 4.

indicates that, using the Commission's current definition of "radio market,"[29] the transaction creates one radio market, composed of 32 radio stations. In this market, a single licensee may, therefore, own up to 7 radio stations, not more than 4 of which are in the same service (AM or FM). If Clear Channel acquires the KLFX(FM), it will own 3 stations (all FM) in the market. The transaction therefore complies with the multiple ownership rules.

C. Public Interest Analysis Under Interim Policy

15. Having concluded that the proposed transaction is consistent with the numerical limits set forth in our ownership rules, we turn now to our competition analysis. Here, we find that the proposed transaction would create a market in which the top two group owners would own all seven FM stations in the Arbitron metro and that their combined share of the radio advertising market would be 98.2%. 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 will harm the public interest. We are therefore unable to conclude on this record 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.

16. In order to set the stage for the hearing in this case, we lay out 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.

17. *Radio Advertising as the Relevant Product Market.* Pursuant to our interim policy, we presume that the relevant product market is radio advertising. However, we consider evidence from the parties that the relevant product market in a specific case includes other forms of media advertising or should be based on listenership rather than advertising. Clear Channel asserts that radio advertising is not the relevant product market, stating that all of its radio stations face vigorous competition from all media, not just other radio stations, on a daily basis.[30] However, Clear Channel provides no evidence to support its assertion that the relevant product market is broader than radio advertising in the Killeen-Temple metro. Accordingly, for purposes of this order we continue to assume that radio advertising is the relevant product market.

18. *The Arbitron Metro as the Relevant Geographic Market.* Pursuant to our interim policy, we presume that the relevant geographic market is the Arbitron metro. However, we consider evidence from the parties that the relevant geographic market in a specific case may be larger, smaller, or otherwise different from the Arbitron metro. Clear Channel asserts that "Arbitron market areas are arbitrarily drawn and do not accurately reflect the geographic areas in which Clear Channel's stations compete for advertising revenue."[31] However, Clear Channel offers no alternative geographic market definition. Further, Tim Thomas, Clear Channel's Vice President and Market Manager for the Killeen-Temple area, states that the town of Killeen exists because of the Fort Hood army base, and that when a large amount of Fort Hood troops are deployed overseas "the stations can almost literally go bankrupt as our listenership drops drastically with soldiers overseas and their spouses leaving to stay with family out

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

[30] Clear Channel Letter at 3.

[31] *Id.*

of the area. Even Temple, Texas gets hit hard seeing its residential occupancy rates drop by 20-30 percent."[32] This statement suggests that Killeen-Temple, Texas is, indeed, a relatively insular commercial market. Under these circumstances, we find no persuasive reason to vary from the presumption in our interim policy that the Arbitron metro, in this case, the Killeen-Temple metro, represents the appropriate geographic market.

19. *Market Participants*. Current BIA data show 11 commercial and two non-commercial "in-market" stations in the Killeen-Temple metro. BIA also identifies 23 out-of-market stations that have some listeners (although their current share may be zero). Clear Channel argues that substantial numbers of people in the Killeen-Temple market listen to the out-of-market radio stations, and notes five stations in particular with significant listening shares.[33] However, Clear Channel itself owns eight of the 23 out-of-market stations, including the top two in terms of listeners in the Killeen-Temple metro. According to the BIA database, the Clear Channel out-of-market stations account for nearly 25 percent of the listening share in the Killeen-Temple metro, while the remaining out-of-market stations account for just less than 16 percent. Clear Channel also states that BIA counts a station's revenue only in its home market and that the BIA database therefore provides no indication of the extent to which the out-of-market stations that have a substantial audience share garner advertising revenue in Killeen-Temple.[34] Clear Channel also states that BIA estimates the revenues of the radio stations, that its estimates are generally less accurate in smaller markets, and that BIA assigned its lowest confidence rating to its estimates in Killeen-Temple. Clear Channel argues that because of these facts, using the BIA database as the sole indicator of market participants is suspect.[35] Finally, Clear Channel reiterates its argument that radio stations are not the only market participants because the relevant product market includes all media, not just radio.[36] Clear Channel, however, provides no evidence as to the amount of local Killeen-Temple advertising broadcast by the out-of-market stations, or whether those stations even compete for local advertising. We are therefore unable to conclude on the record before us that the market participants in the Killeen-Temple metro include more than the in-market stations listed in the BIA and Arbitron databases.

20. *Market Share and Concentration.* Under the interim policy, we presume that BIA revenue share estimates accurately reflect actual market shares. Clear Channel states that the revenue estimates for its station KIIZ(FM) and Sheldon's station KLFX(FM) are overstated by 8.6% and 7.5%, respectively.[37] Moreover, Clear Channel states that the revenues for KTON(AM), also owned by Sheldon, are overstated by 25%.[38] Clear Channel does not provide estimates of the revenues earned by the other stations in the market, however, and does not argue that the market *shares* (as opposed to the absolute amount of revenues) are inaccurate. We also note that using the Arbitron audience shares in the Killeen-Temple metro gives Clear Channel and Cumulus approximately the same shares of the market as using BIA's estimated revenues. The revenue and listening audience figures from the BIA database are as follows:

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[32] Clear Channel Letter, Declaration of Tim Thomas at 1.

[33] Clear Channel Letter at 4.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 5.

Owner	Market Revenue	Market Share	Fall 2001 Audience Share
Clear Channel	$1,950,000	34.8%	12.1
KLFX(FM)	$1,000,000	17.9%	7.6
	$2,950,000	52.7%	19.7 (50.3% of in-market listenership)
Cumulus	$2,550,000	45.5%	19.5 (49.7% of in-market listenership)
Others	$ 100,000	1.8%	0.0
In-market total	$5,600,000	100.0%	39.2
Out-of-market stations			
Clear Channel			24.2
Infinity Broadcasting			4.8
LBJS Broadcasting			4.5
Others			6.6
Out-of-market total			40.1
Ratings unaccounted for:			20.7%*

*This may include listeners of non-commercial stations, which are not rated by Arbitron, or listeners of commercial stations that do not receive sufficient listenership to be rated by Arbitron.

21. Clear Channel's proposed acquisition of KLFX(FM) would bring under common control the number one and number two stations in the Killeen-Temple market. Our preliminary competition analysis using BIA data shows that the proposed transaction would increase Clear Channel's share of the radio advertising in Killeen-Temple market from 34.8 percent to 52.7 percent, giving it the largest share in the market. The proposed transaction also would increase Clear Channel's share of the in-market listenership from 30.8 percent to 50.3 percent. By eliminating the independence of the second strongest station in the Killeen-Temple metro, the transaction would essentially create a duopoly market, with the second strongest station group (Cumulus) having a revenue share of 45.5 percent and an audience share of 49.7 percent, giving the top two owners a combined share of 98.2 percent of the in-market advertising revenues and 100 percent of the audience share attributable to in-market stations. The two stations groups would also own all seven of the FM stations in the Killeen-Temple metro.[39]

22. 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 DOJ presumes that mergers raising the HHI more than 100 points impermissibly "create or enhance market power." Clear Channel argues that that "the HHI accurately reflects market concentration only if the correct product and geographic market is defined and the correct list of market participants

[39] Including the listenership of the out-of-market stations yields similar results. Based on the total of in-market stations and out-of-market stations, Clear Channel currently owns the top three stations in terms of listenership, and the proposed transaction would allow it to acquire the fourth largest station in terms of listenership. With the acquisition, Clear Channel would increase its percentage of the rated listening audience from 45.8 percent to 55.4 percent. The top two station groups, again Clear Channel and Cumulus, would have 79.7 percent of the rated listening audience, with the remaining 20.3 percent divided among six station groups. There are also six other station groups that received listening shares of zero percent according to BIA 2001 data.

included."[40] Clear Channel submits that, for the reasons stated 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 Killeen-Temple, is the appropriate geographic market.[41] Although we believe that mechanical application of the *Horizontal Merger Guidelines*[42] 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.[43] Our preliminary competition analysis using BIA data shows that the proposed combination of stations would result in an HHI of 4848.5 in the Killeen-Temple radio advertising market, with a change in the HHI of 1240.6. Clear Channel has failed to present sufficient evidence to rebut the presumption that this HHI describes a highly concentrated market.

23. *Existing Facilities/Barriers to Entry.* Where market share and concentration data suggest the potential for competition concerns, we examine the number, class, and signal contour of all existing stations in the radio market to determine their competitive significance. We recognize that there may be good AM and FM facilities with 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 good facilities remaining outside the largest group's (or two largest groups') control to provide a competitive challenge. In the Killeen-Temple metro, there are only three commercial radio stations, all in the AM service and each individually owned, that would not be controlled by the two largest groups following the proposed transaction: (1) KREH(AM), Class B; (2) KRMY(AM), Class B; and (3) KTON(AM), Class B. None of these three stations has reported listenership according to the BIA database, and only KRMY(AM) has any estimated revenues ($100,000). Further, KTON(AM) is owned by Sheldon and broadcasts only during the daytime. Based on this record, it is unlikely that any of these stations will offer any competitive challenge in the future.

24. 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. Clear Channel argues that three stations have entered the Killeen-Temple market in the past ten years. It also states that there are opportunities for four stations currently broadcasting outside the metro to move into Killeen-Temple if they made minor technical amendments or changed their cities of license.[44] Clear Channel has provided no evidence, however, as to which stations currently operating outside the Killeen-Temple metro might consider moving into Killeen-Temple, or the likelihood of entry by these stations. Our review of the record therefore shows that while there is might be some possibility of entry into this market, it is unclear whether any entry would actually occur or whether it would be sufficient to be able to counteract any anticompetitive effects that might result from the assignment of KLFX(FM) to Clear Channel.

25. *Potential Adverse Competitive Effects: Coordination and Unilateral Market Power.* Under the interim policy, relevant evidence concerning the potential adverse competitive effects of a

[40] Clear Channel Letter at 5.

[41] *See infra* paras. 17-18.

[42] *Horizontal Merger Guidelines,* issued by U.S. Department of Justice & Federal Trade Commission, April 2, 1992, revised April 8, 1997 ("*Horizontal Merger Guidelines*").

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

[44] Clear Channel Letter at 6.

proposed transaction may include direct proof of adverse competitive effects or facts that demonstrate that structural conditions (*e.g.*, a high market share and significant barriers to entry) will facilitate the exercise of market power. In evaluating the potential adverse competitive effects of a proposed transaction, under the interim policy, we also consider the effect on competition, if any, that may have resulted from a pre-existing local marketing agreement ("LMA") or joint sales agreement ("JSA") between the applicants. Clear Channel contends that the acquisition of KLFX(FM) will not alter the competitive situation in the Killeen-Temple market because it currently operates the station under an LMA and has sold the advertising on KLFX(FM) pursuant to a JSA since 1993.[45] Clear Channel states that, as is typical with JSAs, in return for a monthly fee to the station owner, Clear Channel supplies the sales staff and generally makes all sales-related decisions, including setting advertising prices, subject always to the station owner's right to reject any advertising. Thus, regardless whether it sells advertising as the station's owner or through a JSA, Clear Channel states that its sales decisions and pricing power remain the same.[46]

26. We are not persuaded by Clear Channel's argument that the present transaction is negligible in terms of its impact on competition because it has operated the stations it seeks to acquire pursuant to LMA and JSA agreements for some time. There is no substantial evidence on the record from which we might conclude that no adverse effects have resulted from the aggregation of economic power attributable to Clear Channel's LMA and JSA relationships. We note, in this regard, that this is the first opportunity the Commission will have had to consider any such effects because we do not currently review LMAs or JSAs when they are entered.

27. As stated above, Clear Channel's acquisition of KLFX(FM) would bring under common control the two top stations in the Killeen-Temple metro. It would essentially create a duopoly market in the metro, with Clear Channel and Cumulus owning all seven FM stations and having a combined share of 98.2 percent of the in-market advertising revenues and 100 percent of the audience share attributable to in-market stations. As also stated above, the market is highly concentrated and there are significant barriers to entry. This market structure increases the risk of coordinated behavior leading to price discrimination, division of advertising accounts, and lower quality programming. As the D.C. Circuit has stated, "[t]he combination of a concentrated market and barriers to entry is a recipe for price coordination. Where rivals are few, firms will be able to coordinate their behavior, either by overt collusion of implicit understanding, in order to . . . achieve profits above competitive levels. The creation of a durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices. . . . . Tacit coordination 'is feared by antitrust policy even more than explicit collusion, for tacit coordination, even when observed, cannot be easily controlled directly by the antitrust laws. It is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur.'"[47]

28. *Efficiencies and Public Interest Benefits.* Under the interim policy, we consider evidence of economic efficiencies that the proposed transaction would produce and public interest benefits the proposed transaction would provide 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

[45] Clear Channel Letter at 5.

[46] *Id.* at 5-6.

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

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. Clear Channel asserts that operating KLFX(FM) along with its other major station, KIIZ(FM), reduces operating expenses by at least 30 percent.[48] It also asserts that advertisers have received a better advertising product for the same price,[49] although it does not explain how that has occurred. Clear Channel asserts that several public benefits will result from its acquisition of KLFX(FM). Clear Channel states that it will upgrade the station's facilities and improve the programming, noting that the station currently goes off the air once or twice each month. Clear Channel also asserts that advertisers will be able to use "big-market talent" to produce their advertisements. Clear Channel lists a number of local activities it has undertaken and service organizations it supports, mostly in support of the armed forces personnel at Fort Hood. For example, after the September 11, 2001, terrorist attacks, it broadcast Associated Press news for two-and-a-half days with no commercial interruptions.[50] Ken Williams, the principal of Sheldon, also states that he is "firmly convinced" that Clear Channel is the only willing and able buyer of KLFX(FM), and that he would have difficulty finding another buyer. He states that few companies are interested in buying a stand-alone station.[51]

29. 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."[52] 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. 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. With respect to public interest benefits and transaction-specific efficiencies, we believe that there are material issues as to whether Clear Channel's asserted benefits would result from the transaction and would benefit the public. While Clear Channel appears to be using its current LMA arrangements with KLFX(FM) to realize cost savings and to invest in programming and improved equipment, we find the record in this proceeding insufficient to conclude that

[48] Clear Channel Letter at 6.

[49] *Id.*

[50] *Id.* at 1-2; Declaration of Tim Thomas at 1.

[51] Clear Channel Letter, Declaration of Ken Williams at 1.

[52] *See Horizontal Merger Guidelines*, § 4.

the claimed public interest benefits and transaction-specific efficiencies of this transaction outweigh the potential for competitive harm.

IV. CONCLUSION

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

V. ISSUES TO BE DETERMINED AT HEARING

31. 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 Killeen-Temple, Texas market to determine whether the factual assumptions in paragraphs 17 through 29 above are correct. We further direct the ALJ to determine, in light of his or her conclusions, whether the transaction is likely to cause any anticompetitive harms, and to determine what, if any, public benefits would accrue from this transaction. Finally, we direct the ALJ to apply these findings to determine whether, on balance, grant of the application would serve the public interest. The ALJ should address the following specific issues.

32. 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 Killeen-Temple metro. In the alternative, parties may stipulate that the relevant product market is "radio advertising," the presumptive product market definition in our analytical framework.

33. 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 Killeen-Temple metro.

34. 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 Killeen-Temple 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.

35. Issue 4: *Market Shares.* The ALJ shall receive testimony or other economic evidence that will facilitate the calculation of market shares for all firms identified as market participants (see

Issue 3) based on total sales generated within the relevant geographic market for the most recent year for which data are available. If uncommitted entrants may be expected to enter within a year, in response to a small but significant and non-transitory price increase in the relevant product, then such forecast market shares may also be included. In the alternative, parties may stipulate that market shares will be calculated using the most recent revenue data available in the BIA database.

36. Issue 5: *Market Concentration.* The extent of market concentration depends on the number of firms in the market and their respective market shares. Our analytical framework recognizes the Herfindahl-Hirschman Index ("HHI") as a measure of market concentration but finds that the HHI may not be entirely appropriate when applied to the commercial radio industry. The ALJ shall receive testimony, studies, or other relevant economic evidence to determine the appropriate measure of market concentration in the Killeen-Temple 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.

37. Issue 6: *Potential Adverse Competitive Effects.* Following our analytical framework and the *Horizontal Merger Guidelines*, the ALJ shall receive testimony, studies and other relevant economic evidence that evaluates the nature and extent of any lessening of competition that might result from the transaction in the relevant product and geographic markets. Evidence concerning the potential lessening of competition by (1) coordinated behavior among competing firms and (2) unilateral effects attributable to the behavior of the post-transaction firm should be developed. Both the examination of the issue and the ALJ's opinion will be informed by the findings developed with respect to Issues 1-5.

38. 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 Killeen-Temple 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 Killeen-Temple metro should follow our analytical framework and the *Horizontal Merger Guidelines*. Thus, evidence concerning the timeliness, likelihood, and sufficiency of entry in the Killeen-Temple 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.

39. 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*.

40. 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 Killeen-Temple 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 Killeen-Temple metro.

VI. ORDERING CLAUSES

41. Accordingly, IT IS ORDERED, That, in the event the parties elect to defer further consideration of the application to assign the license of Station KLFX(FM), Nolanville, Texas, from Sheldon Broadcasting, Ltd. to Clear Channel Broadcasting Licenses, Inc. in accordance with the interim policy, Sheldon and Clear Channel SHALL FILE a joint election to defer consideration of the application. Such election SHALL BE FILED within 15 days of the Order becoming effective.

42. IT IS FURTHER ORDERED, That, in the event the parties do not timely file the joint election set forth in the paragraph above, pursuant to Section 309(e) of the Communications Act, the application to assign the license of station KLFX(FM), Nolanville, Texas, from Sheldon Broadcasting, Ltd. to Clear Channel Broadcasting Licenses, Inc. IS DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, on the following issue:

> To determine, in light of the evidence to be presented in the hearing, whether the public interest, convenience and necessity would be served by the grant of the above-captioned assignment application (File No. BALH-20010813AAM).

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

44. 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.

45. IT IS FURTHER ORDERED, That the effectiveness of this Order IS STAYED for a period of 20 days from the date of its release, during the first 10 days of which 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.

46. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, Sheldon 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 this Order becoming effective pursuant to Paragraph 45 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.

47. 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.

48. IT IS FURTHER ORDERED, That the application to assign the licenses for station KLFX(FM), Nolanville, Texas, from Sheldon Broadcasting, Ltd. to Clear Channel Broadcasting Licenses, Inc. WILL BE HELD IN ABEYANCE PENDING THE OUTCOME OF THIS PROCEEDING.

49. 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.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary