

**EXHIBIT A**

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# Department of Justice

FOR IMMEDIATE RELEASE  
MONDAY, AUGUST 10, 1998

AT  
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2888

**DEPARTMENT REQUIRES  
SELL EIGHT RADIO STATIONS  
AS PART OF NATIONWIDE COMMUNICATIONS INC. ACQUISITION**

Radio Stations in San Diego, Cleveland and Columbus, Ohio  
Must be Sold to Alleviate Antitrust Concerns

WASHINGTON, D. C. — The Department of Justice reached a settlement today with Jacor Communications Inc. allowing the company to go forward with its \$620 million acquisition of Nationwide Communications Inc. as long as Jacor sells off eight radio stations—two in San Diego, one in Cleveland, and five in Columbus, Ohio. The Department said that, without the divestitures, the acquisition would have significantly reduced competition in those cities.

If the deal were approved as originally proposed, Jacor would have had control of 12 stations in San Diego, accounting for 42 percent of the radio advertising revenue. In Cleveland, Jacor would have owned six radio stations with 43 percent of the radio advertising revenue. In Columbus, with nine radio stations, Jacor would have had 58 percent of the radio advertising revenue. The Department's Antitrust Division and the Ohio Attorney General's Office conducted a joint investigation into Jacor's acquisition of Nationwide.

"The divestitures will preserve the choices available to advertisers in the San Diego, Cleveland, and Columbus markets," said Joel I. Klein, Assistant Attorney General in charge of the Department's Antitrust Division.

Jacor is addressing the Department's competitive concerns by selling or swapping radio stations with several different companies. Jacor is using a fix-it-first remedy, which means they will complete the sales before acquiring Nationwide.

The two San Diego stations, KKLQ-FM and KJQY-FM, will be sold to Dallas-based Heftel Broadcasting Corporation. Jacor will swap WKNR-AM in Cleveland for WTAE-AM in Pittsburgh, currently owned by Austin, Texas-based Capstar Broadcasting Partners. In Columbus, Jacor will sell WZAZ-FM to Cincinnati-based Blue Chip Broadcasting. Jacor has also agreed to sell their right to acquire WKKJ-FM of Chillicothe, Ohio, to Cincinnati-based Secret Communications LLC.

Jacor will also swap three Columbus stations and two stations in Minneapolis-St.

Paul with New York-based CBS Radio **Station Group**. In return, Jacor will receive **two** Baltimore **stations**, **two** St. Louis **stations**, and **two** San Jose, California stations **from** CBS. Jacor's swap **with CBS will** give CBS WHOK-FM, WL VQ-FM, and WAZU-FM in Columbus and WMJZ-FM and **KSGS-AM** in Minneapolis-St Paul. Jacor will receive **WOCT-FM** and WCAO-AM in Baltimore, **KSD-FM** and KLOU-FM in St. Louis, and KOME-FM and **KUFX-FM** in San Jose.

According to industry estimates, the divestitures will reduce Jacor's **revenue share** to approximately **39** percent in Cleveland, **36** percent in San Diego, and **38** percent in **Columbus**.

Jacor, headquartered in Covington, **Kentucky**, currently **owns** and operates 197 **radio stations** in **55** markets in the U.S. In 1997, its **revenues were** approximately **\$600** million.

Nationwide, headquartered in Columbus, Ohio, **owns** or operates **17** radio stations located in 11 metropolitan **areas** across the U.S. Nationwide's 1997 radio **revenues** were approximately \$1 **13** million.

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**EXHIBIT B**  
**ENGINEERING REPORT**

Arbitron list 33 stations in the Columbus Market; however, we have determined that 16 stations or about half of the Columbus Arbitron Market are licensed to communities outside of the Columbus Urbanized Area. We have determined the following stations are assigned either to Columbus or to a community within the Urbanized Area:

FM Stations

Inside

WCOL - Columbus  
 WSNY - Columbus  
 WLWQ - Columbus  
 WBNS - Columbus  
 WNCI - Columbus  
 WXMG - Upper Arlington  
 WBZX - Columbus  
 WWCD - Grove City  
 WEGE - Westerville  
 WCVO - Gahanna  
 WFJX - Hilliard  
 WCKX - Columbus

FM Stations

Outside

WQID - Mount Vernon  
 WHOK - Lancaster  
 WCLT - Newark  
 WNKO - Newark  
 WSMZ - Johnstown  
 WJZA - Lancaster  
 WJZK - Richwood  
 WJYD - London  
 WAZU - Circleville  
 WODB - Delaware

AM Stations

Inside

WTVN - Columbus  
 WRFD - Columbus  
 WMNI - Columbus  
 WZNW - Columbus  
 WBNS - Columbus

AM Stations

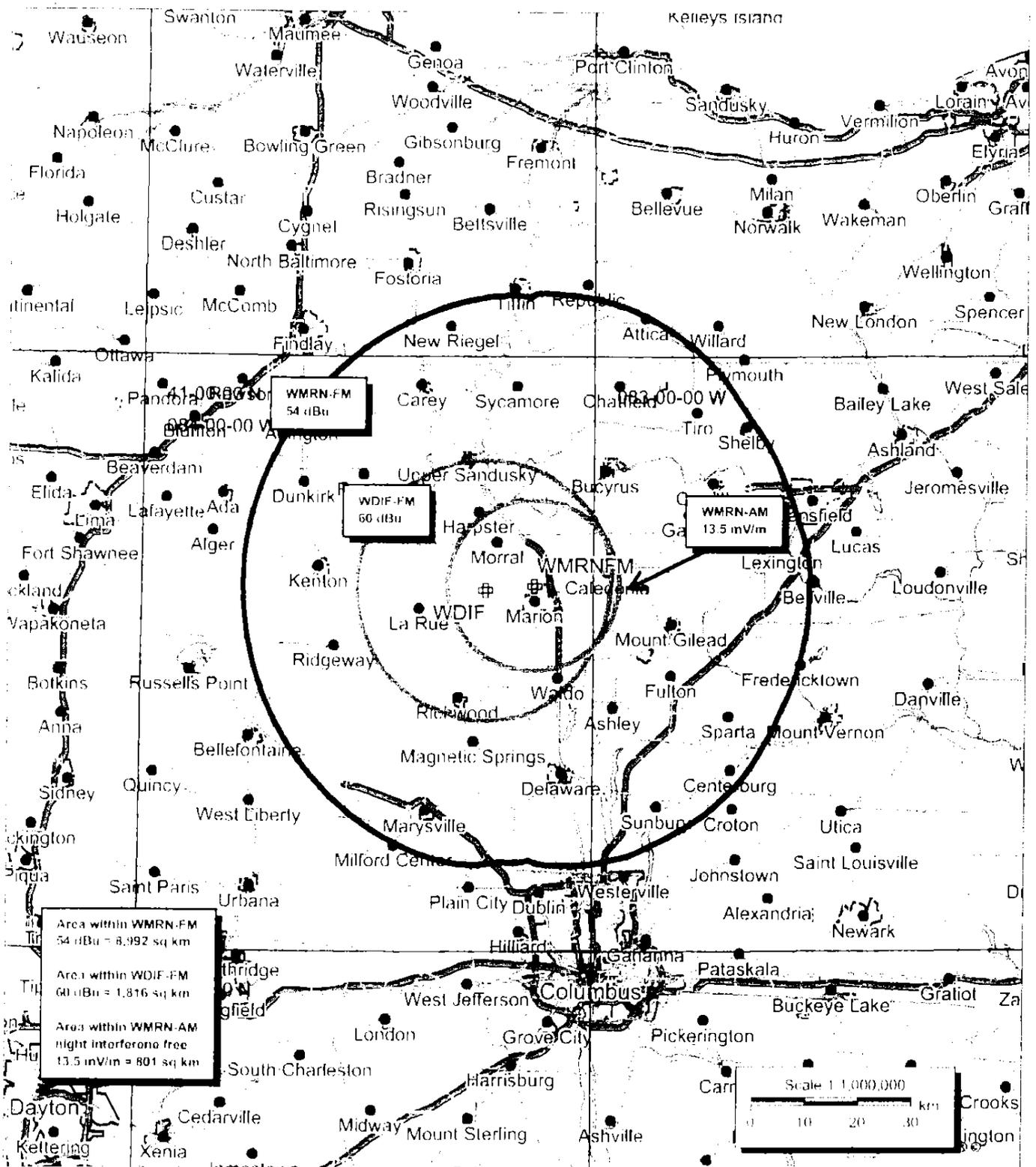
Outside

WHTN - Heath  
 WUCO - Marysville  
 WMJO - Mount Vernon  
 WLOH - Lancaster  
 WCLT - Newark  
 WDLR - Delaware

Bromo Communications, Inc



William G. Brown



**EXHIBIT #1**  
**COMPARISON CONTOURS**  
**WMRN-FM - WDIF-FM - WMRN-AM**  
**Marion Ohio**

**Bromo Communications, Inc.**

Atlanta Georgia

October 2002



Map of the [illegible] area

WIKI  
[illegible]  
[illegible]  
[illegible]

[illegible]

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**EXHIBIT C**  
**COMPETITIVE IMPACT STATEMENT**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA and  
**STATE OF NEW YORK,**  
by and through its Attorney General.  
Dennis C. Vacco,

Plaintiffs,

v.

AMERICAN RADIO SYSTEMS  
CORPORATION,  
THE LINCOLN GROUP, L.P. and  
GREAT LAKES WIRELESS TALKING  
MACHINE LLC,

Defendants.

No. Civ. 96-CV-2459  
(Antitrust)

Filed: October 24, 1996

**COMPETITIVE IMPACT**  
**STATEMENT**

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

**I. NATURE AND PURPOSE OF THE PROCEEDING**

The plaintiffs filed a civil antitrust Complaint on October 24, 1996, alleging that the proposed acquisition of The Lincoln Group, L.P. ("Lincoln") by American Radio Systems Corporation ("ARS") would violate Section 7 of the Clayton Act, 15

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U.S.C. § 18, and that the Joint Sales Agreement ("**JSA**") between ARS and Great Lakes Wireless Talking Machine LLC ("**GreatLakes**") violates Section 1 of the Sherman Act, 15 **U.S.C.** § 1. The Complaint alleges that ARS and Lincoln own and operate three and four radio stations respectively in the Rochester, New York area. In addition, ARS has a JSA with a radio station owned by Great Lakes (**WNVE-FM**), allowing ARS post-merger to control the **sale of** advertising time on an eighth station as well. This acquisition would **allow ARS to control** advertising time on *six* of the top eight radio stations in the Rochester *area*. As a result, the combination of these companies would substantially lessen competition in the sale of radio advertising time in Rochester, New York and the surrounding area.

Moreover, the Complaint alleges that, beginning at least ~~as~~ early as October 1, 1995 and continuing to this day, ARS and Great Lakes entered into a contract, the purpose of which is the elimination of **all** pricing competition **between two** rival radio stations, to the ~~detriment~~ of purchasers of radio advertising time **in** the Rochester area. ~~As~~ such, it constitutes an *illegal contract* in restraint of interstate trade and commerce.

The prayer for relief seeks: (a) adjudication that ARS's proposed acquisition of Lincoln would violate Section 7 of the Clayton **Act**; (b) adjudication that ARS' JSA with Great Lakes is a violation of Section 1 of the Sherman Act; (c) **preliminary and permanent** injunctive relief preventing the **consummation** of the proposed **acquisition** and **enjoining** the continuation of the JSA; (d) **an** award to the **United States** of the costs of this action; and (e) such other **relief as** is pmper.

Shortly before this suit **was** filed, a proposed settlement was reached that permits **ARS** to complete its acquisition of Lincoln, yet preserves competition in the market for which the transaction would raise significant competitive concerns. A Stipulation and proposed Final Judgment embodying the settlement were filed at the same time the Complaint **was** filed.

The proposed Final Judgment orders **ARS** to divest **WHAM-AM** and **WVOR-FM**, both currently owned by Lincoln, and **WCMF-AM**, currently owned by **ARS**. Unless the United States **grants** a time extension, **ARS** must divest these radio stations either within **six** months after the **filing** of the Final Judgment, or within five (5) business days after notice of entry of the **Final** Judgment, whichever is later. If **ARS** does not divest **WCMF-AM** and the Lincoln **Assets** within **the** divestiture period, the Court may appoint a trustee to sell the assets. The proposed Final Judgment **also** requires **ARS** to ensure that, **until** the divestiture mandated by the Final Judgment has been accomplished, all of Lincoln's present stations (including **WHAM-AM** and **WVOR-FM**) will be operated independently **as** viable, ongoing businesses, and kept separate and **apart from** **ARS'** other Rochester **radio** stations. Further, the proposed Final Judgment requires **ARS** to **give** the **United** States prior notice **as** to certain future radio station acquisitions in Rochester.

In addition, the Final Judgment requires **ARS** and Great **Lakes** to terminate the JSA that **allows** **ARS** to sell radio advertising time **for** **WNVE** within **five (5)** **business** days **after** receiving notice of entry of the **Final** Judgment, and to cease **and desist from** entering into any future joint sales agreements between them in

the Rochester, New York Metro **Survey Area**. **ARS** and Great Lakes also **must** terminate their "Option Agreement" dated September 28, 1995, between them, within five (5) business days after receiving notice of the entry of the **Final Judgment**, unless **ARS** has **first** assigned this agreement to **any** entity or entities acquiring either the Lincoln **Assets** or WCMF-AM. **Furthermore**, the proposed **Final Judgment** requires **ARS** and Great **Lakes** to give the United States prior notice before entering any future agreements that would grant **ARS** or Great Lakes the right to sell advertising time or to establish advertising prices for **non-ARS** radio stations in Rochester.

The plaintiffs and the defendants have stipulated that the proposed **Final Judgment** may be entered after compliance with the **APPA Entry** of the proposed **Final Judgment** would terminate this action, except that the Court would retain **jurisdiction** to construe, **modify**, or enforce the provisions of the proposed **Final Judgment** and to punish violations thereof.

**A** \_\_\_\_\_

Defendant **ARS** is a Delaware corporation with its headquarters in **Boston**, Massachusetts. It currently owns and operates 62 **radio stations** in **14 metropolitan areas** in the United States. In 1995, **ARS** reported total net revenues of **approximately \$97 million**. **ARS** owns three radio stations in Rochester, and **sells** advertising for **one other radio station (WNVE)** under a **JSA**

Lincoln is a New York limited partnership headquartered in Syracuse, New York. Lincoln owns four radio stations in Rochester and two in Salem, Ohio. Great Lakes is a New York limited partnership headquartered in East Rochester, New York. It owns one radio station in Rochester, WNVE-FM.

**B. Description of the Events Giving Rise to the Alleged Violations**

On February 23, 1996, ARS agreed to purchase Lincoln for approximately \$30.5 million. As a result of the proposed transaction, ARS would own or have the right to sell advertising for six of the top eight radio stations in Rochester.

ARS and Great Lakes formerly competed for the business of local and national companies seeking to advertise in the Rochester area. This competition ended after ARS and Great Lakes entered into a JSA on September 28, 1995, giving ARS exclusive control over the sale of advertising on Great Lakes' radio station, WNVE-FM. The JSA eliminated rivalry between direct competitors, to the detriment of radio advertisers, without realizing any procompetitive benefits.

The proposed acquisition between ARS and Lincoln and the JSA between ARS and Great Lakes precipitated the Government's suit.

**C. Anticompetitive Consequences of the Proposed Merger**

**1. Sale of Radio Advertising Time in Rochester**

The Complaint alleges that the provision of advertising time on radio stations serving the Rochester, New York Metro Survey Area ("MSA") constitutes a line of commerce and section of the country, or relevant market, for antitrust purposes. The Rochester MSA is the geographical unit for which Arbitron furnishes

radio stations, advertisers, and advertising agencies in Rochester with data to aid in evaluating radio audience size and composition. The Rochester MSA includes **six** counties: **Monroe**; **Wayne**; **Ontario**; **Livingston**; **Genesee** **and** **Orleans**. Local and national advertising that is placed on radio stations **within** the Rochester **MSA** is aimed at reaching listening audiences in the Rochester **MSA**, and radio stations outside of the Rochester **MSA** do not provide effective access to **this** audience. **Thus**, advertisers would not **buy** enough advertising time **from** radio **stations** located outside of the Rochester **MSA** to defeat a small but **significant** nontransitory increase in radio advertising prices within the Rochester **MSA**

Radio advertising time is sold by radio stations directly or through their **national** representatives. Radio stations generate almost **all** of their revenues from the sale of advertising **time** to **local** and national advertisers.

Many local and **national** advertisers purchase **radio** advertising time in Rochester **because** **such** advertising is preferable to advertising in other media for their specific needs. For such **advertisers**, radio time: may be **less** expensive and more cost-efficient **than** other media at reaching the advertiser's target audience (individuals most likely to purchase the advertiser's products or services); may reach certain target audiences that cannot be reached **as** effectively **through** other media; or may offer promotional opportunities to advertisers **that** they **cannot** exploit **as** effectively using other media. For these **reasons**, many local **and** national

advertisers in Rochester who purchase radio advertising time view radio either **as** a necessary advertising medium for them, or as a necessary advertising complement **to** other media.

Although some local and national advertisers may switch some of their advertising to other media rather than absorb a price increase in radio advertising time in Rochester, the existence of such advertisers would not prevent radio stations **from** profitably raising their prices a small but **significant** amount to those advertisers who have strong preferences for using radio over other media for some or all of their advertising campaigns. **Radio** stations, which negotiate prices individually with advertisers, can identify those advertisers with strong radio preferences. Consequently, radio **stations can** charge different advertisers different rates. Because of this ability to price discriminate between different customers, radio **stations may** charge higher prices **to** advertisers **that** view radio **as** particularly effective for their needs, while maintaining lower prices for other advertisers.

## **2 Harm to Competition**

The Complaint **alleges** that **ARS'** proposed acquisition **of Lincoln** would lessen competition substantially in the provision of **radio advertising time** in the Rochester **MSA**. **The** proposed acquisition would create **further** market concentration in an already highly concentrated market, and **ARS** would **control** a substantial share of the advertising revenues in **this** market. **ARS** presently controls approximately **34%** of all radio advertising revenues in Rochester

(including its **JSA** with Great Lakes), and its market share would rise to approximately 64% after the proposed merger. According to the Herfindahl-Hirschman Index ("HHI"), a widely-used measure of market concentration defined and explained in Exhibit A hereto, the pre-merger HHI in this market is 2704, which would rise to **4744** after the merger, with a change of **2040**. This substantial increase in concentration will reduce competition and lead to higher prices and reduced services.

Advertisers select radio stations to reach a large percentage of their target audience based upon a number of factors, including, *inter alia*, the size of the station's audience and the characteristics of its audience. Many advertisers **seek** to reach a large percentage of their target audience by selecting those stations whose audience **best** correlates to their target audience. If a number of **stations** efficiently reach that target audience, advertisers benefit from the competition among such stations to offer better prices or services. Today, **several ARS** and Lincoln **stations** compete head-to-head to reach the same audiences and, for many local and national advertisers buying time in Rochester, they are close substitutes for each other based **on their specific** audience characteristics.

**During** individual price negotiations between advertisers and **radio stations**, advertisers will provide **the stations** with information about **their** advertising needs, including their target audience and the desired **frequency and timing** of ads. Radio

stations thus have the ability to charge advertisers differing prices after assessing the number and attractiveness of alternative **radio** stations that can meet a particular advertiser's specific target audience needs.

After the merger, advertisers attempting to reach certain audiences who now mostly listen to **ARS** and Lincoln stations would face less desirable choices if they buy time solely from firms other than the merged entities in order to reach these audiences. Because advertisers seeking to reach these audiences would have inferior alternatives to the merged entity **as** a result of the merger, the acquisition would give **ARS** the ability to raise its rates and reduce the quality of its service.

The Department also considered how the proposed merger would concentrate Rochester's strongest radio signals into the hands of a single entity. After **the** merger, **ARS** would own four of the seven Class B FM license radio stations in the Rochester area, and would have controlled advertising on **a** fifth Class B FM license radio station through its **JSA** with Great **Lakes**. **ARS** would also own the area's only clear channel AM station. The merger would therefore have given **ARS** control over advertising on **six** of Rochester's eight most **powerful radio** signals.

If **ARS** raised prices or lowered services to those advertisers who **buy ARS** and Lincoln **stations** because of their **strength** in delivering **access** to certain specific audiences, **non-ARS** radio **stations** in Rochester would not be induced to **change** **their** formats **to** attract a greater share of the same **listeners** and to serve better those advertisers seeking to reach such listeners. **Successful** radio **stations are** unlikely to undertake a format change solely in response to small but significant

increases in price being charged to advertisers by a multi-station firm such as ARS, because they would likely have to give up their existing audiences. **Less** successful stations that change format may still not attract enough **Listeners** to provide a suitable alternative to the merged entity.

New entry into the Rochester radio advertising market is highly unlikely in response to a price increase by the merged parties. No unallocated radio broadcast frequencies exist in Rochester. **Also**, stations located in adjacent communities cannot boost their power so **as** to enter the Rochester market without interfering with other stations on the same or similar frequencies, a violation of Federal Communications Commission ("FCC") regulations.

For these reasons, the Department concludes that the merger **as** proposed would substantially lessen competition in the sale of **radio** advertising time in the Rochester MSA, eliminate actual competition between **ARS** and Lincoln, and result in increased rates for radio advertising time in the Rochester MSA, **all** in violation of Section 7 of the Clayton Act.

D. **The JSA is an Illegal Restraint of Trade**

The complaint alleges that **the JSA** between **ARS** and Great Lakes violates Section 1 of **the Sherman Act**. Before entering into **the JSA**, Great Lakes **station WNVE-FM** competed with **ARS Station WCMF-FM** for **advertisers**. Advertisers regularly played one of these stations **off** against the other to **obtain** better rates

and increased services. In the fall of 1995, ARS and Great Lakes entered into a JSA pursuant to which ARS exclusively prices and sells all radio advertising time on WNVE-FM. In return, ARS pays Great Lakes a monthly lump sum.

The JSA gives ARS complete control over the sale of the inventory of its direct competitor. In so doing, the JSA eliminates one of the most important forms of competition between two firms in an open market: independent pricing. The agreement thus gives rise to the inference that it will have anticompetitive effects.

This is the first JSA assessed by the Department. The FCC, though not purporting to address antitrust issues, has suggested that, at least in certain circumstances (without addressing the circumstances present here), some JSAs may be beneficial. Accordingly, the Department considered whether the JSA possessed any redeeming procompetitive virtues. However, the creators of this JSA have not offered any plausible procompetitive justifications for the JSA, and our examination revealed none.

Based on our investigation, we found that this JSA did not improve either the operations of the radio stations or the quality of their products. The JSA did not integrate the management or operations of the two stations. Nor did the JSA create any procompetitive benefits for advertisers. Indeed, the Department uncovered evidence that the JSA was created for the simple purpose of ending price competition between the two stations. As one key participant explicitly acknowledged, the JSA was entered into because the two stations "were fighting needlessly over the advertising dollar."

Given the JSA's inherently suspect nature and conspicuous lack of procompetitive virtues, the **JSA** is **an** unreasonable restraint that violates Section 1 of the Sherman Act. See Federal Trade Comm'n v. Indiana Federation of Dentists, 476 U.S. 447.459 (1986).<sup>1</sup> Moreover, though not necessary to the conclusion that this JSA is anticompetitive, our investigation uncovered evidence that, following the creation of the **JSA**, advertising prices increased despite a decline in listenership.

### **III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT**

The proposed **Final**Judgment would preserve competition in the sale of radio advertising time in the Rochester MSA . It requires **the** divestiture of **WHAM-AM**, **WVOR-FM** and **WCMF-AM**. It ends **ARS'** control of **WNVE** advertising time. This relief will reduce the market **share** **ARS** would have achieved through the merger from over 60 percent to about 40 percent of the Rochester radio market. **The** divestitures will preserve choices for advertisers and help ensure that radio advertising rates in Rochester do not increase, and that services do not decline.

**Unless** the United States grants **an** extension of **time**, **ARS** must divest **WHAM-AM**, **WVOR-FM** and **WCMF-AM** either within **six** months after **the Final** Judgment **has** been filed or within five **(5)**business **days** after notice of entry of **the**

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<sup>1</sup> The Department recognizes that JSAs may *differ* both in their terms and in their potential for realizing procompetitive efficiencies.

Final Judgment, whichever is later. Until the divestitures take place, **all** stations now owned by Lincoln ~~will~~ be maintained as independent competitors to the other stations in the Rochester MSA, including the **ARS** stations.

If **ARS fails** to divest **WHAM-AM, WVOR-FM and WCMF -AM** within the time periods specified in the Final Judgment, the **Court**, upon application of the United States, shall appoint **a** trustee nominated by the United States to effect these divestitures. If a **trustee** is appointed, the proposed **Final** Judgment provides that **ARS** will pay all costs and expenses of the trustee and any professionals and agents retained by the trustee. The compensation paid to the trustee and any persons retained by the trustee shall be both reasonable in light of the value of **WHAM-AM, WVOR-FM and WCMF-AM**, and based on a fee arrangement providing the trustee with an incentive based on the price and **terms** of the divestiture and the speed with which it is accomplished. After appointment, **the** trustee will **file** monthly reports with **ARS**, the plaintiffs and the **Court**, setting forth the trustee's efforts to accomplish the divestiture ordered under the proposed Final Judgment. If the trustee **has** not accomplished the divestiture within **six (6)** months after its appointment, the **trustee** shall promptly **file** with the **Court** a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the **reasons**, in the trustee's judgment, why the **required** divestiture **has** not **been accomplished**, and (3) the trustee's recommendations. At the same time, the trustee **will** furnish **such** report to **ARS** and the **plaintiffs**, who will each have the **right** to be heard and to make additional recommendations.

The proposed Final Judgment requires that ARS maintain all stations now owned by Lincoln separate and apart from ARS, pending divestiture. The Judgment also contains provisions to ensure that these Lincoln stations will be preserved, so that the stations after divestiture will remain viable, aggressive competitors.

In addition, the proposed Final Judgment requires ARS and Great Lakes to terminate the WNVE Joint Sales Agreement within five (5) business days after notice of entry of the Final Judgment, and to cease and desist from entering into any future joint sales agreements between them in the Rochester area. This prohibition prevents the parties from re-entering what the Department has already determined would be an illegal contract, and is designed to prevent a recurrence of a violation of Section 1 of the Sherman Act, not merely as a way to guard against another possible violation of Section 7 of the Clayton Act.

Moreover, ARS and Great Lakes must terminate the WNVE Option Agreement (which gives ARS the right to purchase WNVE) within five (5) business days after notice of entry of the Final Judgment, unless the option has been assigned to one of the entities that is buying either WHAM-FM, WVOR-FM or WCMF-AM. This prohibition prevents further increases in concentration by ARS without providing the government with adequate notice.

The proposed Final Judgment also prohibits ARS from entering into certain agreements with other Rochester radio stations without providing at least thirty (30) days' notice to the Department of Justice. Specifically, ARS must notify the

under HSR. **Thus**, this provision in the decree **ensures** that the Department **will** receive notice of and be able to act, if appropriate, to stop any agreements that might have anticompetitive effects in the Rochester market.

**The** relief in the proposed **Final** Judgment is intended to remedy the competitive effects of the proposed acquisition of Lincoln by **ARS**, and to eliminate a contract between **ARS** and Great Lakes that constitutes an illegal restraint of trade. Nothing in this **Final** Judgment is intended to limit the plaintiffs' ability to investigate or to bring actions, where appropriate, challenging other past or future activities of **ARS** or Great **Lakes** in the Rochester MSA, including their entry into other JSAs, LMAs, or other agreements related to the **sale** of advertising time.

#### **IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS**

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who **has** been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered. **as** well **as** costs and reasonable attorneys' fees. **Entry** of the proposed Final Judgment will neither impair nor assist the **bringing** of **any private** antitrust damage action. Under **the** provisions of **Section 5(a)** of **the Clayton Act**, 15 U.S.C. § 16(a), the proposed **Final** Judgment has **no prima facie** effect in **any** subsequent private lawsuit that may be brought against **defendants**.

Department before acquiring any significant interest in another Rochester radio station, except for acquisition of one additional **Class A**-License FM radio station in the Rochester MSA other than **WDKX-FM** or **WMAX-FM**. Acquisitions beyond this would raise competitive concerns but might be too **small** to be otherwise reportable under the Hart-Scott-Rodino ("**HSR**") premerger notification process.

Moreover, **ARS** and Great Lakes may not agree to sell radio advertising time for any other Rochester radio station, or have any other Rochester radio station sell advertising time for them, without providing the United **States** with notice. **This** provision **ensures** that the Department will receive advance notice of any acquisition, or agreements, through which **ARS** or Great Lakes would increase the amount of advertising time on radio stations that they **cancel**. In particular, this provision requires **ARS** and Great **Lakes** to notify the Department before they enter into any joint sales agreements ("**JSAs**"), where one station **takes** Over another station's advertising time, or enter into any local marketing agreements ("**LMAs**"), where one station takes over another station's broadcasting and advertising **time**, in the Rochester **area**. Agreements whereby **ARS** sells advertising **for** or manages other area radio station would effectively **increase ARS' market share** in the Rochester **MSA**. In **analyzing** the Rochester radio **market**, the Department treated **ARS' present JSA station as if ARS owned it outright**. **Despite their clear** competitive significance, JSAS probably would not be **reportable to the** Department

V. **PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT**

The plaintiffs and the defendants have stipulated that the proposed Find Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States **has** not **withdrawn** its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least *sixty* (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Find Judgment. Any person **who** wishes to comment **should** do so within *sixty* (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The United States **will** evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, **which** remains free to withdraw its consent to the proposed Final Judgment **at any** time prior to entry. The comments and **the** response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

**Craig W. Conrath**  
**Chief, Merger Task Force**  
**Antitrust Division**  
United States Department of Justice  
1401 H **Street, N.W.; Suite** 4000  
Washington, D.C. 20530

The proposed Final Judgment provides that the **Court** retains jurisdiction over this action. and that the parties **may** apply to the **Court** for any order necessary or appropriate for the modification, interpretation, or enforcement of the **Final Judgment**.

VI. **ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT**

The plaintiffs considered, **as** an alternative to the proposed Final Judgment, **a full trial** on the merits of their Complaint against defendants. The plaintiffs *are* satisfied, however, that the divestiture of the Lincoln Assets, the termination of the JSA between ARS and Great Lakes, and other relief contained in the proposed Final Judgment will preserve viable competition in the sale of radio advertising time in the Rochester MSA. Thus, the proposed **Final Judgment** would achieve the relief the **Government** would have obtained through litigation, but avoids the time, expense and uncertainty of a **full trial on** the merits of the Complaint.

VII. **STANDARD OF REVIEW UNDER THE APPA FOR PROPOSER FINAL JUDGMENT**

The **APPA** requires that proposed consent judgments in antitrust cases brought by the United States be subject **to a sixty (60)** day comment period, after which the court **shall** determine whether entry of the proposed **Final Judgment** **“is** in the public interest.” In **making** that determination, the court may consider --

(1) the competitive **impact of such judgment, including** termination of alleged violations, **provisions** for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon **the** adequacy of **such judgment**;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the **issues at trial**.

15 U.S.C. § 16(e). As the United States Court of Appeals for the D.C. Circuit recently held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, "[t]he Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."

Rather,

[a]bsent a showing of corrupt failure of the government to discharge its **duty**, the **Court**, in **making** its public interest **finding**, should . . . carefully consider the explanations of the

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<sup>2</sup> 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination *can* be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), reprinted in U.S.C.C.A.N. 6535, 6538.

government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. RNS, Inc., 858 F.2d 456,462 (9th Cir. 1988), citing United States v. Bechtel Corp., 648 F.2d 660,666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d at 1460-62. Precedent requires that

the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.'

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court

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<sup>3</sup> Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); see BNS, 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127,1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716. See also Microsoft, 56 F.3d at 1461 (whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'") (citations omitted).

approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'"<sup>4</sup>

*This* is strong and effective relief that should fully address the competitive harm posed by the proposed merger and the JSA

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<sup>4</sup> United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd. sub nom. Maryland v. United, 460 U.S. 1001 (1983), quoting Gillette Co., 406 F. Supp. at 716 (citations omitted); United States v. Alcan Aluminum Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

**VIII. DETERMINATIVE DOCUMENTS**

There *are* no determinative **materials** or documents within **the** meaning of the APPA that were considered by the United States in **formulating the** proposed **Final** Judgment.

Respectfully submitted,

  
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EXHIBIT A

DEFINITION OF HHI AND  
CALCULATIONS FOR MARKET

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by **squaring** the market share of each **firm** competing in the market and then summing the **resulting** numbers. For example, for a market consisting of four firms with shares of **thirty, thirty, twenty,** and twenty percent, the **HHI** is 2600 ( $30^2 + 30^2 + 20^2 + 20^2 = 2600$ ). The **HHI** takes into account the relative size and distribution of the **firms** in a market and approaches zero when a market consists of a large number of **firms** of relatively equal size. **The HHI** increases both **as** the number of **firms** in the market decreases and as the disparity in size between those **firms** increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the **HHI** is in **excess** of 1800 points are considered to be concentrated. Transactions that increase the **HHI** by more than 100 points in concentrated markets presumptively **raise** antitrust concerns under the Merger Guidelines. See *Merger Guidelines* § 1.51.