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Federal Communication Commission
Bureau / Office

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MB Docket No. 03-12
Table of Allotments	)	RM-10627
FM Broadcast Stations	)	
(Charles Town, West Virginia and	)	
Stephens City, Virginia)	)	

RECEIVED
MAR 16 2004
Federal Communications Commission
Office of the Secretary

TO: Assistant Chief, Audio Division
Media Bureau

MOTION FOR LEAVE TO SUPPLEMENT
AND SUPPLEMENT TO
PETITION FOR RECONSIDERATION

Mid Atlantic Network, Inc. ("Mid Atlantic") hereby moves for leave to supplement its Petition for Reconsideration filed in the captioned proceeding on December 5, 2003. The gist of the Petition is Mid Atlantic's objection to Clear Channel's move of WKSI-FM (formerly WXVA-FM) from Charles Town, West Virginia to Stephens City, Virginia, which is in the Winchester, Virginia market.[1] The Petition was based on Clear Channel's (and therefore, the Commission's) failure to apply a *Tuck* analysis to this move, as required by *Faye and Richard Tuck*, 3 F.C.C. Rcd. 5374 (1988), due to Clear Channel's relocation of this station to the Winchester Urbanized Area.

This Supplement is being filed pursuant to a speech made by FCC Commissioner Kathleen Abernathy one week ago on March 3, 2004 at the Second Annual Women's Career Summit hosted by Katz Media Group in New York City. Specifically, at that Summit, Commissioner Abernathy noted that the Commission would once again review radio

[1] The licensee of WKSI-FM is Cleveland Radio Licenses, LLC, which is a wholly owned subsidiary of Clear Channel Broadcasting License, Inc. ("Clear Channel").

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consolidation under a "hard look" analysis, similar to the "flagged" transactions reviewed prior to June 2003. *See Attachment 1.* Commissioner Abernathy indicated that the Commission would use its former 50-70 benchmark to determine whether an analysis is required. Under that benchmark, any transactions that give one owner a 50% or more market share, or give the top two owners a 70% or more market share, are subject to Commission review "above and beyond a simple signal contour count." *Id.*

The move of WKSI-FM to the Winchester market implicates this "hard look" consolidation analysis. When Clear Channel bought this station in 2001, Mid Atlantic filed a Petition to Deny the assignment application, showing that the proposed acquisition would likely have an anticompetitive effect on the radio advertising market in the Winchester area, and would thereby disserve the public interest. The Petition was based on Mid Atlantic's knowledge of Clear Channel's plan to move this station from Charles Town to the Winchester market.

Of course, Clear Channel denied any such motive and on February 16, 2001, the Commission denied Mid Atlantic's Petition and granted the WKSI-FM (then WXVA-FM) assignment application on the grounds that Clear Channel's future plans for the station were "too speculative to warrant further consideration." *See Attachment 2.*

Obviously, Clear Channel's plans for this station are no longer speculative. Accordingly, since the Commission is once again looking at the potential anticompetitive effects of radio consolidation, we ask that the Commission review Clear Channel's proposal on this basis, as well as on the basis of Clear Channel's failure to subject this move to a *Tuck* analysis (which Mid Atlantic has shown this proposal would fail).

Should the Commission decline to review Clear Channel's move of WKSI into the Winchester market on consolidation grounds, it would be allowing Clear Channel to avoid that analysis by doing indirectly what it could not have done directly. The Commission would thereby be encouraging others to buy stations in nearby markets and to move them to an otherwise consolidated market as a means of avoiding the Commission's hard look into potentially anticompetitive consolidation situations. A copy of Mid Atlantic's original Petition to Deny, which is no longer speculative, is attached as *Attachment 3*.

For the foregoing reasons as well as those specified in Mid Atlantic's Petition for Reconsideration, we hereby move for leave to supplement that Petition and request the Commission to reconsider its grant of the captioned rulemaking petition.

Respectfully submitted,

MID ATLANTIC NETWORK, INC.

By: ______________________
David M. Silverman

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Its Attorneys

March 10, 2004

Radio Business Report™

Print this page

Radio News ®

Consolidation deals going back under the microscope

RBR has learned that deals resulting in high levels of consolidation are going to get an extra hard look by the FCC Media Bureau, and will be subjected to competitive analysis when such analysis is deemed warranted. The policy is effective immediately.

Kathleen Abernathy made remarks on the topic at the Katz Media Women's Summit last week, saying "flagging" was on the way back, at least on an interim basis.

Sources told RBR that they are not calling it "flagging" this time around - - that policy officially bit the dust at the historic 6/2/03 media ownership rulemaking. Competitive analysis is the preferred term this time around. It is considered to be necessary - - a regulatory bandaid - - during this period of time, when the new rules are suspended pending judiciary review (not to mention possible further legislative action from Congress).

However, although similar to the old flagging policy, the new policy will not necessarily follow the all of the same protocols. For example, there will not be a public notice when a deal goes under the magnifying glass.

The decision to put this interim policy in place came to the Media Bureau from the Commissioner level.

When the 3rd Circuit Court put the new 6/2/03 rules on hold pending its review last September, the FCC reverted to the old rules, but ditched the flagging procedure. Several previously-flagged deals have gotten through in the meantime, leading to stories in RBR such as "When the red flag's away, the evil empire will play".

The old 50-70 benchmark will be used to trigger an analysis. That is, deals which give one owner a 50% or greater market share, or give the top two owners a 70% or greater market share, will be subject to review above and beyond a simple signal contour count to determine if the deal will be approved or not.

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Reply Refer To:
1800B3-AB

February 16, 2001

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Washington, D.C. 20006

Richard J. Bodorff, Esq.
Wiley Rein & Fielding
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Washington, D.C. 20006

In Re: WMRE(AM), Charles Town, WV, Fac. ID #27003
WXVA-FM, Charles Town, WV, Fac. ID #26998
File Nos. BAL/BALH-20001116ABJ-ABK

Dear Counsel:

The staff has under consideration an application seeking consent to the assignment of the licenses for WMRE(AM) and WXVA-FM, Charles Town, WV from Heritage Broadcasting Co., L.P. to Clear Channel Broadcasting Licenses, Inc. ("Clear Channel"). Also under consideration is a petition to deny filed by Mid Atlantic Network, Inc. ("Mid-Atlantic"), the licensee of four radio stations in the Winchester radio metro,[1] alleging that the proposed transaction raises ownership concentration concerns. Based on the reasons set forth below, we deny the petition and grant the assignment application.

Mid Atlantic states that Clear Channel currently owns three stations in the Winchester market,[2] which control 41% of the local advertising revenue. Mid Atlantic further notes that its four stations currently control 38.5% of the advertising revenue and that together, Clear Channel and Mid Atlantic already control nearly 80% of the total advertising revenue in the Winchester market. Mid Atlantic argues that, although WMRE(AM) and WXVA-FM's advertising revenues are not reported in the Winchester market, the proposed acquisition would further Clear Channel's ownership concentration and reduce competition in that market.

Mid Atlantic's allegations are insufficient to warrant further inquiry. In considering the competitive impact of a proposed transaction, the Commission generally focuses on the economic market defined by the relevant Arbitron radio metro, as reported in the BIA database.

[1] WAPP(FM), Berryville, VA, WBPP(FM), Strasburg, VA, WINC(AM) and WINC-FM, Winchester, VA.

[2] WFQX(FM), Front Royal, VA, WNTW(AM) and WUSQ(FM), Winchester, VA.

See Shareholders of Jacor Communications, Inc., 14 FCC Rcd 6867 (MMB 1999). Here, BIA does not report WMRE(AM) or WXVA-FM as being in the Winchester market, nor does it consider the stations as receiving any revenue shares in the market ("below the line stations").

In defense of its contrary claim, Mid Atlantic offers only an unsupported conclusion: "The relevant geographic market for assessing the anticompetitive effects of the proposed acquisition is the Winchester, Virginia metro market." *Petition* at 7. Mid Atlantic provides no additional information as to why these stations should be considered in the same geographic market as Winchester stations, or that advertisers regard these stations as competitive substitutes for Winchester stations. We also find it relevant that the stations' signal contours do not even reach into the Winchester area and conclude that Mid Atlantic's allegation that Clear Channel may have future plans to move WXVA-FM into the Winchester market by moving the transmitter tower and increasing power is too speculative to warrant further consideration.

Under these circumstances and based on our independent review of the record, we find that the petition fails to raise a substantial and material question of fact to warrant further inquiry as to the effect of competition and diversity in the Winchester radio market.

Accordingly, IT IS ORDERED, that the petition to deny filed by Mid Atlantic Network, Inc. IS DENIED. IT IS FURTHER ORDERED, that the application to assign WMRE(AM), Charles Town, WV and WXVA-FM, Charles Town, WV (File Nos. BAL/BALH-20001116ABJ-ABK) IS GRANTED.

Sincerely,

Amy Brett

for Linda B. Blair, Chief
Audio Services Division
Mass Media Bureau

cc: Richard J. Hayes, Jr., Esq.

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STAMP & RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JAN - 2 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application of	)	
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Heritage Broadcasting Comapany	)	
	)	
and	)	File Nos. BAL-20001116ABJ
	)	BALH-20001116ABK
Clear Channel Broadcasting Licenses, Inc.	)	
	)	
For Assignment of Licenses of	)	
WMRE(AM) & WXVA-FM,	)	
Charles Town, West Virginia	)	

TO: Chief, Mass Media Bureau

PETITION TO DENY

MID ATLANTIC NETWORK, INC.

David M. Silverman
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January 2, 2001

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SUMMARY

Mid Atlantic Network, Inc. objects to the proposed assignment of radio stations WMRE(AM) and WXVA-FM in Charles Town, West Virginia from Heritage Broadcasting Company to Clear Channel Broadcasting Licenses, Inc. Guidelines used by the Commission and the Department of Justice ("DOJ") make it clear that the proposed acquisition is likely to have an anticompetitive effect on the market for radio advertising in the Winchester, Virginia market, and thereby disserve the public interest. Although these stations are not currently part of the Winchester market, Clear Channel apparently intends to increase the power of WXVA and move it closer to Winchester, thus bringing it into that market. Since Clear Channel is already the licensee of three stations in Winchester which generate the lion's share of market revenues, allowing these stations to be assigned to Clear Channel would only exacerbate an already anti-competitive market. Accordingly, the captioned application should be denied or designated for hearing.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of	)	
	)	
Heritage Broadcasting Comapany	)	
	)	
and	)	File Nos. BAL-20001116ABJ
	)	BALH-20001116ABK
Clear Channel Broadcasting Licenses, Inc.	)	
	)	
For Assignment of Licenses of	)	
WMRE(AM) & WXVA-FM,	)	
Charles Town, West Virginia	)	

TO: Chief, Mass Media Bureau

PETITION TO DENY

On behalf of Mid Atlantic Network, Inc., licensee of WINC(AM) and WINC-FM in Winchester, Virginia, and of WAPP(FM) in Berryville, Virginia and WBPP(FM) in Strasburg, Virginia, and pursuant to FCC Rule § 73.3584, we hereby petition the Commission to deny the proposed assignment of radio stations WMRE(AM) and WXVA-FM in Charles Town, West Virginia from Heritage Broadcasting Company to Clear Channel Broadcasting Licenses, Inc. ("Clear Channel"). While the proposed transaction technically complies with the Commission's multiple ownership rules, it is likely to have an anticompetitive effect on the market for radio advertising in the Winchester, Virginia market and would thereby disserve the public interest. Accordingly, the captioned application should be denied or designated for hearing.

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Introduction

As the Commission is undoubtedly aware, Clear Channel Communications, Inc., the parent company of the proposed assignee, is the largest radio group owner in the United States. *See* Broadcasting & Cable, Sept. 18, 2000 at 50-52 (Exhibit 1). According to the magazine, "Clear Channel Communications has shattered a previously unimaginable ceiling: owning more than 1,000 of the nation's commercial radio stations. And the group generated an estimated $3.1 billion in 1999. That accounts for nearly 20% of the $16 billion in total radio revenue for the year…." *Id.*

Clear Channel already owns three stations in the Winchester, Virginia radio market, which is ranked number 218 in population out of 268 markets ranked by Arbitron.[1] Significantly, there are no commercial television stations licensed to any city within this market.[2] The three stations currently owned by Clear Channel in this market are WUSQ(FM) and WNTW(AM) in Winchester, as well as WFQX(FM) in Front Royal, Virginia. Mid Atlantic Network is the licensee of radio stations WINC(AM) and WINC-FM in Winchester, Virginia; WAPP(FM) in Berryville, Virginia; and WBPP(FM) in Strasburg, Virginia, all of which are also in the Winchester, Virginia radio market. Thus, Mid Atlantic Network has standing to file this Objection. *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). Clear Channel's three stations account for more than 41% of the advertising revenue in the Winchester market and,

[1] Source: 2000 Broadcasting & Cable Yearbook D-712 (U.S. Radio Markets: Arbitron Metro Survey Area Ranking).

[2] There is a noncommercial station—WVPY—licensed to Front Royal, Virginia, which is considered to be within the Washington, DC Designated Market Area (DMA).

with Mid Atlantic's stations, those two group owners account for nearly 80% of Winchester market advertising revenues.[3]

Under guidelines used by the Commission and the Department of Justice ("DOJ"), the proposed acquisition is likely to have an anticompetitive effect on the market for radio advertising in the Winchester, Virginia market, and would thereby disserve the public interest. The Commission has not targeted the proposed transfer of these stations as one that raises issues of ownership concentration in the relevant market, because WXVA and WMRE currently are not considered part of the Winchester market. As indicated in the attached Declaration from Christopher Lewis (and supported by the Technical Exhibit prepared by Graham Brock, Inc.), however, Clear Channel apparently has plans to move WXVA into the Winchester market, thus increasing its market dominance. Allowing this station to be assigned to Clear Channel would only exacerbate an already anti-competitive market. Accordingly, the captioned application should be denied or designated for hearing.

I. The Commission Should Consider the Antitrust Implications of the Proposed Transaction

The proposed transaction would appear to comply with FCC Rule § 73.3555(a) and the Telecommunications Act of 1996 regarding the number of radio stations one party may own in a market. However, Section 310(d) of the Communications Act provides that the Commission shall determine whether applicants seeking transfer of licenses have demonstrated that a grant of their application serves the public interest:

[3] Source: *BIA Winchester, Virginia Market Competitive Overview*, 2000 (attached as Exhibit 2 hereto).

> No . . . station license . . . shall be transferred . . . except . . . upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

47 USC § 310(d). *See also* FCC Rule § 73.3591(a)(4) (Commission must find that grant of the application would "serve the public interest, convenience and necessity.") If the Commission is unable to make the requisite findings, the application may be designated for hearing pursuant to FCC Rules § 73.3593.

It is well established that the Commission may consider antitrust concerns when evaluating whether the public interest is being served. The Supreme Court has repeatedly recognized that antitrust concerns are a relevant part of the Commission's public interest inquiry under the Communications Act. *See, e.g., FCC v. National Citizens Committee for Broadcasting*, 436 US 775, 795 (1978) (noting that the Commission may properly consider antitrust issues); *U.S. v. RCA*, 358 US 334, 351 (1959) (the Commission may find that antitrust considerations alone would prevent the public interest standard from being satisfied); *FCC v. RCA Communications, Inc.*, 346 US 86, 94 (1953) ("[t]here can be no doubt that competition is a relevant factor in weighing the public interest"); *NBC v. U.S.*, 319 US 190, 222-23 (1943) (the Commission may consider the effect of a broadcast license applicant's anticompetitive conduct on the public interest).

More recently, the U.S. Court of Appeals for the D.C. Circuit has noted that the Commission must consider anticompetitive concerns. Specifically, the D.C. Circuit held that the Commission must "make findings related to the pertinent antitrust policies, draw conclusions from the policies, and weigh these conclusions along with other important public considerations." *United States. v. FCC*, 652 F.2d 72, 82 (D.C. Cir. 1980) (en banc), quoting

Northern Natural Gas Co. v. Federal Power Comm'n, 399 F.2d 953, 961 (D.C. Cir. 1968). *See also, Rogers Radio Communication Services, Inc. v. FCC*, 593 F.2d 1225, 1230 (D.C. Cir. 1978) (the "[e]ffect on competition [is] clearly a proper factor for the Commission to consider under the public interest, convenience, and necessity standard. . . ."); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 41 n.68 (D.C. Cir.), *cert. denied,* 434 U.S. 829, *rehg. denied,* 434 U.S. 988 (1977) ("there can be no question that the Commission can properly consider antitrust issues").

Indeed, since Congress passed the Telecommunications Act of 1996, the Commission has routinely integrated concerns about antitrust issues into its public interest examination of broadcast station assignments and transfers by considering market concentration as part of its public interest assessment. *See, e.g.*, Broadcast Applications, FCC Report No. 24329 at 6 (1998):

> 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 USC 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.

The Commission usually does not attempt to determine whether a proposed transaction violates specific antitrust laws, although it specifically retains the right to do so. Rather, the Commission considers more general antitrust or competitive issues as part of its public interest assessment, using the principles embodied in the Department of Justice ("DOJ")/Federal Trade Commission Horizontal Merger Guidelines (1998) ("Merger Guidelines"), existing antitrust case law, and past Commission analyses of market power. See, e.g., *Application of Airtouch*

Communications, Inc. and Vodafone Group, PLC, 14 FCC Rcd 9430, 9434 ¶ 10 (1999); *Application of Tele-Communications, Inc. and AT&T Corp.,* Memorandum Opinion and Order ("MO&O"), 14 FCC Rcd 3160, 3168 ¶ 14 (1999); *Application of WorldCom, Inc. and MCI Communications Corp.*, MO&O, 13 FCC Rcd 18025, 18035 ¶ 15 (1998); *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee*, MO&O, 12 FCC Rcd 19985, 20008 ¶ 37 (1997); *Merger of MCI Communications Corp. and British Telecommunications PLC*, MO&O, 12 FCC Rcd 15351, 15367 ¶ 33 (1997).

II. Radio Advertising in the Winchester, Virginia Market is the Relevant Product and Geographic Market

A. Radio Advertising Is a Separate Product Market

There is no question that radio advertising is a separate product market apart from any other media that may be present in the area. *See* DOJ Comment and Petition for Rehearing in FCC File No. BTC-980821EE (Wichita, Kansas) at 7-8 (Oct. 19, 1998). In this case, it is particularly appropriate to consider radio advertising as a separate market since there are no commercial television stations licensed to the Winchester, Virginia metro market, which is made up of Clarke, Frederick, Shenandoah and Warren Counties, and the city of Winchester, Virginia. *See* Exhibit 3. Although residents of that market can receive signals from Washington, D.C. and other markets over the air and via cable television, it is not economically practical for many of the merchants in the Winchester market to reach their potential customers through those television stations. Furthermore, as noted by the Assistant Attorney General responsible for the Antitrust Division of DOJ, "if you think advertisers can always sell rock CD's as well through newspapers as through radio, you haven't had teenage kids." Assistant Attorney General Joel I.

Klein, DOJ Analysis of Radio Mergers, Address to the National Association of Broadcasters (Feb. 19, 1997) (transcript at <http://www.usdoj.gov/atr/public/speeches/jik97219.htm>) ("Klein").

B. Geographic Market Considerations

The relevant geographic market for assessing the anticompetitive effects of the proposed acquisition is the Winchester, Virginia metro market. "In considering issues of radio concentration pursuant to a public interest analysis, the Commission generally looks at the advertising revenue share of the proposed combination in the Arbitron radio metro market, as reported in the BIA Master Access Database." *KIXK, Inc.*, 13 FCC Rcd 15685, ¶ 5 (1998). The fact that BIA and Arbitron recognize the Winchester, Virginia metro market as a distinct economic unit and the relevant geographic market for these stations is significant because it identifies the radio stations within that geographic market which media buyers would consider to be close substitutes. Additionally, the Arbitron rating service generally allows a radio station to declare itself as belonging to only one home geographic market, so that stations will generally declare their home market as the one from which they believe they will attract the most advertisers.

According to BIA, the Winchester metro market has a population of approximately 158,700, and is the 218th largest metro market in the country.[4] It ranks 195th in market revenue. *Id.* Because the market is bordered by the Blue Ridge Mountains to the east and the Allegheny Mountains to the west, there can be no question but that it constitutes a separate geographic

[4] Source: *BIA Winchester, Virginia Market Overview*, 2000 (Exhibit 3).

market. According to BIA, there are eight FM and five AM stations licensed to this market. *See* Exhibit 2. WXVA is not among the stations currently considered to be part of that market. *Id.*

III. The Captioned Application Is Contrary to the Public Interest Under Established Standards for Determining Undue Market Concentration

A. Standards Used to Determine Market Concentration

1. Market Control Percentages

The Winchester radio market is already considered to be a concentrated market under DOJ and Commission antitrust guidelines for radio station ownership. In a February 1997 speech, the Assistant Attorney General in the Antitrust Division of DOJ cautioned, "when you're doing a deal that's in the 35% and above range -- or that consolidates a large part of a particular format (even when that involves less than 35% of the overall market) -- you should bring in antitrust counsel early on . . . . Klein, *supra,* at 6. Klein's 35% figure was repeated more forcefully in Broadcasting Magazine in 1998: "Justice has promised to examine radio mergers that would result in one company controlling more than 35% of a market's radio ad revenue." Brown, *Living large in 1997: TV, radio post records for multiples, broker involvement*, Broadcasting & Cable, Feb. 3, 1998 at 32, 34.

DOJ has repeatedly objected to combinations resulting in control of more than 40% of the radio advertising revenue in a market by a single operator, and has agreed to divestitures where the resulting market share falls below 40%. *See, e.g.*, Competitive Impact Statement at III, *U.S. v. Capstar Broadcasting Corp.*, Civ. Action No. 99-CV-00993 (D.D.C. May 12, 1999); Dept. of Justice, *Justice Department Requires Jacor to Sell Eight Radio Stations As Part of Nationwide Communications, Inc. Acquisition* (released Aug. 10, 1998) (http://www.usdoj.gov/atr/public/press_releases/1998/1869.htm). *See also*, Barbara Pinckney, *Radio Merger to Bring Opportunities*, Capital District Business Review, Oct. 11, 1999 at 1 ("When approving mergers, the Justice Department looks to see that the resulting operators [sic] total audience share does not exceed 25 percent of the market and that it has no more than 40 percent of the market revenue."); Jim Abbott, *2 Radio Giants Will Rule Airwaves*, Orlando Sentinel, Oct. 5, 1999 at A1 ("[T]he Department of Justice has ruled that a company can control no more than 40 percent of a market's radio revenue.")

While such DOJ standards are not binding upon the FCC, the Commission has noted that it "has, in the past, considered the Department of Justice's antitrust determinations in connection with its review of an applicant's proposed radio ownership as highly relevant to our decisions." *Christian Faith Broadcast, Inc.*, 13 FCC Rcd 16143 ¶ 21 n.12 (1998); *see also, Jacor Communications, Inc.,* MO&O, 1999 FCC LEXIS 1825 ¶ 30 (MMB, released April 29, 1999).

The Commission has also stated that it would perform a competition analysis "when a proposed radio merger would result in a single radio group controlling 50 percent or more of the radio advertising revenue in a market, or when the two largest radio groups would account for 70 percent or more of the revenue in a market." *Shareholders of AMFM, Inc.*, 15 FCC Rcd 16062, 16066 n.10 (2000). This policy follows recognition by the Commission that the its rules implementing statutory ownership limitations are inadequate in the face of breakneck radio industry consolidation. As Commissioner Tristani has observed:

> Our local ownership rules are clearly broken and in need of repair. What is lacking is not the need to act, nor the means to act, but the will.

Great Empire Broadcasting, Inc., MO&O, 14 FCC Rcd 11145 (June 11, 1999) (Comm'r Tristani, concurring). Evidence of such heightened scrutiny is also apparent in the Commission practice of giving public notice of its intent to seek additional analysis of ownership concentration and by its explicit requests for public comment on such transactions in public notices such as the one pertaining to the captioned applications.

Increased antitrust scrutiny by the DOJ and the Commission at the levels discussed above is consistent with enforcement of antitrust laws in other industries which have been upheld by the U.S. Supreme Court. In one case, the Supreme Court held that a merger resulting in a single bank controlling 30% of the commercial banking business in a market in which four banks had 78% of assets, deposits and net loans presumptively created undue concentration and led to an inference that the merger would lessen competition substantially. *United States v. Philadelphia Nat'l Bank*, 374 US 321, 364-65 (1963). In another case, the Supreme Court found a merger presumptively illegal where the combining firms' aggregate market share was 25% and the leading four firms accounted for 63.7% of the relevant market. *United States v. Continental Can Co.*, 378 US 441, 461 (1964).

2. The Herfindahl-Hirschman Index

DOJ, a number of courts and the Commission use the Herfindahl-Hirschman Index ("HHI") to assess pre- and post-merger economic market concentration. *See, e.g., Nynex Corp.*, 12 FCC Rcd 19985, 20053 n.254 (1997) (Commission "has used HHI analysis in numerous contexts as an initial means of measuring the significance of changes in market concentration."); *Federal Trade Comm'n v. Cardinal Health Care, Inc.*, 12 F. Supp.2d 34, 53 (D.D.C. 1998) (HHI is the most prominent and accurate method of measuring market concentration). The Commission has accepted use of the HHI in applications for transfers of control of radio stations. *See, e.g., Pyramid Communications, Inc.*, 11 FCC Rcd 4898, ¶ 13 (1995).

The HHI is calculated by summing the squares of the individual market shares of all firms participating in the market. Merger Guidelines, ¶ 1.5. *See also, Notice of Inquiry* in MM Docket No. 98-35, 13 FCC Rcd 11276, 11281 n.21 (1998). Under the Merger Guidelines, markets with an HHI below are 1000 are deemed unconcentrated; those with an HHI between 1000 and 1800 are moderately concentrated; and those with an HHI above 1800 are deemed highly concentrated. Merger Guidelines, ¶ 1.5. In cases where the post-merger market is highly concentrated, and an acquisition would result in an increase of more than 100 points in the HHI, the acquisition is presumed to be likely to create or enhance market power or facilitate its exercise. *Id.*; *see also, Nynex Corp.*, supra, 12 FCC Rcd at 20055, n.265. In *Cardinal Health Care*, the court found that an increase in HHI from 1648 to 2450 (802 points) brought about by one proposed merger, and from 1648 to 2277 (629 points) brought about by a second proposed merger, required a presumption that the proposed merger posed a threat to competition. *Cardinal Health Care, supra*, 12 F. Supp. 2d at 53.

B. The Proposed Transaction Poses A Serious Threat to Competition in the Winchester Market

Clear Channel currently controls 41.2% of Winchester metro market radio advertising revenues through its ownership of WFQX(FM), WUSQ-FM and WNTW(AM). *See* Exhibits 2 and 4. Since Mid-Atlantic Network has 38.6% of market revenues, the two largest radio owners in the market have a total of nearly 80%, well above DOJ guidelines of 40% for one owner and the Commission's 70% guidelines for the two largest group owners, respectively. *Id.*

The Winchester radio market currently has six different radio station owners who have a combined HHI of 3329. *See* Chart, Exhibit 4. Under the standards enumerated above, Winchester is a highly concentrated market (HHI above 1800), and approval of the captioned application would continue to pose a threat to competition in that market.

The three existing Clear Channel stations already have a combined HHI of 1697. While WXVA currently has no market share in Winchester, increasing its power and bringing it closer to Winchester would certainly put it in that market.[5] With an HHI currently near 1700, the addition of *any* market share would almost certainly put Clear Channel *alone* above 1800 HHI.

Conclusion

The proposed transaction provides an opportunity for the Commission to retain at least a minimal level of competition in the Winchester market by denying this proposed assignment. Approval of this transaction would allow Clear Channel to consolidate its market dominance in Winchester in an anticompetitive manner and would disserve the public interest. Accordingly,

[5] It can scarcely be doubted that Clear Channel intends to do exactly that. Why else would they be inquiring about additional office space in Winchester for a station that currently has no signal or listenership there? *See* attached Declaration of Christopher Lewis.

we hereby request that the Commission deny the captioned assignment application or designate it for hearing to determine if its grant would serve the public interest.

Respectfully submitted,

MID ATLANTIC NETWORK, INC.

By: ______________________
David M. Silverman

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Suite 200
Washington, D.C. 20006
(202) 659-9750

Its Attorneys

January 2, 2001

DECLARATION OF JOHN P. LEWIS

I, John P. Lewis, hereby declare as follows:

1) I am President and a director of Mid Atlantic Network, Inc., licensee of WINC(AM) and WINC-FM in Winchester, Virginia, and of WBPP(FM) in Strasburg, Virginia and WAPP(FM) in Berryville, Virginia.

2) I have read the foregoing Petition to Deny and all of the facts stated therein are true and correct to the best of my knowledge, information and belief.

I hereby declare under penalty of perjury that the foregoing is true and correct. Dated this 28th day of December 2000.

John P. Lewis

DECLARATION OF CHRISTOPHER LEWIS

I, Christopher Lewis, hereby declare as follows:

1) I am the General Manager of WINC(AM) and WINC-FM in Winchester, Virginia.

2) It is my understanding that Clear Channel intends to buy WMRE(AM) and WXVA-FM, both of which are licensed to Charles Town, West Virginia. Currently, WXVA has a 3000 watt signal and its service is limited to the West Virginia panhandle, consisting primarily of Jefferson and Berkeley Counties. It currently broadcasts a country music format.

3) It is also my understanding that Clear Channel intends to convert WXVA into another Winchester (Virginia) station by moving the transmitter tower southwest toward Winchester and by increasing power to 6000 watts. (The enclosed statement of our consulting engineer, Jeff Brock, confirms that such modifications would be technically permissible under FCC rules.) I have been told that this tower move and power increase would be coupled with a format change to "Hot AC" (adult contemporary) in direct competition with WINC-FM.

4) Clear Channel already owns WUSQ(FM) and WNTW(AM) in Winchester, as well as WFQX(FM) in Front Royal, Virginia, all of which are considered to be in the Winchester radio market. The landlord of Clear Channel's Winchester studio and offices, Nick Nerangis, Jr., advised me that Clear Channel has inquired about obtaining additional office space in Winchester for WXVA.

5) It is my belief that grant of this assignment application will give Clear Channel an unfair advantage in the Winchester market, and that it will have an adverse effect on competition and the public interest.

I hereby declare under penalty of perjury that the foregoing is true and correct. Dated this 27th day of December 2000.

Christopher P. Lewis