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. _____ **COMPLAINT FOR INJUNCTIVE RELIEF AGAINST COMBINATION IN VIOLATION OF SECTION 7 OF THE CLAYTON ACT AND SECTION 1 OF THE SHERMAN ACT**

The United States of America, acting under the direction of the Attorney General of the United States, and the Attorney General of the State of New York, Dennis C. Vacco, bring action (a) to prevent the proposed acquisition by American Radio Systems Corporation ("ARS") of the four radio stations in Rochester, New York, (the "Lincoln Stations") owned by The Lincoln Group, L.P. ("Lincoln") and (b) to enjoin the Joint Sales Agreement ("JSA") between ARS and Great Lakes Wireless Talking Machine LLC ("Great Lakes").

I. Nature of the Action

1. ARS is a large nationwide operator of radio broadcast stations that owns 78 radio stations across the United States, including three located in the Rochester metropolitan area. ARS also controls the advertising for a fourth radio

station in Rochester, WNVE-FM, through a JSA with WNVE-FM's owner, Great Lakes. Lincoln owns four radio stations in Rochester. If the proposed acquisition were consummated, ARS would own or have the right to sell advertising for eight Rochester area radio stations, including six of the top eight radio stations as measured by revenues.

2. ARS and Lincoln compete for the business of local and national companies seeking to advertise to the Rochester area through radio. The acquisition, if consummated, would eliminate price and service competition and the benefits resulting from this competition, and would result in many advertisers having to pay higher prices and receiving fewer services. Following the acquisition, ARS's share of radio advertising dollars in the Rochester metropolitan area would rise from 34 percent to 64 percent, giving ARS substantial market power to raise prices and lower the quality of services it provides to advertisers. Neither the remaining Rochester radio stations nor any new entry is likely to check effectively ARS's ability to exercise the market power it would obtain through this acquisition. Accordingly, the proposed acquisition is likely to lessen competition substantially, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

3. ARS and Great Lakes formerly competed for the business of local and national companies seeking to advertise to the Rochester area. This competition ended after ARS and Great Lakes entered into a JSA giving ARS control over the sale of advertising on Great Lakes' radio station, WNVE-FM. The JSA eliminated price competition without contemplating or realizing any procompetitive

efficiencies. Accordingly, the JSA is a contract or combination in restraint of trade or commerce among the several States in violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1.

II. Jurisdiction, Venue and Standing

4. This action is filed pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. § 25, and Section 4 of the Sherman Act, 15 U.S.C. § 4, to obtain equitable relief to prevent a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and to enjoin a continuing violation of Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1.

5. ARS, Lincoln and Great Lakes sell radio advertising, a commercial activity that substantially affects and is in the flow of interstate commerce. The Court has jurisdiction over the subject matter of this action and jurisdiction over the parties pursuant to 15 U.S.C. §§ 4, 22, and 25, and 28 U.S.C. §§ 1331 and 1337.

6. ARS, Lincoln and Great Lakes have consented to the plaintiffs' assertion that venue in this District is proper under 15 U.S.C. § 22 and 28 U.S.C. § 1391(c).

7. The Attorney General of the State of New York, Dennis C. Vacco, brings this action on behalf of the State of New York, and on behalf of the State of New York's economy and general welfare.

III. Defendants

8. ARS is a Delaware corporation headquartered in Boston, Massachusetts. It owns 78 radio stations located in 15 metropolitan areas in the United States, including the following three stations in the Rochester area: WCMF-FM; WCMF-AM; and WRMM-FM. ARS also has a JSA with one non-ARS station, WNVE-FM, owned by Great Lakes, allowing ARS to control the sale of advertising time on four stations overall. ARS' Rochester revenues in 1995 were approximately $97 million.

9. Lincoln is a New York limited partnership headquartered in Syracuse, New York. Lincoln owns six radio stations located in Rochester and Salem, Ohio, including the following four in the Rochester area: WHAM-AM; WPXY-FM; WVOR-FM; and WHTK-AM.

10. Great Lakes is a New York limited liability company with its headquarters in East Rochester, New York. It owns one station in Rochester, WNVE-FM.

IV. The Proposed Acquisition Is Likely To Reduce Competition Substantially in the Rochester Market for Radio Advertising Time in Violation of the Clayton Act

11. *Radio Advertising Time in Rochester is the Relevant Market.* The relevant geographic market is the Rochester, New York Metro Survey Area ("MSA"). This is the geographical unit for which Arbitron, a company that surveys radio listeners, 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, if there were a small but significant non-transitory increase in radio advertising prices within the Rochester MSA, advertisers would not switch enough advertising time purchases to radio stations located outside of the Rochester MSA to defeat the increase.

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

13. Many local and national advertisers purchase radio advertising time in Rochester because they find such advertising preferable to advertising in other media for their specific needs. Reasons for this include the fact that radio advertising 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). Radio may also reach certain target audiences that cannot be reached as effectively through other media. Additionally, radio stations render certain services or promotional opportunities to advertisers that they cannot exploit as effectively using other media. For these reasons, many local and national advertisers who purchase radio advertising time view radio either as

a necessary advertising medium for them, or as a necessary advertising complement to other media.

14. 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 all 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 negotiate prices individually with advertisers; consequently, radio stations can charge different advertisers different rates. Radio stations generally can identify those advertisers with strong radio preferences. 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.

15. The provision of advertising time on radio stations in the Rochester MSA is a relevant market (i.e., a line of commerce and a section of the country) within the meaning of Section 7 of the Clayton Act.

16. *The Transaction.* On February 23, 1996, ARS agreed to purchase the four radio stations operated by Lincoln in Rochester for approximately $30.5 million.

17. *Market Structure Post-Acquisition.* Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI"), explained in

Appendix A, a combination of ARS and Lincoln would substantially increase concentration in the Rochester radio advertising market. ARS' share of the Rochester radio advertising market (including its JSA with Great Lakes), based on advertising revenues, would increase to about 64 percent. This correlates with an approximate post-merger HHI of 4744, representing an increase of 2040. Following the acquisition, ARS would control advertising time on six of the top eight stations in the Rochester area.

18. *Harm to Competition.* 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.

19. 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, and the merger would eliminate this competition.

20. 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

rates based in part on the number and attractiveness of competitive radio stations that can meet a particular advertiser's specific target audience needs.

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

22. The transaction would have the following effects, among others:

a. competition in the sale of advertising time on radio broadcast stations in the Rochester MSA would be substantially lessened;

b. actual competition between ARS and Lincoln radio stations in the sale of radio advertising time would be eliminated; and

c. the prices for advertising on radio stations in the Rochester MSA would likely increase, and services would likely decline.

23. *Lack of Any Likely Entry To Deter ARS' Ability To Harm Competition.* 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 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.

24. 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 regulations.

25. The effect of the proposed acquisition of the Lincoln Stations by ARS would be to lessen competition substantially in interstate trade and commerce, in violation of Section 7 of the Clayton Act.

V. The JSA Is An Unreasonable Restraint of Trade

26. *Contract To Eliminate Competition.* ARS is the owner of WCMF-FM, a rock format radio station serving the Rochester MSA. Great Lakes is the owner of WNVE-FM, another rock format radio station serving the Rochester MSA. WCMF-FM and WNVE-FM were at one time direct competitors.

27. As a consequence of the impact of the competition between WNVE and WCMF-FM, ARS and Great Lakes entered into negotiations for a JSA between

them, pursuant to which ARS would price and sell all of WNVE-FM's radio advertising time.

28. On September 28, 1995, a written JSA was entered into by representatives of ARS and Great Lakes, the terms of which took effect on October 1, 1995. This agreement "designates ARS as the sole and exclusive radio sales agent for WNVE with full authority to sell local, regional and national advertising time . . . ." Monthly lump sum payments to be made by ARS to Great Lakes as compensation for the exclusive sales arrangement are specified in the agreement. The JSA goes on to recite that, with respect to responsibilities other than the pricing and selling of advertising time, Great Lakes retains "absolute full control, authority and power over the operations of WNVE . . . ." According to the agreement, the arrangement between ARS and Great Lakes "is not intended to be and shall not be construed as a partnership or joint venture . . . ."

29. WCMF-FM has acquired complete control over the sale of the inventory of its direct competitor, WNVE-FM, but no new product has been created, no procompetitive efficiencies have been realized, and there has been no integration of the operations and management of the two stations. Indeed, the purpose of the JSA was simply to end the price competition that had been taking place between ARS and Great Lakes.

30. *Violation Alleged.* Beginning at least as early as October 1, 1995, and continuing to this day, ARS and Great Lakes entered into a contract in

unreasonable restraint of interstate trade and commerce, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

VI. Requested Relief

31. The plaintiffs request: (a) adjudication that ARS's proposed acquisition of the Lincoln Stations 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 proper.

Dated: October 24, 1996

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APPENDIX A
HERFINDAHL-HIRSCHMAN INDEX CALCULATIONS

"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 Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission. See *Merger Guidelines* § 1.51.