UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	**Civil Action No. 99-CV-00993**
v.	:	**(Judge Oberdorfer)**
CAPSTAR BROADCASTING CORPORATION,	:	
and	:	
TRIATHLON BROADCASTING COMPANY	:	
Defendants.	:	

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 plaintiff filed a civil antitrust Complaint on April 21, 1999, alleging that Capstar Broadcasting Corporation's ("Capstar") proposed acquisition of Triathlon

Broadcasting Company ("Triathlon") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleges that Capstar and Triathlon both own and operate radio stations throughout the United States, and that they each own and operate radio stations in the Wichita, Kansas, metropolitan area. Specifically, the complaint alleges that Capstar owns KKRD-FM, KRZZ-FM, and KNSS-AM in Wichita and that Capstar controls approximately 20 percent of the Wichita radio advertising market. The complaint also alleges that Triathlon owns KZSN-FM, KRBB-FM, KEYN-FM, KWSY-FM, KFH-AM, and KQAM-FM in Wichita and controls approximately 33 percent of the radio advertising revenues in the Wichita radio advertising market. The proposed acquisition would give Capstar a significant share of the radio advertising market in Wichita and control over stations that are close substitutes for each other based upon their specific audience characteristics. According to industry estimates, the proposed acquisition would give Capstar control of over 45 percent of the radio advertising revenue -- even after Capstar divests the two lowest ranked FM radio stations pursuant to Federal Communications Commission ("FCC") regulations. As a result, the combination would substantially lessen competition in the sale of radio advertising time in the Wichita metropolitan area.

The prayer for relief seeks: (a) adjudication that Capstar's proposed acquisition of Triathlon described in the Complaint would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; (b) preliminary and permanent injunctive relief preventing

the consummation of the proposed acquisition; (c) an award to the United States of the costs of this action; and (d) such other relief as is proper.

Before this suit was filed, the United States reached a proposed settlement with Capstar and Triathlon which is memorialized in the Stipulation and proposed Final Judgment which have been filed with the Court. Under the terms of the proposed Final Judgment, Capstar must divest five stations -- KEYN-FM, KWSJ-FM, KFH-AM, KNSS-AM and KQAM-AM -- to another radio operator approved by plaintiff at the time it acquires Triathlon. If Capstar does not divest these stations to an approved buyer at the time it acquires Triathlon, Capstar must place the stations in an FCC Trust. The FCC Trust Agreement was filed with the Court as an attachment to the proposed Final Judgment. Unless the Antitrust Division of the United States Department of Justice (the "Antitrust Division") grants an extension, the Trustee must divest the stations to a buyer approved by the Antitrust Division at its sole discretion within four (4) months of the date of entry of the Final Judgment.

The proposed Final Judgment also requires both Capstar and Triathlon to ensure, to the extent they are able under the proposed Final Judgment, that these stations will be operated independently as viable ongoing businesses while Capstar and Triathlon continue to operate them. If the stations are transferred to the Trustee, the Trustee has agreed that he will operate the stations independently as viable ongoing businesses. Further, the proposed Final Judgment requires Capstar to give plaintiff

prior notice regarding future radio station acquisitions or certain agreements pertaining to the sale of broadcast radio advertising time in Wichita.

The plaintiff and defendants have stipulated that the proposed Final Judgment may be entered after compliance with 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.

II. THE ALLEGED VIOLATION

A. The Defendants

Capstar is a Delaware corporation with its headquarters in Austin, Texas. Capstar owns approximately 309 radio stations in 76 U.S. markets. In 1997, Capstar had total revenue of approximately $350 million, approximately $4.9 million of which was derived from its Wichita stations.

Triathlon is a Delaware corporation headquartered in San Diego, California. Triathlon currently owns 31 radio stations in six U.S. markets. In 1997, Triathlon had total revenue of approximately $33.6 million, approximately $8 million of which was derived from its Wichita stations.

B. Description of the Events Giving Rise to the Alleged Violation

On July 23, 1998, Capstar and Triathlon entered into an Agreement and Plan of Merger ("Agreement"). Under the terms of the Agreement, Triathlon agreed to transfer

its licensee companies, including Triathlon Broadcasting of Wichita Licensee, Inc., to Capstar. Also under the terms of the Agreement, Triathlon agreed to sell Triathlon Broadcasting Company to Capstar.

Capstar and Triathlon compete for the business of local and national companies seeking to advertise in the Wichita radio market. The proposed acquisition of Triathlon by Capstar, and the threatened loss of competition that would be caused thereby, precipitated the government suit.

C. Anticompetitive Consequences of the Proposed Acquisition

1. The Sale of Radio Advertising Time In Wichita

The Complaint alleges that the provision of advertising time on radio stations serving the Wichita, Kansas Metropolitan Survey Area ("MSA") constitutes a line of commerce and a section of the country, or a relevant market, for antitrust purposes. The Wichita MSA is the geographical unit for which Arbitron furnishes radio stations, advertising agencies, and advertisers with data to aid in evaluating radio audience size and composition. Advertisers use this data in making decisions about which radio station or combination of radio stations can deliver their target audiences in the most efficient and cost-effective way. The Wichita MSA includes Butler, Harvey, and Sedgwick Counties. Radio stations earn their revenues from the sale of advertising time to local and national advertisers. Many local and national advertisers purchase radio advertising time in Wichita because they find such advertising preferable to advertising in other media for

their specific needs. For such advertisers, radio time (a) 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); (b) may reach certain target audiences that cannot be reached as effectively through other media; or (c) may render certain services or offer promotional opportunities to advertisers that they cannot exploit as effectively using other media. For these and other reasons, many local and national advertisers in Wichita 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 Wichita, the existence of such advertisers would not prevent radio stations from raising their prices a small but significant amount. At a minimum, stations could raise prices profitably to those advertisers who view radio either as a necessary advertising medium for them, or as a necessary advertising complement to other media. 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 among different customers, radio stations may charge higher rates to advertisers that view radio as particularly effective for their needs, while maintaining lower rates for other advertisers.

2. Harm to Competition

The Complaint alleges that Capstar's proposed acquisition of Triathlon would lessen competition substantially in the provision of radio advertising time in the Wichita MSA. The proposed transaction would create further market concentration in an already concentrated market. Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI"), explained in Appendix A of the Complaint, a combination of Capstar and Triathlon would substantially increase the concentration in the Wichita radio advertising markets. The HHI currently is 3040. If Capstar divests only the two least significant FM stations, Capstar's share of the Wichita radio market, based on advertising revenue, would increase from approximately 20 percent to approximately 45 percent. The approximate post-merger HHI would be 3680, representing an increase of about 640 points. This substantial increase in concentration is likely to give Capstar unilateral power to raise advertising rates and reduce the level of service provided to advertisers in Wichita.

Today, several Capstar and Triathlon stations in Wichita compete head-to-head to reach the same audiences and, for many local and national advertisers buying time in Wichita, they are close substitutes for each other based on their specific audience characteristics. The proposed merger would eliminate this competition.

During individual price negotiations between advertisers and radio stations, advertisers 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 needs.

During individualized rate negotiations, advertisers that desire to reach certain listeners can help ensure competitive rates by "playing off" Capstar stations against Triathlon stations. Capstar's acquisition of Triathlon will end this competition. After the acquisition, such advertisers will be unable to reach their desired audiences with equivalent efficiency without using Capstar stations. 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 Capstar the ability to raise prices and reduce the quality of its service to some advertisers on its stations in Wichita.

b. Advertisers could not turn to other Wichita radio stations to prevent Capstar from imposing an anticompetitive price increase

If Capstar raised prices or lowered services to those advertisers who buy advertising time on Capstar and Triathlon stations in Wichita because of their strength in delivering access to certain audiences, non-Capstar radio stations in Wichita would not be induced to change their formats to attract those audiences in sufficiently large numbers to defeat a price increase. 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 Capstar because they would likely lose a substantial portion of

their existing audiences. Even if less successful stations did change format, they would still be unlikely to attract enough listeners to provide suitable alternatives to the merged entity. In addition, new entry into the Wichita radio advertising market would not be timely, likely or sufficient to deter the exercise of market power. For all these reasons, plaintiff concludes that the proposed transaction would lessen competition substantially in the sale of radio advertising time on radio stations serving the Wichita MSA in violation of Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve competition in the sale of radio advertising time in Wichita. It requires Capstar to divest five stations: KEYN-FM, KWSJ-FM, KFH-AM, KNSS-AM and KQAM-AM. The relief will reduce the share in advertising revenues Capstar would have achieved in the transaction from 45 percent to less than 40 percent. The divestitures will preserve choices for advertisers and will ensure that radio advertising prices do not increase and services do not decline as a result of the transaction.

Capstar must divest the KEYN-FM, KWSJ-FM, KFH-AM, KNSS-AM and KQAM-AM assets to either another buyer or a Trustee at the time it acquires Triathlon. The divestitures must be to a purchaser or purchasers acceptable to the plaintiff in its sole discretion. Except in the case of KNSS-AM, the divestitures shall include all the assets of the stations being divested. The divestitures shall be accomplished in such a way as to

satisfy plaintiff, in its sole discretion, that such assets can and will be used as viable, ongoing commercial radio businesses. If defendants fail to divest these stations within the time periods specified in the Final Judgment, a Trustee agreed upon by plaintiff and Defendants and identified in the Final Judgment will be entrusted to effect the divestitures. If the Trustee is appointed, the proposed Final Judgment provides that Capstar will pay all costs and expenses of the Trustee and any professionals and agents retained by the Trustee. After appointment, the Trustee will file monthly reports with the plaintiff, Capstar and the Court, setting forth the Trustee's efforts to accomplish the divestitures ordered under the proposed Final Judgment. If the Trustee has not accomplished the divestitures within four (4) months after the date of the Order's entry, the Trustee shall promptly file with the Court a report setting forth (1) the Trustee's efforts to accomplish the required divestitures, (2) the reasons, in the Trustee's judgment, why the required divestitures have not been accomplished and (3) the Trustee's recommendations. At the same time the Trustee will furnish such report to the plaintiff and defendants, who will each have the right to be heard and to make additional recommendations.

The proposed Final Judgment requires that prior to the consummation of the transaction, defendants will maintain the independence of their respective radio stations in Wichita until the closing of the merger and the transfer of KEYN-FM, KWSJ-FM, KFH-AM, KNSS-AM and KQAM-AM to either a buyer approved by the plaintiff or to the Trustee.

The proposed Final Judgment also prohibits Capstar from entering into certain agreements with other Wichita radio stations without providing at least thirty (30) days' notice to the plaintiff. Specifically, Capstar must notify the plaintiff before acquiring any interest in another Wichita radio station. Such acquisitions could raise competitive concerns but might be too small to be reported otherwise under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"). Moreover, Capstar may not agree to sell radio advertising time for any other Wichita radio station, or to have another radio station that also sells radio advertising time in Wichita sell its radio advertising time, without providing plaintiff with notice. In particular, the provision requires Capstar to notify the plaintiff before it enters into any Joint Sales Agreements ("JSAs") in Wichita. Under a JSA, one station sells another station's advertising time. Despite their clear competitive significance, JSAs may not all be reportable to the Department under the HSR Act. Thus, this provision in the proposed Final Judgment ensures that the plaintiff will receive notice of and be able to act, if appropriate, to stop any agreements that might have anticompetitive effects in the Wichita radio advertising market.

The relief in the proposed Final Judgment is intended to remedy the likely anticompetitive effects of Capstar's proposed transaction with Triathlon in Wichita. Nothing in this Final Judgment is intended to limit the plaintiff's ability to investigate or to bring actions, where appropriate, challenging other past or future activities of defendants in Wichita, or any other markets.

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.**

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The plaintiff and the defendants have stipulated that the proposed Final 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 Final 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 plaintiff 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 its entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Any such written comments should be submitted to:

Craig W. Conrath
Chief, Merger Task Force
Antitrust Division
United States Department of Justice
1401 H Street, NW, Suite 4000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and 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 plaintiff considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against defendants. The plaintiff is satisfied, however, that the divestiture of KEYN-FM, KWSJ-FM, KFH-AM, KNSS-AM and KQAM-AM and other relief contained in the proposed Final Judgment will preserve viable competition in the sale of radio advertising time in the Wichita radio advertising markets. Thus, the proposed Final Judgment would achieve the relief the plaintiff 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 PROPOSED 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 District of Columbia Circuit 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 plaintiff'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 Corp., 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."[1] 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 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. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988) (citing United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 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**

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[1] **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.**

> **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.[2]**

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 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.' "[3]

This is strong and effective relief that should fully address the competitive harm posed by the proposed transaction.

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[2] **Bechtel, 648 F.2d at 666 (citations omitted)(emphasis added); see BNS, 858 F.2d at 463; United States v. National Broad. 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).**

[3] **United States v. American Tel. and Tel Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd. sub nom. Maryland v. United States, 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 plaintiff in formulating the proposed Final Judgment.

Dated: May 12, 1999

Respectfully submitted,

/s/

Karl D. Knutsen
Attorney
Merger Task Force

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CERTIFICATE OF SERVICE

I, Karl D. Knutsen, of the Antitrust Division of the United States Department of Justice, do hereby certify that true copies of the foregoing Competitive Impact Statement were served this 12th day of May, 1999, by United States mail, to the following:

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/s/

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