UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. CLEAR CHANNEL COMMUNICATIONS, INC. and AMFM INC., Defendants.	Civil Action No. 1:00CV02063 JUDGE: Thomas Penfield Jackson Filed: November 15, 2000

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 United States filed a civil antitrust Complaint on August 29, 2000, alleging that the proposed merger between Clear Channel Communications, Inc. (“Clear

Channel") and AMFM Inc. ("AMFM") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleges that Clear Channel's and AMFM's $23.8 billion merger would have the effect of lessening competition substantially in the provision of radio advertising time and of out-of-home advertising services in several areas of the United States.

Clear Channel and AMFM are two of the three largest operators of broadcast radio stations in the United States. Clear Channel's and AMFM's radio stations compete head-to-head against one another for the business of local and national companies seeking to advertise on radio stations in many cities throughout the United States, including Allentown, Pennsylvania; Denver, Colorado; Harrisburg, Pennsylvania; Houston, Texas; and Pensacola, Florida.

In addition, Clear Channel, through its subsidiary, Eller Media Company ("Clear Channel/Eller"), is a major provider of out-of-home advertising of various types, including billboards, bulletins and posters. AMFM has an approximately 28.6 percent equity interest in Lamar Advertising Company ("Lamar"), another major provider of out-of-home advertising that competes directly with Clear Channel/Eller. Clear Channel/Eller and Lamar compete vigorously in out-of-home advertising in numerous markets across the country.

The Complaint alleges that Clear Channel and AMFM's merger, unless blocked, would substantially lessen competition and would result in many advertisers paying higher prices for radio advertising time and out-of-home advertising. The prayer for relief seeks: (a) adjudication that Clear Channel's proposed merger with AMFM would violate Section 7 of the Clayton Act; (b) preliminary and permanent injunctive relief preventing the consummation of the proposed merger; (c) an award to the United States of the costs of this action; and (d) such other relief as is just and proper.

Before this suit was filed, the Department of Justice ("Department") reached an agreement with Clear Channel and AMFM, under which the parties agreed to divest 99 stations in 27 markets to other radio operators approved by the Department in order to preserve competition in those markets. The majority of those stations were to be sold under what is commonly referred to as the "fix-it-first" approach utilized by the Department's Antitrust Division, which requires divestiture of certain assets before parties consummate their merger. The remaining stations are to be divested in accordance with the terms of a proposed Final Judgment agreed to by the parties. In addition, the defendants are required to divest completely AMFM's previously held equity interest in Lamar, now held by Clear Channel, under the terms of the proposed Final Judgment.

A Stipulation and proposed Final Judgment were filed simultaneously with the Complaint on August 29, 2000. The United States 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

Clear Channel, headquartered in San Antonio, Texas, is one of the largest radio broadcast companies in the United States. For 1999, the company reported net television and radio revenues of approximately $1.4 billion. Clear Channel, through its wholly owned subsidiary, Eller Media Company, is also one of the largest providers of out-of-home advertising services (such as billboard advertising) in the United States. In 1999, Clear Channel/Eller reported revenues in excess of $1.25 billion.

AMFM, headquartered in Dallas, Texas, is also one of the largest radio broadcast companies in the United States. For 1999, the company reported radio group net revenues of approximately $1.7 billion. In addition, prior to the merger, AMFM owned approximately 28.6 percent of the total outstanding securities of Lamar, giving it rights to participate in the operation of Lamar, including representation on Lamar's Board of Directors. Lamar provides out-of-home advertising in many markets across the country. In 1999, Lamar had revenues of approximately $444 million.

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

On October 2, 1999, Clear Channel and AMFM entered into an Agreement and Plan of Merger, worth approximately $23.8 billion, that would create the largest radio broadcast company in the United States and eliminate head-to-head competition between Clear Channel and AMFM in several markets. Attempting to resolve the Department's competitive concerns prior to the filing of the Complaint, Clear Channel and AMFM sold 85 radio stations in 24 markets to buyers approved by the Department. These stations were purchased by buyers who will compete against Clear Channel after the merger, thereby restoring much of the competition that would have been lost as a result of the merger. Clear Channel and AMFM, however, did not sell enough radio stations in the Allentown, Denver, Harrisburg, Houston, and Pensacola Metropolitan Survey Areas ("MSA"),[1] to resolve the Department's concerns.

C. Anticompetitive Consequences of the Proposed Acquisition

1. Radio Advertising

The Complaint alleges that the provision of advertising time on radio stations is a relevant product market and that the Allentown, Denver, Harrisburg,

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[1] An MSA is the geographical unit for which Arbitron, a company that surveys radio listeners, provides data to radio stations, advertisers and advertising agencies 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 Allentown MSA is comprised of Carbon, Lehigh, and Northampton counties in Pennsylvania and Warren County in New Jersey. The Denver MSA is comprised of Adams, Arapahoe, Boulder, Denver, Douglas, and Jefferson counties in Colorado. The Harrisburg MSA is comprised of Cumberland, Dauphin, Lebanon, and Perry counties of Pennsylvania. The Houston MSA is comprised of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller counties of Texas. The Pensacola MSA is comprised of Escambia and Santa Rosa counties of Florida.

Houston and Pensacola MSAs ("Divestiture Cities") are each a relevant geographic market.

a. Relevant Product Market

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 the Divestiture Cities 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 in 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 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 the Divestiture Cities 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 the Divestiture Cities, the existence of such advertisers would not prevent radio stations from profitably 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, or as a necessary advertising complement to other media. Radio stations, which negotiate prices individually with advertisers, can generally 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 rates to advertisers that view radio as particularly effective for their needs, while maintaining lower rates for other advertisers. For these reasons, the sale of radio advertising time is a relevant product market for purposes of Section 7 of the Clayton Act.

b. Relevant Geographic Markets

Local and national advertising placed on radio stations in the Allentown, Denver, Harrisburg, Houston, and Pensacola MSAs is aimed at reaching listening audiences within each of those respective MSAs, and other radio stations do not provide effective access to those audiences. If there were a small but significant increase in radio advertising prices within any one of these MSAs, advertisers would not buy enough advertising time from radio stations outside of the MSA to defeat the increase. Thus, the Allentown, Denver, Harrisburg, Houston, and Pensacola MSAs are each a relevant geographic market for purposes of Section 7 of the Clayton Act.

c. Harm to Competition in Radio Advertising Markets

The Complaint alleges that the Clear Channel/AMFM merger would lessen competition substantially in the sale of advertising time on radio broadcast stations in the Divestiture Cities. In particular, the merger would further concentrate markets that are already highly concentrated. The Complaint alleges that Clear Channel's market share in each of the Divestiture Cities would exceed 41 percent, and in some markets would be more than 69 percent, after the merger. Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI"), which is explained in Appendix A to the Complaint, the merger would result in concentration in each of these markets from about 2262 to 6231 points, well above the 1800 threshold at which the United States normally considers a market to be highly concentrated.

Furthermore, the Complaint alleges that the merger would eliminate head-to-head competition between Clear Channel and AMFM for advertisers seeking to reach specific audiences. 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, the characteristics of its audience, and the geographic reach of a station's signal. Many advertisers seek to reach a large percentage of their target listeners by selecting those stations whose audience best correlates to their target listeners. Today, several Clear Channel and AMFM stations in the Divestiture Cities compete head-to-head to reach the same audiences and, for many local and national advertisers buying time in those markets, the stations are close substitutes for each other based on their specific audience characteristics. The proposed transaction would eliminate such competition.

Format changes are unlikely to deter the anticompetitive consequences of this transaction. 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 Clear Channel because they would likely lose a substantial portion of their existing audiences. Even if less successful stations did change format, they still would be unlikely to attract enough listeners to provide suitable alternatives to the Clear Channel stations in their markets. Finally, new entry into radio advertising markets in the Divestiture Cities is highly unlikely in response to a small but significant price increase by Clear Channel because of the general lack of capacity to add additional signals in metropolitan markets. Also, it is unlikely that stations located in adjacent communities would be permitted to boost their power sufficiently so as to enter the MSAs in the Divestiture Cities without interfering with other stations on the same or similar frequencies in violation of Federal Communications Commission ("FCC") regulations.

For all of these reasons, the Complaint alleges that the proposed merger would lessen competition substantially in the sale of advertising time on radio stations serving the Divestiture Cities, eliminate competition between Clear Channel and AMFM, and result in increased prices and reduced quality of service for radio advertisers in the Divestiture Cities, all in violation of Section 7 of the Clayton Act.

2. <u>Out-of-Home Advertising</u>

a. Relevant Markets

Out-of-home advertising companies, such as Clear Channel/Eller and Lamar, generate revenue from the sale of out-of-home advertising, such as billboards, to local and/or national businesses that want to promote their products and services. Advertisers select out-of-home advertising based upon a number of factors, including the size of the target audience (individuals most likely to purchase the advertiser's products or services), the traffic patterns of the audience, as well as other audience characteristics.

Out-of-home advertising has unique characteristics that distinguish it from other advertising media. Among other things, out-of-home advertising is particularly suitable for highly visual, limited-information advertising and is typically less expensive and more cost-efficient than other media in reaching an advertiser's target audience. For many advertisers, there is no close substitute for out-of-home advertising. Such advertisers would not switch to another advertising medium if out-of-home advertising prices increased by a small but significant amount. Thus, the Complaint alleges that out-of-home advertising is a relevant product market for purposes of Section 7 of the Clayton Act.

In addition, out-of-home advertising is typically offered on a localized, market-by-market basis rather than nationally or regionally and is sold at prices based on local market conditions. It is typically sold by local sales forces and targeted to reach consumers in a specific city, county or metropolitan area. For advertisers seeking to reach consumers in a specific local area, advertising outside the local area is not an adequate substitute because most of the target audience may not even see the advertising. Thus, the relevant geographic markets within the meaning of Section 7 of the Clayton Act for out-of-home advertising are typically localized, often no larger than a city, county or metropolitan area.

b. Harm to Competition

Clear Channel/Eller is one of only a few providers of out-of-home advertising services competing with Lamar in several markets across the United States, including Atlanta, Georgia, and Chicago, Illinois. The proposed merger between Clear Channel and AMFM would give Clear Channel unfettered ownership and control of the assets and holdings of AMFM, including AMFM's approximately 28.6 percent equity interest in Lamar.

Clear Channel's acquisition of AMFM's significant equity interest in Lamar may substantially lessen competition in the areas in which Clear Channel/Eller and Lamar compete to provide out-of-home advertising. By acquiring a partial ownership interest in Lamar, Clear Channel will have reduced incentives to compete against Lamar for out-of-home advertisers and will have incentives to charge higher prices than it otherwise would. This is because Clear Channel will indirectly benefit even when a customer chooses Lamar rather than Eller. In addition, Clear Channel's post-merger ownership in Lamar, which would include voting rights, board representation, and certain other rights, would give it the ability directly or indirectly to influence Lamar's business decisions, and would further lessen competition in out-of-home advertising. With these rights, Clear Channel could gain access to competitively sensitive information, which could be used by Clear Channel in an anticompetitive way. Entry into the out-of-home advertising would not be timely, likely or sufficient to mitigate the competitive harm resulting from this aspect of the merger. Hence, the Complaint alleges that the merger would lessen substantially competition between Clear Channel/Eller and Lamar in the provision of out-of-home advertising in local markets, and would result in increased prices and reduced quality of service for advertisers, in violation of Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment will preserve competition in both the sale of radio advertising time in the Divestiture Cities and the sale of out-of-home advertising in local markets by requiring substantial radio station divestitures and a complete divestiture of AMFM's ownership interest in Lamar ("the Lamar Holdings").

A. Radio Divestitures

The proposed Final Judgment requires Clear Channel to divest 14 radio stations in five markets in the Divestiture Cities (the "Radio Assets") to buyers approved by the United States within one hundred and fifty (150) days after the filing of the Complaint, or five (5) days after notice of the entry of the Final Judgment by the Court, whichever is later. The United States, in the exercise of its sole discretion, may extend this time for two additional thirty (30) day periods.

The divestitures required by the proposed Final Judgment will maintain or reduce Clear Channel's resulting post-merger market shares in radio advertising at levels that either Clear Channel or AMFM possessed (whichever was greater) in each of the Divestiture Cities before the merger,[2] thereby effectively restoring the pre-merger competitive situation to each of these markets.[3] Thus, these divestitures will preserve

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[2] In Allentown, AMFM's premerger share was 49.90 percent; Clear Channel's post-merger share will be 49.90 percent. In Harrisburg, AMFM's premerger share was 41.03 percent; the post-merger share will be 35.90 percent. In Pensacola, AMFM's premerger share was 49.61 percent; the post-merger share will be 19.69 percent. In Denver and Houston, the defendants were able to sell some of the stations required to be divested prior to consummation of their merger. In Denver, without any divestitures, the defendants would have held a post-merger market share of 66.51 percent. They sold five stations before the merger, which brought their market share down to 45.99 percent. After they sell the additional radio station required to be divested under the proposed Final Judgment, they will hold a 45.46 percent share, which is equal to AMFM's original share (*i.e.*, before the merger and any divestitures). In Houston, the parties sold all but five stations before the merger, reducing their combined market share to 41.15 percent. After they make the additional divestitures called for by the proposed Final Judgment, they will hold only a 38.04 revenue share, which is less than AMFM's original share of the Houston market.

[3] As noted above, the parties also divested a number of radio stations prior to the filing of the Complaint in order to resolve the Department's concerns about the merger. A similar approach was employed by the Department with respect to those markets: Clear Channel was required to either divest down to its (or AMFM's) premerger market share or to a level that would not warrant competitive concern.

choices for advertisers and will ensure that radio advertising prices do not increase and services do not decline as a result of the merger.

Under the terms of the proposed Final Judgment, the Radio Assets must be sold to purchasers acceptable to the United States, in its sole discretion. Unless the United States otherwise consents in writing, the divestitures will include all the assets of the stations being divested, and will be accomplished in way that will satisfy the United States, in its sole discretion, that such assets can and will be used as viable, ongoing commercial radio businesses. The proposed Final Judgment also requires the defendants to maintain the independence of the Radio Assets, and requires those stations to be kept separate and apart from the defendants' other radio stations. The proposed Final Judgment also contains provisions intended to ensure that these stations will remain viable and aggressive competitors after divestiture.

In addition, the proposed Final Judgment prohibits Clear Channel from entering into certain agreements with other radio stations in the Divestiture Cities without providing at least thirty (30) days' notice to the United States. First, Clear Channel must notify the United States before acquiring any assets of or interest in any other radio station in the Divestiture Cities. Such acquisitions could raise competitive concerns but might be too small to be reported under the Hart-Scott-Rodino ("HSR") premerger notification statute, 15 U.S.C. § 18a. Second, Clear Channel may not enter into any joint sales or cooperative selling arrangement with any other radio station in the Divestiture Cities without providing the United States with advance notice. Such arrangements include any Joint Sales Agreement ("JSA"), where one station takes over another station's advertising time, and any Local Marketing Agreement ("LMA"), where one station takes over another station's broadcasting and advertising time, as well as other comparable arrangements. Arrangements whereby Clear Channel would manage, or sell advertising on behalf of, other radio stations in the Divestiture Cities would effectively increase its market share in those cities. Despite their competitive significance, such arrangements also might not be reportable under the HSR Premerger Notification Act. Thus, this provision of the proposed Final Judgment ensures that the United States will receive advance notice of and be able to act, if appropriate, to prevent any agreements that might have anticompetitive effects in the Divestiture Cities.

B. Divestiture of the Lamar Holdings

The proposed Final Judgment also requires the defendants to divest completely, by December 31, 2002, the approximately 28.6 percent equity interest held by AMFM in the Lamar Holdings that Clear Channel acquired as a result of the merger. This divestiture may be made by public offering, private sale, or a combination thereof. However, such stock may not be sold: (1) to any entity that is currently in the out-of-home advertising business without the United States's written approval; or (2) in a manner that the United States believes could significantly impair Lamar as an effective competitor in the sale of out-of-home advertising.

In merger cases in which the Antitrust Division seeks a divestiture remedy, it requires completion of the divestiture within the shortest time period reasonable under the circumstances. While the time period for divestiture of the Lamar Holdings in this case is significantly longer than the United States ordinarily would accept, the Division has agreed to a longer time in this case because of concerns that a more rapid divestiture of such a large amount of relatively thinly traded stock might harm competition. A complete divestiture in the time period required by the Antitrust Division in the typical case (*e.g.*, four months or less) potentially could adversely affect the price of Lamar stock, thereby increasing the cost of raising additional capital and limiting Lamar's ability to maintain and augment its outdoor advertising portfolio. This would have the effect of reducing Lamar's ability to compete effectively.

The terms of the proposed Final Judgment reflect a balancing of the potential harm to competition that might arise from a divestiture that proceeds either too slowly or too rapidly. By permitting the divestiture of the Lamar Holdings to be accomplished by December 31, 2002, the proposed Final Judgment will accomplish the required divestiture so as to minimize the risk of significant anticompetitive effects from Clear Channel's acquisition of a partial ownership stake in Lamar while at the same time minimizing the risk of any potential adverse effect on Lamar's ability to raise capital and compete effectively. Moreover, other supplementary provisions in the Final Judgment, described below, are designed to reduce the risk that Clear Channel's partial ownership of Lamar could create incentives for anticompetitive activity during the interim period before the completion of the required divestiture.

C. Corporate Governance Restrictions Relating to the Lamar Holdings

During the period that Clear Channel possesses the Lamar Holdings, its ability to participate in the governance of Lamar will be restricted by the proposed Final Judgment. In particular, it must abide by two agreements reached between Clear Channel and Lamar (the "First Amendment to Stockholders Agreement" and the "Amended and Restated Registration Rights Agreement," both of which are attached to the proposed Final Judgment as Schedules C and D, respectively), which set out the rights and obligations of the parties with respect to issues relating to the governance of Lamar and the sale of its stock. In addition, until the divestiture of the Lamar Holdings, Clear Channel must treat that equity interest in Lamar as a passive investment, and must hold it separate and apart from Clear Channel's other activities and interests. Neither Clear Channel nor its representatives may: exercise any voting rights except as provided in the First Amendment to Stockholders Agreement; participate as officers or directors of Lamar, participate in the selection of Lamar's officers or directors, or participate in any board of directors meetings or committees; exercise any veto rights over Lamar's activities; or obtain nonpublic information about

Lamar. In addition, the proposed Final Judgment provides that the two AMFM representatives on the Lamar board -- Thomas O. Hicks and R. Steven Hicks -- must resign those seats within two days after the merger is consummated.[4] Collectively, these provisions are intended to promote a “hold separate” relationship between Clear Channel and the Lamar Holdings during the pre-divestiture period and reduce the risk that Clear Channel will influence Lamar’s business decisions.

Other provisions in the proposed Final Judgment require that the defendants may not take any action that will in any way impede the divestiture of the Lamar Holdings. In addition, the defendants may not acquire any additional shares of Lamar stock except as a result of certain events, such as a stock split or dividend, where the percentage of their equity interest in Lamar does not increase. Any additional shares so acquired must be divested as part of the Lamar Holdings. Finally, the defendants must appoint someone to oversee the Lamar Holdings, who will be responsible for the defendants’ compliance with this portion of the decree.

As a general matter, the Antitrust Division does not believe that decree restrictions dealing with corporate governance arrangements are an appropriate remedy for the anticompetitive effects that might arise from mergers and acquisitions. Such restrictions will have only limited efficacy as long-term protections against anticompetitive effects, and may require ongoing oversight of the conduct of a

[4] The United States has confirmed that these two individuals resigned on August 30, 2000.

corporation's internal affairs that neither the Antitrust Division nor a Court is well-suited to perform. The proposed Final Judgment in this matter adopts such provisions only because of the unique factors that are present here, and only as an interim measure designed to mitigate any anticompetitive incentives that could otherwise arise during the unusually lengthy period permitted for complete divestiture of the Lamar Holdings.

D. Trustee Provisions

In the event that the defendants fail to make any required divestitures of either the Radio Assets or the Lamar Holdings (collectively the "Divestiture Assets") within the time periods set forth in the proposed Final Judgment, a trustee(s) will be appointed by the Court to effect such divestitures. Clear Channel will pay all costs and expenses of any trustee and of any professionals and agents retained by the trustee(s), and may not object to any sale by the trustee(s) on any ground other than malfeasance. After appointment, the trustee(s) will report monthly to the United States and the Court on its efforts to accomplish the required divestitures. If the trustee(s) has not accomplished the divestitures within six (6) months of his or her appointment, the trustee(s) shall inform the Court of his or her efforts to accomplish the required divestitures, the reasons the required divestitures have not been accomplished and the trustee's recommendations.

E. Ban on Reacquisition

The defendants may not reacquire any of the Divestiture Assets or the assets used in the operation of the radio stations listed in Schedule E of the proposed Final Judgment[5] during the term of the consent decree, which is for ten years unless extended by the Court. Reacquisition of any of the Divestiture Assets would undermine, if not negate, the benefits of the relief obtained in these markets. Accordingly, this provision is necessary to protect the integrity of the relief.

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.

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[5] Schedule E lists the other radio stations in the Denver and Houston MSAs that the parties have already divested under the “fix-it-first” arrangement. Since all the required divestitures in Denver and Houston did not occur under the “fix-it-first” approach, the defendants may not reacquire any of the stations divested in these markets, including those that they divested prior to consummating their merger.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States 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. All comments will be given due consideration by the United States Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to its entry. The United States will evaluate and respond to the comments. 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:

J. Robert Kramer, II
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
1401 H Street, NW, Suite 3000
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, as well as to punish violations of its provisions.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered as an alternative to the proposed Final Judgment, a full trial on the merits against the defendants. The United States could have brought suit and sought a preliminary and permanent injunction against the merger of Clear Channel and AMFM. The United States is satisfied, however, that the radio station divestitures, the complete divestiture of the Lamar Holdings, and the other relief contained in the proposed Final Judgment will preserve competition in the sale of radio advertising and out-of-home advertising. Thus, the United States is convinced that the proposed Final Judgment, once implemented by the Court, will prevent the Clear Channel/AMFM merger from having adverse competitive effects.

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;
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> (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) (emphasis added). As the United States Court of Appeals for the District of Columbia Circuit held, the APPA 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 Corp., 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

In conducting this inquiry, "the 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."[6] 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) (quoting 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 1458-62. 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

[6] 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 1974 U.S.C.C.A.N. 6535, 6538.

> 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.[7]

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.' "[8]

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." Microsoft, 56 F.3d at 1459. Since the "Court's

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[7] 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).

[8] 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); see also United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that the court "is only authorized to review the decree itself,: and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. Id.

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.

Dated: November 15, 2000

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Filippini, 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 15th day of November, 2000, by first-class mail, to the following:

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