IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA, Plaintiff, v. JACOR COMMUNICATIONS, INC. and CITICASTERS, INC., Defendants.	No. Civ. C-1-96-757 (Antitrust) Filed: August 5, 1996 **COMPETITIVE IMPACT STATEMENT**

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

I. NATURE AND PURPOSE OF THE PROCEEDING

The plaintiff filed a civil antitrust complaint on August 5, 1996, alleging that the proposed acquisition of Citicasters, Inc. ("Citicasters") by Jacor Communications, Inc. ("Jacor") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. Jacor and Citicasters own and operate radio

broadcast stations in various cities across the United States, and they are the first and third largest owners of radio stations in the Cincinnati, Ohio area.

The complaint alleges that the combination of these companies would substantially lessen competition in the sale of radio advertising time in Cincinnati, Ohio and the surrounding areas. The prayer for relief seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act, 15 U.S.C. § 18, and (2) a preliminary and permanent injunction preventing Jacor and Citicasters from carrying out the proposed merger.

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

The proposed Final Judgment orders Jacor to divest WKRQ-FM in Cincinnati, which it will acquire from Citicasters in the proposed transaction, including all the assets necessary to make WKRQ an economically viable competitor in the Cincinnati radio market. Unless the United States grants a time extension, Jacor must complete this divestiture within six months after the entry of the Final Judgment. If Jacor does not divest the WKRQ Assets during the divestiture period, the Court may appoint a trustee to sell the assets. The proposed Final Judgment further requires defendants to ensure that, until the divestiture mandated by the Final Judgment has been accomplished, WKRQ will be operated independently as a viable, ongoing business, and kept separate and apart from Jacor's other Cincinnati radio stations. Finally, the proposed Final Judgment requires Jacor to give the United States prior notice as to certain future radio station acquisitions in Cincinnati or agreements that would grant Jacor the right to sell advertising time

for non-Jacor radio stations in Cincinnati.

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

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Transaction

Defendant Jacor is an Ohio corporation with its headquarters in Cincinnati, Ohio. It currently owns and operates 22 stations in 7 cities.[1] In 1995, Jacor reported total revenues of approximately $134 million, $40 million from operations in the Cincinnati area. Jacor owns four Cincinnati radio stations, and sells advertising for three more radio stations under joint sales agreements ("JSAs").

Citicasters is a Florida corporation headquartered in Cincinnati, Ohio. Citicasters owns 19 radio stations in 8 cities, and also owns two television stations. In 1995, Citicasters' total revenues were approximately $60 million, $10 million from its Cincinnati radio operations. Citicasters owns two radio stations in Cincinnati.

On February 12, 1996, Jacor agreed to purchase Citicasters for approximately $770 million. This transaction, which would combine Jacor and Citicasters, precipitated the Government's suit. As a result of the proposed transaction, Jacor would own six major radio

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[1] In a separate acquisition, Jacor plans to acquire Noble Broadcast Group, Inc., which owns 10 radio stations.

stations in Cincinnati and control the sale of advertising time for three more.

B. Sale of Radio Advertising Time

The complaint alleges that the provision of advertising time on radio stations serving the Cincinnati metropolitan area constitutes a line of commerce and section of the country, or relevant market, for antitrust purposes. Advertisers that seek to reach residents of the Cincinnati area would not find radio stations that broadcast to other areas to be acceptable substitutes for Cincinnati stations.

Radio stations earn money by selling broadcast time to advertisers. Advertisers choose among radio stations by comparing differences among the stations' rates, audience size, audience composition, and availability of time for sale. An advertiser typically has a "target audience" (young women, for example) that it seeks to reach when marketing its product or service, and wants its target audience to have substantial exposure to its message. To ensure this reach and frequency, advertisers generally buy time on multiple radio stations in the same market. Because a radio station bases its rates on the size of its overall audience, advertisers prefer to advertise on stations that are listened to primarily by their target audience.

For Cincinnati advertisers, radio is a qualitatively different medium from television or newspapers. Perhaps most significantly, radio gives Cincinnati advertisers the ability to reach target audiences far more efficiently that other media. Cincinnati radio stations attract different types of audiences by adopting different formats, such as country or rock and roll. By choosing appropriate radio stations, a Cincinnati advertiser can reach a large percentage of its target audience without also reaching (and thus paying for) listeners outside of its target. Although television and newspapers are good vehicles for reaching a broad, undifferentiated audience, they

generally lack radio's ability to provide efficient targeting.

Radio advertisements are also comparatively inexpensive to produce, and can be changed or modified easily and with little advance notice to the radio station. This makes radio advertising especially attractive to Cincinnati advertisers that need to change messages frequently (for example, to advertise different items as being on sale each week), as well as to companies with limited advertising budgets. Radio is also the most effective medium for delivering a message to consumers when they are traveling in their cars or outside their homes.

Radio thus has particular advantages for those seeking to place low-cost, targeted or time-sensitive advertising. Many Cincinnati advertisers therefore perceive radio as a distinct advertising medium from television or newspapers. Accordingly, many are not likely to switch any or some of their advertising budget from radio to other media were radio prices to rise 5-10%.

Radio stations negotiate rates individually with each advertiser. As an integral part of these negotiations, an advertiser will provide the station with a description of its target audience, as well as the reach and frequency it desires. Based on this information and the station's knowledge of its competitors, the station can identify the reasonable alternatives available to advertisers, and has the ability to charge advertisers different rates, based on whether such alternatives exist.

C. Anticompetitive Consequences of the Proposed Merger

The complaint alleges that Jacor's proposed acquisition of Citicasters would lessen competition substantially in the provision of advertising time on radio in the Cincinnati area. The proposed acquisition would create further market concentration in an already highly concentrated

market, and Jacor would control a substantial share of the advertising revenues in this market. Jacor presently controls 42% of all radio advertising revenues in Cincinnati, and its market share would rise to 53% after the proposed merger. According to the Herfindahl-Hirschman Index ("HHI"), a widely-used measure of market concentration defined and explained in Appendix A, Jacor possesses a pre-merger HHI of 2180, which would rise to 3077 after the merger.

Advertisers, at present, can choose among radio stations owned by Jacor, Citicasters and others. When there are multiple stations that could satisfy its needs, an advertiser can get competing bids from the stations, and so obtain better rates or other special services from them. After the merger, advertisers will have fewer radio companies to choose from, and many will have to purchase advertising time from Jacor/Citicasters so as to obtain the desired reach and frequency. Advertisers will thus lose the benefits that the existing competition between Jacor and Citicasters stations provides.

Currently, many advertisers feel that advertising on either one of the Jacor-controlled stations, or on WKRQ, is very important. Many of these advertisers' target audiences include young adults (listeners aged 18 to 34). Thus, the Jacor stations and WKRQ compete against each other for the business of advertisers trying to reach that audience, and in rate negotiations, advertisers use this competition to get better rates or increased services from the Citicasters and Jacor stations. This competition will be eliminated by the merger.

Currently, advertisers trying to reach young adults could efficiently reach this audience on the radio without having to use a Jacor station. Post-merger, however, many of these advertisers will be much more dependant on purchasing time from Jacor stations. Jacor could accordingly raise its rates, and reduce the quality of its service, to advertisers targeting young adults (or who

need either the Jacor stations or WKRQ for other reasons) who would have scant alternatives to paying the increase, while maintaining lower rates for other advertisers. This would make a price increase profitable even though some advertisers could switch to other radio stations.

Non-Jacor radio stations in Cincinnati are not likely to respond to Jacor's increased prices after the acquisition by changing formats so as to attract a greater number of young adults. Most radio stations change format only when their existing formats are losing money. A station is also unlikely to change its format solely in response to higher prices being charged by a large established company that controls a number of stations in the market, such as Jacor.

Entry by new radio stations in this market is unlikely. The FCC is unlikely to grant a license to a new radio station, as there is insufficient spectrum to accommodate a new signal without interfering with existing signals. In addition, radio stations sited in nearby communities cannot easily boost their signal power so as to provide better coverage and thereby enter the Cincinnati market. Boosting a signal would interfere with neighboring stations on the same or similar frequencies, a violation of FCC regulations.

For these reasons, the Department concludes that the merger as proposed would substantially lessen competition in the sale of radio advertising time in the Cincinnati area, eliminate actual competition between Jacor and Citicasters, and result in increased rates for radio advertising time in the Cincinnati metropolitan area, all 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 the Cincinnati metropolitan market. It requires the divestiture of WKRQ-FM, the station owned by Citicasters that competes most directly with Jacor stations for advertising dollars targeted to young adults. As a result of this divestiture, WKRQ-FM will remain as a strong competitor to the Jacor stations. The divestiture will preserve choices for advertisers and help ensure that radio advertising rates in Cincinnati do not increase as a result of the acquisition.

Unless the United States grants a time extension, this divestiture of WKRQ must be accomplished by Jacor within six months after entry of the Final Judgment. The defendants must divest the assets and rights associated with WKRQ in such a way as to satisfy the plaintiff that the station can and will be operated as a viable, ongoing business, and that until the divestiture, the station will be maintained as an independent competitor to the other stations in the Cincinnati area, including the Jacor stations.

If the defendants fail to divest WKRQ within the six months after entry of Final Judgment, or extension thereof, the Court, upon application of the United States, shall appoint a trustee nominated by the United States to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that Jacor will pay all costs and expenses of the trustee and any professionals and agents retained by the trustee. The compensation paid to the trustee and any persons retained by the trustee shall be both reasonable in light of the value of WKRQ and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished. After appointment, the trustee will file monthly reports with the parties and the Court setting forth the trustee's efforts to accomplish the

divestiture ordered under the proposed Final Judgment. If the trustee has not accomplished the divestiture within six (6) months after its appointment, the trustee shall promptly file with the Court a report setting forth (1) the trustee's efforts to accomplish the required divestiture, (2) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (3) the trustee's recommendations. At the same time, the trustee will furnish such report to the parties, who will each have the right to be heard and to make additional recommendations consistent with the purpose of the trust.

The proposed Final Judgment requires that Jacor maintain WKRQ separate and apart pending divestiture. The Judgment also contains provisions to ensure that the assets of WKRQ will be preserved so that the station after divestiture will remain a viable, aggressive competitor.

The proposed Final Judgment also prohibits Jacor from entering into certain agreements with other Cincinnati radio stations without providing at least thirty (30) days notice to the Department of Justice. Specifically, Jacor must notify the Department before acquiring any significant interest in another Cincinnati radio station, which would raise competitive concerns but might well be too small to be reported under the Hart-Scott-Rodino ("HSR") premerger notification process. In addition, Jacor may not agree to sell radio advertising time for any other Cincinnati radio station, without providing such notice. This provision ensures that the Department will receive advance notice of any acquisition, or agreements, through which Jacor will increase the amount of advertising time on radio stations that it can sell. In particular, this provision will require Jacor to notify the Department before it enters into any more joint sales agreements ("JSAs") or limited management agreements ("LMAs") with other stations in the Cincinnati area. Such agreements, whereby Jacor sells advertising for or manages other area

radio stations, would effectively increase Jacor's market share in Cincinnati. In analyzing the Cincinnati radio market, the Department treated Jacor's three present JSA stations as if Jacor owned them outright. Despite their clear competitive significance, a JSA or an LMA probably would not be reportable to the Department under HSR. Thus, this provision in the decree ensures that the Department will receive notice of and be able to act, if appropriate, to stop any agreements that might have anticompetitive effects in the Cincinnati market.

The relief in the proposed Final Judgment is intended to remedy the competitive effects of the proposed acquisition of Citicasters by Jacor. Nothing in this Final Judgment is intended to limit the plaintiff's ability to investigate or bring actions, where appropriate, challenging other past or future activities of Jacor in the Cincinnati area, including its entry into JSAs, LMAs or other agreements related to the sale of advertising time on non-Jacor stations.

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 United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Donald J. Russell
Chief, Telecommunications Task Force
Antitrust Division
United States Department of Justice
555 4th Street, N.W., Room 8104
Washington, D.C. 20001

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 WKRQ and other relief contained in the proposed Final Judgment will preserve viable competition in the sale of radio advertising time in the Cincinnati metro area. Thus, the proposed Final Judgment would achieve the relief the government would have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR 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) (emphasis added). As the United States Court of Appeals for the D.C. Circuit recently held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint,

whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, "[t]he Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[2] 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.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d at 1460-62. Precedent requires that

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of

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[2] 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.

> 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.[3]

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.'"[4]

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

[4] 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 United States in formulating the proposed Final Judgment.

Dated: August 2, 1996

Respectfully submitted,

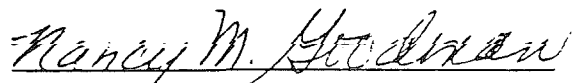

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EXHIBIT A

DEFINITION OF HHI AND

CALCULATIONS FOR MARKET

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

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

Based on available radio advertising revenues, the pre-merger HHI for the Cincinnati area radio market is 2180. After the proposed merger the HHI would be 3077, an increase of 897 points.