DEPARTMENT OF JUSTICE

CURRENT ISSUES IN RADIO STATION MERGER ANALYSIS

Address by

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It is nice to be here once again at the Business Development Associates Antitrust Conference to talk about developments in the area of merger enforcement. I look forward to this event, and the chance to catch up with many friends.

I'd like to talk today about an issue that has arisen recently in connection with our review of radio station acquisitions--namely whether an acquiring person, in the context of an acquisition subject to the reporting requirements of the Hart-Scott-Rodino Act, can take over *operating control* of one or more of the acquired stations *before* the HSR waiting period has expired. It should come as no surprise that the Justice Department and the Federal Trade Commission believe that transferring operational or management control in such circumstances results in a transfer of beneficial ownership, and raises an HSR compliance issue.

Our review of radio station acquisitions has been much in the news lately, and with good reason. The enactment of the new

Telecommunications Act in February has unleashed an incredible consolidation wave in this industry.

The Telecommunications Act raised substantially the FCC-imposed limits on the number of commercial radio stations a single entity could own, operate, or control in one market. The maximum number depends on the number of commercial stations in the market, but the limit was raised from 4 stations to 8 stations in the largest markets. The nationwide limit of 20 FM and 20 AM stations has been eliminated entirely.

While the Telecommunications Act raised the FCC's station ownership limits, it made clear at the same time that antitrust review of radio mergers was preserved.[1] It follows that antitrust law restrictions on station ownership can be more binding than the new telecommunications law statutory limits in some cases. As between the Justice Department and the FTC, the Department has taken the lead in reviewing radio mergers.

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1 Telecommunications Act of 1966, Pub. L. 104-104, Sec. 601(b)(1), 110 Stat. 56, 143.

And it has been a flood of mergers, indeed. By one count, there were 189 radio deals announced in the first half this calendar year, worth some $25 billion. We have received over 100 HSR filings for radio transactions, and opened close to 20 investigations.

The deals subject to investigation have ranged in size from the acquisition of a single, major radio station by an operator that already dominates the market in a given metro area, up to the $5.4 billion Westinghouse/Infinity transaction, still pending, which would combine the two largest radio broadcast groups in the country .

Our focus in reviewing these transactions has been primarily on the prospect of increased prices for radio advertising. Using traditional analytic techniques under our Horizontal Merger Guidelines, we have taken the position that radio advertising is a relevant product market for antitrust purposes, and explored both unilateral and coordinated effects theories of harm to advertisers. In many cases, concerns generated by a traditional

Guidelines analysis have been bolstered either by complaints about the transaction from advertisers, or by documents from the files of the merging parties that make clear that price increases to advertisers are an anticipated, even an intended, impact of the merger.

We have announced only one formal challenge to a radio merger so far this year. That was a challenge to Jacor's $770 million acquisition of Citicasters, which we settled with a proposed consent decree that would require Jacor to divest one of the larger Citicasters stations in Cincinnati. [2]

Our reviews of radio station mergers have been in the news lately in part because merger enforcement is a comparatively new phenomenon in the radio industry. Historically, the FCC-imposed caps on station ownership have tended to be more binding than antitrust constraints, so we had not devoted much time to looking at radio acquisitions.

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[2] United States v. Jacor Communications, Inc., Civil Action No. 1-96-757, Aug. 5, 1996 (S.D. Ohio).

The recent statutory changes have increased the practical importance of antitrust constraints in this industry. It is to be expected that the industry would react given that more attention is now focused on the antitrust constraints. Accustomed perhaps to a tradition of regulatory caps on station ownership, some in the industry have pressed us for definitive antitrust "rules of the road." As this audience knows all too well, however, antitrust enforcement rarely lends itself to such bright-line treatment. And, in candor, our investigations get richer and more sophisticated as we explore the various transactions that may raise concerns.

But another reason our reviews of radio mergers have attracted attention is that in the course of reviewing recent radio transactions, we have developed concerns about certain cooperative radio marketing and management arrangements now in use in the industry.

Under one arrangement, known as a "joint selling agreement," or "JSA", a radio station or radio group may sell radio advertising time not only

on its own station or stations, but also for one or more competing stations in the same market. Such an arrangement may obviously raise issues under Section 1 of the Sherman Act.

Under another arrangement, known alternatively as a "local marketing agreement" ("LMAs") or "time brokerage agreement", a radio station owner/licensee not only transfers the right to sell advertising time; the third party also provides programming, in some cases as much as 100% of the programming. These arrangements may also raise Section 1 issues. For the remainder of my time, however, I'd like to focus on an HSR-related issue that has arisen concerning LMAs and their use in the specific context of radio station acquisitions.

In a number of radio station acquisitions that we have reviewed recently, the parties entered into an expansive LMA *in connection with the acquisition*, and did so before filing notification and observing the HSR waiting period. The FTC Premerger Notification Office has informed

counsel involved in these transactions that the agencies are concerned that use of LMAs in connection with radio station acquisitions may prematurely transfer beneficial ownership. While we have heard arguments to the contrary -- you may have seen reference to a 14-page letter on this point -- I want to take this opportunity to reiterate our concern and elaborate on our position.

First, let me make clear that in discussing HSR concerns about LMAs, I am referring to LMAs *entered into in connection with an acquisition.* An LMA or other arrangement such as a joint sales agency outside the context of an acquisition would not violate the HSR Act. Such LMAs, for HSR purposes, are somewhat analogous to leases and management contracts, which have generally been deemed not to transfer beneficial ownership.[3] The station owner has not left the business, and when the LMA expires may operate the station himself or enter into an LMA with someone else.

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[3]See ABA Premerger Notification Practice Manual (1991 ed.), Interpretations 48, 76.

In our view, however, an LMA entered into in connection with an acquisition transfers operating control of the assets or business before expiration of the HSR waiting period. The buyer, through having operating control of the programming and the pricing of advertising, is essentially operating the business of the radio station. The owner of the station has effectively left the business prior to HSR review being completed. Whether the FCC for its regulatory purposes views the owner/licensee as retaining control of the broadcast license is hardly dispositive for HSR purposes.[4]

Premature transfer of operating control in the context of an acquisition transfers beneficial ownership in all industries, including radio. While some counsel have expressed surprise when informed of the agencies' HSR concern about LMAs entered into in connection with radio station

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[4]The FTC and DOJ, in promulgating the HSR rules, rejected the suggestion that the HSR rules' definition of "beneficial ownership" conform to the SEC's definition of that term. "After assessing the compatibility of the SEC's definition of 'beneficial ownership' and the use of that concept in these rules, the Commission concluded that the legislative intent underlying each program and the goals of each program were sufficiently distinct to support different usages of the term 'beneficial ownership'." 43 Fed. Reg. 33,450, 33,459 (July 31, 1978). The FCC regulatory program and HSR do not even use the same terminology. We see no legal or logical reason that beneficial ownership for HSR purposes must reside in the same party who is deemed to control a radio station for FCC regulatory purposes.

acquisitions, I believe that counsel familiar with HSR understand well that HSR does not permit you to operate the business of the company you are acquiring during the HSR waiting period. Indeed, a 1994 article in the Antitrust Law Journal observed that: "Conduct that prematurely places excessive influence or control over the seller's business in the hands of the purchaser potentially could run afoul of either [Section 1 of the Sherman Act or Section 7A of the Clayton Act]."[5]

Second, I would like to emphasize that our position regarding the application of the HSR Act to LMAs does not prohibit parties from using LMAs throughout the pendency of an FCC application, but only during the HSR waiting period. In transactions that do not present competitive issues sufficient to warrant the issuance of a second request, the HSR waiting period will expire in 30 days -- earlier if early termination is granted. The parties are, of course, free under the HSR Act to utilize an LMA once the HSR waiting period expires. I would also note that to the extent that parties

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[5]W. Blumenthal, "The Scope of Permissible Coordination Between Merging Entities Prior to Consummation", 63 Antitrust Law Journal 1, 36 (1994).

to an HSR reportable acquisition have entered into an LMA in conjunction therewith and have not yet filed their HSR Notification and Report Form, they should do so expeditiously as a corrective measure for already having transferred beneficial ownership. Indeed, since the agencies began voicing concern over the use of LMAs in connection with acquisitions, a number of radio transactions have been reported under HSR in which the filing indicates that an LMA will go into effect *after* the waiting period expires.

It has been argued that LMAs have in years past been used in connection with HSR-reported radio acquisitions without DOJ or FTC objection. Our intention in making our position known with regard to LMAs and HSR is to stop practices that we believe prematurely transfer beneficial ownership, not to punish those who may have engaged in those practices before learning of the agencies' position. Therefore, in exercising our prosecutorial discretion, absent extraordinary circumstances, we do not intend to seek HSR civil penalties as to parties who in the past entered into LMAs in connection with a purchase agreement. In general, I would

strongly urge counsel to contact the FTC's Premerger Notification Office if they have questions about how the HSR Act applies to their particular transactions.

The position with respect to LMAs in the radio industry is fully consistent with past precedent of the Department and the FTC. Indeed, in May 1996, many months before the issue over radio station LMAs arose, the issue of operational control during the pendency of the HSR waiting period arose in a civil penalty case brought by the Department at the request of the FTC following their investigation of Titan Wheel International, Inc.[6] Titan had contracted to acquire certain assets of Pirelli Armstrong related to the manufacture of agricultural tires at a Des Moines, Iowa facility. At the time the contract was entered into, the workers at the facility were on strike. The Complaint alleged that Titan's premerger notification stated: "Pending the closing of the acquisition, Seller has agreed to permit Buyer to have immediate possession and use (but not title) to, and to operate, the

[6]United States v. Titan Wheel International, Inc., Civil Action No. 1:96CV01040, May 7, 1996 (D.D.C.).

acquired assets (and to hire the employees) at the Facility for Buyer's account, but subject to an 'unwinding' . . . in the event that the closing does not occur." We further alleged that Titan "took immediate possession and operational control" of the assets covered by the contract.

The government's theory of Titan's HSR violation is stated clearly in paragraph 18 of the Complaint:

> "18. The Purchase Agreement, by including among its terms the transfer to Titan of immediate possession and operational control of the Pirelli Armstrong assets covered by the Purchase Agreement, had the effect, upon execution, of transferring to Titan beneficial ownership of those assets . . .. The post hoc 'unwind' provision did not vitiate Titan's beneficial ownership in the assets. As a result of the transfer of beneficial ownership, Titan acquired and held . . . an aggregate total amount of assets of Pirelli having a value in excess of $15 million."

The complaint alleged that Titan was in violation of the HSR Act until operating control of the assets covered by the contract was returned to the seller, a total of 13 days, and Titan agreed to pay the maximum $130,000 civil penalty available under the Act. The FTC Press Release highlighting that Titan had been charged with taking control of Pirelli Armstrong assets

prior to expiration of the HSR waiting period is attached to the printed copy of my remarks.[7]

Thank you for your kind attention. At this point, I would be glad to take questions.

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[7]While Titan Wheel demonstrates that entering into an acquisition agreement that immediately transfers operating control of assets may be viewed by the FTC and DO as transferring beneficial ownership of those assets, prior cases challenged other acquisition agreements as, upon entry, transferring beneficial ownership of assets or voting securities. See United States v. Atlantic Richfield Co. (ARC/Union Carbide), Civil Action No. 91 0205, January 30, 1991 (D.D.C.) (acquisition agreement described in complaint had effect, upon execution, of transferring beneficial ownership of assets; buyer and seller each agreed to pay $1,000,000 civil penalty); United States v. Atlantic Richfield Co. (ARCO/U.F. Genetics), Civil Action No. 91 3267, December 20, 1991 (D.D.C.) (execution of agreements described in complaint transferred beneficial ownership of 100% of the voting securities; seller and buyer agreed to pay civil penalties of $290,000 and $150,000 respectively).