Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of	)	
	)	
Birmingham Christian Radio, Inc.,	)	
Assignor	)	File No. BAL-20011228AAE
	)	
and	)	
	)	
Radio South, Inc.,	)	
Assignee	)	
	)	
For Consent to Assignment of License of	)	
WSPZ(AM), Tuscaloosa, AL	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 2003 **Released: April 23, 2003**

By the Commission: Commissioner Copps issuing a statement.

1. In this order, we consider the above-captioned application of Radio South, Inc. ("Radio South") to acquire the license of station WSPZ(AM), Tuscaloosa, Alabama, from Birmingham Christian Radio, Inc. ("BCR"). We resolve the competition concerns raised by this application pursuant to the interim policy adopted in the Notice of Proposed Rulemaking in MM Docket No. 01-317 ("*Local Radio Ownership NPRM*").[1] This application is uncontested. After reviewing the record, we conclude that grant of this application is consistent with the public interest.

I. INTRODUCTION

2. For much of its history, the Commission has sought to promote diversity and competition in broadcasting by limiting the number of radio stations a single party could own or acquire in a local market.[2] In March 1996, the Commission relaxed the numerical station limits in its local radio ownership rule in accordance with Congress' directive in Section 202(b) of the Telecommunications Act of 1996.[3] Since then, the Commission has granted thousands of assignment and transfer of control applications proposing transactions that complied with the new limits. In certain instances, however, the Commission has received applications proposing transactions that would comply with the new limits, but that nevertheless would produce concentration levels that raised significant concerns about the potential impact on the public interest.

---

[1] *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19861, 19894-97 ¶¶ 84-89 (2001).

[2] *See generally id*. at 19862-70 ¶¶ 3-18.

[3] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), § 202(b); 47 C.F.R. § 73.3555(a)(1).

3. In response to these concerns, the Commission concluded that it has "an independent obligation to consider whether a proposed pattern of radio ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local radio market and[,] thus, would be inconsistent with the public interest."[4] In August 1998, the Commission also began "flagging" public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concerns.[5] Under this policy, the Commission flags proposed transactions that would result in one entity controlling 50 percent or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70 percent or more of the advertising revenues in that market.[6] The public notice for a flagged transaction indicates that the Commission intends to subject the proposed transaction to further competition review and seeks comment from the public on that issue.[7]

4. On November 8, 2001, we adopted the *Local Radio Ownership NPRM*. We expressed concern that "our current policies on local radio ownership [did] not adequately reflect current industry conditions" and had "led to unfortunate delays" in the processing of assignment and transfer applications.[8] Accordingly, we adopted the *Local Radio Ownership NPRM* "to undertake a comprehensive examination of our rules and policies concerning local radio ownership" and to "develop a new framework that will be more responsive to current marketplace realities while continuing to address our core public interest concerns of promoting diversity and competition."[9] In the *NPRM*, we requested comment about possible interpretations of the statutory framework, including whether the new numerical station ownership limits definitively addressed the permissible levels of radio station ownership, whether they addressed diversity concerns only, or whether they established rebuttable presumptions of ownership levels that were consistent with the public interest. We also requested comment on how we should define and apply our traditional goals of promoting diversity and competition in the modern media environment. The *NPRM* also sought comment on how we should implement our policies toward local radio ownership.

5. In the *Local Radio Ownership NPRM*, we also set forth an interim policy to "guide [our] actions on radio assignment and transfer of control applications pending a decision in this proceeding."[10] Although we recognized the need to "handle currently pending radio assignment and transfer applications and to address any future applications filed" while the *NPRM* is pending, we disavowed any intent to

---

[4] *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13043 ¶ 8 (1999) (citing 47 U.S.C. § 309(a) and *KIXK, Inc.*, 13 FCC Rcd 15685 (1998)). *See also Shareholders of Citicasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19135, 19141-43 ¶¶ 12-16 (1996).

[5] *See* Public Notice, Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998).

[6] *See AMFM, Inc.*, 15 FCC Rcd 16062, 16066 ¶ 7 n.10 (2000).

[7] *See generally Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 18. A flagged public notice includes the following language:

> Note: Based on our initial analysis of this application and other publicly available information, including advertising revenue share data from the BIA database, the Commission intends to conduct additional analysis of the ownership concentration in the relevant market. This analysis is undertaken pursuant to the Commission's obligation under Section 310(d) of the Communications Act, 47 U.S.C. Section 310(d), to grant an application to transfer or assign a broadcast license or permit only if so doing serves the public interest, convenience and necessity. We request that anyone interested in filing a response to this notice specifically address the issue of concentration and its effect on competition and diversity in the broadcast markets at issue and serve the response on the parties.

[8] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 19.

[9] *Id.*

[10] *Id.* at 19894 ¶ 84.

prejudge the "ultimate decision" in the rulemaking and rejected any "fundamental" changes to our current policy pending completion of the rulemaking.[11]

6. Under our interim policy, "we presume that an application that falls below the [50/70] screen will not raise competition concerns" unless a petition to deny raising competition issues is filed. For applications identified by the 50/70 screen, the interim policy directs the Commission's staff to "conduct a public interest analysis," including "an independent preliminary competitive analysis," and sets forth generic areas of inquiry for this purpose.[12] The interim policy also sets forth timetables for staff recommendations to the Commission for the disposition of cases that may raise competition concerns.

7. We decide the application before us pursuant to our interim policy, which entails a competition analysis of the proposed transaction. This proposed transaction raises competition concerns primarily because it reduces the potential for a third viable competitor to emerge in a near-duopoly market, as explained in detail in Section III(C) below. Currently, Radio South accounts for a 37.3 percent radio advertising market share and the top two station groups – Radio South and Clear Channel Communications, Inc. ("Clear Channel")[13] – garner 94.9 percent of the local radio advertising revenues in the Tuscaloosa, Alabama Arbitron metro ("Tuscaloosa metro").[14] These concentration levels, however, do not provide a complete picture of the competitive realities within the Tuscaloosa metro. As discussed in detail below, there is potential for two stations in the Tuscaloosa metro to provide increased competition in the near future. The record also indicates that WSPZ(AM) is in poor financial condition and that, if the proposed transaction is not approved, the station is likely to go off the air. The record further indicates that Radio South's acquisition of WSPZ(AM) will ensure that this station stays on the air and, moreover, provides improved programming to listeners in the market. For these reasons, we conclude that Radio South's acquisition of WSPZ(AM) serves the public interest.

II. BACKGROUND

8. Radio South is currently the licensee of four stations in the Tuscaloosa metro: (1) WLXY(FM), Northport, AL; (2) WTID(FM), Reform, AL; (3) WTSK(AM), Tuscaloosa, AL; and (4) WTUG-FM, Tuscaloosa, AL. After its proposed acquisition of WSPZ(AM), Radio South would own two AM stations and three FM stations in the metro.

9. On January 11, 2002, the Commission issued a public notice indicating that the Radio South application had been accepted for filing.[15] The public notice also "flagged" the application pursuant to the Commission's "50/70" screen. Based on Year 2001 revenue estimates from the BIA[16] database, the five stations Radio South proposes to own account for a 37.3 percent revenue share in the Tuscaloosa metro. Post-consummation, Radio South and Clear Channel would collectively control 94.9 percent of the revenue share in the metro, as noted above.

---

[11] *Id.*

[12] *Id.* at 19895 ¶ 86.

[13] According to our database, the radio station group licensee is Capstar TX Limited Partnership, a subsidiary of Clear Channel.

[14] A metro is a metropolitan area defined by the Arbitron rating service, which is used by radio stations and radio advertisers in negotiating and determining advertising rates.

[15] *See* Public Notice, Broadcast Applications, Report No. 25149 (rel. Jan. 11, 2002).

[16] BIA is a communications and information technology, investment banking, consulting, and research firm. BIA provides strategic funding, consulting, and financial services to the telecommunications, Internet, and media/entertainment industries. Unless otherwise specified, references throughout this document to BIA data refer to the Year 2001 data made available to the public on October 16, 2002.

10. No party filed a petition to deny or other objection to the transaction in response to the flagged public notice. By letter dated July 10, 2002 ("Inquiry Letter"), the staff requested that the parties provide additional information in order to assess fully the transaction's effect on the public interest.[17] The Inquiry Letter also allowed the parties to update the record to reflect competitive changes that may have occurred in the Tuscaloosa metro and in light of the interim policy we adopted in the *Local Radio Ownership NPRM*. Radio South filed a response on July 30, 2002.[18] BCR filed two responses to the Inquiry Letter, one dated July 30, 2002, and one dated August 5, 2002, and also submitted supplemental material on August 23, 2002, January 17, 2003, February 6, 2003, and March 14, 2003.[19]

III. DISCUSSION

A. Framework for Analysis Under Interim Policy

11. Section 310(d) of the Communications Act of 1934, as amended (the "Communications Act"), requires the Commission to find that the public interest, convenience and necessity would be served by the assignment of BCR's radio broadcast license to Radio South before the assignment may occur.[20] We are making that finding in this case pursuant to the interim policy laid out in the *Local Radio Ownership NPRM*.[21] Under the interim policy, we conduct a public interest analysis, including but not limited to an independent competition analysis of the proposed transaction based on publicly available information and information in the Commission's records.[22]

12. Under the interim policy, to decide whether a proposed assignment serves the public interest, we first determine whether it complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission's rules, including our local radio ownership rules. If it does, we then consider any potential public interest harms of the proposed transaction as well as any

[17] Letter from Peter H. Doyle, Chief, Audio Division, Office of Broadcast License Policy, Media Bureau, to John C. Trent, Esq., *et al.* (dated Jul. 10, 2002).

[18] Letter from Erwin G. Krasnow, Counsel for Radio South, Inc., to Peter H. Doyle, Chief, Audio Division, Office of Broadcast License Policy, Media Bureau (dated Jul. 30, 2002) ("Radio South Response").

[19] Letter from John C. Trent, Esq., Counsel for Birmingham Christian Radio, Inc., to Peter H. Doyle, Chief, Audio Division, Office of Broadcast License Policy, Media Bureau (dated Jul. 30, 2002) ("BCR Jul. 30 Response"); Letter from John C. Trent, Esq., Counsel for Birmingham Christian Radio, Inc., to Peter H. Doyle, Chief, Audio Division, Office of Broadcast License Policy, Media Bureau (dated Aug. 5, 2002), submitting a statement dated Aug. 1, 2002 by Wilene Prewitt ("Prewitt Statement"); Letter from John C. Trent, Esq., Counsel for Birmingham Christian Radio, Inc., to Jerry Duvall, Economist, Media Bureau (dated Aug. 22, 2002), submitting financial data for station ("BCR Supp. Response"); Letter from John C. Trent, Esq., Counsel for Birmingham Christian Radio, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Jan. 17, 2003), submitting Wilene Prewitt's supplement dated Jan. 14, 2003 stating under penalty of perjury that the Prewitt Statement was true and correct. (The Prewitt Statement as supplemented on Jan. 14, 2003 is hereinafter referred to as the "Prewitt Declaration"); Letter from John C. Trent, Esq., Counsel for Birmingham Christian Radio, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Feb. 6, 2003), submitting Declaration of Gary Stevens, President, Gary Stevens & Co., dated Jan. 30, 2003; Letter from John C. Trent, Esq., Counsel for Birmingham Christian Radio, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Mar. 14, 2003), submitting Declaration of Gary Stevens, President, Gary Stevens & Co., dated Feb. 28, 2003 ("Stevens Declaration").

[20] 47 U.S.C. § 310(d).

[21] *See Local Radio Ownership NPRM,* 16 FCC Rcd at 19894-97 ¶¶ 84-89.

[22] *Id*. at 19895-96 ¶ 86.

potential public interest benefits to determine whether, on balance, the assignment serves the public interest.[23]

13. The Commission's analysis of public interest benefits and harms includes an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles. While an antitrust analysis, such as that undertaken by the Department of Justice or the Federal Trade Commission, focuses solely on whether the effect of a proposed merger "may be substantially to lessen competition"[24] in the advertising market, our focus is different.[25] Our analysis of radio license assignments is informed by how those antitrust experts look at competition issues, yet our authority arises out of the Communications Act, which is not concerned solely with the potential impact of economic concentration on advertisers, but ultimately seeks to maximize the utility that the public derives from the public airwaves. The Commission's public interest evaluation is therefore not limited to competition concerns but necessarily encompasses the "broad aims of the Communications Act."[26] These broad aims include, among other things, ensuring the existence of an efficient, nationwide radio communications service available to everyone and promoting locally oriented service and diversity in media voices.[27] Our public interest analysis therefore includes assessing whether the transfer will affect the quality of radio services or responsiveness to the local needs of the community,[28] and whether it will result in the provision of new or additional services to listeners.[29]

---

[23] *Id.* at 19895 ¶ 85; *see VoiceStream Wireless Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 9779, 9789 ¶ 17 (2001); *see also Chet-5 Broadcasting, L.P.*, 14 FCC Rcd at 13043 ¶ 8 (holding that the Commission has "an independent obligation to consider whether a proposed pattern of radio station ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local market and thus would be inconsistent with the public interest").

[24] 15 U.S.C. § 18.

[25] Although the Commission's analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which allows the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies may find based solely on antitrust laws. *See FCC v. RCA Communications,* 346 U.S. 86, 96-97 (1953) ("To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure."). *See also RCA Communications,* 346 U.S. at 94; *United States v. FCC*, 653 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (The Commission's "determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry."); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff'd on recon.,* 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger); *Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agency to "analyze proposed mergers under the same standards that the Department of Justice . . . must apply.").

[26] *See AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3168-69 ¶ 14 (1999); *WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18030-31 ¶ 9 (1998) ("*Worldcom-MCI Order*").

[27] For example, the Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (*quoting United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

[28] *See Deregulation of Radio*, Report and Order, 84 FCC 2d 968, 994-97 (1981); *Sixth Report and Order*, Docket No. 8736, 1 RR 91:559, :624 (1952).

[29] *See*, *e.g.*, *Worldcom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9.

14. Thus, under our interim policy, where a proposed transaction raises concerns about economic concentration, we will consider evidence that the particular circumstances of a case may mitigate any adverse impact that might otherwise result, as well as any evidence of benefits to radio listeners that might result from the proposed transaction. Ultimately, it is the potential impact of the transaction on listeners that will determine whether we can find that, on balance, grant of a particular radio station assignment or transfer of control application serves the public interest.

B. Local Radio Ownership Rules

15. The Commission's local radio ownership rules restrict the number of radio stations in the same service and the number of stations overall that may be commonly owned in any given local radio market.[30] A local radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned.[31] Under the rules, as amended by the Telecommunications Act of 1996, in a local radio market with 45 or more commercial radio stations, a single entity may own up to eight commercial radio stations, no more than five of which are in the same service; in a market with 30 to 44 commercial radio stations, one owner may hold up to seven commercial radio stations, no more than four of which are in the same service; in a market with 15 to 29 stations, a single owner may own up to six stations, no more than four of which are in the same service; and in a market with 14 or fewer stations, one owner may hold up to five stations, no more than three of which are in the same service, except that no single entity may control more than 50 percent of the stations in such a market.[32]

16. Radio South's multiple ownership showing indicates that, using the Commission's current definition of "radio market,"[33] the transaction creates one radio market which has at least 12 radio stations.[34] In this market, a single licensee may, therefore, own up to 5 radio stations, not more than 3 of which are in the same service (AM or FM). Post-acquisition, Radio South will own 5 stations (2 AM/3 FM) in the market. Radio South's proposed acquisition of WSPZ(AM) therefore is consistent with the numerical limits in our local radio ownership rules.

C. Public Interest Analysis Under Interim Policy

17. In the interim policy we stated that, consistent with precedent, we will continue to examine the potential competitive effects of proposed radio station combinations. Competition analysis requires us to define at the outset the relevant product and geographic markets in which the radio stations compete. We must also determine the market shares and concentration levels that the proposed transaction would produce. Ultimately, we must weigh the potential competitive benefits and harms, as well as other public interest benefits and harms that the proposed transaction is likely to produce to determine if, overall, grant of the underlying application would be consistent with the public interest.

18. *Relevant Product Market.* Under our interim policy, we presume that the relevant product market is radio advertising.[35] Radio South seeks to rebut this presumption. According to Radio

---

[30] 47 C.F.R. § 73.3555(a).

[31] *Id.*; *see Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368 (1996).

[32] *See supra* note 3.

[33] *See Definition of Radio Markets*, Notice of Proposed Rulemaking, 15 FCC Rcd 25077, 25077-78 ¶¶ 2-3 (2000).

[34] *See* Application to Assign License for station WSPZ(AM) from BCR to Radio South (FCC Form 314) (File No. BAL-20011228AAE), dated Dec. 28, 2001, Exh. 14.

[35] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19895 ¶ 86.

South, the relevant product market includes advertising by other media. Specifically, Radio South argues that the product market "should take into account inter-media competition from newspapers, television stations, cable and other local media outlets in Tuscaloosa" and that its "stations in the Tuscaloosa market face vigorous competition for advertising revenues from all media."[36]

19. Under standard competition analysis, alternative media would be included in the relevant product market only if their presence would preclude a hypothetical monopolist of radio advertising from profitably raising prices by a "small but significant and nontransitory" amount.[37] In markets such as radio advertising, where individually negotiated contracts and repeated interaction between buyers and sellers facilitate price discrimination, determining the relevant product market can be more complicated. Standard competition analysis provides that where there is price discrimination, we look at those buyers that do not consider other media to be good substitutes for radio advertising.[38] We consider evidence, however, from the parties that the relevant product market in a specific case includes other forms of media advertising or should be based on listenership rather than advertising. While some advertisers may find other media to be good substitutes for radio, Radio South and BCR do not address our concern that there may be a significant number of advertisers that do not consider other media to be good substitutes for radio. Radio station groups that are able to exercise market power may be able to profitably impose a discriminatory price increase to these targeted advertisers, even if they are unable to impose a general increase in price on all radio advertisers because that general price increase would not be profitable.[39] Radio South has not presented any facts that are unique to this transaction or the Tuscaloosa metro sufficient to rebut the presumption that radio advertising is the relevant product market. Radio South's generalized arguments challenging our interim policy presumption that the relevant product market is radio advertising are more appropriately addressed in the context of the pending local radio ownership rulemaking proceeding.

20. *Relevant Geographic Market and Market Participants.* Pursuant to our interim policy, we presume that the relevant geographic market is the Arbitron metro. For this proposed transaction, Radio South concurs with our presumption that the Tuscaloosa metro, identified by Arbitron as encompassing Tuscaloosa County in Alabama, represents the appropriate geographic market.[40] Likewise, Radio South does not dispute that BIA correctly identifies the market participants. BIA identifies 14

[36] Radio South Response at 2.

[37] *See, e.g., Horizontal Merger Guidelines*, issued by U.S. Department of Justice & Federal Trade Commission, April 2, 1992, revised April 8, 1997 ("*Horizontal Merger Guidelines"*), §§ 1.1, 1.12.

[38] *See id.* § 1.12. Staff and DOJ analysis of radio transactions suggests that existing buyers of radio advertising differ significantly in their likelihood of switching to other media in response to a "small but significant and non-transitory" price increase for radio advertising.

[39] The *Horizontal Merger Guidelines* at § 1.12 state: "If a hypothetical monopolist can identify and price differently to those buyers ("targeted buyers") who would not defeat the targeted price increase by substituting to other products in response to a 'small but significant and nontransitory' price increase for the relevant product, ….. then a hypothetical monopolist would profitably impose a discriminatory price increase on sales to targeted buyers. This is true regardless of whether a general increase in price would cause such significant substitution that the price increase would not be profitable."

[40] Radio South Response at 2.

commercial stations[41] and two non-commercial stations in the Tuscaloosa metro, and 17 out-of-market commercial stations[42] that historically have had listeners in the Tuscaloosa metro.[43]

21. *Market Share and Market Concentration.* Under the interim policy, we presume that BIA revenue share estimates accurately reflect actual market shares. According to the BIA database, radio stations that are home to the Tuscaloosa metro generated $6,900,000 in radio advertising revenues in 2001. Using BIA data, the post-transaction market structure in the Tuscaloosa metro is as follows:[44]

Owner	2001 Market Revenue	2001 Market Share	Spring 2002 Audience Share
Radio South	$2,575,000	37.3%	18.6% (32.7% of in-market)
Clear Channel	$3,975,000	57.6%	24.7% (43.5% of in-market)
John Sisty Enterprises, Inc.	$ 200,000	2.9%	2.3% (4.1% of in-market)
Lawson Communications	$ 150,000	2.2%	6.1% (10.7% of in-market)
Warrior Broadcasting, Inc.	$ 0	0.0%	5.1% (9.0% of in-market)
Total	$6,900,000	100%	56.8% (100% of in-market)

As noted above, the four stations that Radio South currently owns account for a 37.3 percent share of advertising revenues and 32.7 percent of in-market listening; Clear Channel has four stations with a 57.6 percent revenue share and 43.5 percent in-market listening share; and together, Radio South and Clear Channel, the two largest station groups, account for a 94.9 percent revenue share and 76.2 percent in-market listening share. The station Radio South seeks to acquire, WSPZ(AM), currently has a zero percent revenue share. BIA data show that, therefore, the proposed transaction would not under current conditions change Radio South's market share in the Tuscaloosa metro.

22. Radio South maintains that BIA data overstate its share of advertising revenue and claims that "[i]t defies logic and [Radio South's] assessment of competition from out-of-market stations licensed to Birmingham that such stations have no advertising revenue" in the Tuscaloosa metro.[45] Yet, Radio South provides no specific evidence to rebut our presumption that the BIA data are correct. It does not provide, for example, alternative revenue figures for any stations, including its own. In a declaration submitted by BCR, Ms. Wilene Prewitt, the station manager of WSPZ(AM) since 1999, reported that the station's gross revenues for 2001 were less than $5,000.[46] Radio South also does not provide evidence of the amount of advertising revenues earned by Birmingham stations from Tuscaloosa local advertisers. We recognize that BIA only provides revenue estimates for stations in Arbitron metro markets and

[41] Of the 14 in-market commercial radio stations, BIA data show that Radio South owns four stations, Clear Channel owns four stations, Lawson Communications owns two stations, and BCR, John Sisty Enterprises, Inc., Jason Schmitt and Warrior Broadcasting, Inc. each own one station.

[42] Clear Channel is the only in-metro participant that owns out-of-market stations relevant to this analysis. Clear Channel owns 4 of the 17 out-of-market stations listed by BIA.

[43] Radio South stated that it "does not take issue with the Commission's preliminary competitive analysis, namely, that there are 15 stations in the Tuscaloosa metro and 17 out-of market stations that receive listening share in the Tuscaloosa metro." Radio South Response at 2. After the Inquiry Letter set forth the staff's preliminary competition analysis, BIA identified a new station in the Tuscaloosa metro, WDGM(FM), Greensboro, AL, which was initially licensed in May 2002. Therefore, there are now 16 total in-metro stations (14 commercial and 2 non-commercial).

[44] Radio stations with no reported revenue or audience share are not included in this chart.

[45] Radio South Response at 3.

[46] Prewitt Declaration ¶ 4. If $5,000 in revenue for WSPZ(AM) is incorporated into the analysis, Radio South would have a 37.4 percent post-transaction revenue share and the two-firm revenue concentration would remain at 94.9 percent. WSPZ(AM)'s financial condition is further discussed *infra* ¶¶ 34-37.

attributes all station revenues to a station's home metro. In this instance, staff analysis suggests that the rates charged on, and the audiences delivered by, stations in the Birmingham, Alabama metro ("Birmingham metro") would likely not attract Tuscaloosa local advertisers. We therefore find no reason to incorporate revenues from out-of-market stations into our analysis in this case.

23. We also recognize that the audience listening shares reported by BIA suggest a less concentrated market than that suggested by the BIA Year 2001 revenue estimates. While revenue estimates indicate that Clear Channel and Radio South currently control 94.9 percent of Tuscaloosa metro radio advertising revenue, their stations account for a lesser 76.2 percent in-market listening share. A partial explanation for this discrepancy is the fact that a new station, WDGM(FM), Greensboro, Alabama, licensed to Warrior Broadcasting, Inc., first came on the air in 2002 and consequently earned no revenue in 2001. However, in the Spring 2002 ratings period, WDGM(FM) accounted for approximately a 9.0 percent in-market listening share. Of the 14 commercial Tuscaloosa metro stations, only two Clear Channel stations and one Radio South station achieved a larger audience share than WDGM(FM) in Spring 2002. It is likely that WDGM(FM) is earning significant local advertising revenues which would reduce Clear Channel's and Radio South's current market share. In addition, according to BIA Year 2001 estimates, Lawson Communications' two stations account for a 2.2 percent revenue share but account for 10.7 percent of the in-market listening share. These factors suggest that revenue shares calculated using the BIA Year 2001 revenue estimates may overstate the relative revenue-share dominance of Radio South and Clear Channel in the Tuscaloosa metro.

24. While staff analysis suggests that the out-of-market stations would not be a good alternative for local advertisers, the Tuscaloosa metro does have listeners of out-of-market stations. According to BIA data, in-metro stations account for 56.8 percent of total listening in the Tuscaloosa metro and out-of-market commercial stations account for approximately 31.5 percent of Tuscaloosa listening.[47] Moreover, a Birmingham metro station – WBHJ(FM) – is the most popular station in the Tuscaloosa metro.[48] These facts lessen our concerns, from a diversity perspective, regarding the adverse effect of the proposed transaction on listeners in the Tuscaloosa metro.

25. Our interim policy recognizes the Herfindahl-Hirschman Index ("HHI") as a measure of market concentration but finds that the general standards regarding the post-merger HHI found in the *Horizontal Merger Guidelines* may not be entirely appropriate when applied to the commercial radio industry.[49] While the HHI may provide useful information regarding the potential unilateral and coordinated effects of a proposed merger, any measured HHI must be carefully interpreted within the full context of the factual circumstances of the merger. Factors considered in interpreting the significance of any measured HHI include, but are not necessarily limited to: the existence of other viable competitors post-merger; the dominance of strong signals; the possibility of additional entry into the metro;

---

[47] The shares do not total 100 percent because BIA data does not include shares for non-commercial stations or very small shares of any stations, *i.e.*, shares less than 0.5 percent.

[48] The Cox Radio-owned WBHJ(FM) is licensed to Tuscaloosa but is home to the larger Birmingham metro. In the Spring 2002 ratings period, WBHJ(FM) had a 12.6 percent audience share in the Tuscaloosa metro, larger than any station home to the Tuscaloosa metro.

[49] *Horizontal Merger Guidelines*, § 1.51. *See Great Empire Broadcasting, Inc.*, 14 FCC Rcd 11145, 11150 (1999). The following radio mergers that included settlements with DOJ attest to DOJ's recognition that an HHI over 1800 may not necessarily imply adverse competitive consequences in a local radio market. *See, e.g.,* Final Judgment in *United States v. CBS Corporation and American Radio Systems Corporation,* Case No. 98CV00819 (D.D.C. June 30, 1998); Final Judgment in *United States v. Hicks, Muse, Tate & Furst, Inc.,* Case No. CV 98-2422, (E.D.N.Y. Aug. 17, 1998); Final Judgment in *United States v. EZ Communications, Inc. and Evergreen Media Corp.,* Case No. 97CV00406 (D.D.C. Jun. 17, 1997); Final Judgment in *United States v. Westinghouse Electric Corporation,* Case No. 96 CV02563 (D.D.C. Mar. 10, 1997); Final Judgment in *United States v. Jacor Communications, Inc.,* Case No. C-1-96-757 (S.D. Ohio, Dec. 31, 1996).

efficiencies created by the merger; and possible adverse effects on listeners in the local radio market.[50] Our competition analysis using the BIA database shows that the current HHI is 4724.6. The proposed combination of stations in the relevant geographic market results in no change in the HHI, reflecting the current "zero-revenue" status of WSPZ(AM). An HHI of 4724.6 suggests that the Tuscaloosa radio market is highly concentrated.[51] Radio South asserts that the Commission's HHI calculation does not accurately indicate market concentration because the Commission has improperly analyzed the product market and market shares.[52] Radio South does not, however, proffer its own HHI calculation and does not present sufficient evidence to warrant change of our calculated HHI.

26. *Conditions of Entry.* We consider evidence regarding the possibility of entry by new stations, as well as any barriers to entry, and the timeliness, likelihood, and sufficiency of entry to counter any potential market power. In other words, we will examine whether new stations or stations that are not currently market participants would be able and likely to enter the market and prevent a price increase or other anticompetitive actions. Radio South acknowledges that "[a]lthough the Tuscaloosa Metro had a new entrant in the past year," another new entrant is unlikely due to "the fact that Tuscaloosa, a 200+ market has Arbitron listings of over 30 radio stations."[53] Radio South contends, however, that out-of-market stations "with listenership in Tuscaloosa could easily move into the market."[54] All but one of the out-of-market stations with a reportable listening share in the Tuscaloosa metro are home to the Birmingham metro. Radio South has not shown that it is likely that such stations would move from the Birmingham metro, the 57th largest BIA market, and focus its efforts on the Tuscaloosa metro, the 222nd largest BIA market, even in response to increases in advertising rates in the smaller Tuscaloosa market. These out-of-market stations all have a significantly larger audience in the Birmingham metro than in any other metro.[55] Their rates are already likely to be much higher for local Tuscaloosa advertisers because they deliver a large number of Birmingham listeners.[56]

27. Where market share and concentration data suggest the potential for competition concerns, we examine the number, class, and signal contour of all existing stations in the radio market to determine their competitive significance. We recognize that there may be AM and FM facilities with good capacity, albeit low current advertising revenues, and our analysis considers the potential for these stations to provide effective competition in the future. In some cases there may be a sufficient number of such facilities remaining outside the largest group's (or two largest groups') control to provide a competitive challenge. In this case, there would be five commercial radio stations post-transaction – one Class A FM, one Class B AM, one Class C AM, one Class C2 FM, and one Class C3 FM – that would not be controlled or operated by the two largest groups in the Tuscaloosa metro. According to the BIA database, four of these stations have reported listenership and three have reported advertising revenues in the Tuscaloosa metro in 2001. Two of these five stations could provide increased competition in the

---

[50] *Great Empire Broadcasting, Inc.*, 14 FCC Rcd at 11148 ¶ 16.

[51] The *Horizontal Merger Guidelines* characterize such a market as "highly concentrated." *See Horizontal Merger Guidelines*, § 1.51.

[52] Radio South Response at 3.

[53] *Id.*

[54] *Id.*

[55] For example, Citadel Communications Corporation's WRAX(FM) received a 2.3 audience share in the Tuscaloosa metro in the Spring 2002 ratings period. Yet, BIA data show that Tuscaloosa listeners account for less than ten percent of WRAX(FM)'s total audience.

[56] Similarly, the one out-of-market station that is home to the Columbus-Starkville-West Point, Mississippi metro has a much larger audience in its home metro than in the Tuscaloosa metro. Radio South has not shown that it is likely that this station would move from the Columbus-Starkville-West Point metro to the Tuscaloosa metro in response to increases in advertising rates in the Tuscaloosa metro.

Tuscaloosa metro in the near future. As discussed earlier, WDGM(FM) is a recent entrant to the Tuscaloosa metro.[57] The station came on the air in 2002 and therefore did not produce revenue in 2001, but is achieving a significant audience and reasonably can be expected to garner significant revenue during the current year. In addition, WNPT-FM, a Class C2 station which BIA indicates is currently dark, may resume broadcast operations which will offer some advertisers an additional alternative in the Tuscaloosa metro in the future. Therefore, although there are barriers to entry and entry by new stations is unlikely, some modest "entry" by existing stations in the metro is possible.

28. *Potential Adverse Competitive Effects: Unilateral and Coordinated Effects.* Under the interim policy, relevant evidence concerning the potential adverse competitive effects of a proposed transaction may include direct proof of adverse competitive effects or facts that demonstrate that structural conditions (*e.g.*, a higher market share and significant barriers to entry) will facilitate the exercise of market power. We also consider the effect on competition, if any, that may have resulted from pre-existing local marketing agreements or joint sales agreements.

29. Radio South asserts that the acquisition of WSPZ(AM) will not "diminish competition" in the Tuscaloosa metro for the following reasons: 1) there will be five in-market stations that are not owned by the two largest groups (Radio South and Clear Channel); 2) there are many out-of-market stations competing for the Tuscaloosa audience; and 3) Tuscaloosa is "one of the few 200+ markets in the United States with over 30 broadcast stations with some degree of listenership."[58] In addition, Radio South claims that the proposed transaction will not adversely affect advertisers because WSPZ(AM), the station it seeks to acquire, currently has no advertising revenues.[59] Radio South also states that it "does not currently have (or contemplate having) agreements of any kind" with other local radio owners, including time brokerage or joint sales agreements, and asserts that there is presently "no coordinated behavior between any groups in the Tuscaloosa metro."[60]

30. Following the proposed transaction, Radio South will control five of the fourteen Tuscaloosa metro commercial radio stations, and as noted above, the two largest station groups (Radio South and Clear Channel)[61] will account for a 94.9 percent revenue share,[62] and the HHI will be 4724.6.[63] The current market structure raises competition concerns due to the potential for anticompetitive coordinated effects. While the station Radio South seeks to acquire, WSPZ(AM), currently shows a zero percent revenue share, the proposed transaction does represent an accumulation of current capacity by a large group owner in a market where entry by new stations is unlikely and only modest "entry" by existing stations may be possible.

31. Radio South's purchase of WSPZ(AM) makes the emergence of a third viable competitor more difficult in this near-duopoly market. This market structure increases the risk of coordinated behavior leading to price discrimination, division of advertising accounts, and lower quality

---

[57] *See supra* ¶ 23.

[58] Radio South Response at 3.

[59] *Id.*

[60] *Id.*

[61] BIA data show that the four stations that Radio South currently owns account for a 37.3 percent share of advertising revenues and the station group owned by Clear Channel includes four stations with an aggregate 57.6 percent revenue share in the Tuscaloosa metro. *See supra* ¶ 21.

[62] As discussed earlier, the current revenue shares probably overstate the actual market concentration because some in-metro stations not owned by the two largest groups appear to be good alternatives for most local Tuscaloosa advertisers. *See supra* ¶ 23.

[63] *See supra* ¶ 25.

programming. As the D.C. Circuit has stated, "[t]he combination of a concentrated market and barriers to entry is a recipe for price coordination. Where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to . . . achieve profits above competitive levels. The creation of a durable duopoly affords both the opportunity and incentive for both firms to coordinate to increase prices . . . . Tacit coordination 'is feared by antitrust policy even more than explicit collusion, for tacit coordination, even when observed, cannot easily be controlled directly by the antitrust laws. It is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur.'"[64] Based on the record before us, we are concerned about the potential for adverse competitive effects from coordinated behavior as a result of the transaction.

32. *Efficiencies and other public interest benefits.* Under the interim policy, we consider evidence of economic efficiencies that the proposed transaction would produce and public interest benefits the proposed transaction would provide to listeners or advertisers, such as improvements in the quality, scope and quantity of community responsive programming, improved community service, and the furtherance of localism. Parties asserting that a proposed transaction will produce efficiencies and other public interest benefits are required to show both how the transaction will yield those benefits and how those benefits will flow through to listeners or advertisers.

33. Radio South asserts that its acquisition of WSPZ(AM) will result in cost savings and operating efficiencies "realized through shared use of personnel in the areas of news, traffic, promotion, Internet, sales, business, engineering and other administrative functions."[65] Radio South also claims that "[c]ommon ownership" will result in a reduction in "expenditures for utilities, vehicles and office supplies" and use of its automation equipment will save on programming costs.[66]

34. BCR argues that the proposed transaction will benefit both advertisers and listeners in the Tuscaloosa metro.[67] In support of this argument, BCR submitted an informal "failing station" showing based on the failing station guidelines we proposed in our *Local Radio Ownership NPRM*.[68] Those guidelines propose that we would presume a waiver would serve the public interest if each of the following criteria were satisfied: (1) one of the merging stations has had low all-day audience share; (2) the financial condition of one of the merging stations is poor; (3) the transaction will produce public interest benefits; (4) the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the station, and selling to an out-of-market buyer would result in an artificially depressed price.[69]

35. BCR claims that WSPZ(AM) has not received a reportable audience share in the Tuscaloosa metro since 1997, prior to BCR's ownership, when the station had a sports/talk format.[70] BCR programs the station in Gospel format. BIA data show that WSPZ(AM) had no audience share in the Tuscaloosa metro in Spring 2002 and has not received a reportable share in the Tuscaloosa metro for

---

[64] *FTC v. Heinz*, 246 F.3d at 724-25 (quoting 4 Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law*, ¶ 901b2 at 9 (rev. ed. 1998)) (other quotations and citations omitted).

[65] Radio South Response at 4.

[66] *Id.*; *see also* BCR Supp. Response at 3.

[67] BCR Jul. 30 Response at 1-2; BCR Supp. Response at 3,5.

[68] In our *Local Radio Ownership NPRM*, we sought comment on our proposal to use the failing station criteria we adopted in our television local ownership rules as a model to evaluate failing station showings in our competition analyses of radio mergers. *See Local Radio Ownership NPRM*, 16 FCC Rcd at 19891-92 ¶¶ 74-76.

[69] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19891-92 ¶ 75.

[70] BCR Supp. Response at 1.

any ratings period during the past three years. Regarding the station's financial condition, Ms. Prewitt, the station's Manager, states in her Declaration that "[s]ince 1999, WSPZ has experienced financial and technical difficulties . . . ."[71] BCR states that WSPZ(AM) has lost approximately $20,000 in each of the past three years.[72] According to Ms. Prewitt, WSPZ(AM)'s gross revenues were: "less than $5,000" for 2001; "less than $10,000" for 2000; "less than $10,000" for 1999; and "less than $1,000" through August 1, 2002.[73]

36. BCR asserts that the proposed transaction will benefit the public because, in light of WSPZ(AM)'s financial and technical difficulties, the station is likely to go dark if the proposed transaction is not approved.[74] Radio South contends that the current licensee will not be able to maintain the operation of the station for a significant period of time and that, if the station is not sold to a financially qualified buyer with knowledge of the Tuscaloosa market, it is unlikely that WSPZ(AM)'s performance will improve.[75] Radio South further contends that the proposed transaction will lead to public interest benefits for listeners in the Tuscaloosa metro by serving "the 50+ audience with Public Affairs, local news, weather and other information not presently available to [those] residents of Tuscaloosa."[76] Radio South also reports that it "is committed to improving the technical facilities of WSPZ(AM), including installing auxiliary power."[77]

37. BCR also asserts that Radio South, an in-market buyer that has agreed to purchase WSPZ(AM) for $150,000, is the only reasonably available candidate willing to operate the station.[78] Out-of-market buyers, BCR argues, would only offer artificially depressed prices for this station. BCR's counsel, John C. Trent, estimates that the market value of WSPZ(AM), "a 5 kW day and 1 kW night Station in the middle of the dial, with the problems noted above [no revenues, no ratings, and technical problems]," is between $105,000 and 135,000.[79] Mr. Trent also states that, over the past two years, other offers for the station included bids ranging from $20,000 to $50,000, and a verbal offer of $80,000. The BIA database indicates that BCR acquired the station in 1997 for $130,000. Gary Stevens, a radio broker familiar with the Tuscaloosa market and who has nearly seventeen years experience valuing broadcast properties, states that the value of WSPZ(AM) is "between $100,000 and $135,000" and confirms that Radio South "may be the only buyer which has the ability and the willingness to acquire WSPZ."[80]

38. Based on our review of the record for this transaction, we conclude that the acquisition of WSPZ(AM) by Radio South could adversely affect competition in the Tuscaloosa radio advertising market by increasing the likelihood of coordinated behavior that may result in higher prices for some

---

[71] Prewitt Declaration ¶ 3.

[72] BCR Supp. Response at 1-2. Using current base expenses for the year 2002 (including lease expenses, utility expenses and employee expenses), BCR estimates that the station lost $18,533 in 2000, $23,533 in 2001 and $18,022 through August 1, 2002.

[73] Prewitt Declaration ¶ 4; BCR Supp. Response at 1.

[74] Prewitt Declaration ¶ 5.

[75] Radio South Response at 4-5.

[76] *Id.* at 4. According to the BIA database, WSPZ(AM) is one of four AM stations in the Tuscaloosa market programming in Gospel format. Radio South proposes to "add diversity to the Tuscaloosa market by programming an unduplicated news, public affairs and music format" targeting the 50+ demographic. *See id.* at 2. *See also* Declaration of Houston L. Pearce ¶ 3, attached to the Radio South Response.

[77] Radio South Response at 2.

[78] BCR Supp. Response at 2-3.

[79] BCR Supp. Response at 2.

[80] Stevens Declaration ¶¶ 1-4.

radio advertisers. Moreover, the attenuated opportunity for creating a vigorous third competitor following the merger may diminish the intensity of competitive rivalry for listeners such that programming quality may be adversely affected as well. As noted above, our concerns regarding the adverse competitive effects of this transaction are only somewhat mitigated by factors such as the recent addition of a new station in the Tuscaloosa market and the resumption of broadcast operations by an existing Tuscaloosa market station. The adverse effects would be most likely and most troublesome if the acquired station were economically viable. We are persuaded by BIA data and the evidence provided in the parties' submissions, however, that WSPZ(AM) is not currently, and likely has not been for many years, economically viable as a stand-alone AM station in the Tuscaloosa metro. Moreover, there appears to be no imminent alternative to Radio South's purchase of WSPZ(AM) that reasonably could be expected to improve the prospects of the station. Indeed, the probable alternative to the proposed transaction is that WSPZ(AM) will become silent. Under these circumstances, we conclude that the significant public interest benefits resulting from the continued operation of WSPZ(AM) and technical improvements to the station, together with the program improvements Radio South plans as owner of the station, particularly with respect to local news, outweigh the potential harm to competition in the Tuscaloosa metro.

IV. CONCLUSION

39. Based on the foregoing analysis and our review of the assignment application, we find no substantial and material questions of fact warranting further inquiry as to the effect of the proposed transaction on competition. We conclude that Radio South is qualified to be the licensee of WSPZ(AM) and that grant of this transaction is consistent with the public interest, convenience and necessity.

V. ORDERING CLAUSES

40. ACCORDINGLY, IT IS ORDERED, That the application to assign station WSPZ(AM), Tuscaloosa, Alabama, from Birmingham Christian Radio, Inc., to Radio South, Inc. (File No. BAL-20011228AAE) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: Application of Birmingham Christian Radio, Inc., Assignor, and Radio South, Inc., Assignee, for Consent to Assignment of License of WSPZ (AM), Tuscaloosa, AL

I support this transfer of WSPZ to Radio South despite the significant levels of market concentration that will result from this transaction, because the parties have made an adequate showing to demonstrate that WSPZ is a "failing station" which would otherwise go silent. The community will receive a tangible benefit from WSPZ remaining viable and on the air, and I am heartened by Radio South's commitment to serve the 50+ audience with public affairs, local news, weather, and other information not presently available to those residents of Tuscaloosa.

When harm to competition is likely to result from any transaction, the Commission must assure itself with as much certainty as is possible that, despite the harm to competition, the transaction will nonetheless serve the public interest, convenience and necessity. I find that to be the case here.