brought by the United States be subject to a sixty (60) day comment period, after which the Court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' In making that determination, the Court may consider—

(1) The competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) The impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial. 15 U.S.C. § 16(e).

As the United States Court of Appeals for the 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 governments 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. No. 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 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]

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

*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.

Respectfully submitted,

Dando B. Cellini,

*Merger Task Force, U.S. Department of Justice, Antitrust Division, 1401 H Street, N.W., Suite 4000, Washington, D.C. 20530, (202) 307–0829.*

Dated: March 20, 1997.

[2] 119 Cong. Rec. 24598 (1073). *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.

[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).

**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 points 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.

**Certificate of Service**

I, Dando B. Cellini, hereby certify that, on March 20, 1997, I caused the foregoing document to be served on defendants American Radio Systems Corporation and EZ Communications, Inc. by having a copy mailed, first-class, postage prepared, to:

James R. Loftis, III,

Joseph J. Simons,

Collier Shannon Rill & Scott, PLLC,

*3050 K Street, NW., Suite 400, Washington, DC 20007, (202) 342–8480, Counsel for American Radio Systems Corporation.*

Ray V. Hartwell, III,

Andrew J. Strenio, Jr.,

Hunton & Williams,

*1900 K Street, NW., Washington, DC 20006–1109, (202) 955–1639, Counsel for EZ Communications, Inc.*

Dando B. Cellini.

[FR Doc. 97–8459 Filed 4–2–97; 8:45 am]

BILLING CODE 4410–11–M

## Proposed Final Judgment and Competitive Impact Statement; United States of America versus EZ Communications, Inc. and Evergreen Media Corporation

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), that a proposed Final Judgment, Stipulation, and

Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States* v. *EZ Communications, Inc. and Evergreen Media Corporation* Civ. Action No. 97 CV 406. The proposed Final Judgment is subject to approval by the Court after the expiration of the statutory 60-day public comment period and compliance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h).

Plaintiff filed a civil antitrust Complaint on February 27, 1997, alleging that a proposed swap and acquisition of radio stations in Charlotte, North Carolina between EZ Communications, Inc. (''EZ'') and Evergreen Media Corporation (''Evergreen'') would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that EZ and Evergreen both own and operate numerous radio stations throughout the United States, and that they each own and operate radio stations in the Charlotte, North Carolina metropolitan area. The combined transactions would give EZ a significant share of the radio advertising market in the Charlotte metropolitan area. As a result, the combination of these stations would lessen competition substantially in the sale of radio advertising time in the Charlotte metropolitan area.

The prayer for relief seeks: (a) An adjudication that the proposed transactions described in the Complaint would violate Section 7 of the Clayton Act; (b) preliminary and permanent injunctive relief preventing the consummation of such transactions; (c) an award to the United States of the costs of this action; and (d) such other relief as is proper.

Shortly before this suit was filed, a proposed settlement was reached that permits EZ to complete its transactions with Evergreen, yet preserves competition in the market in which the transactions 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 EZ to divest WRFX-FM, currently owned by Evergreen. Unless the plaintiff grants a time extension, EZ must divest this radio station either within six months after the filing of the Complaint or within five (5) business days after notice of entry of the Final Judgment, whichever is later. If EZ does not divest WRFX-FM within the divestiture period, the Court shall, upon plaintiff's application, appoint a trustee to sell the assets. The proposed Final Judgment also requires EZ to ensure that, until the divestiture mandated by the Final Judgment has been accomplished, WRFX-FM will be operated independently as a viable, ongoing business, and kept separate and apart from defendant EZ's other Charlotte radio stations. Further, the proposed Final Judgment requires defendants to give plaintiff prior notice regarding future radio station acquisitions or certain agreements pertaining to the sale of radio advertising time in Charlotte.

A Competitive Impact Statement filed by the United States describes the Complaint, the proposed Final Judgment, and remedies available to private litigants.

Public comment is invited within the statutory 60-day comment period. Such comments, and the responses thereto, will be published in the **Federal Register** and filed with the Court. Written comments should be directed to Craig W. Conrath, Chief, Merger Task Force, Antitrust Division, 1401 H Street, N.W., Suite 4000, Washington, D.C. 20530 (telephone: (202) 307–0001). Copies of the Complaint, Stipulation, proposed final Judgment and Competitive Impact Statement are available for inspection in Room 215 of the U.S. Department of Justice, Antitrust Division, 325 7th Street, N.W., Washington. D.C. 20530 (telephone: (202) 514–2481) and the office of the Clerk of the United States District Court for the District of Columbia, 3rd Street and Constitution Avenue, N.W., Washington, D.C.

Copies of any of these materials may be obtained upon request and payment of a copying fee.

**Constance K. Robinson,**

*Director of Operation Antitrust Division.*

**United States District Court For the District of Columbia**

*United States of America,* Plaintiff, v. *EZ Communications, Inc. and Evergreen Media Corporation,* Defendants. Civil Action No. 1:97CV00406, Filed 2/27/97, Judge Oberdorfer.

## Stipulation and Order

It is stipulated by and between the undersigned parties, by their respective attorneys, as follows:

(1) The Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and venue of this action is proper in the United States District Court for the District of Columbia.

(2) The parties stipulate that a Final Judgment in the form hereto attached may be filed and entered by the Court, upon the motion of any party or upon the Court's own motion, at any time after compliance with the requirements of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16), and without further notice to any party or other proceedings, provided that plaintiff has not withdrawn its consent, which it may do at any time before the entry of the proposed Final Judgment by serving notice thereof on defendants and by filing that notice with the Court.

(3) Defendants shall abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment, or until expiration of time for all appeals of any Court ruling declining entry of the proposed Final Judgment, and shall, from the date of the signing of this Stipulation by the parties, comply with all the terms and provisions of the proposed Final Judgment as though the same were in full force and effect as an order of the Court.

(4) Defendants shall not consummate the transaction sought to be enjoined by the complaint herein before the Court has signed this Stipulation and Order.

(5) This Stipulation shall apply with equal force and effect to any amended proposed Final Judgment agreed upon in writing by the parties and submitted to the Court. In the event that, as contemplated by defendants, the WRFX–FM Assets are transferred by defendant Evergreen Media Corporation (''Evergreen'') to defendant EZ Communications, Inc. (''EZ'') or to a trust approved by plaintiff and the FCC prior to the entry of the attached Final Judgment, then an amended Complaint and proposed Final Judgment which do not name Evergreen as a defendant shall promptly be filed herein and submitted to the Court.

(6) The parties recognize that there could be a delay in obtaining approval by or a ruling of a government agency related to either the transfer of the WRFX–FM Assets to EZ or to an approved trust, described in paragraph (5) above, or the divestiture required by Section IV of the Final Judgment, notwithstanding the good faith efforts of defendants and any prospective Acquirer, as defined in the Final Judgment. In this circumstance, plaintiff will, in the exercise of its sole discretion, acting in good faith, give special consideration to forbearing from applying for the appointment of a trustee pursuant to Section V of the Final Judgment, or from pursuing legal remedies available to it as a result of such delay, provided that: (a) defendants have entered into a definitive agreement to divest the WRFX–FM Assets, and such agreement and the Acquirer have been approved by plaintiff; (b) all papers necessary to

secure any governmental approvals and/or rulings to effectuate such divestiture (including but not limited to FCC, SEC and IRS approvals or rulings) have been filed with the appropriate agency; (c) receipt of such approvals are the only closing conditions that have not been satisfied or waived; and (d) defendants have demonstrated that neither they nor the prospective Acquirer are responsible for any such delay.

(7) In the event (a) plaintiff withdraws its consent, as provided in paragraph 2 above, or (b) the proposed Final Judgment is not entered pursuant to this Stipulation, the time has expired for all appeals of any Court ruling declining entry of the proposed Final Judgment, and the Court has not otherwise ordered continued compliance with the terms and provisions of the proposed Final Judgment, then the parties are released from all further obligations under this Stipulation, and the making of this Stipulation shall be without prejudice to any party in this or any other proceeding.

(8) Defendants represent that the divestiture ordered in the proposed Final Judgment can and will be made, and that defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained therein.

Dated: February 26, 1997.

For Plaintiff United States of America

Dando B. Cellini,

*U.S. Department of Justice, Antitrust Division, Merger Task Force, 1401 H Street, NW., Suite 4000, Washington, DC 20005, (202) 307–0829.*

*So Ordered.*

United States District Judge

For Defendant EZ Communications, Inc.

Ray V. Hartwell, III,

Andrew J. Strenio, Jr.,

Hunton & Williams,

*1900 K Street, NW, Washington, DC 20006–1109, (202) 955–1639.*

For Defendant Evergreen Media Corporation.

Bruce J. Prager,

Latham & Watkins,

*885 Third Avenue, New York, NY 10022–4802, (212) 906–1272.*

**Final Judgment**

Whereas, plaintiff, the United States of America, having filed its Complaint herein on February 27, 1997, and defendants EZ Communications, Inc. (''EZ'') and Evergreen Media Corporation (''Evergreen''), by their attorneys, having consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without this Final Judgment constituting any evidence against or an admission by any party with respect to any issue of law or fact herein;

And whereas, defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

And whereas, the purpose of this Final Judgment is prompt and certain divestiture of certain assets to assure that competition is not substantially lessened;

And whereas, plaintiff requires defendants to make certain divestitures for the purpose of remedying the loss of competition alleged in the Complaint;

And whereas, defendants have represented to plaintiff that the divestiture ordered herein can and will be made and that defendants will later raise no claims of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

Now, therefore, before the taking of any testimony, and without trial or adjudication of any issue of fact or law herein, and upon consent of the parties hereto, it is hereby ordered, adjudged, and decreed as follows:

*I. Jurisdiction*

This Court has jurisdiction over each of the parties hereto and over the subject matter of this action. The Complaint states a claim upon which relief may be granted against defendants EZ and Evergreen, as hereinafter defined, under Section 7 of the Clayton Act, as amended (15 U.S.C. 18).

*II. Definitions*

As used in this Final Judgment:

A. *EZ* means defendant EZ Communications, Inc., a Virginia corporation with its headquarters in Fairfax, Virginia, and includes its successors and assigns (specifically including without limitation American Radio Systems Corporation (''ARS''), a Delaware corporation headquartered in Boston, Massachusetts, which has agreed to acquire EZ through merger), its subsidiaries, and directors, officers, managers, agents and employees acting for or on behalf of EZ.

B. *Evergreen* means defendant Evergreen Media Corporation, a Delaware corporation with its headquarters in Irving, Texas, and includes Evergreen's successors and assigns, its subsidiaries, and directors, officers, managers, agents and employees acting for or on behalf of Evergreen.

C. *WRFX–FM Assets* means all of the assets, tangible or intangible, used in the operation of the WRFX 99.7 FM radio station in the Charlotte Area, including but not limited to all real property (owned and leased) used in the operation of that station; all broadcast equipment, personal property, inventory, office furniture, fixed assets and fixtures, materials, supplies and other tangible property used in the operation of that station; all licenses, permits, authorizations and applications therefor issued by the Federal Communications Commission (''FCC'') and other governmental agencies related to that station, all contracts, agreements, leases and commitments of defendants pertaining to that station and its operations; all trademarks, service marks, trade names, copyrights, patents, slogans, programming materials and promotional materials relating to that station, and all logos and other records maintained by defendants or that station in connection with its business.

D. *Charlotte Area* means the Charlotte, North Carolina Metro Survey Area as identified by The Arbitron Radio Market Report for Charlotte (Fall 1996), which is made up of the following counties: Union, York, Cabarrus, Rowan, Mecklenburg, Lincoln and Gaston.

E. *Acquirer* means the entity to whom defendants divest the WRFX–FM Assets under this Final Judgment.

F. *EZ Radio Station* means any radio station owned by EZ and licensed to a community in the Charlotte Area, other than WRFX–FM.

G. *Non-EZ Radio Station* means any radio station licensed to a community in the Charlotte area that is not an EZ Radio Station.

*III. Applicability*

A. The provisions of this Final Judgment apply to the defendants, their successors and assigns (specifically including without limitation ARS), their subsidiaries, affiliates, directors, officers, managers, agents and employees, and all other persons in active concert or participation with them who shall have received actual notice of this Final Judgment by personal service or otherwise, specifically including any trustee or trustees appointed by defendants pursuant to an FCC License Trust Agreement or an FCC Assets Trust Agreement applicable to the WRFX–FM Assets.

B. The defendants shall require, as a condition of the sale or other disposition of all or substantially all of the assets used in their business of owning and operating their portfolio of radio stations in the Charlotte Area, that the acquiring party or parties agree to be bound by the provisions of this Final

Judgment; provided, however, defendants need not obtain such an agreement from an Acquirer in connection with the divestiture of the WRFX–FM Assets.

*IV. Divestiture of WRFX–FM Assets*

A. Defendant EZ is hereby ordered and directed, in accordance with the terms of this Final Judgment, within six (6) months after the filing of the compliant in this action, or within five (5) business days after notice of entry of this Final Judgment, whichever is later, to divest the WRFX–FM Assets to an Acquirer acceptable to plaintiff, in its sole discretion. Unless plaintiff otherwise consents in writing, the divestiture pursuant to Section IV of this Final Judgment, or by the trustee appointed pursuant to Section V, shall include all the WRFX–FM Assets and shall be accomplished in such a way as to satisfy plaintiff, in its sole discretion, that the WRFX–FM Assets can and will be used by an Acquirer as a viable, ongoing commercial radio business. The divestiture, whether pursuant to Section IV or V of this Final Judgment, shall be made (1) to an Acquirer that, in the sole judgment of plaintiff, has the capability and intent of competing effectively, and has the managerial, operational and financial capability to compete effectively as a radio station operator in the Charlotte Area; and (2) pursuant to agreements the terms of which shall not, in the sole judgment of plaintiff, interfere with the ability of the Acquirer to compete effectively.

B. Defendant EZ agrees to use its best efforts to divest the WRFX–FM Assets, and to obtain all regulatory approvals necessary for such divestiture, as expeditiously as possible. Plaintiff, in its sole discretion, may extend the time period for the divestiture for two (2) additional thirty (30)-day periods of time, not to exceed sixty (60) calendar days in total.

C. In accomplishing the divestiture ordered by this Final Judgment, defendant EZ promptly shall make known, by usual and customary means, the availability of the WRFX–FM Assets. Defendant EZ shall inform any person making a bona fide inquiry regarding a possible purchase that the sale is being made pursuant to this Final Judgment and provide such person with a copy of the Final Judgment. Defendant EZ shall make known to any person making an inquiry regarding a possible purchase of the WRFX–FM Assets that the assets described in Section II (C) are being offered for sale. Defendants also shall offer to furnish to all bona fide prospective purchasers, subject to customary confidentiality assurances, all information regarding the WRFX–FM Assets customarily provided in a due diligence process, except such information that is subject to attorney-client privilege or attorney work-product privilege. Defendants shall make available such information to plaintiff at the same time that such information is made available to any other person.

D. Defendants shall permit bona fide prospective purchasers of the WRFX–FM Assets to have access to personnel and to make such inspection of the assets, and any and all financial, operational or other documents and information, as is customary in a due diligence process.

E. Defendants shall not interfere with any efforts by any Acquirer to employ the general manager or any other employee of WRFX–FM.

*V. Appointment of Trustee*

A. In the event that EZ has not divested the WRFX–FM Assets within the time period specified in Section IV above, the Court shall appoint, on application of plaintiff, a trustee selected by plaintiff to effect the divestiture of the assets.

B. After the trustee's appointment has become effective, only the trustee shall have the right to sell the WRFX–FM Assets. The trustee shall have the power and authority to accomplish the divestiture at the best price than obtainable upon a reasonable effort by the trustee, subject to the provisions of Section V and VII of this Final Judgment and consistent with FCC regulations, and shall have such other powers as the Court shall deem appropriate. Subject to Section V (C) of this Final Judgment, the trustee shall have the power and authority to hire at the cost and expense of defendant EZ any investment bankers, attorneys or other agents reasonably necessary in the judgment of the trustee to assist in the divestiture, and such professionals or agents shall be solely accountable to the trustee. The trustee shall have the power and authority to accomplish the divestiture at the earliest possible time to purchaser acceptable to plaintiff in its sole judgment, and shall have such other powers as this Court shall deem appropriate. EZ shall not object to the sale of the WRFX–FM Assets by the trustee on any grounds other than the trustee's malfeasance. Any such objection by EZ must be conveyed in writing to plaintiff and the trustee no later than fifteen (15) calendar days after the trustee has provided the notice required under Section VII of this Final Judgment.

C. The trustee shall serve at the cost and expense of EZ, on such terms and conditions as the Court may prescribe, and shall account for all monies derived from the sale of the assets sold by the trustee and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services and those of any professionals and agents retained by the trustee, all remaining monies shall be paid to EZ, and the trustee's services shall then be terminated The compensation of such trustee and of any professionals and agents retained by the trustee shall be reasonable in light of the value of the divestiture 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.

D. Defendants shall take no action to interfere with or impede the trustee's accomplishment of the divestiture of the WRFX–FM Assets, and shall use their best efforts to assist the trustee in accomplishing the required divestiture, including best efforts to effect all necessary regulatory approvals. Subject to a customary confidentiality agreement, the trustee shall have full and complete access to the personnel, books, records and facilities related to the WRFX–FM Assets, and defendants shall develop such financial or other information as may be necessary for the divestiture of the WRFX–FM Assets. Defendants shall permit prospective purchasers of the WRFX–FM Assets to have access to personnel and to make such inspection of physical facilities and any and all financial, operational or other documents and information as may be relevant to the divestiture required by this Final Judgment.

E. After its appointment becomes effective, the trustee shall file monthly reports with defendant EZ, plaintiff and the Court, setting forth the trustee's efforts to accomplish divestiture of the WRFX–FM Assets as contemplated under this Final Judgment; provided, however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. Such reports shall include the name, address and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, any interest in the WRFX–FM Assets, and shall describe in detail each contact with any such person during that period. The trustee shall maintain full records of all efforts made to divest these assets.

F. Within six (6) months after its appointment has become effective, if the trustee has not accomplished the divestiture required by Section IV of this Final Judgment, 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; provided, however, that to the extent such reports contain information that the trustee deems confidential, such reports shall not be filed in the public docket of the Court. The trustee shall at the same time furnish such reports to plaintiff and defendant EZ, which shall each have the right to be heard and to make additional recommendations. The Court shall thereafter enter such orders as it shall deem appropriate to accomplish the purpose of this Final Judgment, which shall, if necessary, include extending the term of the trustee's appointment.

*VI. Preservation of Assets/Hold Separate*

Until the divestiture of the WRFX–FM Assets required by Section IV of the Final Judgment has been accomplished:

A. Defendants shall take all steps necessary to operate WRFX–FM as a separate, independent, ongoing, economically viable and active competitor to defendant EZ's other stations in the Charlotte Area, and shall take all steps necessary to ensure that, except as necessary to comply with Section IV and paragraphs B and C of this Section of the Final Judgment, the management of said station, including the performance of decision-making functions regarding marketing and pricing, will be kept separate and apart from, and not influenced by, defendant EZ.

B. Defendants shall use all reasonable efforts to maintain and increase sales of advertising time by WRFX–FM, and shall maintain at 1996 or previously approved levels for 1997, whichever are higher, promotional advertising, sales, marketing and merchandising support for such radio station.

C. Defendants shall take all steps necessary to ensure that the assets used in the operation of WRFX–FM are fully maintained. WRFX–FM's sales and marketing employees shall not be transferred or reassigned to any other station, except for transfer bids initiated by employees pursuant to defendants' regular, established job posting policies, provided that defendants give plaintiff and Acquirer ten (10) day's notice of such transfer.

D. Defendants shall not, except as part of a divestiture approved by plaintiff, sell any WRFX–FM Assets.

E. Defendants shall take no action that would jeopardize the sale of the WRFX–FM Assets.

F. Defendants shall appoint a person or persons to oversee the assets to be held separate and who will be responsible for defendants' compliance with Section VI of this Final Judgment.

*VII. Notification*

Within two (2) business days following execution of a binding agreement to divest, including all contemplated ancillary agreements (e.g., financing), to effect any proposed divestiture pursuant to Section IV or V of this Final Judgment, defendant EZ or the trustee, whichever is then responsible for effecting the divestiture, shall notify plaintiff of the proposed divestiture. If the trustee is responsible, it shall similarly notify defendant EZ. The notice shall set forth the details of the proposed transaction and list the name, address and telephone number of each person not previously identified who offered to, or expressed an interest in or a desire to, acquire any ownership interest in WRFX–FM Assets, together with full details of same. Within fifteen (15) calendar days of receipt by plaintiff of such notice, plaintiff may request from defendants, the proposed purchaser or purchasers, any other third party, or the trustee, if applicable, additional information concerning the proposed divestiture, the proposed purchaser, and any other potential purchaser. Defendants and the trustee shall furnish any additional information requested within fifteen (15) calendar days of the receipt of the request. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after plaintiff has been provided the additional information, whichever is later, plaintiff shall provide written notice to defendants and the trustee, if there is one, stating whether or not it objects to the proposed divestiture. If plaintiff fails to object within the period specified, or if plaintiff provides written notice to defendants and the trustee, if there is one, that it does not object, then the divestiture may be consummated, subject only to defendants' limited right to object to the sale under Section V(B) of this Final Judgment. A divestiture proposed under Section IV shall not be consummated if plaintiff objects to it. Upon objection by plaintiff, or by defendant EZ under the proviso in Section V(B), a divestiture proposed under Section V shall not be consummated unless approved by the Court.

*VIII. Financing*

Defendants are ordered and directed not to finance all or any part of any purchase by an Acquirer made pursuant to Sections IV or V of this Final Judgment without the prior written consent of plaintiff.

*IX. Affidavits*

A. Within twenty (20) calendar days of the filing of this Final Judgment and every thirty (30) calendar days thereafter until the divestiture has been completed, whether pursuant to Section IV or Section V of this Final Judgment, defendants shall deliver to plaintiff an affidavit as to the fact and manner of defendants' compliance with Section IV or V of this Final Judgment. Each such affidavit shall include, *inter alia*, the name, address and telephone number of each person who, at any time after the period covered by the last such report, was contacted by defendants, or their representatives, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or made an inquiry about acquiring, any interest in the WRFX–FM Assets, and shall describe in detail each contact with any such person during that period. Each such affidavit shall also include a description of the efforts that defendants have taken to solicit a buyer for the WRFX–FM Assets.

B. Within twenty (20) calendar days of the filing of this Final Judgment, defendants shall deliver to plaintiff an affidavit which describes in reasonable detail all actions defendants have taken and all steps defendants have implemented on an on-going basis to preserve WRFX–FM pursuant to Section VII of this Final Judgment. Defendants shall deliver to plaintiff an affidavit describing any changes to the efforts and actions outlined in their earlier affidavit(s) filed pursuant to this Section within fifteen (15) calendar days after such change is implemented.

C. Defendants shall preserve all records of all efforts made to preserve WRFX–FM and to divest the WRFX–FM Assets.

*X. Notice*

A. Unless such transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the ''HSR Act''), EZ, without providing advance notification to the plaintiff, shall not directly or indirectly acquire any assets of or any interest, including any financial, security, loan, equity, or

management interest, in any Non-EZ Radio Station.

B. EZ, without providing advance notification to the plaintiff, shall not directly or indirectly enter into any agreement or understanding that would allow EZ to market or sell advertising time or to establish advertising prices for any Non-EZ Radio Station.

C. Notification described in (A) and (B) above shall be provided to the United States Department of Justice in the same format as, and per the instructions relating to, the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5–9 of the instructions must be provided only with respect to EZ Radio Stations in the Charlotte Area. Notification shall be provided at least thirty (30) days prior to acquiring any such interest or entering any such agreement covered in (A) or (B) above, and shall include, beyond what may be required by the applicable instructions, the names of the principal representatives of the parties to the agreement who negotiated the agreement, and any management or strategic plans discussing the proposed transaction. If within the 30-day period after notification, representatives of the plaintiff make a written request for additional information, defendants shall not consummate the proposed transaction or agreement until twenty (20) days after submitting all such additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder.

D. This Section shall be broadly construed and any ambiguity or uncertainty regarding the filing of notice under this Section shall be resolved in favor of filing notice.

*XI. Compliance Inspection*

For the purpose of determining or securing compliance with the Final Judgment and subject to any legally recognized privilege, from time to time:

A. Duly authorized representatives of the plaintiff, including consultants and other persons retained by the plaintiff, shall, upon written request of the United States Attorney General, or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to defendants made to their principal offices, be permitted:

(1) Access during office hours of defendants to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of defendants, who may have counsel present, relating to any matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of defendants and without restraint or interference from defendants, to interview directors, officers, employees and agents of defendants, who may have cousel present, regarding any such matters.

B. Upon the written request of the Untied States Attorney General, or of the Assistant Attorney General in charge of the Antitrust Division, made to defendants' principal offices, defendants shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in Section IX or this Section XI shall be divulged by any representative of the Untied States to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which plaintiff is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by a defendant to plaintiff, and such defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and such defendant marks each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure,'' then ten (10) calendar days' notice shall be given by plaintiff to such defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which such defendant is not a party.

*XII. Retention of Jurisdiction*

Jurisdiction is retained by this Court at any time for such further orders and directions as may be necessary or appropriate for the construction, implementation or modification of any provisions of this Final Judgment, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

*XIII. Termination*

Unless this Court grants an extension, this Final Judgment will expire upon the tenth anniversary of the date of its entry.

*XIV. Public Interest*

Entry of this Final Judgment is in the public interest.

**Certificate of Service**

I, Dando B. Cellini, hereby certify that, on February 27, 1997, I caused the foregoing documents to be served on defendants EZ Communications, Inc. and Evergreen Media Corporation by having a copy mailed, first-class postage prepaid, to:

Ray V. Hartwell, III,

Andrew J. Strenio, Jr.,

Hunton & Williams,

*1900 K Street, NW, Washington, DC 20006–1109, (202) 955–1639, Counsel for EZ Communications, Inc.*

Bruce J. Prager,

Latham & Watkins,

*885 Third Avenue, New York, NY 10022–4802, (212) 906–1272, Counsel for Evergreen Media Corporation.*

Dando B. Cellini.

**Competitive Impact Statement**

Plaintiff, the United States of America, 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*

Plaintiff filed a civil antitrust Complaint on February 27, 1997, alleging that a proposed swap and acquisition of radio stations in Charlotte, North Carolina between EZ Communications, Inc. (''EZ'') and Evergreen Media Corporation (''Evergreen'') would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that EZ and Evergreen both own and operate numerous radio stations throughout the United States, and that they each own and operate radio stations in the Charlotte, North Carolina metropolitan area. The combined transactions would give EZ a significant share of the radio advertising market in the Charlotte metropolitan area. As a result, the combination of these stations would lessen competition substantially in the sale of the radio advertising time in the Charlotte metropolitan area.[1]

[1] Prior to, and independent of, the transactions giving rise to this action, EZ and other radio station owners had announced plans to swap radio stations. The swaps would have eliminated existing competition and resulted in EZ dominating the country format—and its listeners—and SFX Broadcasting Inc. dominating the rock format—and

The prayer for relief seeks: (a) an adjudication that the proposed transactions described in the Complaint would violate Section 7 of the Clayton Act; (b) preliminary and permanent injunctive relief preventing the consummation of such transactions; (c) an award to the United States of the costs of this action; and (d) such other relief as is proper.

Shortly before this suit was filed, a proposed settlement was reached that permits EZ to complete its transactions with Evergreen, yet preserves competition in the market in which the transactions would raise significant competitive concerns. A stipulation and proposed Final Judgment embodying the settlement were filed at the same time the Complaint was filed.[2]

The proposed Final Judgment orders EZ to divest WRFX–FM, currently owned by Evergreen. Unless the plaintiff grants a time extension, EZ must divest this radio station either within six months after the filing of the Complaint or within five (5) business days after notice of entry of the Final Judgment, whichever is later. If EZ does not divest WRFX–FM within the divestiture period, the Court shall, upon plaintiff's application, appoint a trustee to sell the assets. The proposed Final Judgment also requires EZ to ensure that, until the divestiture mandated by the Final Judgment has been accomplished, WRFX–FM will be operated independently as a viable, ongoing business, and kept separate and apart from defendant EZ's other Charlotte radio stations. Further, the proposed Final Judgment requires defendants to give plaintiff prior notice regarding future radio station acquisitions or certain agreements pertaining to the sale of radio advertising time in Charlotte.

The plaintiff and the defendants 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.

its listeners. These transactions were abandoned following the Department of Justice's investigation into whether the swaps were a device to allocate Charlotte's advertisers in such a way as to lessen competition between the two station groups. Therefore, it was not necessary to seek relief regarding these swaps in this Complaint.

[2] In a related transaction, American Radio Systems Corporation (''ARS'') has agreed to acquire EZ through merger. Should the proposed merger be consummated, ARS will succeed to EZ's obligations under the proposed Final Judgment.

*II. The Alleged Violations*

A. The Defendants

Defendant EZ is a Virginia corporation with its headquarters in Fairfax, Virginia. It currently operates 23 radio stations throughout the United States, including two radio stations in Charlotte. In 1996 EZ reported revenues of approximately $14 million from its Charlotte stations.

Evergreen is a Delaware corporation headquartered in Irving, Texas. It owns and operates 41 radio stations nationwide, including five stations in the Charlotte area. In 1996 Evergreen derived approximately $22 million in revenues from its Charlotte stations.

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

On August 27, 1996, EZ entered into an agreement to swap two of its radio stations in Philadelphia for five of Evergreen's stations in Charlotte, North Carolina. In addition, EZ agreed to purchase another Charlotte radio station Evergreen for $10 million. The result of these two transactions, as is more fully discussed below, would be to give EZ a significant share of the radio advertising market in Charlotte, as well as a significant percentage of advertising directed to certain target audiences in Charlotte.

EZ and Evergreen previously have competed for the business of local and national companies seeking to advertise in the Charlotte area. Because the proposed transactions between EZ and Evergreen would have eliminated this competition, they precipitated the government's suit.

C. Anticompetitive Consequences of the Proposed Transaction

1. *Sale of Radio Advertising Time in Charlotte.* The Complaint alleges that the provision of advertising time on radio stations serving the Charlotte, North Carolina Metro Service Area (''MSA'') constitutes a line of commerce and section of the country, or relevant market, for antitrust purposes. The Charlotte MSA is the geographical unit for which Arbitron furnishes radio stations, advertisers and advertising agencies in Charlotte with data to aid in evaluating radio audience size and composition. Advertisers use this data in making decisions about which radio station or combination of radio stations can deliver their target audiences in the most efficient and cost-effective way. The Charlotte MSA includes seven countries: Union, York, Cabarrus, Rowan, Mecklenburg, Lincoln and Gaston.

Local and national advertising that is placed on radio stations within the Charlotte MSA is aimed at reaching listening audiences within the Charlotte MSA, and radio stations outside of the Charlotte MSA do not provide effective access to this audience. Thus, if there were a small but significant nontransitory increase in radio advertising prices within the Charlotte MSA, advertisers would not buy enough advertising time from radio stations located outside of the Charlotte MSA to defeat the increase.

Radio stations earn their revenues from the sale of advertising time to local and national advertisers. Many local and national advertisers purchase radio advertising time in Charlotte because they find such advertising preferable to advertising in other media for their specific needs. For such advertisers, radio time (a) may be less expensive and more cost-efficient than other media at reaching the advertiser's target audience (individuals most likely to purchase the advertiser's products or services); (b) may reach certain target audiences that cannot be reached as effectively through other media; or (c) may offer promotional opportunities to advertisers that they cannot exploit as effectively using other media. For these and other reasons, many local and national advertisers in Charlotte who purchase radio advertising time view radio either as a necessary advertising medium for them or as a necessary advertising complement to other media.

Although some local and national advertisers may switch some of their advertising to other media rather than absorb a price increase in radio advertising time in Charlotte, the existence of such advertisers would not prevent radio stations from raising their prices a small but significant amount. At a minimum, stations could raise prices profitably to those advertisers who view radio either as a necessary advertising medium for them, or as a necessary advertising complement to other media. Radio stations, which negotiate prices individually with advertisers, can identify those advertisers with strong radio preferences. Consequently, radio stations can charge different advertisers different rates. Because of this ability to price discriminate between different customers, radio stations may charge higher rates to advertisers that view radio as particularly effective for their needs, while maintaining lower rates for other advertisers.

2. *Harm to Competition.* The Complaint alleges that EZ's proposed station swaps and acquisition with Evergreen would lessen competition substantially in the provision of radio

advertising time in the Charlotte MSA. First, the proposed transactions would create further market concentration in an already highly concentrated market, and EZ would control a substantial share of the advertising revenues in this market. EZ's market share of radio advertising revenues would increase to 55 percent after the proposed transactions. According to the Herfindahl-Hirschman Index (''HHI''), a widely-used measure of market concentration defined and explained in Appendix A, EZ possesses a pretransaction HHI of 2198, which would rise by 1440 points to 3638 after the transactions. This substantial increase in concentration is likely to give EZ the unilateral power to raise advertising prices and reduce the level of service provided to advertisers in the Charlotte radio market.

Furthermore, the proposed transactions would eliminate head-to-head competition between EZ and Evergreen for advertisers seeking to reach specific audiences. Advertisers select radio stations to reach a large percentage of their target audience based upon a number of factors, including, *inter alia*, the size of the station's audience, the characteristics of its audience, and the geographic reach of a station's signal. Many advertisers seek to reach a large percentage of their target audience by selecting those stations whose audience best correlates to their target audience. Today, EZ's two stations and several of Evergreen's stations compete head-to-head to reach the same audiences and, for many local and national advertisers buying time in Charlotte, the stations are close substitutes for each other based on their specific audience characteristics. The proposed transactions would eliminate such competition, notably including competition for advertisers seeking to reach male listeners in Charlotte.

Advertisers seeking to reach male listeners in Charlotte currently help ensure competitive rates by ''playing off'' Evergreen stations against EZ stations. Because the direct competition between the Evergreen and EZ stations would be eliminated by the proposed transactions, and because advertisers seeking to reach male listeners would have inferior alternatives as a result of the transactions, the transactions would give EZ the ability to raise its rates and reduce the quality of its services to some of its advertisers on its Charlotte stations. This is particularly true because of EZ's ability to charge different prices to different advertisers.

Format changes are unlikely to deter the anticompetitive consequences of these transactions. If EZ raised prices or lowered services to those advertisers who buy EZ and Evergreen stations because of their strength in delivering access to certain specific audiences, non-EZ radio stations in Charlotte would not be induced to change their formats to attract a greater share of the same listeners and to serve better those advertisers seeking to reach such listeners. Successful radio stations are unlikely to undertake a format change solely in response to small but significant increases in price being charged to advertisers by a multi-station firm such as EZ, because they would likely lose a substantial portion of their existing audiences. Even if less successful stations did change format, they still would be unlikely to attract enough listeners to provide a suitable alternative to EZ.

Finally, new entry into the Charlotte radio advertising market is highly unlikely in response to a price increase by EZ. No unallocated radio broadcast frequencies exist in Charlotte. Also, stations located in adjacent communities cannot boost their power so as to enter the Charlotte market without interfering with other stations on the same or similar frequencies, a violation of Federal Communications Commission (''FCC'') regulations.

For all of these reasons, plaintiff concludes that the proposed transactions would lessen competition substantially in the sale of radio advertising time in the Charlotte MSA, eliminate actual competition between EZ and Evergreen, and result in increased prices and reduced quality of service for radio advertising time in the Charlotte MSA, 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 Charlotte MSA. It requires the divestiture of WRFX–FM, Charlotte's most popular station among male listeners. This relief will reduce the market share in advertising revenues EZ would have achieved through the proposed transactions from over 55 percent to about 40 percent of the Charlotte radio market. The divestiture will preserve choices for advertisers and help ensure that radio advertising rates in Charlotte do not increase and that services do not decline as a result of the combined transactions.

Unless plaintiff grants an extension of time, EZ must divest WRFX–FM either within six months after the Complaint has been filed or within five (5) business days after notice of entry of the Final Judgment, whichever is later. Until the divestiture takes place, WRFX–FM will be maintained as a viable and independent competitor to EZ's other stations in the Charlottee MSA.

If EZ fails to divest WRFX–FM within the time periods specified in the Final Judgment, the Court, upon plaintiff's application, shall appoint a trustee nominated by plaintiff to effect the divestiture. If a trustee is appointed, the proposed Final Judgment provides that EZ 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 WRFX–FM, 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 plaintiff, defendant EZ 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 plaintiff and defendant EZ, who will each have the right to be heard and to make additional recommendations.

The proposed Final Judgment requires that defendants maintain WRFX–FM separate and apart from defendant EZ's other Charlotte stations, pending divestiture. The Judgment also contains provisions to ensure the WRFX–FM will be preserved, so that this station remains a viable, aggressive competitor after divestiture.

The proposed Final Judgment also prohibits EZ from entering into certain agreements with other Charlotte radio stations without providing at least thirty (30) days' notice to the Department of Justice. Specifically, EZ must notify the Department before acquiring any interest in another Charlotte radio station. Such acquisitions could raise competitive concerns but might be too small to be reported otherwise under the Hart-Scott-Rodino (''HSR'') premerger notification statute. Moreover, EZ may not agree to sell radio advertising time for any other Charlotte radio station without providing plaintiff with notice. In particular, the provision requires EZ to notify the Department before it enters

into any Joint Sales Agreements (''JSAs''), where one station takes over another station's advertising time, or any Local Marketing Agreements (''LMAs''), where one station takes over another station's broadcasting and advertising time, or other comparable arrangements in the Charlotte area. Agreements whereby EZ sells advertising for or manages other Charlotte area radio stations would effectively increase its market share in this MSA. Despite their clear competitive significance, JASs probably would not be reportable to the Department under the HSR Act. Thus, this provision in the proposed Final Judgment 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 Charlotte market.

The relief in the proposed Final Judgment is intended to remedy the likely anticompetitive effects of EZ's proposed transactions with Evergreen in Charlotte. Nothing in this Final Judgment is intended to limit the plaintiff's ability to investigate or to bring actions, where appropriate, challenging other past or future activities of defendants in the Charlotte MSA.

*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 APA, provided that the plaintiff 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 plaintiff written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**. The plaintiff will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the plaintiff will be filed with the Court and published in the **Federal Register**.

Written comments should be submitted to: Craig W. Conrath, Chief, Merger Task Force, Antitrust Division, United States Department of Justice, 1401 H Street, NW; Suite 4000, Washington, DC 20530.

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and that 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*

Plaintiff considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against defendants. Plaintiff is satisfied, however, that the divestiture of WRFX–FM and other relief contained in the proposed Final Judgment will preserve viable competition in the sale of radio advertising time in the Charlotte MSA. 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.A. § 16(e).

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.'' [3] Rather,

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest findings, 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 insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to

[3] 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.

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.[4]

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.' '' [5]

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

*VIII. Determinative Documents*

There are no determinative materials or documents within the meaning of the APPA that were considered by the plaintiff in formulating the proposed Final Judgment.

Respectfully submitted,

Dando B. Cellini,

*Merger Task Force, U.S. Department of Justice, Antitrust Division, 1401 H Street, N.W.; Suite 4000, Washington, D.C. 20530, (202) 307–0829.*

Dated: March 20, 1997.

**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 increases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points 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.

**Certificate of Service**

I, Dando B. Cellini, hereby certify that, on March 20, 1997, I caused the foregoing document to be served on defendants EZ Communications, Inc. and Evergreen Media Corporation by having a copy mailed, first-class, postage prepaid, to:

Ray V. Hartwell, III,

Andrew J. Strenio, Jr.,

Hunton & Williams,

*1900 K Street, NW, Washington, DC 20006–1109, (202) 955–1639, Counsel for EZ Communications, Inc.*

Bruce J. Prager,

Latham & Watkins,

*885 Third Avenue, New York, NY 10022–4802, (212) 906–1272, Counsel for Evergreen Media Corporation.*

Dando B. Celini.

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BILLING CODE 4410–11–M

[4] *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).

[5] *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).

## United States v. Western Pine Association, et al.

Notice is hereby given that defendant Western Wood Products Association (''WWPA'') has filed with the United States District Court for the Central District of California a motion to terminate the Consent Decree in *United States* v. *Western Pine Ass'n, et al.,* Civil Action No. 41–1389 RJ, and that the Department of Justice (''Department''), in a stipulation and order also filed with the Court, has tentatively consented to termination of the Consent Decree but has reserved the right to withdraw its consent pending receipt of public comments. The complaint in this case (filed February 6, 1941) alleged that the Western Pine Association (''WPA'') and its lumber company members had curtailed output, fixed prices, and enforced arbitrary and unreasonable rules and policies for standardization and distribution of western pine lumber.

On February 6, 1941, a Consent Decree was entered against the WPA and its members which (1) required WPA to make its grading services available to both members and nonmembers alike without discrimination and at the actual cost of the services rendered and (2) contained various injunctive provisions relating to the conduct of the WPA and its members. Specifically, the Consent Decree enjoined the defendants from (1) assigning to manufacturers a maximum production figures; (2) allocating business; (3) fixing prices, discounts or commissions; (4) disseminating information concerning production, sales, or prices; (5) refusing to quote f.o.b.; and (6) restricting the sale of lumber to any particular class of customers.

The Department has lodged with the court a memorandum setting forth the reasons why the Government believes that termination of the Consent Decree would serve the public interest. Copies of WWPA's motion papers, the stipulation containing the Government's consent, the Government's memorandum and all further papers filed or lodged with the court in connection with this motion will be available for inspection at the Legal Procedure Unit of the Antitrust Division, Room 215 North, Liberty Place, Washington, D.C. 20530, and at the Office of the Clerk of the United States District Court for the Central District of California 90012. Copies of any of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Interested persons may submit comments regarding the proposed termination of the decree to the Government. Such comments must be received by the Division with sixty (60) days and will be filled with the court by the Government. Comments should be addressed to Christopher S. Crook, Acting Chief, San Francisco Office, Antitrust Division, Department of Justice, 450 Golden Gate Avenue, Box 36046, San Francisco, California 91402 (Telephone: (415) 436–6660).

**Rebecca P. Dick,**

*Deputy Director of Operations.*

[FR Doc. 97–8533 Filed 4–2–97; 8:45 am]

BILLING CODE 4410–11–M

## Notice Pursuant to the National Cooperative Research and Production Act of 1993; The Asymetrical Digital Subscriber Line Forum

Notice is hereby given that, on November 5, 1996, pursuant to Section