Matthew S. Wild | Senior Counsel at **Levitt & Kaizer** | (212) 737-0400

DOJ CONDITIONS APPROVAL OF PRIVATE EQUITY GROUPS' ACQUISITION OF INTERESTS IN COMPETING PORTFOLIO COMPANIES ON DIVESTITURES

February 13, 2008. On November 16, 2006, Bain Capital and Thomas H. Lee Partners ("THL") entered into an agreement to purchase a 70% interest in Clear Channel Communications for $28 billion. By the time that the transaction was scheduled to close, Bain and THL also would have passive equity interests in two competing radio operators – Cumulus Media Partners ("CMP") and Univision Communications. Notwithstanding that the equity interests would be passive and with respect to Univision would be only 14%, the Antitrust Division alleged that the overlap between these competitors would result in higher prices for radio advertising and Spanish-language radio advertising in the geographic markets in which they compete. Accordingly, the Antitrust Division conditioned approval of the transaction on divestiture of the competing assets.

Transaction

Bain and THL are private equity groups with $40 billion and $12 billion, respectively under management. They actively manage and operate the assets in which they invest. Together, they own 50% equity and voting interest in CMP. THL also owns a 14% equity interest in Univision and 20% of the voting interests. To comply with FCC restrictions on ownership of multiple radio operators, however, Bain and THL plan to strip all voting and management interests they have in CMP and Univision. Thus, before closing the Clear Channel transaction, Bain and THP would have only passive equity interests in CMP and Univision.

Relevant Markets

The Antitrust Division alleged two relevant product markets – radio advertising and Spanish-language advertising. With respect to both relevant markets, the Antitrust Division alleged that there are a significant number of advertisers that would not switch to another advertising medium in response to a small, but significant non-transitory increase in price. The Antitrust Division also alleged that advertisers are vulnerable to price discrimination. The radio stations can charge a higher price to a number of advertisers that view their format as particularly effective to reach their target audiences.

The Antitrust Division alleged that relevant geographic markets were MSAs in which Clear Channel and CMP or Univision compete. Advertisers use MSAs as the basis to evaluate radio stations' audience size and composition. Clear Channel and CMP compete in the Houston and Cincinnati MSAs. Clear Channel and Univision compete in the Houston, Las Vegas and San Francisco MSAs.

The Antitrust Division also alleged that entry into any of the relevant markets in response to small, non-transitory increase in price was unlikely because spectrum is scarce and expensive. With respect to Spanish-language radio, the Antitrust Division also alleged that it would not be profitable for radio operators to switch to Spanish-language programming in response to a small but non-transitory increase in price in Spanish-language radio advertising. It would unprofitable to do so because they would loose too much advertising revenue in a demographic their own target audience.

Competition

The radio advertising markets in the Houston and Cincinnati MSAs are highly concentrated. After the merger, the parties would have combined shares advertising revenue of 37% and 65%

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respectively. Similarly, the Spanish-language radio advertising markets in the Houston, Las Vegas and San Francisco MSAs are highly concentrated. After the merger, the parties would have combined shares of advertising revenue of 75%, 73% and 70%, respectively.
In addition to potential reduction of competition caused by the high combined market shares, CMP and Clear Channel and Univision and Clear Channel are often radio advertisers next best substitutes. Because those advertisers are readily identifiable, post-merger the parties could charge them higher prices knowing that they are less likely to choose another radio station on which to advertise.

Partial Ownership

The competitive concerns were not reduced even though Bain's and THL's interests in the competing radio operators would be passive and they would have only partial ownership of them. Indeed, THL has only a 14% equity interest in Univision.

The Antitrust Division identified the potential harm to competition that would still exist – e.g., "THL [or Bain] could cause ... Clear Channel to forbear from competing against [Univision or CMP], knowing that a significant portion of lost sales would be recaptured by a company in which THL [or Bain] had a significant ownership interest."[1]

Accordingly, the Antitrust Division required the parties to divest the overlapping radio stations to a buyer that it deemed capable of maintaining competition in those markets.

[1] The Antitrust Division identified three other ways in which competition could be harmed by the partial ownership of competitors. They do not apply, however, when the investment in one of the competitors is strictly passive.

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