

The proposed Consent Decree may be examined at the Office of the United States Attorney, Hal Boggs Federal Building, 501 Magazine Street, New Orleans, Louisiana 70130; the Region VI Office of the Environmental Protection Agency, 1445 Ross Avenue, Dallas Texas 75202; and at the Consent Decree Library, 1120 G Street, NW, 3rd Floor, Washington, DC 20005, (202) 624-0892. A copy of the proposed Consent Decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, NW, 4th Floor, Washington, DC 20005. In requesting a copy please refer to the referenced case and enclose a check in the amount of \$9.25 (25 cents per page reproduction costs), payable to the Consent Decree Library.

**Joel M. Gross,**

*Chief, Environmental Enforcement Section,  
Environment and Natural Resources Division.*

[FR Doc. 99-14894 Filed 6-10-99; 8:45 am]

BILLING CODE 4410-15-M

## DEPARTMENT OF JUSTICE

### Notice of Consent Judgments Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act

In accordance with Departmental Policy, 28 CFR § 50.7, notice is hereby given a proposed Consent Decree in *United States v. Ray McCune et al.*, Civ. Action No. 2:97CV 0860B was lodged in the United States District Court for the District of Utah on May 11, 1999.

The proposed decree settles the United States' Complaint against Ray R. McCune under sections 104, 107 and 113(g)(2) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. 9604, 9607, and 9613(g)(2), for reimbursement of costs incurred by the United States in response to the release or threat of release of hazardous substances from the Reclaim Barrel Company Site located at 8487 South Redwood Road, West Jordan, Salt Lake County, Utah ("the Site"). The proposed decree provides for recovery of \$10,000.00 in response costs based on Mr. McCune's limited financial ability to fully reimburse the United States for response costs.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, written comments relating to the proposed Consent Decrees. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States*

*v. Ray McCune et al.*, Civ. Action No. 2:97CV 0860B, DOJ # 90-11-2-1270.

The proposed Consent Decree may be examined at the Office of the United States Attorney, District of Utah, 350 South Main Street, Salt Lake City, Utah 84107; at the Region VIII Office of the U.S. Environmental Protection Agency, 999 18th Street, Suite 500, North Tower, Denver, CO 90202; and at the Consent Decree Library, 1120 G Street, NW, 3rd Floor, Washington, DC 20005, (202) 624-0892. Copies of the Consent Decrees may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, NW, 3rd Floor, Washington, DC 20005. In requesting copies, please enclose a check in the amount of \$4.75 for the Ray McCune Consent Decree (25 cents per page reproduction costs) payable to the Consent Decree Library.

**Joel M. Gross,**

*Environmental Enforcement Section,  
Environment and Natural Resources Division.*

[FR Doc. 99-14893 Filed 6-10-99; 8:45 am]

BILLING CODE 4410-15-M

## DEPARTMENT OF JUSTICE

### Notice of Lodging of Consent Decree Under the Clean Water Act

Under 28 CFR 50.7 notice is hereby given that on May 26, 1999, a proposed Consent Decree in *United States v. Quanex Corporation*, Civil Action No. H-99-1633, was lodged with the United States District Court for the Southern District of Texas.

In this action the United States sought civil penalties and injunctive relief for violations of National Pollutant Discharge Elimination System (NPDES) permits and pollution prevention regulations at a facility located in Rosenberg, Fort Bend County, Texas. The Consent Decree resolves allegations that Quanex Corporation, the facility owner until December 3, 1997, and Vision Metals, Inc., the facility owner after December 3, 1997, failed to comply with NPDES permits by violating effluent limits, failing to monitor, failing to report, failing to properly operate and maintain the facility, and failing to comply with the Spill Prevention Control and Countermeasure Plan regulatory requirements. The Consent Decree also resolves allegations that Quanex failed to comply with two Administrative Orders. Quanex is required to pay a civil penalty of \$466,421. Vision Metals, Inc. is required to pay a civil penalty of \$58,907 and perform injunctive relief to ensure compliance with its NPDES permit and the pollution prevention regulations.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *U.S. v. Quanex Corporation*, D.J. Ref. 90-5-1-1-4495.

The Consent Decree may be examined at the Office of the United States Attorney, 910 Travis, Suite 1500, Houston, Texas 77208, at U.S. EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202, and at the Consent Decree Library, 1120 G Street, NW, 3rd Floor, Washington, DC 20005, (202) 624-0892. A copy of the Consent Decree may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, NW, 3rd Floor, Washington, DC 20005. In requesting a copy, please enclose a check in the amount of \$15.25 (25 cents per page reproduction cost) payable to the Consent Decree Library.

**Joel M. Gross,**

*Chief, Environmental Enforcement Section,  
Environment and Natural Resources Division.*

[FR Doc. 99-14892 Filed 6-10-99; 8:45 am]

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## DEPARTMENT OF JUSTICE

### Antitrust Division

#### United States v. Capstar Broadcasting Corporation and Triathlon Broadcasting Company; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. Section 16(b) through (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 of America v. Capstar Broadcasting Corporation and Triathlon Broadcasting Company*, Civil Action No. 99-CV00993. On April 21, 1999, the United States filed a Complaint alleging that the proposed acquisition by Capstar Broadcasting Corporation ("Capstar") of the radio assets of Triathlon Broadcasting Company ("Triathlon") in Wichita, Kansas, would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed the same time as the Complaint, requires Capstar to divest five radio stations in Wichita pursuant to the Final Judgment. Copies of the Complaint, proposed Final Judgment and Competitive Impact

Statement are available for inspection at the Department of Justice in Washington, DC in Room 215, 325 Seventh Street, NW, and at the Office of the Clerk of the United States District Court for the District of the District of Columbia.

Public comment is invited within 60 days of the date of this notice. Such comments, and responses thereto, will be published in the **Federal Register** and filed with the Court. Comments should be directed to Craig W. Conrath, Chief Merger Task Force, Antitrust Division, Department of Justice, 1401 H St. NW., Suite 4000, Washington, DC 20530 (telephone: (202) 307-0001).

**Constance K. Robinson,**

*Director of Operations & Merger Enforcement.*

United States of America, United States Department of Justice, Antitrust Division, 4000 City Center Building, Washington, DC 20530, Plaintiff, v. Capstar Broadcasting Corporation, 600 Congress Ave. Suite 1400, Austin, TX 78701 and Triathlon Broadcasting Company, 750 B Symphony Towers, Suite 1920, San Diego, CA 92101, Defendants.

[Civil Action No. 990993]

### Stipulation

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

1. This Court has jurisdiction over the subject matter of this action and the parties have agreed to waive all objections to personal jurisdiction and venue 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 by the Court, 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. 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.

5. In the event plaintiff withdraws its consent, as provided in paragraph 2 above, or in the event 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.

6. Defendants represent that the divestitures 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: April 20, 1999.

For Plaintiff United States of America.

Karl D. Knutsen,

*United States Department of Justice, Antitrust Division, Merger Task Force, 1401 H Street, N.W., Washington, D.C. 20530, (202) 514-0976.*

For Defendant Capstar Broadcasting Corporation.

Neil W. Imus,

*Vinson & Elkins L.L.P., 1455 Pennsylvania Ave., N.W., Washington, D.C. 20006, (202) 639-6675.*

For Defendant Triathlon Broadcasting Company.

David J. Laing,

*Baker & McKenzie, 815 Connecticut Ave., N.W., Washington, DC 20006, (202) 452-7023.*

United States of America, Plaintiff, v. Capstar Broadcasting Corporation, and Triathlon Broadcasting Company, Defendants.

[Civil Action No. 99 0993]

### Final Judgment

*Whereas*, plaintiff, the United States of America, filed its complaint in this action on April 21, 1999, and plaintiff and defendants Capstar and Triathlon by their respective 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*, these Defendants have agreed to be bound by the provisions of

this Final Judgment pending its approval by the Court;

*And Whereas*, the essence of this Final Judgment is the 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 the plaintiff that the divestitures ordered herein can and will be made and that Defendants will not later raise claims of hardship, contractual bar, or difficulty as grounds for asking the Court to delay or modify the divestiture described 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 Defendants and over the subject matter of this action, and Defendants have agreed to waive any objection to personal jurisdiction or venue. The Complaint states a claim upon which relief may be granted against the Defendants, 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. "Capstar" means defendant Capstar Broadcasting Corporation, a Delaware corporation with its headquarters in Austin, Texas, and its successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and directors, officers, managers, agents, and employees, including but not limited to Hicks, Muse, Tate, & Furst Incorporated ("Hicks-Muse"), a Delaware corporation with its headquarters in Dallas, Texas.

B. "Triathlon" means defendant Triathlon Broadcasting Company, a Delaware corporation with its headquarters in San Diego, California, and its successors, assigns, subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and directors, officers, managers, agents, and employees.

C. "Defendants" means Capstar and Triathlon.

D. "Antitrust Division" means the Antitrust Division of the United States Department of Justice.

E. "Radio Assets" means all of the assets, tangible or intangible, used in the operation of the radio stations KEYN-

FM, KWSJ-FM, KNSS-AM, KFH-AM, and KQAM-AM, that sell advertising time in Wichita, Kansas, including all real property (owned or leased) used in the operation of these stations, all broadcast equipment, office equipment, office furniture, fixtures, materials, supplies, and other tangible property used in the operation of these stations; all licenses, permits, authorizations, and applications therefor issued by the Federal Communications Commission ("FCC") and other government agencies related to these stations; all contracts, agreements, leases and commitments of Defendants relating to their operations; all trademarks, service marks, trade names, copyrights, patents, slogans, programming materials, and promotional materials relating to these stations; and all logs and other records maintained by the operator or owner in connection with its business, except that in the case of KNSS-AM, the divestiture may include only those assets necessary to continue the transmitting, programming, and selling of that station in its present form.

F. "Acquirer" means the entity to whom defendant Capstar divests the Radio Assets.

G. "Wichita" means the Wichita, Kansas Metropolitan Survey Area, which includes Sedgwick, Harvey and Butler Counties, Kansas.

### III. Applicability

A. The provisions of this Final Judgment apply to the Defendants, their successors and assigns, their subsidiaries, directors, officers, managers, agents, and employees, and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise, specifically including any trustee or trustees appointed by defendant pursuant to an FCC Trust Agreement (as defined in Section V(A)) applicable to the Radio Assets.

B. Defendant Capstar shall require, as a condition of the sale or other disposition of any of the Radio Assets, that the Acquirer or Acquirers agree to be bound by the provisions of this Final Judgment.

### IV. Divestiture of Radio Assets

A. Capstar is hereby ordered and directed in accordance with the terms of this Final Judgment to divest the Radio Assets to (i) an Acquirer acceptable to the Antitrust Division at its sole discretion or (ii) the Trustee identified pursuant to § V at the same time it acquires Triathlon. Unless plaintiff otherwise consents in writing, the divestiture pursuant to the section IV of

this Final Judgment, or by the Trustee appointed pursuant to Section V, shall include all the Radio Assets and shall be accomplished in such a way as to satisfy plaintiff, in its sole discretion, that the Radio Assets can and will be used by an Acquirer as a viable and ongoing radio business. The divestiture, whether pursuant to section IV or section V of this Final Judgment, shall be made (1) to an Acquirer that, in the sole judgment of plaintiff, has the capability and the intent of completing effectively, and has the managerial, operational, and financial capability to compete effectively as a radio operator in the Wichita 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 Capstar agrees to use its best efforts to divest the Radio Assets, and to obtain all regulatory approvals necessary for such divestiture, as expeditiously as possible.

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

D. In accomplishing the divestiture ordered by this Section IV, defendant Capstar shall permit prospective purchasers of the Radio Assets to have access to personnel and to make such inspection of assets, and any and all financial, operational, and or other documents and information, as is customary in a due diligence process.

E. Defendant Capstar shall not interfere with any efforts by any Acquirer to employ the general manager or any other employee of the Radio Assets.

### V. Appointment of Trustee

A. In the event that Capstar has not divested the Radio Assets in the time period specified in § IV above, Henry M. Rivera shall, subject to the prior approval of the FCC, become Trustee (the "Trustee") to effect the operation and sale of the Radio Assets pursuant to an FCC Trust Agreement submitted by Capstar to the FCC, as amended, and attached to this proposed Final Judgment as Exhibit A (the "FCC Trust Agreement"). In the event of Mr. Rivera's resignation, incapacity to act, death, or insolvency, the Court shall appoint, on application of plaintiff and subject to such prior approvals as may be required, 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 Radio Assets. The Trustee shall have the power and authority to accomplish the sale pursuant to the conditions of the FCC Trust Agreement.

C. The Trustee shall serve at the cost and expense of defendant Capstar, on such terms and conditions contained in the FCC Trust Agreement or 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 pursuant to the attached FCC Trust Agreement.

D. Defendants shall take no action to interfere with or impede the Trustee's accomplishment of the divestiture of the Radio Assets, and shall use their best efforts to assist the Trustee in accomplishing the required divestiture, including its best efforts to effectuate 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 Radio Assets, and, at the Trustee's request, Defendants shall develop such financial or other information as may be necessary for the divestiture of the Radio Assets. The Trustee shall permit prospective purchasers of the Radio 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 his appointment becomes effective, the Trustee shall file reports pursuant to this Final Judgment and the FCC Trust Agreement with defendant Capstar, the plaintiff, and the Court, setting forth the Trustee's efforts to accomplish divestiture of the Radio

Assets as contemplated under this Final Judgment; provided, however, that to the extent that 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 Radio 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 the Radio Assets.

F. Within four (4) months after the date of entry of this proposed Final Judgment, if the Trustee has not accomplished the divestiture required by Section V 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 at the same time shall furnish such reports to the plaintiff and to defendant Capstar, which shall have the right to be heard and to make additional recommendations. The Court shall thereafter enter such orders as it deems appropriate to accomplish the purpose of this Final Judgment, which shall, if necessary, include extending the term of the Trustee's appointment after all applicable government approvals are obtained.

G. Upon divestiture of the radio assets, the FCC Trust will be deemed terminated and the Trustee discharged.

#### **VI. Notice**

Capstar shall provide advance notification of the Antitrust Division when it directly or indirectly acquires any assets of or any interest (including any financial, security, loan, equity or management interest) in any broadcast radio station that sells advertising time in Wichita, Kansas, or enters into any joint sales agreement or any cooperative selling arrangement with any other operator of radio stations serving listeners in Wichita, Kansas. This obligation to provide notice is met under this section when a transaction is 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").

Notification under this section shall be provided to the Antitrust Division 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 about the sales of radio advertising time in Wichita. Notification shall be provided at least thirty (30) days prior to the acquisition of any such interest, 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 Antitrust Division make a written request for additional information, Defendant Capstar 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. 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.

#### **VII. Preservation of Assets/Hold Separate**

Until the divestiture of the Radio Assets required by Sections IV or V of the Final Judgment has been accomplished:

A. Defendants shall take all steps necessary to operate the Radio Assets as separate, independent, ongoing, economically viable and active competitors to the other stations in Wichita, Kansas, 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 stations, including the performance of decision-making functions regarding marketing and pricing, will be kept separate and apart from, and not influenced by, defendant Capstar in the case of Triathlon stations and defendant Triathlon in the case of Capstar stations.

B. Defendants shall use all reasonable efforts to maintain and increase sales of advertising time by the Radio Assets, and shall maintain at 1997, 1998, or previously approved levels for 1999, whichever are higher, promotional advertising, sales, marketing and merchandising support for such radio stations.

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

D. Defendant Capstar shall not, except as part of a divestiture approved by plaintiff, sell any Radio Assets.

E. Defendants shall take no action that would jeopardize the sale of the Radio Assets.

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

#### **VIII. Financing**

Defendant Capstar is ordered and directed not to finance all or any part of any purchase by an Acquirer made pursuant to Sections IV or V or this Final Judgment.

#### **IX. Compliance Inspection**

For purposes of determining or securing compliance with the Final Judgment or determining whether the Final Judgment should be modified or terminated and subject to any legally recognized privilege, from time to time:

A. duly authorized representatives of the plaintiff, upon the written request of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the Defendants made to their principal offices, shall be permitted:

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

(2) Subject to the reasonable convenience of the Defendants and without restraint or interference from any of them, to interview, either informally or on the record, their officers, employees, and agents, who may have counsel present, regarding any such matters.

B. Upon the written request of the Assistant Attorney General in charge of the Antitrust Division, made to the Defendants' principal offices, the Defendants shall submit written reports, under oath if requested, with respect to any matter contained in the Final Judgment.

C. No information or documents obtained by the means provided in Section IX or X of this Final Judgment shall be divulged by a representative of the plaintiff 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 the 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 the Defendants to the plaintiff, the Defendants represent and identify 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 the Defendants mark 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 the plaintiff to the Defendants prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which the Defendants are not a party.

#### X. 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, defendant Capstar shall deliver to plaintiff an affidavit as to the fact and manner of defendant's 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 defendant, or its 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 Radio 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 defendant Capstar has taken to solicit a buyer for the Radio Assets.

B. Within twenty (20) calendar days of the filing of this Final Judgment, defendant Capstar shall deliver to plaintiff an affidavit which describes in reasonable detail all actions defendant Capstar has taken and all steps defendant Triathlon has implemented on an on-going basis to preserve the Radio Assets describing any changes to the efforts and actions outlined in its earlier affidavit(s) filed pursuant to this section within fifteen (15) calendar days after such change is implemented.

C. Defendant Capstar shall preserve all records of all efforts to preserve the Radio Assets and to divest the Radio Assets.

#### XI. Retention of Jurisdiction

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

#### XII. Termination

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

#### XIII. Public Interest

Entry of this Final Judgment is in the public interest.

Dated: \_\_\_\_\_

United States District Judge

#### ATTACHMENT A

##### Wichita Stations Trust Agreement

THIS TRUST AGREEMENT (the "*Trust Agreement*") is entered into as of April 30, 1999, and shall be effective April 30, 1999, by and between Capstar Broadcasting Corporation, a Delaware corporation ("*Beneficiary*"), and Henry M. Rivera (the "*Trustee*").

##### Recitals

A. Beneficiary, through subsidiaries, holds various licenses, permits and authorizations issued by the Federal Communications Commission (the "FCC") with respect to the radio station in the Wichita, Kansas radio market (the "*Wichita Market*") listed on Annex A hereto (the "*Capstar Wichita Station*").

B. Pursuant to the Agreement and Plan of Merger dated as of July 23, 1998 (the "*Purchase Agreement*"), among Capstar Radio Broadcasting Partners, Inc., TBC Radio Acquisition Corp., a wholly-owned subsidiary of Capstar Radio Broadcasting Partners, Inc. ("*Merger Sub*"), and Triathlon

Broadcasting Company, a Delaware corporation ("*Triathlon*"), Merger Sub will be merged (the "*Merger*") with and into Triathlon, with Triathlon being the surviving corporation and an indirect wholly-owned subsidiary of Beneficiary. Triathlon, through its subsidiaries, holds various licenses, permits, and authorizations issued by the FCC with respect to certain radio stations in the Wichita Market listed on Annex B hereto (the "*Triathlon Wichita Stations*"). The Merger will result in the attribution to Beneficiary of the Triathlon Wichita Stations. Accordingly, each reference in this Trust Agreement to Beneficiary shall be deemed, following the consummation of the merger, to include Triathlon, and the Capstar Wichita Station and the Triathlon Wichita Stations shall be referred to collectively as the "*Stations*."

C. The Communications Act of 1934, as amended, and the rules, regulations, and policies of the FCC (collectively, the "*Communications Act*") do not permit Beneficiary to own and operate all of the Stations. Beneficiary desires to enter into this Trust Agreement to facilitate consummation of the Merger by assuring that such consummation will not result in the attribution to Beneficiary of radio stations with overlapping signal contours in the Wichita Market in contravention of the Communications Act.

D. Interim acquisition by the Trustee of the Station Assets (as hereinafter defined) for the purpose of holding and operating the same for productive business use and selling the Station Assets to a government-approved buyer or buyers pursuant to the Final Judgment in *United States v. Capstar Broadcasting Corporation and Triathlon Broadcasting Company*, C.A. No. \_\_\_\_\_ (D.D.C. Apr. \_\_\_\_, 1999) as proposed, entered or modified (the "*Final Judgment*") (proposed Final Judgment attached hereto), provided that the Trustee continues to operate the Stations until such a sale can be consummated, would provide an appropriate mechanism to facilitate consummation of the Merger while complying with the laws and regulations relating to transactions of this type, and accordingly the Trustee and Beneficiary desire to associate together for the joint conduct of the business of holding and operating such Station Assets.

Now, Therefore, in consideration of the recitals and of the respective agreements and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties, intending to be legally bound hereby, agree as follows:

##### Agreements

1. *Creation and Purpose of The Wichita Stations Trust.* Subject to the terms and conditions hereof, a trust in respect of the Stations is hereby created and established, to be known as the "Wichita Stations Trust," and the Trustee hereby accepts the trust created hereby and agrees to serve as trustee hereunder. The trust created hereby shall be irrevocable until such time as the Trustee sells the Station Assets to a government-approved buyer or buyers.

2. *Assets to be Conveyed; Assumption of Obligations.*

(a) From time to time on or before consummation of the Merger, Beneficiary shall convey, transfer, assign, and deliver to Trustee, and Trustee shall acquire and assume from Beneficiary, all of Beneficiary's right, title, interest, and obligations in and to all of the assets, properties, contracts, leases, and agreements that are used, held for use, useful or necessary in the conduct of the business and operation of each Station as of the date of this Trust Agreement, including the following assets:

(i) All of Beneficiary's right, title and interest in and to the licenses, permits and other authorizations issued by any governmental authority and used, held for use, useful or necessary in the conduct of the business and operation of any Station, including the call letters of each Station and any applications for such licenses, permits and authorizations;

(ii) All of Beneficiary's right, title and interest in and to all real property, including leasehold interests and easements, used, held for use, useful or necessary in the conduct of the business and operation of any Station;

(iii) All equipment, office furniture and fixtures, office materials and supplies, inventory, spare parts, motor vehicles and other tangible personal property of every kind and description, owned, leased or held by Beneficiary and used, held for use, useful or necessary in the conduct of the business and operation of the Stations;

(iv) All cash in each Station's operating bank accounts;

(v) All accounts receivable arising out of the operation of each Station;

(vi) All of Beneficiary's rights under and interest in all contracts relating to the conduct of the business of any Station (the "Assumed Contracts"), and any contract for the sale of the Stations as contemplated by Section 3;

(vii) All programs and programming materials of whatever form or nature owned by Beneficiary and used or held for use on or by any Station;

(viii) All of Beneficiary's rights, title and interest in and to the trademarks, trade names, service marks, franchises, copyrights, including registrations and applications for registration of any of them and good will related thereto, jingles, logos, slogans, licenses, permits and privileges owned or held by Beneficiary and used, held for use, useful or necessary in the conduct of the business and operation of any Station;

(ix) All files, records, books of account, computer programs and software and logs relating to the operation of any Station, including payable records, receivable records, invoices, statements, traffic material, programming information and studies, technical information and engineering data, news and advertising studies and consultants' reports, ratings reports, marketing and demographic data, sales correspondence, lists of advertisers, promotional materials, credit and sales reports, budgets, financial reports and projections, sales, operating and business plans, filings with the FCC and original executed copies of all written contracts to be assigned hereunder.

(x) All of Beneficiary's rights under manufacturers' and vendors' warranties relating to items included in the Station Assets and all similar rights against third parties relating to items included in the Station Assets to the extent contractually assignable; and

(xi) All intangible assets of Beneficiary relating to any Station or the business and operation of any Station not specifically described above, including goodwill, and all other assets used or held for use in connection with any Station.

The assets to be transferred to the Trustee hereunder are hereinafter collectively referred to as the "Station Assets." Notwithstanding this Section 2(a), beneficiary and Trustee acknowledge that the Station Assets shall include only those assets that Beneficiary would have sold to a third party in an arms-length transaction involving the Stations consistent with the Final Judgment. The Trustee shall retain and hold the Station Assets only in accordance with the terms and conditions set forth in this Trust Agreement.

(b) The Trustee shall assume and be solely responsible for the payment, performance and discharge of all of Beneficiary's liabilities, obligations, and duties under or in respect of the Assumed Contracts that relate to and accrue in the period after transfer of the Station Assets. Except as specifically provided in this Trust Agreement, the Trustee shall not be liable for and shall not assume any liabilities, obligations, or duties of Beneficiary (whether known or unknown, matured or unmatured, or fixed or contingent).

(c) Prior to the date hereof, Beneficiary shall have obtained policies of insurance, or procured the amendment of or riders to existing policies of insurance, to provide insurance coverage related to the Station Assets under the umbrella policies currently held by Beneficiary. All such policies shall name the Trustee as the insured or an additional insured and shall not be canceled or amended without thirty (30) days prior written notice to the Trustee. The Trustee is hereby authorized to make payment of all premiums, and all deductibles and excesses, related to such policies of insurance in the same manner as any other expense in the ordinary course of business of the Stations.

### 3. Management and Other Actions by Trustee.

(A) The Wichita Stations Trust is authorized to carry on business. During the term of this Trust Agreement, the right to manage and direct the management of the business of the Stations shall be solely vested in the Trustee, subject to the following:

(i) The Trustee shall have the obligation to consummate the sale of the Station Assets within four (4) months from the date of the entry of the Final Judgment, pursuant to the conditions contained herein and at a price that renders to Beneficiary the maximum cash present value for the Station Assets. The Trustee has read that certain Stipulation and Order and the proposed Final Judgment attached thereto which Beneficiary executed on April \_\_\_\_, 1999, in the Civil Action styled "United States v. \_\_\_\_\_," which Final Judgment shall apply to the

Trustee under Section III(A) thereof effective this date, consistent with the obligations assumed by Beneficiary under the Stipulation and Order (attached hereto). Without limiting the generality of the foregoing, the Trustee shall have the power and authority to hire at the cost and expense of Beneficiary any investment bankers, attorneys or other agents reasonably necessary, in the judgment of the Trustee, to assist in the sale of the Station Assets, and such professionals or agents shall be solely accountable to the Trustee. The Trustee shall have the power and authority to accomplish the sale of the Station Assets at the earliest possible time to any purchaser approved by the Department of Justice ("DOJ") who the DOJ determines has the intent and managerial, operational and financial capability to compete effectively as a radio station operator in the Wichita Market. Beneficiary shall not take any action to jeopardize the Trustee's sale of the Station Assets, but shall use its best efforts to assist the Trustee in accomplishing the required sale, including its best efforts to effect all regulatory approvals. The Trustee and Beneficiary shall permit prospective purchasers of the Stations to have access to personnel and to make such inspection of physical facilities and any and all financial, operational and other documents and information as may be relevant to the sale of the Station Assets. To facilitate the sale of the Station Assets, the Trustee may request in writing from Beneficiary such representations and warranties, consents, information, covenants and indemnities (which may be directly provided by Beneficiary to a buyer, as negotiated and determined by the Trustee, so long as notice and copies of any such communications are given by Beneficiary to the Trustee) regarding such sale, and such request shall not be unreasonably denied.

(ii) In fulfilling its obligations to effectuate the sale of the Station Assets, the Trustee shall take all actions necessary or appropriate to effectuate the transfer of title to the Station Assets held by the Trustee pursuant to this Trust Agreement to (and assumption of the liabilities, obligations and commitments of the Station Assets by) an unaffiliated third party. In this regard, the Trustee shall enter into appropriate agreements and submit and fully prosecute appropriate applications to the FCC requesting approval to assign the Station Assets. The Trustee also shall seek and obtain the prior approval of the DOJ for the sale of the Station Assets. Beneficiary shall have the right to request the Trustee to sell the Station Assets to an unaffiliated third party it a binding contract (an "Existing Sale Agreement") has been entered into, but not consummated, prior to the effective date of this Trust Agreement. If the DOJ concurs with such sale, the Trustee shall take all necessary and appropriate actions to effectuate the sale as provided herein and therein, including without limitation by accepting the assignment of the Existing Sale Agreement.

(iii) The Trustee shall file monthly reports with Beneficiary and the DOJ setting forth the Trustee's efforts to sell the Station Assets as contemplated by this Trust Agreement. Such

reports shall be designated confidential and 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 Station Assets, and shall describe in detail each contact with any such person during that period. The Trustee shall maintain full records of all efforts undertaken to sell the Station Assets. If the Trustee has failed to consummate the sale of the Station Assets within four (4) months from the date of the entry of the Final Judgment, the Trustee shall promptly produce a report stamped confidential to Beneficiary, the DOJ and the Court setting forth (1) the Trustee's efforts to sell the Station Assets; (2) the reasons, in the Trustee's judgment, why the required sale has not been consummated; and (3) the Trustee's recommendations.

(iv) Within five (5) business days following execution of a binding agreement for the sale of the Station Assets, including all contemplated ancillary agreements (e.g., financing agreements), to effect, in whole or in part, the sale of the Station Assets, the Trustee shall notify Beneficiary and the DOJ of the proposed sale. The notice (as provided for herein) 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 desire to, acquire any ownership interest in the Station Assets, together with the full details of same. Within fifteen (15) calendar days of receipt by the DOJ, the DOJ may request from Beneficiary, the proposed purchaser, any other third party, or the Trustee, additional information concerning the proposed sale, the proposed purchaser and any other potential purchaser. Beneficiary and the Trustee shall furnish the requested information within fifteen (15) calendar days of receipt of the request. Within thirty (30) calendar days after receipt of the notice or within twenty (20) calendar days after the DOJ has been provided the additional information, whichever is later, the DOJ shall provide written notice to Beneficiary and the Trustee, stating whether or not it objects to the proposed sale. If the DOJ fails to object within the period specified, or if the DOJ provides written notice that it does not object, then the DOJ will be deemed to have approved the sale pursuant to the trust agreement. Beneficiary may only object to the sale where the Trustee has acted with malfeasance.

(v) The Trustee shall have absolute and complete control over the operations of the Station Assets pending their sale. The Trustee shall operate the Stations as separate, independent, ongoing, economically viable and active competitors to Beneficiary, and the Trustee shall ensure that the management of the Stations is kept separate and apart from, and not influenced by, Beneficiary. The Trustee shall use all reasonable efforts to maintain and increase sales of advertising time, and to maintain promotional advertising, sales, marketing and merchandising support for the Stations at 1998 levels or greater.

(vi) The Trustee shall conduct the operations of the Stations in accordance with its duties as a licensee of the FCC. In addition, the Trustee shall, within fifteen (15) days of the end of each calendar month, provide to Beneficiary's Chief Financial Officer such monthly financial reports consisting of unaudited balance sheets of the Stations and related statements of operations and cash flows for the month and three-month period then ended as shall be necessary for Beneficiary to meet its financial reporting requirements to its accountants, lenders, the Securities and Exchange Commission and any other governmental authorities of competent jurisdiction. In no case shall such information be provided to Beneficiary's employees who are involved in the management or operation of Beneficiary's radio stations in the Wichita Market.

(vii) Any employee hired by the Trustee who is not employed at the Stations as of the effective date of this Trust Agreement shall not be a 1% or greater shareholder, director, officer, or employee of Beneficiary or its affiliates, and may not have any business and familial relationship (as defined in the FCC Policy Statement in MM Docket No. 85-218, FCC 86-67 (March 17, 1986)) with Beneficiary or with any 1% or greater shareholder, director, officer, or employee of Beneficiary or its affiliates.

(b) The trustee shall cause any employee hired by him pursuant to Section 3(a)(vii) and any person previously employed by Beneficiary whom the Trustee elects to retain, to execute and deliver to the Trustee an agreement, in form and substance acceptable to the Trustee, pursuant to which such employee agrees to comply with the rules, regulations and policies of the FCC, including without limitation all rules, regulations and policies governing communications among such employee and Beneficiary or its officers, directors, employees, and affiliates, regarding the Stations and their management and operations.

(c) Effective as of the effective date of this Trust Agreement, the Trustee will hire on behalf of the Wichita Stations Trust those current employees of the Stations on the same terms and conditions as such employees were employed by Beneficiary, provided that the Trustee is not required to provide such employees with any medical, pension, insurance or other employee benefit plans, programs or arrangements. To the extent that Beneficiary provides such employees of the Wichita Stations Trust with group medical, group insurance and/or pension plan benefits on or after the date of this Trust Agreement through plans maintained by Beneficiary for its employees, the Trustee shall within such reasonable time as deemed necessary or appropriate by Beneficiary provide to Beneficiary or its designee such reports, data or other information as Beneficiary or its designee shall Beneficiary for purposes of administering such plans or satisfying any reporting or other requirements as may be required by law or any governmental agency. In no event shall the Trustee or the Wichita Stations Trust be responsible for any liabilities or obligations relating to or arising

under any of Beneficiary's employee benefit plans, programs or arrangements, whether such liabilities or obligations arise, or relate to a period, prior or subsequent to the effective date of this Trust Agreement, except for liabilities or obligations caused by Trustee's own gross negligence or willful misconduct. All liabilities or obligations that relate to or arise under any of Beneficiary's employee benefit plans, programs or arrangements, except for liabilities or obligations caused by Trustee's own gross negligence or willful misconduct, shall remain the sole and complete responsibility of Beneficiary and shall be subject to the indemnification provided in Section 4(c) of this Trust Agreement.

(d) To the extent that the Trustee determines in his discretion that management and operation of the Stations consistent with past practice or that payment of the charges and other expenses set forth in Section 4(c) requires funds in excess of the ordinary cash flow of the Stations (as diminished by any prior remittances of cash accumulations from operations in excess of the actual and projected expenses as determined by the Trustee in his sole discretion ("Excess Cash Flow"), Beneficiary agrees to provide a line of credit to Trustee in the amount of \$250,000. Beneficiary shall not communicate directly or indirectly with the Trustee about, or participate with the Trustee in making, any decision to draw on the line of credit or as to when or how the funds will be used. The Trustee may draw on the line of credit by making a written draft on Beneficiary for a specific amount of funds. Beneficiary shall, within ten days of receipt of such draft, provide such funds to Trustee in the amount requested, up to the limit of the line of credit. The outstanding principal balance under the line of credit shall bear interest at a rate equal to the rate in effect under Beneficiary's credit facility at the time the Trustee draws on such line of credit. The principal amount of any drawings on the line of credit, together with accrued and unpaid interest thereon, shall be paid from (i) Excess Cash Flow and (ii) if any balance is outstanding upon completion of any sale of the Station Assets pursuant to Section 3, then prior to any distribution contemplated by Section 5(b), from the proceeds of any such sale. All amounts paid under this Section 3(d) shall be applied first to all interest then accrued and unpaid hereunder, and the balance, if any, to principal.

(e) To the extent that the Stations' operations generate Excess Cash Flow, such Excess Cash Flow shall first be applied to repay amounts due to Beneficiary under the line of credit provided for in Section 3(d), and thereafter shall be remitted to Beneficiary from time to time as the trustee shall determine.

(f) No person other than the Trustee or managers designated by the Trustee shall have any authority with respect to the management of the Stations or Station Assets for so long as this Trust Agreement is in effect. The Trustee shall have no beneficial interest in the Station Assets.

(g) Except as expressly provided in this Trust Agreement, the Trustee shall not: (1) incur any debt or guaranty obligation in favor



of any other person; (2) engage in any business other than as necessary in Trustee's reasonable opinion to meet his fiduciary duties with respect to the operation of the Stations as a broadcast license serving the Wichita Market; (3) sell or otherwise transfer, assign or encumber the Station Assets, or (4) enter into any agreement to do so, or enter into any merger, consolidation, or similar transaction or engage in any reclassification or similar transaction.

(h) The Trustee shall have full authority and power over the operation and management of the Stations, shall conduct the operations of the Stations in the ordinary course of business consistent with past operations of the Stations, and, to the extent possible, shall maintain the status quo of such operations as currently conducted with a view to maximizing the value to be received by Beneficiary consistent with the Trustee's duties as a licensee of the FCC and as a fiduciary of Beneficiary. Without limiting the generality of the foregoing, during the term of this Trust Agreement, except as contemplated by this Trust Agreement, the Trustee shall not:

(i) Fail to use all commercially reasonable efforts to preserve intact Beneficiary's present business organization of the Stations and preserve each Station's relationships with customers, suppliers and other having business dealings with it;

(ii) Fail to use commercially reasonable efforts to maintain the Station Assets in their current condition, except for ordinary wear and tear;

(iii) Fail to use all commercially reasonable efforts to maintain the present format of the Stations;

(iv) Except for amendments of employment agreements in the ordinary course of business and consistent with past operations of the Stations, materially amend any material contract or default in any material respect (or take or omit to take any action that, with or without the giving of notice or passage of time, would constitute a material default) under any material contract or, except in the ordinary course of business and consistent with past operations of the Stations, enter into any new material contract;

(v) Sell (Whether by merger, consolidation, or the sale of an equity interest or assets), lease, or dispose of any Station Assets except pursuant to an agreement to sell the Station Assets, which is permitted under this Trust Agreement, or in the ordinary course of business and consistent with past practice or, even if in the ordinary course of business and consistent with past practices (other than sales of surplus or obsolete equipment), whether in one or more transactions, in no event involving a Station Asset or Station Assets having an aggregate fair market value in excess of \$75,000;

(vi) (A) Mortgage, (B) pledge, or (C) subject to any material lien, pledge, claim, security interest, restriction, mortgage, tenancy and other possessory interest, conditional sale or other title retention agreement, assessment, easement, right of way, covenant, restriction, right of first refusal, defect in title, encroachment or other burden, option or encumbrance of any kind, any Station Assets;

(vii) Enter into, or enter into negotiations or discussions with any person other than a

purchaser under an agreement to sell the Station Assets, which is permitted under this Trust Agreement, with respect to, any local marketing agreement, time brokerage agreement, join sales agreement, or any other similar agreement;

(viii) Fail to use commercially reasonable efforts to maintain the ability of each Station to operate at a maximum power and full coverage at all times; or

(ix) Agree to or make any commitment, orally or in writing any actions prohibited the this Trust Agreement or the Final judgment.

Notwithstanding this Section 3(h), Beneficiary acknowledges that the business organization and operator of the Station Assets of station KNSS(AM)—as they exist on the date of this Trust Agreement will change as the station is incorporated in the operation and business organization of the Triathlon Wichita Stations.

(i) The Trustee shall have any and all such further powers and shall take such further actions (including, but not limited to, taking legal action) as may be necessary to fulfill the Trustee's obligations under this Trust Agreement.

(j) If as of the date hereof any of the Stations are not subject to a binding Existing Sale Agreement for a Sale (or Sales) (as defined below) of the Station Assets, or if any Existing Sale Agreement terminates or expires during the term of this Agreement, the Trustee shall promptly take such actions and execute such documents in order to effect a disposition of the Station Assets which renders to Beneficiary the maximum cash present value for the Station Assets. The Trustee may negotiate the terms and conditions of a binding agreement for the sale of the Station Assets (a "Sale Agreement") in his sole and absolute discretion. Trustee shall submit and fully prosecute appropriate applications to such governmental authorities as such Sale Agreement requires, requesting approval to assign such Station Assets, and, upon satisfaction of all closing conditions under such agreements (unless waived, in whole or in part, by the Trustee), transfer title to the Station Assets to the third party (or parties).

#### 4. Concerning the Trustee.

(a) The Trustee shall be entitled to receive as a trustee fee (the "Wichita Trustee Fee") for his services hereunder a fee of \$2,500 per month for each Station that is in the Wichita Stations Trust (which amount shall be prorated for each Station for partial months based on a 30-day month), *provided, however, that the Wichita Trustee Fee plus any Capstar II Trustee Fee to which the Trustee may be entitled under the Capstar Trust II Agreement entered into as of April 30, 1999, by and between the Beneficiary and the Trustee (the "Capstar Trust II Agreement") shall not exceed a total of \$15,000 per month. The fee (the "Engagement Fee") received by the Trustee pursuant to the Engagement and Assignment Agreement entered into as of February 3, 1999, by and between the Beneficiary and the Trustee (the "Engagement and Assignment Agreement") shall be credited toward any amounts otherwise due as a Wichita Trustee Fee and a Capstar II Trustee Fee. In the event*

that the Wichita Trustee Fees and the Capstar II Trustee Fees paid to the Trustee, in the aggregate, do not exceed the Engagement Fee, nothing in this Agreement shall restrict the Trustee's entitlement to the entire Engagement Fee. The Trustee agrees that in return for the Wichita Trustee Fees, he will devote such time to the Wichita Stations Trust as is necessary, appropriate, or advisable in the proper exercise of his fiduciary duties hereunder. Payment of Trustee's monthly compensation shall be made by Beneficiary within 20 days after the end of each calendar month during the term of this Trust Agreement.

(b) The Trustee is expressly authorized to incur and pay from the Station Assets held in trust all reasonable expenses, disbursements, and advances incurred or made by the Trustee in the performance of his duties hereunder (including reasonable fees, expenses and disbursements of his counsel), which the Trustee in good faith deems necessary, proper, or advisable in the performance of his duties under this Trust Agreement; provided, however, that the Trustee may pay legal fees attributable to legal services that he personally performs for the Wichita Stations Trust in his capacity as an attorney if, and only if, at any time during the calendar month in which such services are performed the combined number of stations in the Wichita Stations Trust and the Capstar Trust II is five or fewer.

(c) The Trustee shall not be liable, except for his own gross negligence or willful misconduct and, except with respect to claims based upon such gross negligence or willful misconduct that are successfully asserted against the Trustee, Beneficiary shall indemnify and hold harmless the Trustee (and any successor trustee) from and against any and all losses, liabilities, claims, actions, damages and expenses, including reasonable attorneys' fees and disbursements, arising out of and in connection with (i) the Trustee's performance of his duties under this Trust Agreement and/or any Sale Agreement, (ii) Beneficiary's failure to perform its obligations under the Trust Agreement, (iii) any liability arising out of or related to the Station Assets that accrued or arose prior to the date of transfer to the Trustee, including without limitation with respect to the Assumed Contracts, (iv) losses arising out of or related to the Station Assets, and the operation thereof on a going concern basis, that are not recovered from the proceeds of a Sale, or otherwise under the Trust Agreement, (v) fines and penalties levied by the FCC or any other governmental authority, and costs related thereto, which may be caused or incurred by the transactions contemplated by the Trust Agreement, any Sale or any other action, error or omission of any person other than the Trustee, (vi) taxes that may be levied upon or payable by the Trustee, in his personal capacity, arising out of or related to the Trust and (vii) the Trustee's obligation, if any, under the employment laws, including without limitation the Employee Retirement Security Act of 1974, as amended. Payments to the Trustee pursuant to this Section 4(c) shall be made within 20 days of Trustee's submission to Beneficiary of an invoice or bill therefor,



plus appropriate supporting documentation. The obligations of Beneficiary to the Trustee under this Section 4(c) shall survive the resignation, incapacity to act, death or insolvency of the Trustee and the termination of this Trust Agreement.

(d) The Trustee shall be entitled to rely in good faith upon any order, judgment, certification, demand, notice, instrument or other writing delivered to him hereunder without being required to determine the authenticity or the correctness of any fact stated therein or the propriety or validity or the service thereof. The Trustee may act in reliance upon any instrument or signature believed by him in good faith to be genuine and may assume that any person purporting to give receipt or advice or make any statement or execute any document in connection with the provisions hereof has been duly authorized to do so. The Trustee may act pursuant to the advice of counsel with respect to any matter relating to this Trust Agreement and shall not be liable for any action taken or omitted in good faith in accordance with such advice. The Trustee's counsel and advisors shall be independent of, and have no relationship with, Beneficiary.

(e) Subject to Section 4(c), the rights and duties of the Trustee hereunder shall terminate upon the Trustee's incapacity to act, death or insolvency, and no interest in the Sale Agreement or the Station Assets directly or indirectly held by the Trustee nor any of the rights and duties of a deceased or insolvent Trustee may be transferred by will, devise, succession or in any manner except as provided in this Trust Agreement. The heirs, administrators, executors or other representatives of an incapacitated, deceased or insolvent Trustee shall, however, have the right and duty to convey the Sale Agreement and the Station Assets held by the Trustee to one or more successor trustees designated by Beneficiary pursuant to Section 4(g).

(f) The Trustee (and any successor trustee) may resign by giving not less than 60 days prior written notice of resignation to Beneficiary, provided that a successor trustee has been appointed, such appointment has received all necessary approval from the FCC, and any order granting such approval has become a final order with respect to which no action, request for stay, petition for hearing or reconsideration, or appeal has expired. Beneficiary shall cooperate fully in the prompt appointment of a successor trustee and shall not unreasonably interfere with or delay the effectiveness of such resignation.

(g) In the event of such resignation, incapacity to act, death or insolvency of the Trustee, the Court shall appoint, on application of the DOJ, a Trustee selected by the DOJ, subject to such prior approval of the FCC as may be required, to effect the divestiture of the Station Assets. Any successor trustee shall succeed to all of the rights and obligations of the Trustee replaced hereunder and shall be deemed the Trustee for purposes of this Trust Agreement, upon execution of such successor trustee of a counterpart of this Trust Agreement.

(h) The Trustee and any successor trustee designated pursuant to Sections 4(f) and (g)

shall not be 1% or greater stockholder, officer, employee, director, or affiliate of Beneficiary, and may not have any business or familial relationship (as defined in the FCC Policy Statement in MM Docket No. 85-218, FCC 86-67 (March 17, 1986)) with any officer, employee, director, or 1% of greater stockholder or affiliate of Beneficiary. Neither the Trustee nor any successor trustee will serve as an officer, employee, or director of Beneficiary, its affiliates, or its successor companies.

(i) The Trustee agrees to resign as Trustee if requested to do so by the DOJ in order for Defendants (as defined in the Final Judgment) to meet their obligations under the Final Judgment. Such resignations will not be effective until a successor trustee has been appointed pursuant to the provisions of the Trust Agreement.

#### 5. Termination: Distribution of Station Assets or Proceeds from Sale of Station Assets.

(a) Subject to such FCC and DOJ approval as may be required, and following the receipt of such approval, this Trust Agreement and the Wichita Stations Trust created hereby shall terminate if such termination would not cause Beneficiary to be in violation of the Communications Act or the Final Judgment.

(b) Upon the termination of this Trust Agreement under Section 5(a) or pursuant to a Sale (or Sales) of all or substantially all of the Station Assets to an unaffiliated third party (or parties) pursuant to Section 3, the Trustee shall receive the money, securities, rights or property which are distributed or are distributable in respect of the Station Assets, and, after paying (or reserving for payment thereof) any reasonable expenses or liabilities incurred pursuant to this Trust Agreement, shall promptly distribute or cause the distribution of such money, securities, rights or property to Beneficiary or its designee.

#### 6. Communications.

(a) The Trustee may communicate with and provide reports to Beneficiary concerning the implementation of the Wichita Station Trust, but not concerning the management and operations of the Stations except as provided in Section 3(a)(vi).

(b) The Trustee may engage in the communications contemplated by Section 3 hereof to facilitate a Sale (or Sales) of the Station Assets to an unaffiliated third party (or parties).

(c) During the term of this Trust Agreement, neither Beneficiary nor any of its officers, directors, employees, stockholders, or affiliates shall communicate with the Trustee regarding the operation or management of the Stations; provided, however, that Beneficiary may communicate with the Trustee as provided in Section 3, and concerning the mechanics of implementing any Sale of the Station Assets to an unaffiliated third party.

(d) Any communications permitted by Section 6(a), (b), or (c) shall be evidenced in writing, and shall be retained the Trustee for inspection upon request by the FCC.

(e) All notices, requests, consents, waivers, and other communications required or permitted to be given hereunder shall be in writing and shall be deemed to have been

duly given (a) if transmitted by facsimile, upon acknowledgement of receipt thereof in writing by facsimile or otherwise, (b) if personally delivered, upon delivery or refusal of delivery, or (c) if mailed by registered or certified United States mail, return receipt requested, postage prepaid, upon delivery or refusal of delivery. All notices, consents, waivers, or other communications required or permitted to be given hereunder shall be addressed to the respective party to whom such notice, consent, waiver, or other communication relates at the following addresses:

If to Beneficiary: Capstar Broadcasting Corporation, 600 Congress Avenue, Suite 1400, Austin, Texas 78701, Attention: William S. Banowsky, Jr., Facsimile: (512) 340-7890.

With copies to:

Vinson & Elkins L.L.P., 3700 Trammell Crow Center, 2001 Ross Avenue, Dallas, Texas 75201, Attention: Michael D. Wortley, Rodney L. Moore, Facsimile: (214) 999-7732.

Wiley, Rein & Fielding, 1776 K Street, N.W., Washington, D.C. 20006, Attention: Nathaniel F. Emmons, Facsimile: (202) 719-7049

If to the Trustee: Henry M. Rivera, Shook Hardy & Bacon L.L.P., Hamilton Square, Suite 800, 600 14th Street, NW, Washington, D.C. 20005-2004, Facsimile: (202) 783-4211.

Any party by written notice to the other parties pursuant to this Section 6(e) may change the address or the persons to whom notices or copies thereof shall be directed.

#### 7. Miscellaneous.

(a) This Trust Agreement (which term shall be deemed to include the annexes, exhibits, and schedules hereto and the other certificates, documents, and instruments delivered hereunder), constitutes the entire agreement between the parties hereto and supersedes all prior agreements, commitments, or understandings with respect to the subject matter hereof. This Trust Agreement shall not be amended, altered or modified except by an instrument in writing duly executed by each of the parties hereto. Substantial changes in this Trust Agreement may be made only as approved by the FCC and the DOJ, pursuant to and consistent with the Final Judgment. A copy of any substantial change shall be filed by the Trustee with the FCC and the DOJ within ten days following the execution thereof, with copies to the appropriate divisions and bureaus of the FCC and the DOJ.

(b) This Trust Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective permitted successors and permitted assigns, and nothing in this Trust Agreement, express or implied, is intended to confer upon any other person any rights or remedies of any nature whatsoever under or by reason of this Trust Agreement. Subject to Section 4(g), this Trust Agreement shall not be assignable by any of the parties hereto.

(c) If any term or other provision of this Trust Agreement is invalid, illegal, or incapable of being enforced by any rule of applicable law, or public policy, all other conditions and provisions of this Trust

Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated herein are not affected in any manner materially adverse to any party. Upon such determination that any term or other provision is invalid, illegal, or incapable of being enforced, the parties hereto shall negotiate in good faith to modify this Trust Agreement so as to effect the original intent of the parties as closely as possible in a mutually acceptable manner in order that the transactions contemplated herein are consummated as originally contemplated to the fullest extent possible.

(d) The headings of the sections of this Trust Agreement are solely for convenience of reference and shall not be given any effect in the construction or interpretation of this Trust Agreement. Unless otherwise stated, references in this Trust Agreement to Sections, subsections, Annexes, Exhibits, Schedules, and other subdivisions refer to the corresponding Sections, subsections, Annexes, Exhibits, Schedules, and other subdivisions of this Trust Agreement. The words "this Trust Agreement," "herein," "hereby," "hereunder," "hereof," and words of similar import, refer to this Trust Agreement as a whole and not to any particular subdivision unless expressly so limited. The word "or" is not exclusive, and the word "including" (in its various forms) means "including without limitation." Pronouns in the masculine, feminine, or neuter genders shall be construed to state and include any other gender.

(e) This Trust Agreement shall be governed by and construed in accordance with the laws of the State of Texas without regard to conflicts of law principles.

(f) This Trust Agreement may be executed and delivered (including by facsimile transmission) in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute a single instrument, and shall become effective when one or more counterparts have been signed and delivered by each of the parties hereto, it being understood that all parties need not sign the same counterpart.

#### 8. Relationship to Final Judgment.

The Trustee hereby agrees to be bound by the applicable provisions of the Final Judgment, and to the extent that any provision contained in this Trust Agreement is inconsistent with the Final Judgment, the provisions of the Final Judgment shall govern.

[Remainder of page intentionally left blank]

In witness whereof, the parties hereto have executed this Trust Agreement or caused this Trust Agreement to be duly executed on their behalf as of the date first written above.

Beneficiary: Capstar Broadcasting Corporation

By: \_\_\_\_\_

William S. Banowsky, Jr.,  
Executive Vice President

Trustee: Wichita Stations Trust

By: \_\_\_\_\_

Henry M. Rivera  
Trustee

#### Annex A

KNSS(AM), Wichita, Kansas

#### Annex B

KFH(AM), Wichita, Kansas  
KQAM(AM), Wichita, Kansas  
KEYN(FM), Wichita, Kansas  
KWSJ(FM), Haysville, Kansas

United States of America, Plaintiff, v.  
Capstar Broadcasting Corporation, and  
Triathlon Broadcasting, Company,  
Defendants.

[Civil Action No. 99-CV-00993]

(Judge Oberdorfer)

#### Competitive Impact Statement

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

#### I. Nature and Purpose of the Proceeding

The plaintiff filed a civil antitrust Complaint on April 21, 1999, alleging that Capstar Broadcasting Corporation's ("Capstar") proposed acquisition of Triathlon Broadcasting Company ("Triathlon") would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18. The Complaint alleges that Capstar and Triathlon both own and operate radio stations throughout the United States, and that they each own and operate radio stations in the Wichita, Kansas, metropolitan area. Specifically, the complaint alleges that Capstar owns KKRD-FM, KRZZ-FM, and KNSS-AM in Wichita and that Capstar controls approximately 20 percent of the Wichita radio advertising market. The complaint also alleges that Triathlon owns KZSN-FM, KRBB-FM, KEYN-FM, KWSY-FM, KFHM-AM, and KQAM-FM in Wichita and controls approximately 33 percent of the radio advertising revenues in the Wichita radio advertising market. The proposed acquisition would give Capstar a significant share of the radio advertising market in Wichita and control over stations that are close substitutes for each other based upon their specific audience characteristics. According to industry estimates, the proposed acquisition would give Capstar control of over 45 percent of the radio advertising revenue—even after Capstar divests the two lowest ranked FM radio stations pursuant to Federal Communications Commission ("FCC") regulations. As a result, the combination would substantially lessen competition in the sale of radio advertising time in the Wichita metropolitan area.

The prayer for relief seeks: (a) adjudication that Capstar's proposed acquisition of Triathlon described in the

Complaint would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; (b) preliminary and permanent injunctive relief preventing the consummation of the proposed acquisition; (c) an award to the United States of the costs of this action, and (d) such other relief as is proper.

Before this suit was filed, the United States reached a proposed settlement with Capstar and Triathlon which is memorialized in the Stipulation and proposed Final Judgment which have been filed with the Court. Under the terms of the proposed Final Judgment, Capstar must divest five stations—KEYN-FM, KWSJ-FM, KFHM-AM, KNSS-AM and KQAM-AM—to another radio operator approved by plaintiff at the time it acquires Triathlon. If Capstar does not divest these stations to an approved buyer at the time it acquires Triathlon, Capstar must place the stations in an FCC Trust. The FCC Trust Agreement was filed with the Court as an attachment to the proposed Final Judgment. Unless the Antitrust Division of the United States Department of Justice (the "Antitrust Division") grants an extension, the Trustee must divest the stations to a buyer approved by the Antitrust Division at its sole discretion within four (4) months of the date of entry of the Final Judgment.

The proposed Final Judgment also requires both Capstar and Triathlon to ensure, to the extent they are able under the proposed Final Judgment, that these stations will be operated independently as viable ongoing businesses while Capstar and Triathlon continue to operate them. If the stations are transferred to the Trustee, the Trustee has agreed that he will operate the stations independently as viable ongoing businesses. Further, the proposed Final Judgment requires Capstar to give plaintiff prior notice regarding future radio station acquisitions or certain agreements pertaining to the sale of broadcast radio advertising time in Wichita.

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

#### II. The Alleged Violation

##### A. The Defendants

Capstar is a Delaware corporation with its headquarters in Austin, Texas.

Capstar owns approximately 309 radio stations in 76 U.S. markets. In 1997, Capstar had total revenue of approximately \$350 million, approximately \$4.9 million of which was derived from its Wichita stations.

Triathlon is a Delaware corporation headquartered in San Diego, California. Triathlon currently owns 31 radio stations in six U.S. markets. In 1997, Triathlon had total revenue of approximately \$33.6 million, approximately \$8 million of which was derived from its Wichita stations.

#### *B. Description of the Events Giving Rise to the Alleged Violation*

On July 23, 1998, Capstar and Triathlon entered into an Agreement and Plan of Merger ("Agreement"). Under the terms of the Agreement, Triathlon agreed to transfer its licensee companies, including Triathlon Broadcasting of Wichita Licensee, Inc., to Capstar. Also under the terms of the Agreement, Triathlon agreed to sell Triathlon Broadcasting Company to Capstar.

Capstar and Triathlon compete for the business of local and national companies seeking to advertise in the Wichita radio market. The proposed acquisition of Triathlon by Capstar, and the threatened loss of competition that would be caused thereby, precipitated the government suit.

#### *C. Anticompetitive Consequences of the Proposed Acquisition*

##### **1. The Sale of Radio Advertising Time in Wichita**

The Complaint alleges that the provision of advertising time on radio stations serving the Wichita, Kansas Metropolitan Survey Area ("MSA") constitutes a line of commerce and a section of the country, or a relevant market, for antitrust purposes. The Wichita MSA is the geographical unit for which Arbitron furnishes radio stations, advertising agencies, and advertisers 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 Wichita MSA includes Butler, Harvey, and Sedgwick Counties. 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 Wichita 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 render certain services or 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 Wichita 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 Wichita, 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 among 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 Capstar's proposed acquisition of Triathlon would lessen competition substantially in the provision of radio advertising time in the Wichita MSA. The proposed transaction would create further market concentration in an already concentrated market. Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI"), explained in Appendix A of the Complaint, a combination of Capstar and Triathlon would substantially increase the concentration in the Wichita radio advertising markets. The HHI currently is 3040. If Capstar divests only the two least significant FM stations, Capstar's share of the Wichita radio market, based on advertising revenue, would increase from approximately 20 percent to approximately 45 percent. The approximate post-merger HHI would be 3680, representing an increase of about

640 points. This substantial increase in concentration is likely to give Capstar unilateral power to raise advertising rates and reduce the level of service provided to advertisers in Wichita.

Today, several Capstar and Triathlon stations in Wichita compete head-to-head to reach the same audiences and, for many local and national advertisers buying time in Wichita, they are close substitutes for each other based on their specific audience characteristics. The proposed merger would eliminate this competition.

During individual price negotiations between advertisers and radio stations, advertisers provide the stations with information about their advertising needs, including their target audience and the desired frequency and timing of ads. Radio stations thus have the ability to charge advertisers differing rates based in part on the number and attractiveness of competitive radio stations that can meet a particular advertiser's specific target needs.

During individualized rate negotiations, advertisers that desire to reach certain listeners can help ensure competitive rates by "playing off" Capstar stations against Triathlon stations. Capstar's acquisition of Triathlon will end this competition. After the acquisition, such advertisers will be unable to reach their desired audiences with equivalent efficiency without using Capstar stations. Because advertisers seeking to reach these audiences would have inferior alternatives to the merged entity as a result of the acquisition, the acquisition would give Capstar the ability to raise prices and reduce the quality of its service to some advertisers on its stations in Wichita.

b. Advertisers could not turn to other Wichita radio stations to prevent Capstar from imposing an anticompetitive price increase.

If Capstar raised prices or lowered services to those advertisers who buy advertising time on Capstar and Triathlon stations in Wichita because of their strength in delivering access to certain audiences, non-Capstar radio stations in Wichita would not be induced to change their formats to attract those audiences in sufficiently large numbers to defeat a price increase. Successful radio stations are unlikely to undertake a format change solely in response to small but significantly increases in price being charged to advertisers by a multi-station firm such as Capstar because they would likely lose a substantial portion of their existing audiences. Even if less successful stations did change format, they would still be unlikely to attract

enough listeners to provide suitable alternatives to the merged entity. In addition, new entry into the Wichita radio advertising market would not be timely, likely or sufficient to deter the exercise of market power. For all these reasons, plaintiff concludes that the proposed transaction would lessen competition substantially in the sale of radio advertising time on radio stations serving the Wichita MSA 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 Wichita. It requires Capstar to divest five stations: KEYN-FM, KWSJ-FM, KFJH-AM, KNSS-AM and KQAM-AM. The relief will reduce the share in advertising revenues Capstar would have achieved in the transaction from 45 percent to less than 40 percent. The divestitures will preserve choices for advertisers and will ensure that radio advertising prices do not increase and services do not decline as a result of the transaction.

Capstar must divest the KEYN-FM, KWSJ-FM, KFJH-AM, KNSS-AM and KQAM-AM assets to either another buyer or a Trustee at the time it acquires Triathlon. The divestitures must be to a purchaser or purchasers acceptable to the plaintiff in its sole discretion. Except in the case of KNSS-AM, the divestitures shall include all the assets of the stations being divested. The divestitures shall be accomplished in such a way as to satisfy plaintiff, in its sole discretion, that such assets can and will be used as viable, ongoing commercial radio businesses. If defendants fail to divest these stations within the time periods specified in the Final Judgment, a Trustee agreed upon by plaintiff and Defendants and identified in the Final Judgment will be entrusted to effect the divestitures. If the Trustee is appointed, the proposed Final Judgment provides that Capstar will pay all costs and expenses of the Trustee and any professionals and agents retained by the Trustee. After appointment, the Trustee will file monthly reports with the plaintiff, Capstar and the Court, setting forth the Trustee's efforts to accomplish the divestitures ordered under the proposed Final Judgment. If the Trustee has not accomplished the divestitures within four (4) months after the date of the Order's entry, the Trustee shall promptly file with the Court a report setting forth (1) the Trustee's efforts to accomplish the required divestitures, (2) the reasons, in the Trustee's judgment, why the required divestitures have not

been accomplished and (3) the Trustee's recommendations. At the same time the Trustee will furnish such report to the plaintiff and defendants, who will each have the right to be heard and to make additional recommendations.

The proposed Final Judgment requires that prior to the consummation of the transaction, defendants will maintain the independence of their respective radio stations in Wichita until the closing of the merger and the transfer of KEYN-FM, KWSJ-FM, KFJH-AM, KNSS-AM and KQAM-AM to either a buyer approved by the plaintiff or to the Trustee.

The proposed Final Judgment also prohibits Capstar from entering into certain agreements with other Wichita radio stations without providing at least thirty (30) days' notice to the plaintiff. Specifically, Capstar must notify the plaintiff before acquiring any interest in another Wichita radio station. Such acquisitions could raise competitive concerns but might be too small to be reported otherwise under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. 18a (the "HSR Act"). Moreover, Capstar may not agree to sell radio advertising time for any other Wichita radio station, or to have another radio station that also sells radio advertising time in Wichita sell its radio advertising time, without providing plaintiff with notice. In particular, the provision requires Capstar to notify the plaintiff before it enters into any Joint Sales Agreements ("JSAs") in Wichita. Under a JSA, one station sells another station's advertising time. Despite their clear competitive significance, JSAs may not all be reportable to the Department under the HSR Act. Thus, this provision in the proposed Final Judgment ensures that the plaintiff will receive notice of and be able to act, if appropriate, to stop any agreements that might have anticompetitive effects in the Wichita radio advertising market.

The relief in the proposed Final Judgment is intended to remedy the likely anticompetitive effects of Capstar's proposed transaction with Triathlon in Wichita. 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 Wichita, or any other markets.

### 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 attorney's 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 provision of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the **Federal Register**. The 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 its entry. The comments and the response of the United States will be filed with the Court and published in the **Federal Register**.

Any such 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 the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

### VI. Alternatives to the Proposed Final Judgment

The plaintiff considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against defendants. The plaintiff is satisfied, however, that the divestiture of KEYN-FM, KWSJ-FM, KFJH-AM, KNSS-AM, and KQAM-AM,

and other relief contained in the proposed Final Judgment will preserve viable competition in the sale of radio advertising time in the Wichita radio advertising markets. Thus, the proposed Final Judgment would achieve the relief the plaintiff 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 trail.

15 U.S.C. 16(e).

As the United States Court of Appeals for the District of Columbia Circuit 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 plaintiff'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 Corp.*, 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."<sup>1</sup> Rather,

[a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should \* \* \* carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

*United States v. Mid-America Dairymen, Inc.*, 1977–1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (citing *United States v. Bechtel Corp.* 648 F.2d 660, 666 (9th Cir. 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.<sup>2</sup>

The proposed Final Judgment therefore should not be reviewed under a standard of whether it is certain to eliminate very 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.'" <sup>3</sup>

This is strong and effective relief that should fully address the competitive

Cong. 2d Sess. 8–9 (1974), reprinted in U.S.C.C.A.N. 6535, 6538.

<sup>2</sup> *Bechtel*, 648 F.2d at 666 (citations omitted) (emphasis added); see *BNS*, 858 F.2d at 463; *United States v. National Broad. 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)).

<sup>3</sup> *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).

harm posed by the proposed transaction.

#### 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.

Dated: May 12, 1999.

Respectfully submitted,

Karl D. Knutsen,

Attorney, Merger Task Force.

U.S. Department of Justice

Antitrust Division, 1401 H Street, N.W., Washington, D.C. 20530, (202) 514-0976.

#### Certificate of Service

I, Karl D. Knutsen, of the Antitrust Division of the United States Department of Justice, do hereby certify that true copies of the foregoing Competitive Impact Statement were served this 12th day of May, 1999, by United States mail, to the following:

David J. Laing, Baker & McKenzie, 815 Connecticut Ave. N.W., Washington, D.C. 20006, Counsel for Triathlon Broadcasting Company.

Neil W. Imus, Vinson & Elkins, 1455 Pennsylvania Avenue, N.W., Washington, D.C. 20006, Counsel for Capstar Broadcasting Corporation

Karl D. Knutsen.

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#### DEPARTMENT OF JUSTICE

##### Antitrust Division

#### **United States of America v. Imetal, DBK Minerals, Inc., English China Clays, plc, and English China Clays, Inc.; Proposed Final Judgment and Competitive Impact Statement**

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. Sections 16(b) through (h), that a Complaint, Hold Separate Stipulation and Order, and a proposed Final Judgment were filed with the United States District Court for the District of Columbia in *United States v. Imetal, DBK Minerals, Inc., English China Clays, plc, and English China Clays, Inc.*, Civil No. 99–1018 on April 26, 1999. A Competitive Impact Statement was filed on May 24, 1999. The Complaint alleged that the proposed acquisition of English China Clays ("ECC") by Imetal would violate Section 7 of the Clayton Act, 15 U.S.C. Section 18, in the markets for water-washed and calcined kaolin and fused silica in the United States and in the

<sup>1</sup> 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