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202-857-2946

MAY 13 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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May 13, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

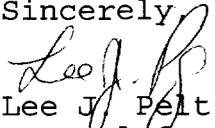
Re: MM Docket No. 93-41
Triad Family Network, Inc.

Dear Ms. Searcy:

Transmitted herewith, on behalf of Triad Family Network, Inc., is an original and six (6) copies of its Second Petition to Enlarge Issues Against Positive Alternative Radio, Inc., in connection with the above-referenced broadcast proceeding.

Should any questions arise regarding this matter, please contact the undersigned.

Sincerely,


Lee J. Peltzman
Counsel for

TRIAD FAMILY NETWORK, INC.

Enclosure

0+6

MAY 13 1993

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM No. 93-41
)	
TRIAD FAMILY NETWORK, INC.)	BPED-910227MD
Winston-Salem, North Carolina)	
Channel 207C3)	
)	
POSITIVE ALTERNATIVE RADIO, INC.)	BPED-911119MC
Asheboro, North Carolina)	
Channel 207A)	
)	
For Construction Permit for a)	
New Noncommercial Educational)	
FM Station)	

To: Administrative Law
Judge Joseph P. Gonzalez

**SECOND PETITION TO ENLARGE ISSUES
AGAINST POSITIVE ALTERNATIVE RADIO, INC.**

SHAINIS & PELTZMAN
Suite 500
1255 23rd Street, N. W.
Washington, D. C. 20037
202-857-2946

May 13, 1993

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SUMMARY

Radio never possessed reasonable assurance for the transmitter site proposed in its Asheboro application. Triad has supplied the Sworn Statement of Edward Swicegood, President and General Manager of Randolph Broadcasting, Inc., licensee of Station WKXR(FM), owner of Radio's proposed site. Mr. Swicegood relates that he had no understanding with Vernon Baker, Radio principal, regarding permitting Radio to use the WKXR site. There was never any meeting of the minds with respect to leasing space on the WKXR tower. There were only vague discussions regarding the mere possibility that an agreement might someday develop. Something more than a mere possibility a site will be available is required to establish reasonable assurance. Thus, an appropriate site availability issue must be designated against Radio's application.

Additionally, when an applicant specifies a transmitter site to which it has reason to know it lacks reasonable assurance, a site certification issue must be added. The addition of such an issue is warranted here against Radio's application.

Finally, in view of the clear material multiple conflicts in testimony between Radio and its proposed site owner, Edward Swicegood, an appropriate candor issue must be added against Radio's application.

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FM Station)	

To: Administrative Law
Judge Joseph P. Gonzalez

**SECOND PETITION TO ENLARGE ISSUES
AGAINST POSITIVE ALTERNATIVE RADIO, INC.**

Triad Family Network, Inc. ("Triad"), by its attorneys, hereby seeks the enlargement of issues against the application of Positive Alternative Radio, Inc. ("Radio"). In support of its position, Triad states the following:

This Second Petition to Enlarge Issues Against Positive Alternative Radio, Inc., is being filed pursuant to Sections 1.229(b) and (c) of the Commission's rules. The Petition is being filed within fifteen (15) days from the date when the facts relied upon were discovered by Triad. The newly discovered evidence is the Sworn Statement of Edward Swicegood, President, General Manager, Director and principal of Randolph Broadcasting, Inc., licensee of Station WKXR(AM), Asheboro, North Carolina. See Attachment A. Mr. Swicegood is the individual with whom Vernon H.

Baker, principal of Radio, spoke with regarding use of a WKXR tower for Radio's transmitter site. Mr. Swicegood states that he never gave Radio permission to use WKXR's tower as its site.

This Second Petition to Enlarge Issues also raises questions of probable decisional significance and such substantial public interest importance as to justify the designation of issues as requested herein. See Muncie Broadcasting Corp., 54 RR 2d 42, 45 n. 15 (1983); Shirley Marchant, 4 FCC Rcd. 5241 (Rev. Bd. 1989); Edgefield-Saluda Radio Co., 5 FCC 2d 148 (Rev. Bd. 1966).

I. SITE AVAILABILITY AND FALSE CERTIFICATION

A. BACKGROUND

In its application, filed November 19, 1991, Radio specified a site on a tower owned by Station WKXR, Asheboro, North Carolina. Radio has repeatedly asserted that it had reasonable assurance of use of that site as a result of a telephone conversation between Radio principal, Vernon Baker, and Edward F. Swicegood, President of Randolph Broadcasting, Inc., licensee of Station WKXR(AM), and General Manager of that station. See e.g., Radio Petition for Reconsideration of HDO, filed March 17, 1993, at p. 2 ("Swicegood readily agreed to use of his North Tower as outlined by Baker").

In point of fact, however, as the attached Sworn Statement of Edward Swicegood makes clear, Radio never had reasonable assurance regarding use of its proposed site. Mr. Swicegood never gave Mr. Baker permission to use the WKXR tower. Mr. Swicegood is specific in his declaration that "there had been [no] meeting of the minds with respect to our leasing space on our tower to Mr. Baker or his

group." Swicegood Statement at p. 2.

No terms were discussed, much less agreed upon by the prospective parties. As Mr. Swicegood relates:

We did not reach an understanding as to what my company would be paid, where on the tower his FM antenna would be located, or any other issue of significance. In fact, Mr. Baker never indicated what he was willing to pay us for the use of our site. Additionally, Mr. Baker never offered my company any money in good faith to keep the site available to him.

Swicegood Statement at p. 2.

In fact, there was nothing more than a mere possibility that the site might be available to Radio in the future.

I finally told him [Baker] that the only assurance that I could give him would be that I [Swicegood] would consider trying to work something out with him in the future. . . [W]e did not have a formal or even informal understanding regarding Mr. Baker's use of my tower.

Swicegood Statement at pp. 2-3.

B. ARGUMENT

The law on the question of site assurance is clear. An applicant seeking a new broadcast facility must, in good faith, possess "reasonable assurance" that its transmitter site will be available at the time it files its application. See Jose M. Oti d/b/a Sandino Telecasters, FCC 93-173, released April 12, 1993; 62 Broadcasting, Inc., 4 FCC Rcd. 1768, 1771-72 (Rev. Bd. 1989); Port Huron Family Radio, Inc., 4 FCC Rcd. 2532, 2534-35 (Rev. Bd. 1989); Shirley Marchant, supra, 4 FCC Rcd. at 5242. While an applicant need not have a binding agreement or absolute assurance, a mere possibility, assumption, or hope that the site will be available

will not suffice. See 62 Broadcasting, Inc., supra, 4 FCC Rcd. at 1773. A mere possibility that a site will be available in the future is not sufficient. See Shirley Marchant, supra, 4 FCC Rcd. at 5242; William F. Wallace, 49 FCC 2d 1424 (Rev. Bd. 1974). An applicant cannot merely have vague discussions with the site owner, negotiate no bona fide arrangement and earnestly represent "reasonable assurance" of that site. Although no formal written agreement is necessary, the Commission has long held that some firm understanding is essential. See Progressive Communications, Inc., 3 FCC Rcd. 5758, 5759-60 (Rev. Bd. 1988) (quoting William F. Wallace, supra, 49 FCC 2d at 1427; Dutchess Communications Corp., 58 RR 2d 381, 389 (Rev. Bd. 1985). In order to demonstrate reasonable assurance that its proposed site is available, an applicant must show "some indication of the property owner's favorable disposition toward making an arrangement with the applicant, beyond simply a mere possibility." National Innovative Programming Network, Inc., 2 FCC Rcd. 5641, 5643 (1987). There at

least must be a meeting of the minds of the involved parties

Reasonable assurance requires more than a vague willingness to deal. See Progressive Communications, Inc., 61 RR 2d 560, 563 (Rev. Bd. 1986).

In this case, Radio never had reasonable assurance concerning use of the WKXR tower site. There is little doubt that Radio principal, Vernon Baker, did communicate with a representative of the site owner (Edward Swicegood) and that Baker did attempt to secure some kind of agreement. However, it is also clear that, under the law from prior cases, Baker did not receive the required reasonable assurance. At most, he received a "vague willingness to deal" from Mr. Swicegood. As Edward Swicegood has declared in his Sworn Statement, there never was a meeting of the minds of the involved parties regarding leasing space on the WKXR tower to Radio. There was no formal or even informal understanding regarding Radio's use of the tower. At most, there was a possibility that, at some point in the future, the site might be available under the right terms.¹ But, as noted above, the Commission has long held that something more than a "mere possibility" that a site will be available is required for site assurance.

The present case is not dissimilar from the fact pattern in Shirley Marchant, 4 FCC Rcd. at 5241. In that case, the Mass Media

¹ As it turned out, Radio and Edward Swicegood were never able to agree on terms upon which the WKXR site would be made available. This further demonstrates that Radio's claim to the WKXR site was never based on anything more than vague discussions that the site possibly would be available at a later time. Something more is required to meet the Commission's reasonable assurance standard. See cases cited above.

Bureau submitted a Declaration from the site owner which related a previous discussion between the site owner and an applicant. In that case, as well as this, the applicant identified its primary interest as having a site for purposes of filing its application. The site owner in Shirley Marchant agreed to the applicant's request that she could specify the tower in her application to be filed with the Commission. However, she never gave permission to the applicant to use the company's tower. Likewise, here, as well, no permission was ever granted by Edward Swicegood to Radio to use the WKXR tower. As the Commission noted in Shirley Marchant,

[a]lbeit a close question here, we simply cannot determine on the basis of the pleadings before us whether Marchant possessed the requisite 'reasonable assurance' of her proposed transmitter site, in good faith, at the time she filed her application. It is axiomatic, as the Court has reiterated, that where 'significant material disputes of fact remain to be resolved' the Commission 'shall formally designate [an] application for hearing.' 47 U.S.C. Section 309(a) [citations omitted]. . . [W]e have no choice but to reopen the record in this proceeding for evidentiary exploration.

4 FCC Rcd. at 5242.

Further, it is clear that Radio had its engineering prepared

engineering was completed. Obviously, as may be observed by these facts as well as Mr. Swicegood's Statement, Radio was not interested in securing a meeting of the minds on November 16. It had no intention of constructing at the WKXR site. Rather, Radio was interested in making sure that its proposal did not meet with outright rejection so that its already-prepared engineering would be wasted. In fact, Radio never discussed a lease, either prior to filing its application or at any time during the subsequent year, until Mr. Swicegood brought the matter up.

Further evidence of the fact that Radio had no intention of constructing at its proposed site, but was merely interested in specifying an existing tower for purposes of filing its application. comes from the subsequent conversation between Vernon

See Attachment D (Engineering Statement of York David Anthony).

Nor is this the only time that Radio has claimed reasonable assurance of site availability where none existed. In April, 1991, an informal objection was filed against Radio's WPVB major change application. The objection contained a statement from a site owner, Sidney A. Able, that Vernon Baker had contacted Mr. Able regarding WPVB's proposal to mount on his station's (WMJR) tower, that Able had refused to give Baker reasonable assurance that the WMJR tower would be available to Radio, but that Radio nevertheless had proposed the WMJR tower in its application. Even Radio acknowledged in its Replies that no meeting of the minds regarding site assurance had occurred. The Commission eventually granted the WPVB application, but only after Radio demonstrated that the WMJR tower had subsequently become available to it. See Attachments E, F, and G (Radio Reply to Informal Objection, dated May 6, 1991; Radio Opposition to Informal Objection of Praise Communications, Inc., dated June 4, 1991; and Commission letter, dated July 10, 1992).

Certainly, in view of Mr. Swicegood's Sworn Statement and the above facts, it is clear that Radio never had sufficient assurance to justify any reasonable belief that Radio's declared site would be available to it. In view of this, a site availability issue is required with respect to whether Radio ever possessed "reasonable assurance" of its proposed transmitter site at the time it filed its application. See Shirley Marchant, supra, 4 FCC Rcd. at 5242.

Moreover, when an applicant specifies a transmitter site which

it knows is not available to it, the applicant is subject to the addition of a false certification issue as well as a site availability issue. An intent to deceive can be inferred from a motive to deceive. See Scott and Davis Enterprises, Inc., 88 FCC 2d 1090, 1099 (Rev. Bd. 1982). In this case, Radio had a motive to deceive the Commission by specifying a site which it did not possess reasonable assurance because the window for filing applications was fast closing and its Asheboro proposal would be rejected absent a specified site. Thus, an intent to deceive may be implied and an appropriate certification issue should be added.

II. LACK OF CANDOR

Further, there are additional issues which must be added against Radio's application. Radio has repeatedly lacked candor in its statements to the Commission regarding its dealings with Mr. Swicegood. Thus, for example, in Radio's Petition for Reconsideration, at p. 2, Radio claimed reasonable assurance by asserting that "Swicegood readily agreed to use of his North Tower as outlined by Baker." (Emphasis added.) In fact, contrary to Radio's description of that November 15, 1991, conversation, Mr. Swicegood did not readily agree or for that matter, agree at all to use of the WKXR tower as outlined by Vernon Baker. Rather, as Mr. Swicegood has stated, he "did not believe that there had been any meeting of the minds with respect to our leasing space on our tower to Baker or his group." Swicegood Statement, p. 2.

At another point, Radio has represented to the Commission that "details were generally agreed to" by Vernon Baker and Edward

Swicegood regarding Radio's use of the WKXR site. Radio Petition for Reconsideration at p. 6. In fact, nothing could be further from the truth. As Mr. Swicegood has explained in his Statement, there was no understanding reached with respect to details regarding the leasing of space on the WKXR tower by Radio. "We did not reach an understanding as to what my company would be paid, where on the tower his FM antenna would be located or any other issue of significance." Swicegood Statement at p. 2. Mr. Swicegood's Statement directly contradicts Radio's claim that "details were generally agreed to."

Another false statement was Radio's claim contained in its Reply to Opposition to Petition for Reconsideration, filed April 5, 1993, at p. 4, that the Baker November 16, 1991, letter to Mr. Swicegood "amplified a previous conversation when Swicegood provided reasonable assurance to Baker that Radio might locate its antenna on one of the WKXR towers."² In fact, Mr. Swicegood has specifically declared the opposite. Mr. Swicegood states that his conversation with Baker on that Sunday (November 16, 1991) was the "only conversation that I had with Baker regarding his need to list my site in his application until I spoke with him one year later." Swicegood Statement at p. 2 (emphasis added).

Mr. Swicegood's Statement also contradicts Radio's declaration

² Radio's statement was made in opposition to Triad's allegation that Radio's engineering was drafted prior to the November 16, 1991, telephone call between Mr. Swicegood and Mr. Baker. Radio took issue with that assertion and argued that "it should have been obvious to Triad" that the Baker November 16 communication was not the first contact between him and Swicegood.

as to the reasons that Radio needed to amend. While Radio has claimed that Vernon Baker received a letter from Edward Swicegood in mid-December, 1991, demanding "out of a clear sky" tower payments of \$1,200.00 per month, Mr. Swicegood has given a complete history of his discussions with Radio which casts that letter in a vastly different light. Mr. Swicegood notified Mr. Baker, on November 13, 1992, one month earlier than Radio has told the Commission, requesting a site proposal from Radio. Mr. Baker wrote back to Swicegood and the two met on December 9, 1992, at which time Swicegood provided Baker with his proposal. This was hardly a "out of a clear sky" demand by Mr. Swicegood, who states that his proposal was submitted only after repeatedly requesting Radio to propose a lease price. Swicegood Statement at pp. 3-4.

Mr. Swicegood's Statement also specifically contradicts Radio's claim that Radio would have had to pay Swicegood "up to nearly \$50,000.00" to claim use of the WKXR tower. Radio Petition for Leave to Amend, filed March 17, 1993, at p. 4. In fact, on December 10, 1992, Mr. Swicegood called Mr. Baker offering to drop the request that payments be made between that date and the start of construction with the exception of the first year's rent. Swicegood Statement at p. 4. Thus, Radio was on express notice that it would not be liable for "up to nearly \$50,000.00." Its statement to the contrary is a complete fabrication.

This is not simply a case of puffery by a Commission applicant. All of the above statements were made by Radio with the expectation that they would be relied upon by the Commission and

convince it to accept Radio's amendment. Radio noted itself that without acceptance of that amendment, it would have no site and its application would be dismissed. See Petition for Leave to Amend at p. 4.

In order efficiently to accomplish its statutory licensing duties, the Commission must be able to place complete reliance upon the showings submitted by applicants and licensees. Thus, the Commission is entitled to demand complete and absolute candor from those who come before it seeking grants. See RKO General, Inc. v. FCC, 670 F. 2d 215, 229-30 (D. C. Cir. 1981), cert. denied, 456 U.S. 927 (1982); FCC v. WOKO, Inc., 329 U.S. 223, 228-29 (1946); Lorain Journal Co. v. FCC, 351 F. 2d 824, 830 (D.C. Cir. 1965), cert. denied sub nom. W.W.I.Z., Inc. v. FCC, 383 U.S. 967 (1966). Moreover, applicants have an affirmative obligation to disclose all relevant information to the agency. The Commission should not be expected to play procedural games with those who come before it in order to ascertain the whole truth. When an applicant furnishes false or even misleading information, the Commission is justified in finding that the applicant lacks the good character which is essential for a licensee to perform in the public interest. Indeed, the Commission is empowered to disqualify an applicant for submitting a statement which is technically correct, but which fails to include relevant information or otherwise is designed to mislead the Commission. See RKO General, Inc. v. FCC, supra; WADECO, Inc. v. FCC, 628 F. 2d 122, 126-27 (D.C. Cir. 1980). See also Town & Country Radio, Inc., 53 FCC 2d 1035, 1036-37 (Rev. Bd.

1975); Fred Kaysbier, 34 FCC 2d 788, 794-95 (Rev. Bd. 1970).

Here, Radio was less than candid and provided misleading information in its statements to the Commission. The Commission should not be expected to play games with Radio in order to ascertain the whole truth with respect to Radio's dealings with its proposed site owner. Accordingly, the Commission must add a lack of candor issue against Radio as a result of its false statements to the Commission.

CONCLUSION

WHEREFORE, in view of the foregoing, Triad respectfully requests that the issues in this proceeding be enlarged as follows:

1. To determine whether Positive Alternative Radio, Inc., possessed reasonable assurance of its proposed transmitter site at the time it filed its application;
2. To determine whether Positive Alternative Radio, Inc., made a misrepresentation or lacked candor by proposing a site to the Commission without having reasonable assurance;
3. To determine whether Positive Alternative Radio, Inc., lacked candor in its statements made in various pleadings filed with the Commission regarding its efforts at obtaining reasonable assurance of its proposed site; and
4. To determine, in light of the evidence addressed in the foregoing issues, whether Positive Alternative Radio, Inc., possesses the basic qualifications to be a Commission licensee.

DISCOVERY REQUESTED

Triad seeks the following documents pursuant to the procedure set forth in Section 1.229(e) of the Commission's rules:

1. Any and all documents relating to Radio's efforts at

obtaining a transmitter site prior to the filing of its Asheboro, North Carolina, application, including, but not limited to:

- (a) all documents received by Radio and/or its agents from any site owner or its representative regarding use of that owner's site by Radio,
- (b) all documents submitted by Radio and/or its agents to any site owner or its representative with respect to Radio's proposed use of that site,
- (c) all documents, including, but not limited to, telephone records, calendars, diaries, and notes, reflecting the date or substance of any conversation between Radio and/or its agents and any person relating to any effort to obtain reasonable assurance of a transmitter site,
- (d) all documents received by Radio and/or its agents from any natural person reflecting that individual's willingness to grant reasonable assurance to Radio in connection with the use of a transmitter site by Radio.

2. Any and all documents relied upon by Radio to support its

Virginia L. Baker, and Edward A. Baker. Triad reserves the right to request further documents and request additional depositions based upon the information contained in the documents initially provided to it or secured as a result of the above depositions.

Respectfully submitted,

TRIAD FAMILY NETWORK, INC.

By: Aaron P. Shainis (LJP)
Aaron P. Shainis

By: Lee J. Peltzman
Lee J. Peltzman
Its Attorneys

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May 13, 1993

ATTACHMENT A

**SWORN STATEMENT
OF
EDWARD SWICEGOOD**

I, Edward Swicegood, state that the following statement is true and correct to the best

[REDACTED]

4. After a lengthy conversation and, at Mr. Baker's urgings, I finally told him that the only assurance that I could give him would be that I would consider trying to work something out with him in the future. We did not reach an understanding as to what my company would be paid, where on the tower his FM antenna would be located, or any other issue of significance. In fact, Mr. Baker never indicated what he was willing to pay us for the use of our site. Additionally, Mr. Baker never offered my company any money in good faith to keep the site available to him. I did not believe that there had been any meeting of the minds with respect to our leasing space on our tower to Mr. Baker or his group. Rather, it was my impression from Mr. Baker's statements that his sole concern was in having a site that he could use in an application that needed to be filed within a few days of our conversation. It should be noted that our telephone conversation on that Sunday was the only conversation that I had with Mr. Baker regarding his need to list my site in his application until I spoke with him one year later. Between November of 1991 and September of 1992, Mr. Baker communicated with me regarding his request that we allow him to place his public file at our studios. I agreed to do this for him. However, we did not have any further discussions regarding terms on which we would be willing to allow him to locate an FM antenna on our tower.

5. Approximately a year later, in September, 1992, I received a short letter from Mr. Baker which contained information regarding his proposed FM station. I have attached a copy of that letter as Exhibit A. After receiving that letter, I called my attorneys about Mr. Baker's application. I informed counsel that no agreement had ever been sent to me and that no understanding had been reached during the past year. I was informed by my counsel

that, if he had been serious about going forward, Mr. Baker would have provided a written agreement to me after we had first talked and that such an agreement would have contained specific terms such as the length of the agreement, rental amount, and a commitment to hold the space available for some defined period of time.

6. The fact that Mr. Baker never provided me with any proposed agreement containing essential terms for close to a year after our conversation prompted my letter of November 13, 1992, which asked for a proposal from Mr. Baker and set a deadline of 30

for his response. I was never furnished with a response from Mr. Baker.

[REDACTED]

Instead, attached to it was a proposed Agreement, which omitted any reference to a specific annual rental for antenna space. He asked me to "fill in any blanks" and stated that we would discuss it further.

8. After receiving Vernon Baker's proposal mentioning no rental amount, I, along with Ron Bennett, my business partner and a fellow stockholder in the company, came up with a proposal to present to Mr. Baker. Mr. Baker called me on December 8 or 9 and stated that he wanted to meet me in my office on December 9, 1992. At that meeting, I presented Mr. Baker with a copy of our proposed terms for an agreement and he signed a receipt for that copy. I asked for \$1,200.00 per month because I did not want the hassle of having to deal with new construction at our directional AM tower site without a sufficient rental amount to make it worth our while. Mr. Baker complained about the proposed rent as well as our request that his group commence payment immediately. However, he did not reject the offer, stating instead that he would think about it. A copy of my offer is attached as Exhibit D.

9. One day after our meeting, on December 10, 1992, I called Vernon Baker and offered to drop our request that payments be made between that date and the start of construction, with the exception of the first year's rent, which would be retained by Randolph Broadcasting in any case. Mr. Baker stated that he would talk to his other principals about my offer.

10. One week later, on December 17, 1992, Vernon Baker called me back and stated that he was working with his lawyer on what to do, but that, because of the upcoming holidays, it would be necessary for me to give him an additional two weeks, until January 4,

1993, rather than December 20, 1992 (the date mentioned in my December 9, 1992, letter), to come to a decision:

11. Not having heard from Vernon Baker by January 6, 1993, two days after the date which he himself had requested, I sent a letter to Mr. Baker stating that since I had not heard from him by his requested January 4, 1993, deadline, I had concluded that he no longer had any interest in the site and that, consequently, I considered the matter closed. A copy of that letter is attached as Exhibit E.

12. In a January 15, 1993, letter to me, Mr. Baker stated that he had located another site for his noncommercial educational FM antenna and that he expected that the FCC would allow him to change his site. A copy of that letter is attached as Exhibit F. In