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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Federal Communications Commission
Office of the Secretary

In re Application of)
)
ALLEGHENY COMMUNICATIONS)
GROUP, INC.)
) File No. BPH-910628MC
For Construction Permit)
for FM Radio Station,)
Pittsburgh, Pennsylvania)
)
To: The Commission)

PETITION TO DISMISS OR DENY

EZ Communications, Inc. ("EZ"), licensee of WBZZ(FM) in Pittsburgh, Pennsylvania, by its attorneys and pursuant to Section 73.3584 of the Commission's Rules, hereby petitions to dismiss or deny the above-captioned application that was filed by Allegheny Communications Group, Inc. ("ACGI") on June 28, 1991. The ACGI application is mutually exclusive with the application that EZ filed on April 1, 1991, seeking renewal of WBZZ(FM)'s license.

Summary

ACGI's engineering proposal is defective since it violates Sections 73.215 and 73.316 of the Commission's Rules, violates ANSI requirements, and represents a hazard to air navigation. No rule waiver has been requested or is justified, and ACGI's application must, therefore, be dismissed.

Moreover, ACGI's application is not a bona fide application filed for the purpose of obtaining a broadcast authorization.

Rather, as discussed in detail below, it is but one more in a long series of applications filed by one of ACGI's principals or its counsel in order to obtain settlement payments. In these cases, the abuses of the Commission's processes have not been limited merely to the filing of the applications themselves. In many of the cases, their prosecution has been punctuated by countless harassing and baseless motions.

In this case, as discussed below, there is already evidence that ACGI's counsel has abused civil judicial processes and committed indirect criminal contempt in Pennsylvania in order to obtain sealed court records ACGI has filed as part of a baseless petition to deny WBZZ(FM)'s application. In addition, the Commission's records demonstrate that ACGI's president was a principal in numerous other applications filed by his current counsel which challenged broadcast renewals and which FCC records suggest were filed solely for the purpose of settlement.

These particular abuses by ACGI's counsel and its president take on heightened significance in light of recent Commission findings, collected below, that ACGI's counsel has lacked candor before the Commission and has participated in the submission of, if not "manufactured," numerous applications filed with improper intent or structured in a manner that the FCC has labelled "shams." At a time when the Commission has recently attempted to curb abuses in its renewal process, failure to dismiss or deny

"downside" risk in mounting such challenges. Prompt dismissal or denial of the ACGI application is necessary to deter such abuses and maintain the integrity of the FCC's processes.

I. The Allegheny Application Is Technically Defective and Must Be Dismissed

In order to help curb license renewal challenge abuses, the Commission in 1989 abolished the Cameron doctrine, which had permitted license challengers like ACGI simply to specify WBZZ(FM)'s existing transmission system.¹ In doing so, the Commission stated that:

This policy change . . . will help prevent the filing of sham applications. Challengers will have to compete on technical as well as other aspects of their proposal

constitutes a new and wholly-unnecessary hazard to air navigation by proposing interference to the localizer HFE on Runway 28R at the Greater Pittsburgh Airport.

None of these rule violations are necessary or desirable. No basis exists for any rule waiver and, in any event, none has been sought by ACGI. Its application thus must be dismissed.

II. To Ensure Integrity of the Commission's Processes, the New Settlement Rules Compel Close Scrutiny of the Bona Fides Of Renewal Challengers at an Early Stage in the Proceedings

to any public interest aim."⁴ In addition, the Commission acknowledged that the renewal process "ha[d] provided or can provide a vehicle to extort" settlement payments from licensees.⁵

The Commission's report modifying its rules defines the abusive tactics with which it is concerned as "the use of competing applications, petitions to deny or citizens' agreements to extract money or other consideration from incumbent licensees or other mutually exclusive applicants, rather than to further the Commission's public interest goals."⁶ To curb these abuses, the FCC has adopted, among other reforms, limitations on the

Under the standards that the Commission articulated in adopting these new rules, the instant case presents a prime example of the conduct that the Commission views as a threat to the integrity of its process. As established below, ACGI's

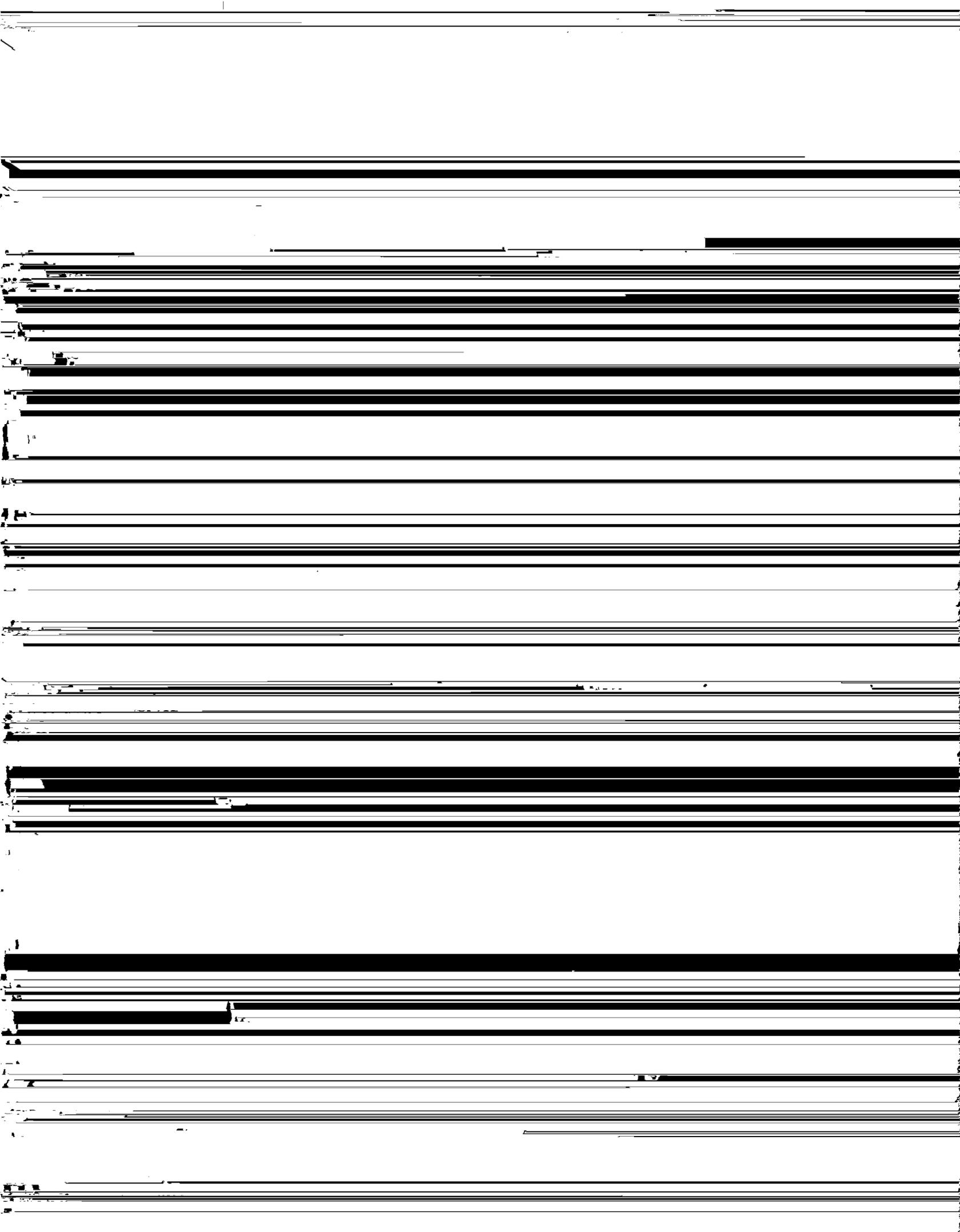
legitimate and prudent expenses; they just require deferral of such payments until after release of an administrative law judge's Initial Decision. Thus, challengers need only be willing to defer reimbursement of their expenses until after a hearing or find counsel (or be found by counsel) who are willing to defer or partially defer payment until after a hearing. Assuming (presumably on counsel's assurance) that its legal fees will be recoverable as reasonable and prudent expenses, an applicant thus sees little "downside" risk in slogging through a hearing.

In this case, ACGI and its counsel, fueled by the payments

III. ACGI's Demonstrated Lack of Connection to WBZZ(FM)'s Service Area and Its President's Past Participation in Speculative Renewal Challenges Cast Substantial Doubt on Whether the Application Is a Bona Fide Challenge

- A. The ACGI Application Evidences No Connection to the Pittsburgh Area and No Interest in Meeting the Needs of Pittsburgh Area Listeners

An applicant for a broadcast license is required to certify that its application has not been filed for an improper purpose.⁹ Thus, a party that files a bona fide application challenging an existing licensee's renewal must intend to operate and program the station in the public interest. This intention



qualifications of EZ.¹¹ Specifically, the settlement addressed an adjudicated tort case and an EEO claim that was settled after the first several days of trial. These cases received little press treatment outside Pittsburgh, except in the broadcast trade press of the type ACGI's counsel would be reviewing to discover incumbent stations "at risk."

Most significantly, neither the ACGI application nor petition makes any valid claim that WBZZ(FM)'s program performance has been other than superior or that EZ, in its operation of WBZZ(FM) for more than fourteen years, has violated any Commission rule or policy.

B. On Several Prior Occasions, ACGI's President Has Filed Speculative Renewal Challenges

By itself, the lack of expressed interest on the part of ACGI's principals in the operation of WBZZ(FM) would not be fatal. However, when viewed in combination with the ACGI president's past history of filing and then settling license renewal challenges, the generic nature of the ACGI application lends further credence to the conclusion that it was filed for improper reasons.

The application states that Herbert E. Long, Jr., a resident of northwest Washington, D.C., is president, a director, and

¹¹ See generally Opposition to Petition To Deny, filed July 29, 1991 in FCC File No. BRH-910401C2.

owner of 16.3 percent of ACGI's stock.¹² The application also discloses that Mr. Long was the president, a director, and an owner of 20.39 percent of the stock of Potomac Broadcasting Corporation ("PBC"), an applicant that filed renewal challenges against WGMS(AM), Bethesda, Maryland, and WGMS-FM, Washington, D.C., both of which at the time were owned by RKO General, Inc. In addition, the application states that Mr. Long was a partner in LBW Partnership, a limited partnership that held a 13.75 percent interest in Los Angeles Television Partnership ("LATV"). According to the ACGI application, LATV twice filed applications "for construction permit for a new television station in Los Angeles."¹³ The application notes that the PBC application and the two LATV applications were dismissed by the Commission.

The ACGI application, however, omits key facts which are relevant to an examination of ACGI's motive in filing its Pittsburgh application. First, as the FCC docket history cards attached as Exhibit 2 show, both PBC and LATV were represented by Cohen & Berfield, the law firm that currently represents ACGI.

PBC's application was dismissed pursuant to a settlement which grossed \$3.775 million for the applicant.¹⁴ What is somewhat surprising, however, is that PBC was willing to accept the payment, dismiss its application, and disappear from the FCC

¹² ACGI Form 301, Question 6. His son, Herbert E. Long, III, is listed as owning an additional five percent of the company's stock.

¹³ ACGI Form 301, Exhibit 2.

¹⁴ RKO General, Inc. (WGMS), 65 RR 2d 245, 245-46 n.1 (1988).

scene after being declared the winner in the comparative phase of

last attempt in securing a settlement. The timing of these filings raises serious questions about their motivation.

On February 24, 1986, two years after the City of Angels court ruling, LATV filed its first application and request for waiver of the FCC cut-off rules. This filing coincidentally came shortly after RKO and Fidelity proposed a settlement agreement involving Westinghouse Broadcasting and Cable, Inc. that would have brought an end to the twenty-year KHJ-TV proceeding.¹⁷ After the parties failed to consummate the Westinghouse agreement, the Commission's General Counsel dismissed LATV's petition for waiver as moot because it was determined that the waiver request was necessarily related to the Commission's disposition of that particular settlement agreement.¹⁸

Undeterred, LATV filed yet a second petition for waiver of the FCC's cut-off rules. This filing was submitted several months after RKO and Fidelity proposed a settlement involving The Walt Disney Co. Again, the proposed settlement was designed to terminate the decades long proceeding.¹⁹ The agreement called for dismissal of RKO's renewal application, grant of Fidelity's application, and ultimate acquisition by Disney of the KHJ-TV

¹⁷ RKO General, Inc. (KHJ-TV), 65 RR 2d 192, 210 n. 23 (1988).

¹⁸ Id. citing FCC 87I-019, released February 23, 1987. In its consistently litigious fashion, LATV also filed an application for review of this dismissal of its first waiver petition; the Commission dismissed the application for review as moot following LATV's submission of its second application. Id.

¹⁹ Id. at 192.

facilities. Under the agreement, Disney was to pay RKO a total of \$218,625,000 and Fidelity \$105,375,000.²⁰

LATV fought tenaciously to interject itself again at this late stage of the proceedings. Relying on City of Angels, the Commission in a well-reasoned analysis rejected LATV's second petition for a waiver of the cut-off rules. The Commission found that the settlement offered "the best opportunity to serve the public interest by terminating an extraordinarily burdensome proceeding and putting a station into the hands of an unquestionably qualified applicant with a distinguished record."²¹ Opening the proceeding to additional applicants at

dismissed this filing.²⁴ LATV filed an appeal with the United States Court of Appeals for the District of Columbia Circuit, seeking review of the Commission's approval of the RKO-Fidelity-Disney settlement and rejection of LATV's attempts to file an application. Finally, at that level, the parties reached a settlement that presumably satisfied LATV because the saga came to an end.²⁵

IV. In Filing and Prosecuting ACGI's Application, Its Counsel Has Abused Not Only FCC Processes But Committed Serious Breaches of Pennsylvania's Judicial Processes

As previously noted, on June 28, 1991, ACGI filed a Petition To Deny WBZZ(FM)'s renewal application. The focus of the Petition was an employment-related tort action and a pending EEO suit that arose from the same facts, both of which WBZZ(FM) had already settled (while the tort action was on appeal and the EEO action was being tried). As WBZZ(FM) explained in its Opposition to the Petition To Deny submitted on July 29, 1991, the settlement and the baseless claims ACGI extrapolates from it have no bearing on WBZZ(FM)'s qualifications.

Following the court-supervised settlement of the civil suits against WBZZ(FM), the judge ordered that the record be sealed. Despite this court order, ACGI's counsel opened, inspected, and copied the sealed record. He then attached his verbatim notes from the sealed record to the ACGI Opposition. He describes his actions in a sworn declaration that he attached to ACGI's Petition To Deny.

As explained at length in the affidavit of Pennsylvania counsel attached as Exhibit 3, this examination and use by ACGI's counsel of a record that he knew to be sealed constitutes a serious breach of judicial procedures under Pennsylvania law. Specifically, the action is one of indirect criminal contempt.²⁷ It is not excused merely because ACGI's counsel claims to have

²⁶ (...continued)
however, the violation is being submitted as evidence of ACGI's penchant to abuse processes.

²⁷ The label "direct criminal contempt" is reserved for offenses committed in the courtroom itself. See Affidavit, Tab 3, at 5-6.

received permission from a clerk to open the file. He admits that he knew the record was sealed and nonetheless opened it without making an effort to obtain a lawful court order permitting him to do so, and then he publicly disseminated the material again without court permission.²⁸

The commission of this grossly improper act by ACGI's counsel is further evidence of the abusive way in which ACGI has already pursued this renewal challenge. Such gross abuse takes on particular significance when considered with the Commission's many acknowledgements over the past several years that applicants represented by ACGI's counsel have been "shams" designed to take advantage of the Commission's processes and its very recent acknowledgement that ACGI's counsel has displayed a lack of candor in testifying about the formation of such applicants.

V. ACGI's Abusive Renewal Challenge Is Just One More in a Lengthy Series of Sham Applications Manufactured by Its Legal Counsel

- A. The Record in the Recent WWOR-TV Renewal Challenge Demonstrates Not Only an Abuse of Process by ACGI's Counsel and Its Client in That Proceeding But Also Highlights Its Counsel Lack of Veracity and History of Using Renewal Filings To Extract Settlements

On remand from the Commission, an Administrative Law Judge recently found a renewal challenger represented by ACGI's counsel, Cohen & Berfield, to be unqualified to participate in a

²⁸ Mr Cohen's culpability is further shown by the fact that he apparently first had called the court reporter to ask her to disclose the record to him, a request she flatly rejected. See Affidavit of Deborah S. Lampo attached at Tab 4.

monetary settlement because the challenger had filed its application solely to secure a settlement, had abused the Commission's processes, and had presented witnesses (including its counsel) who lacked candor.²⁹ Less than a year earlier, the judge had approved the same proposed settlement pursuant to which the renewal challenger, Garden State Broadcasting Limited Partnership, would have received a \$2 million payment in exchange for dismissal of its application challenging the license of WWOR-TV in Secaucus, New Jersey³⁰. Troubled by the record evidence involved in that settlement, the full Commission, however, sua sponte remanded the case for a determination whether the renewal challenger's intentions were bona fide at the time it filed its application or whether the application had been filed merely to extort payment.³¹

The Administrative Law Judge's findings on remand are particularly telling in evaluating the bona fides of ACGI. In WWOR-TV, the A.L.J. found that Garden State's principals had decided to challenge the WWOR-TV renewal less than one month after another group composed of many of the same individuals and represented by Cohen & Berfield had received a \$5.37 million payment for dismissing an earlier challenge that they had filed against an assignment of WWOR-TV's license.³² Their counsel's

²⁹ WWOR-TV, Inc., 6 FCC Rcd 4350, 4366 (A.L.J. 1991).

³⁰ WWOR-TV, Inc., 6 FCC Rcd 131 (A.L.J. 1991).

³¹ WWOR-TV, Inc., 6 FCC Rcd 1524 (1991).

³² WWOR-TV, Inc., 6 FCC Rcd 4350, 4365 (A.L.J. 1991).

share of that settlement had been \$528,000. Indeed, Cohen & Berfield's retainer agreement had included a provision calling for a ten percent bonus in legal fees if the case settled.³³

Moreover, with respect to Cohen & Berfield's conduct of the case, the A.L.J. findings on remand provide as follows: =

- Counsel had solicited Garden State's general partner to participate in the venture which "contemplated obtaining a second ultra-profitable settlement" and which the attorney had "aided and abetted";³⁴
- Counsel, a witness in the Garden State proceedings, had "misstated facts" in an account that was found to be a "factual falsification";³⁵
- Garden State lacked candor in failing to disclose documents that were in its counsel's possession;³⁶ and
- Garden State made tactical uses of its appellate rights to defer final litigation on the merits in order to facilitate a prehearing settlement.³⁷

In his decision, the judge also drew conclusions based on evidence in the record concerning Cohen & Berfield's representation of other applicants that had filed renewal challenges. Specifically, the judge found that "challengers for

³³ Id. at 4360.

³⁴ Id. at 4355.

³⁵ Id.

³⁶ Id. at 4361, 4366.

³⁷ Id. at 4367 n.16.

renewal licenses that retained Cohen & Berfield have settled the renewal cases that they litigate with a marked degree of consistency."³⁸ Similarly, he noted that ACGI's counsel "has a history of representing challengers to renewal applications and it is accepted that he has considerable expertise as a practitioner in how to apply renewal procedures in order to receive a settlement".³⁹

Finally, the judge cited another application for a new FM license in Poughkeepsie, New York, that had been handled by Cohen & Berfield. In that case, the Commission had concluded that the proposal was "'not reliable'" and unworthy of any integration credit."⁴⁰ According to the judge in the WWOR-TV case,

that finding by the Commission is probative of Cohen's and [his client's] capacity to form a mens rea to deceive the Commission in a broadcast application. That demonstrated capacity of mens rea supports the finding of wrongful intent in connection with filing an application in this proceeding for the purpose of securing a settlement and thereby abusing the Commission's processes.⁴¹

As set forth below, this intent can be inferred from many other cases and suffuses the ACGI filing as well.

³⁸ Id. at 4360. The judge cited renewal challenges to the licenses of WYST-FM, Baltimore, Maryland; KHJ-TV, Los Angeles, California; WBBM-TV, Chicago, Illinois; WBNX-FM, New York; and WOOK-FM, Washington, D.C.

³⁹ Id. at 4362.

⁴⁰ Id. at 4367 n.9.

⁴¹ Id.

B. ACGI's Counsel Have Filed Numerous Renewal Challenges and Applications for New Facilities That Have Been Deemed To Lack Bona Fides or To Be "Sham" Applications

In addition to the questionable WGMS(AM)/WGMS-FM, KHJ-TV, and WWOR-TV renewal challenges discussed above, ACGI's counsel have filed numerous other renewal challenges that have resulted in settlements for their clients. In several of these other cases, concerns have been raised about the bona fides of the applicants or the actions that they took to prosecute their applications. In addition, in countless decisions involving the award of construction permits for new broadcast facilities, applicants represented by ACGI's counsel have been found to be constructs of their counsel or "shams" disguising real parties-in-interest, most typically allegedly passive investors who did not possess the comparative attributes that would make their applications likely winners.

In a case very recently affirmed by the United States Court of Appeals for the District of Columbia Circuit, the Commission rejected the application of Southeast Florida Broadcasting Limited Partnership, a group that had been challenging the renewal of the license of WHYI-FM for six years, as a "sham" deserving of absolutely no integration credit.⁴² The Commission affirmed the Review Board's conclusion that the two-tier limited partnership had been "designed to artificially enhance

Southeast's integration and diversification showings."⁴³ The Review Board had found that the group's sole general partner had nothing to do with the partnership's formation and had had virtually no contact with the limited partners thereafter.⁴⁴ Rather, the applicant's counsel had recruited the limited partners, met with them, then recruited the general partner, and arranged a meeting for the limiteds and the general.⁴⁵ That meeting was the only occasion when the general partner met with the investors before the evidentiary hearing.⁴⁶ In addition, according to the record, the law firm, not the general partner, prepared the group's initial budget and hired its consultants.⁴⁷ Under the compensation arrangement between the applicant and Cohen & Berfield, the law firm would have received a fifteen percent bonus in the event of a settlement.⁴⁸

In a similar compensation arrangement, ACGI's counsel had represented an applicant that in 1987 had challenged the renewal of license of WBBM-TV, Chicago, Illinois, a station owned and operated by CBS, Inc. In that case, the retainer agreement

⁴³ Id. at 478.

⁴⁴ Metroplex Communications, Inc., 67 RR 185 (Rev. Bd. 1989), aff'd, 68 RR 2d 475 (1990).

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Mass Media Bureau's Proposed Findings of Fact and Conclusions of Law ("MMBPFAC"), filed December 13, 1990 at 28-29, in MM Dkt. No. 88-382, citing MMB Ex. 1. (Attached at Tab 6.)

provided for a ten percent bonus payment to counsel in the event of a settlement.⁴⁹ As it happened, the A.L.J. criticized the challenger's discovery requests as "clearly improper"⁵⁰ and, following a further problem with the general partner, the limited partners instructed counsel to settle the case.⁵¹ The settlement agreement provided for dismissal of the renewal challenge in exchange for a \$187,500 payment.⁵²

Cohen & Berfield have also been quick to represent entities challenging the various license renewal applications of major broadcast multiple owners when a problem arose at one station or with the parent company that raised the possibility that other licenses held by the group might be vulnerable. In addition to challenging the renewals of RKO-owned WGMS(AM)/WGMS-FM and KHJ-TV, Cohen & Berfield in the 1980's represented clients that challenged the licenses of five other RKO-licensed stations -- WOR(AM) and WRKS(FM), New York, New York; WFYR(FM), Chicago, Illinois; WAXY-FM, Fort Lauderdale, Florida; and WRKO(AM) and WROR-FM, Boston, Massachusetts.

The deal was a result of the fact that the parent company was in a position to pay a large sum of money to settle the case.