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Federal Communications Commission
Office of the Secretary

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

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

To: The Commission

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REPLY TO OPPOSITION TO PETITION TO DISMISS OR DENY

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January 17, 1992

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Summary

As demonstrated in the Petition To Dismiss or Deny ("Petition") filed on December 6, 1991, Allegheny Communications Group, Inc.'s ("ACGI's") application challenging the renewal of license of WBZZ(FM) must be dismissed. Nothing that ACGI has filed in opposing WBZZ(FM)'s Petition dispels this conclusion.

Both ACGI's application as originally filed on June 28, 1991, and as amended on August 30, 1991, include fatal technical flaws, the most serious of which relate to its failures to deal properly with several short-spacings. In its initial application, ACGI completely failed to protect a proposed FM allotment at Barnesboro. When ACGI attempted to fix this error in its amendment, it did not comply with the Commission's rules for contour protection. Both in the initial application and amendment, ACGI also violated Section 73.316's requirements for directional antenna systems. As the third particularly serious technical error, ACGI improperly claimed automatic entitlement to WBZZ(FM)'s "grandfathered" short-spacing rights under Section 73.213(a). With repeal of the Cameron doctrine, ACGI must demonstrate why such special treatment is warranted. Its filings are completely silent on this point.

Dismissal at this stage is also necessary because ACGI's challenge is not a bona fide application filed for the purpose of obtaining a broadcast authorization. Prompt dismissal or denial of the ACGI application is necessary to deter such abuses and ensure the integrity of the Commission's processes.

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REPLY TO OPPOSITION TO PETITION TO DISMISS OR DENY

EZ Communications, Inc. ("EZ"), licensee of WBZZ(FM) in Pittsburgh, Pennsylvania, by its attorneys, hereby replies to the "Opposition to Petition To Dismiss or Deny," that was filed by Allegheny Communications Group, Inc. ("ACGI") on December 19, 1991.[1] On December 6, 1991, EZ had filed a "Petition To Dismiss or Deny" ("Petition") against the above-captioned application, which is mutually exclusive with the application that EZ filed on April 1, 1991, seeking renewal of WBZZ(FM)'s license.

In its Petition, EZ demonstrated that serious defects in ACGI's technical proposal required dismissal of its application. In addition, EZ raised serious issues about the bona fides of ACGI's renewal challenge. In its Opposition, ACGI has presented nothing to dispel EZ's arguments about ACGI's technical proposal

[1] EZ's deadline for submitting this Reply was extended to today pursuant to extension requests to which ACGI's counsel consented.

or its motivation in filing its application. As shown in detail below, ACGI's application must be dismissed.

I. ACGI's Application As Originally Filed and As Amended Includes Patent Engineering Defects That Require Dismissal of Its Renewal Challenge

In its Petition, EZ identified numerous deficiencies in the technical portion of ACGI's application that was submitted on June 28, 1991. In its Opposition, ACGI attempts to rescue its proposal by claiming that many of the defects raised in the Petition were cured by an amendment that ACGI filed an August 30, 1991.

Far from remedying ACGI's problems, however, the amendment introduces serious new rule violations that also require dismissal of ACGI's proposal. The proposal set forth in the amendment fails to comply with the Commission's technical standards for contour protection. The amendment also leaves unremedied problems with ACGI's proposed directional antenna system and with its protection of an Ohio station.

Thus, no matter which technical proposal is considered, ACGI's renewal challenge must be dismissed because it violates Commission engineering requirements. Commission precedent does not allow disregard of these defects. Nor does precedent permit ACGI to attempt to correct the problems by filing a new curative amendment at this late date. ACGI already took advantage of the one opportunity that the Commission rules allow for amendment of its proposal. The only legally sustainable option available to

the Commission is dismissal of ACGI's amendment and its original application.

A. Background

In its original application, ACGI proposed to operate on 93.7 MHz (Channel 229) as a Class B facility with a maximum effective radiated power of 43.5 kw using a directional antenna with a radiation center 157.5 meters above average terrain. ACGI proposed that the antenna be side-mounted on a tower owned by AT&T and currently used for microwave operations. The tower is located on the northern edge of Pittsburgh. In its August 30,

station. The short-spacing arises because, as stated in ACGI's original application, the AT&T tower is 128.5 miles (206.7 kilometers) from the Mt. Vernon station and 89.4 miles (143.9 kilometers) from the proposed Clearfield operation.

In addition, as noted in ACGI's amendment, the AT&T tower is 63.6 miles (102.3 kilometers) from the reference coordinates for a proposal to allot Channel 228A at Barnesboro, Pennsylvania, which was already pending at the time that ACGI filed its application.[2] Section 73.213(c)(1) requires that a Class B FM facility be located at least 65.3 miles (105 kilometers) from the Barnesboro reference coordinates.[3]

ACGI has proposed various ways of dealing with these short-spacings. In neither its original application nor its August 30, 1991, however, has it presented solutions that comply with the Commission's rules and precedents.

B. ACGI's Amendment Is Fatally Flawed

ACGI's August 30, 1991 amendment is fatally flawed for at least three reasons. First, it fails to afford proper protection to the proposed allocation of Channel 228A at Barnesboro, Pennsylvania. Second, ACGI's proposed directional antenna system

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[2] See Order To Show Cause (MM Dkt. No. 87-433), 4 FCC Rcd 6939 (MMB 1989).

[3] Section 73.213(c)(1) rather than Section 73.207 establishes the permissible spacing between ACGI's proposal and the Barnesboro allotment because the Barnesboro reference coordinates and the Channel 229B allocation in Pittsburgh became short-spaced as a result of the Commission's revision of Section 73.207 in MM Dkt. No. 88-375. See Second Report and Order (MM Dkt. No. 88-375), 66 R.R. 2d 1473 (1989).

does not comply with the requirements of Section 73.316. Finally, in addressing the short-spacing to WQIO(FM), ACGI assumes an automatic entitlement to a short-spacing allowed to

toward the Barnesboro allocation, it must utilize contour protection under Section 73.215.[7]

ACGI's contour protection proposal, however, fails to meet the requirements of the Commission's rules. Section 73.215(b)(2)(i) of the Commission's rules requires that, for vacant allotments such as the channel at Barnesboro, contours must be based on the presumed use, at the allotment's reference point, of the maximum ERP that could be authorized for the station class of the allotment.[8] The maximum ERP for the Barnesboro Class A allotment is 6.0 kilowatts.[9] In its amendment, ACGI assumed an ERP of only 3.0 kilowatts in computing the contours necessary to protect the Barnesboro allotment. As a result, ACGI's amendment fails to give requisite protection to the Barnesboro allotment, and the amendment must be dismissed.

2. Violations of Section 73.316

The Commission must also dismiss the ACGI amendment for multiple violations of Section 73.316. ACGI's compliance with Section 73.316 is essential since it has proposed to use a directional antenna system to meet the contour protection requirements of Section 73.215.

Section 73.316(b)(2) explicitly states that "directional antennas used to protect short-spaced stations pursuant to

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[7] Report and Order (MM Dkt. No. 87-121), 65 RR 2d 1651, 1657-58 (1989), aff'd on recon., Memorandum Opinion and Order, 6 FCC Rcd 5356 (1991).

[8] 47 C.F.R. § 73.215(b)(2)(i).

[9] 47 C.F.R. § 73.211(b)(1).

Section 73.213 or Section 73.215 of the rules, that have a radiation pattern which varies more than 2 dB per 10 degrees of azimuth will not be authorized."[10] As explained at length in the attached engineering statement, the radiation pattern introduced in ACGI's August 30, 1991, amendment exceeds this basic requirement over five arcs. As shown in the table on pages 8-9 of the engineering statement, the rate of attenuation varies between 2.002 and 2.0580. Section 73.316(a)(2) does not permit rounding "down" to alleviate this problem. The rule is clear on its face: "a radiation pattern which varies more than 2 dB per 10 degrees of azimuth will not be authorized." (emphasis supplied)

In addition, ACGI's non-compliance with Section 73.316(b)(2) is not a defect that can be waived. As the Commission has repeatedly noted, waivers of Section 73.316 are available only to applicants seeking to protect a non-broadcast facility, such as Table Mountain in Colorado; the NRAO facility at Greenbank, West Virginia; or a Commission monitoring station.[11] Such waivers are not available to address a short-spacing problem.[12] As this authority makes clear, a failure to comply with Section

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[10] 47 C.F.R. § 73.316(b)(2) (emphasis supplied).

[11] See, e.g., Showem, Inc., DA 91-1479, released December 17, 1991 at ¶¶ 2-3; Radio Representatives, Inc., 5 FCC Rcd 1894, 1896 (1990).

[12] Evergreen Broadcasting Company, 4 FCC Rcd 8224, 8225 (OGC 1989), vacated on other grounds, 6 FCC Rcd 1606 (OGC 1990).

73.316(c)(2) requires dismissal of the offending amendment or application.

In addition to this fatal deficiency, ACGI's amendment fails to comply with other parts of Section 73.316. Under Section 73.316(c)(5), the FCC requires a statement that the antenna will be mounted "in accordance with specific instructions provided by the antenna manufacturer."[13] ACGI's amendment lacks such a statement. Similarly, Section 73.316(c)(7) requires a statement that "no other antennas of any type are mounted on the same tower level as a directional antenna, and that no antenna of any type is mounted within any horizontal or vertical distance specified by the antenna manufacturer as being necessary for proper directional operation."[14] Again, the ACGI amendment lacks any such statement, even though, as shown in the photographs submitted with EZ's Petition, ACGI's antenna is to be side-mounted on an existing commercial tower on which other antennae already are mounted.

In its Opposition, ACGI claims that such statements are not required until the licensing stage. Opposition at 6-7. ACGI's assertion ignores the explicit language of FCC Form 301. In no uncertain terms, the form requires applicants to provide "<u>all data specified in 47 C.F.R. Section 73.316</u>."[15]

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[13] 47 C.F.R. § 73.316(c)(5).

[14] 47 C.F.R. § 73.316(c)(7).

[15] FCC Form 301, Section V-B, Question 10 (emphasis supplied).

Moreover, the text of Section 73.316 itself belies ACGI's claim that its compliance may be delayed until the licensing stage. The various subsections of Section 73.316(c) are all prefaced with the statement that "[a]pplications proposing the use of directional antenna systems must be accompanied by the following: ..."[16] When the Commission meant to refer to license applications in Section 73.316, it specifically did so. See, e.g., Section 73.316(f). ACGI has not cited any rule language or administrative history that would excuse its noncompliance with the explicit, clearly worded requirements of Section 73.316(c). Any Commission failure to hold ACGI to these standards will make a mockery of them and prohibit their routine enforcement in other cases.

3. Failure To Protect WQIO(FM), Mt. Vernon, Ohio

As noted, ACGI's proposed transmitter site is short-spaced to WQIO(FM), Mt. Vernon, Ohio by 21.3 miles (34.3 kilometers) under the standards set forth in Section 73.207. Following the changes adopted in 1989 in MM Docket No. 87-121,[17] ACGI's proper course should have been to propose contour protection under Section 73.215 in the direction of WQIO(FM). As explained in the attached engineering statement, such contour protection is technically possible.

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[16] 47 C.F.R. § 73.316(c) (emphasis supplied).

[17] Report and Order (MM Docket 87-121), 65 R.R. 2d 1651 (1989).

Instead of proposing contour protection to address the WQIO(FM) problem, ACGI simply assumes that it can take advantage of special short-spacing rules available to "grandfathered" stations, like WBZZ(FM), under Section 73.213(a) of the Commission's rules.[18] According to ACGI, because WBZZ(FM)'s facilities qualify, ACGI's proposals also automatically qualify. Even though ACGI asserts in its Opposition that it is eligible for such an "entitlement," ACGI has not shown any factual justification for special dispensation. ACGI's legal gymnastics and its disregard for the need for any factual showing have no support in Commission rule, policy, or decision. To the contrary, judicial and Commission authorities, even those cited by ACGI, demonstrate the fallacies its claimed "entitlement."

ACGI contends that denying it the right to take advantage of WBZZ(FM)'s "grandfathered" rights would represent a "pro-incumbent bias" in violation of Las Vegas Valley Broadcasting Co. v. FCC, 589 F. 2d 594 (D.C. Cir. 1978). ACGI's counsel, Cohen & Berfield, has already tried a very similar argument once before. In comments objecting to repeal of the Cameron doctrine, Cohen & Berfield relied on Las Vegas, only to have its arguments totally rejected by the Commission.

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[18] Section 73.213(a) provides that stations at locations authorized prior to November 16, 1964 that did not meet the separation distances required by Section 73.207 and have remained short-spaced since that time may be modified or relocated provided that the predicted distance to the 1 mV/m field strength contour is not extended toward the 1 mV/m field strength contour of any short-spaced station.

As explained in EZ's Petition, the Commission in 1989, as part of its renewal reforms, abolished the Cameron doctrine, which had previously permitted renewal challengers like ACGI simply to specify the incumbent licensee's antenna site and technical facilities. Petition at 3. In abolishing the Cameron doctrine, the Commission stated that the "change [will] help

In addition, ACGI contends that RKO General, Inc. (WGMS), 57 RR 2d 629, 633-34 (1984), demonstrates that the "grandfather" benefits of Section 73.213 are available to renewal challengers. That case, however, arose prior to repeal of the Cameron doctrine, and the challenger there sought to take advantage of a site that WGMS(FM) had previously specified in a construction permit application. In this case, because of repeal of the Cameron doctrine, ACGI is no longer entitled to specify WBZZ(FM)'s facilities and cannot claim the same advantages available to the WGMS(FM) challenger. WGMS(FM) also had very little force and effect as authority even before repeal of the Cameron doctrine. Its precedential weight was limited by the Commission's statement that the RKO proceedings involved "unique circumstances" and technical defects that otherwise might have

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[21](...continued)

> incumbent already has a site available. This requirement is not "unrealistically stringent" and does not create a "pro-incumbent bias." In fact, it is possible that a challenger may actually secure a better site than the incumbent's and could obtain a preference for better coverage. Moreover, it is notable that Las Vegas Valley was itself a pre-Cameron case in which the applicant's financial difficulties stemmed in part from the fact it sought to use a site which required a right-of-way from the incumbent and did not earmark funds to meet the incumbent's asking price. The Court did not appear troubled by the fact that the challenger had to find a site of its own, and with respect to the challengers's proposed site the court stated "these difficulties" were consequences of [the challenger's] own choice of transmitter sites.

67 R.R. 2d at 1521 (footnotes omitted).

been fatal were accordingly being overlooked.[22] The WGMS(FM) case does not compel the result that ACGI seeks.

In abolishing the Cameron doctrine, the Commission indicated that, if the incumbent's site were the only "feasible one" and the incumbent indicated that the site would be unavailable, then the Commission would not allow the incumbent's obstinacy to block consideration of the renewal challenge.[23] This is not such a case. The attached engineering exhibit demonstrates that ACGI could have met the short-spacing to WQIO(FM), Mt. Vernon, Ohio by proposing contour protection. Even assuming contour protection were unavailable, ACGI has provided no factual justification for its request for special dispensation. Relevant precedent unequivocally provides that a waiver of short-spacing requirements such as that ACGI seeks in claiming entitlement to WBZZ(FM)'s "grandfathered" rights will only be granted upon a demonstration that no fully spaced or less short-spaced sites are available.[24] In fact, since 1986, the Commission has made clear that it will return short-spaced applications lacking such a

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[22] RKO General, Inc. (WGMS), 57 RR 2d at 634.

[23] 67 RR 2d at 1521.

[24] Orange Park Florida T.V., Inc. v. FCC, 811 F.2d 664 (D.C. Cir. 1987).

demonstration.[25] In such cases, the Commission will not permit the filing of a curative amendment.[26]

Support for this result is found in Section 73.3566(a) of the Commission's rules, which provides,

> Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and

failing adequately to protect the facilities of WQIO(FM), Mt. Vernon, Ohio.

C. ACGI's Original Application Must Be Dismissed Because of ACGI's Admitted Mistakes Regarding the Barnesboro Allotment As Well As Its Failure To Comply with Section 73.316 and To Protect the Barnesboro Allotment and WQIO(FM)

Once the ACGI amendment is dismissed as Commission processing standards and precedent require, ACGI's original application must also be dismissed. Again, at least three reasons compel this result. First, as noted, ACGI itself has acknowledged that the application improperly failed to protect the proposed Barnesboro allotment. In addition, the original application suffered from the identical problem involving WQIO(FM) in Mt. Vernon, Ohio. Third, the original application made very similar mistakes in describing its proposed directional antenna system.

1. Failure To Protect Barnesboro Allotment

ACGI's original application was filed on June 28, 1991. At that time, the Commission had pending before it a proposal to substitute Channel 228A for unoccupied Channel 223A at Barnesboro, Pennsylvania. Public notice of this proposal, which the Commission had already determined would serve the public

requested by existing stations.[28] As ACGI's amendment admits, there was no question but that an application filed in late June 1991 had to protect the Barnesboro rulemaking proposal that been pending for almost two years.

Andalusia, Alabama, 49 Fed. Reg. 32201 (1984), and its progeny make clear that when a pending allocation rulemaking and pending application are in technical conflict, the proposed rulemaking is to be preferred. As recently as last month, the Commission reaffirmed this long-standing principle. On December 16, 1991, the Commission released a Notice of Proposed Rulemaking proposing to give construction permit applications that had already passed a "cut-off" date protection against subsequently filed and conflicting rulemaking petitions.[29] In the opposite situation in which previously filed rulemaking proposals are in

pending long before ACGI ever filed its application. Thus, given ACGI's own admission and the weight of Commission precedent, ACGI's failure to protect the previously pending Barnesboro allotment is fatal to grant of its original application.

2. Failure To Protect WQIO(FM), Mt. Vernon, Ohio

The original application also failed to protect WQIO(FM) in Mt. Vernon, Ohio. The amendment made absolutely no change in this aspect of ACGI's proposal. Thus, for the same reasons discussed above in Section I.B.3., the original application cannot be granted.

3. Violations of Section 73.316

Finally, the underlying application's directional antenna proposal fails to comply with Section 73.316 in many of the same ways that the amendment does. As noted in EZ's Petition To Dismiss or Deny, the directional system proposed in ACGI's original application exceeds the rate of attenuation allowed under Section 73.316(b)(2). Specifically, the petition exceeds the maximum 2 db per 10° rate over the 50° to 60° and 90° to 100° arcs. In addition, the original application did not include the information required under Section 73.316(c).

In its Opposition, ACGI attempts to belittle the failures in its specification of its directional pattern, arguing that EZ improperly rounded and recalculated the figures presented in ACGI's proposal. As explained at length in the attached Engineering Statement, it is ACGI and not EZ that has miscalculated the relevant figures. EZ's objections were based

on the relative fields listed in ACGI's application, and EZ's calculations were performed in a manner consistent with that utilized by the FM Branch. ACGI's contention that, even if EZ's calculations are correct, the final results can all be "rounded down" to the 2 dB level is patently wrong. As noted earlier, Section 73.316(b)(2) is explicit in establishing 2 dB as the maximum level allowed. Allowing compliance with this section of the rules through "rounding down" would wreak havoc with the Commission's attempt to ensure that the use of directional antennas does not result in intolerable interference in the FM band. The requirements of Section 73.316(b)(2) cannot be waived, and ACGI's original application must be dismissed.

D. Engineering Conclusion

As EZ demonstrated in its Petition, there are numerous technical reasons why ACGI's original application cannot be granted. ACGI's amendment has offered nothing to cure these defects. Indeed, the amendment itself is so technically deficient that it also must be dismissed. Left without any legally acceptable technical proposal, ACGI's renewal challenge must be dismissed.

II. The Information Concerning Abuse of Process Submitted in EZ's Petition Is Clearly Relevant To Establish the Improper Motives of ACGI, and the Petition Succeeds in Doing So

In its Petition, EZ presented voluminous information which demonstrated that ACGI has absolutely no public interest reason for challenging WBZZ(FM)'s renewal; that its filing is evidence

of an emerging pattern on the part of its president to file renewal challenges merely to secure settlements; and that the application is just one of numerous ersatz or sham applications filed by its counsel, many of which have resulted in lucrative settlements.

In its Opposition, ACGI decries these contentions labelling them "frivolous," "speculative," and "anachronistic," and claiming that, following modification of the Commission's settlement rules, parties have absolutely no incentive to challenge an incumbent's renewal. ACGI's argument ignores that, although the Commission has delayed the prospect of settlement payments, the possibility of payment still remains for those well-funded applicants who have the patience to await reimbursement after release of an Initial Decision.[31] The prospect also remains for counsel to generate fees during the payment hiatus which may ultimately be paid by the challenged station, rather than his nominal client. Thus, there is relatively little risk of loss for challengers willing to put up some initial funds and persist through the Initial Decision stage, particularly if counsel for the challengers do not require immediate payment of all or most of their fees during the prosecution of the challenge.

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[31] EZ disagrees with ACGI's contention that renewal challengers have little leverage to compel a settlement after the Initial Decision stage. Renewal challengers have extensive appellate rights. The delay would not deter those who view a renewal challenge as a worthwhile, long-term speculation given the possibility, at a minimum, of recovering at least some, if not all, of their prosecution costs.

Given the obvious continued danger of potential abuse, it is extremely important, as EZ argued in its Petition, that ACGI's application be given a very thorough examination and analysis at this stage. Only by such careful review at the beginning will the Commission ensure that its resources are not misused and licensees like EZ are not held hostage to renewal extortions.

In its Opposition, ACGI first attacks EZ's contention that ACGI's principals bear no relationship to Pittsburgh. ACGI has misunderstood the point. EZ presented the evidence not to argue at this stage that ACGI is somehow to be disqualified or comparatively disfavored but to demonstrate ACGI's improper motive. Bona fide renewal challenges are filed to address perceptions of poor broadcast service, not to simply make money. Without any connection whatsoever to the Pittsburgh service area, ACGI's principals are in no position to judge EZ's truly exemplary past service during more than a decade of its stewardship of WBZZ(FM). Without some Pittsburgh connection, ACGI's motives thus are almost automatically suspect, particularly since non-resident applicants, proposing no integration of ownership and management, is normally very weak contenders. Suspicion of ACGI's motives is further engendered by the participation of ACGI's president in previous renewal challenges. ACGI's Opposition does nothing to dispel the questions EZ has raised about ACGI's motives.

In the remainder of its Opposition, ACGI repeatedly contends that EZ's evidence should be stricken. When ACGI's baseless

procedural request and invective are disregarded, however, it becomes clear that the rest of ACGI's Opposition presents nothing of substance.

In the Petition, all of the facts EZ submitted, except for those concerning publication by ACGI's counsel of sealed court records, were drawn from Commission records of which official notice may be taken. With respect to publication of the sealed records, even if ACGI's version of facts is accepted as true, i.e., that somehow Mr. Cohen mistakenly received permission to examine the sealed court record, his own declaration establishes that he realized he was dealing with records that were not to be reviewed by anyone but the parties to the Pennsylvania court action. The semantic quibble that ACGI presents at Page 18 of its Opposition to argue that the transcript of the settlement hearing was completely different from all other documents in the case because it was "non-testimonial" begs credulity. By the facts ACGI's counsel admits, there can be no doubt that he has published a portion of a record that was sealed and that he obviously knew it was sealed.

ACGI attempts to argue that somehow its counsel's publication of the sealed record should not be considered because the offense has not been adjudicated. Transgressions which are clear on their face require no adjudication. EZ has documented the extensive abuses to show a pattern of misusing the Commission's and other entities' processes, a pattern that

requires the Commission at this stage to give ACGI's application and conduct searching review.

Finally, ACGI claims that, based on two other cases in which opponents of Cohen & Berfield clients failed to make a convincing case of abuse, EZ's recitation of abusive filings made by ACGI's counsel should now be stricken. ACGI never denies, however, that the other documented cases of abuse exist. These cases include the WWOR-TV renewal challenge, see Petition at 17-20, in which both the renewal challenger and its counsel were cited for abuse of process and lack of candor, findings that were affirmed late last month by the full Commission.[32]

In Fresno FM Limited Partnership, one of the cases ACGI cites to support its request that the Commission strike EZ's arguments, the Commission struck some contentions but allowed other damning allegations to remain, specifically permitting the finding that that particular Cohen & Berfield client shared features with other limited partnerships found to be unreliable.[33] In striking the material, the Commission cited generally to Federal Rule of Evidence 404.[34] Subsection (a) of

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[32] "License Renewal of WWOR-TV, Secaucus, NJ, Affirmed," Rept. No. DC-2023, released Dec. 31, 1991.

[33] Fresno FM Limited Partnership, FCC 91-375, released Nov. 27, 1991 at n.3.

[34] Federal Rule of Evidence 404 provides as follows:

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(continued...)