

party-in-interest to Sample. There is nothing in the record to indicate that McVey performed any act relating to Eldon as an agent of O-Town. Lowrey Communications, L.P., 7 FCC Rcd 7139 (Rev. Bd. 1992).

124. While McVey believes that it would make economic sense for whoever obtains the Eldon station to consider a programming arrangement with KKSI, to enjoy economies of scale frequently afforded by such arrangements. There is no evidence that Sample's proposed station will be tied to KKSI in any manner. When McVey and Brown were speculating about a possible sale of KKSI to John Pritchard, McVey recalled that KKSI and the Eldon station could (under the rules at that time) be jointly owned. As a result, he may have volunteered that Pritchard could own both stations.

125. Sample-Day affirms that, as the general partner, she is the sole active principal of Sample. She prepared and filed the application on behalf of Sample and will be in sole overall control of the new station.

126. Linder is completely comfortable with Sample-Day's ability to manage the partnership including prosecuting the application and operating the station. He will remain entirely passive in accordance with the terms of the partnership agreement. He understands and accepts that he is a passive investor with no voice in station management or operation. This was a condition for his becoming involved in the Sample entity.

127. The Linder's acquisition of ownership of station KKSI have no bearing on the Sample application. It does not support a conclusion that the Eldon station will be under Bruce Linder's or O-Town's control. John and Donald Linder became involved in KKSI only after McVey lost the commitment of his initial financing source and was unable to secure an alternate source. McVey's initial filing for KKSI was completely independent of any Linder. There is no common thread with the instant case.

128. John and Donald Linder have had no involvement in Sample's Eldon application. There is no evidence that O-Town, or its officers or directors, will have any connection whatsoever with the management and operation of Sample's Eldon station. O-Town is not a real-party-in-interest in the Sample application.

129. Sample-Day is the only person in control of the limited partnership. She prepared and prosecuted Sample's application without any input or interference from Bruce Linder or O-Town. As the sole general partner, she has made all decisions on behalf of the applicant and will continue to do so in the future. The record fully supports a conclusion that she will be in complete overall control of the Eldon station. The control issues must be adjudicated in favor of Sample.

### 3. Programming Issues.

130. The program service statement in Sample's appli-

cation states that the station

will provide listeners in the community of license with news, weather and general information pertaining to Eldon. At the same time, listeners in the community of license will have access to regional, national, and international information. The idea is to offer a focal point where listeners can seek, find and suggest information they find pertinent to their needs. Public service announcements are a must.

131. This statement was created and certified to by Sample-Day. None of Sample-Day's hearing testimony contradicts this representation, or indicates that there would be any joint programming with KKSI. Bruce Linder is unaware of any plans or discussions to duplicate or share programming between KKSI and Sample's Eldon station.

132. McVey suggested to Brown that whoever receives the Eldon construction permit should consider a local marketing arrangement with KKSI. He believes that such an arrangement would serve the economic interests of KKSI and the new Eldon permittee by reducing operating costs. McVey testified that his comments were never meant to suggest that there was any arrangement or understanding between Sample and O-Town on the matter. He never discussed Sample-Day's programming plans with her and had no knowledge of any understanding or arrangement for Sample to share programming with KKSI. McVey commented to Bill Collins about programming arrangements between KKSI and the new Eldon station. These comments left Collins with the impression that McVey was not serious and was merely tossing ideas around.

133. The record is clear that Sample has no programming intentions to potentially duplicate the programming of station KKSI.

### 3. Misrepresentation Issues.

134. Applicants are required to be honest and candid with the Commission. Its licensing scheme depends upon its ability to trust the word of those who come before it. The Commission looks for "clues as to risks and for evidence as to expectable performance." Westinghouse Broadcasting Company, Inc., 44 FCC 2778, 2783 (1962).

135. The basic issues were added because McVey, an officer of O-Town was unable to recall making the exact statements Brown alleges. Whatever McVey said, the totality of the record shows that his statements were not based on anything anyone may have said to him. Each of Sample's witnesses was consistent in all material respects and were credible. The most important testimony was that of Sample-Day and Linder, the principals of Sample, for it is they that the Commission will look to fulfill the representations made in the application, and it is Sample who will be entrusted with Eldon construction permit and will operate the station in the public interest according to the Commission's rules.

136. There is no independent evidence that McVey's statements were anything other than unfounded comments. Brown was only able to speculate by assuming that McVey had a basis for

the alleged statements. Assumptions are not sufficient to impeach Sample's credibility. David Collins, an independent third party who presented testimony on behalf of Rivertown, stated that McVey's comments to him were loose talk, not serious and in the nature of tossing ideas around. This fully supports McVey's explanation that he could not have meant his remarks as Brown understood them; McVey had no knowledge of the relationship between Sample-Day and Linder, no information that Linder or O-Town would have anything to do with the operation of the Eldon station and no other facts upon which to base such remarks.

137. There is no evidence that Sample or its principles have made any misrepresentations to the Commission or that there is any risk that Sample cannot be expected to fulfill its representations and be completely candid with the Commission. Accordingly, the misrepresentation issue must be resolved in favor of Sample.

#### B. Standard Comparative Issues.

138. Under the standard comparative issue, the criteria are (1) diversification in ownership and control of media of mass communications; and (2) integration of ownership and management.

##### 1. Diversification

139. Neither of the applicants acknowledge having an at-

tributable interest in a medium of mass communications. Brown, Rivertown's 55% voting shareholder, has no ownership nor corporate position in any broadcast licensee. Although he is presently the general manager of KKMI Burlington, Iowa, he promised to resign from this position prior to commencing program test operations at the new station timely. However, he became the general manager of stations WAIK/WGBQ Galesburg, Illinois, on May 6, 1991, while Rivertown's application was pending.<sup>7</sup> Rivertown first reported this managerial employment to the Commission on July 7, 1992, over two months after the employment commenced and more than four months after the last day to file amendments-as-of-right in the Eldon proceeding, March 2, 1992.

140. Any mass media interests acquired by a comparative applicant after the amendment-as-of-right date must be reported to the Commission within 30 days of the acquisition under Section 1.65 of the rules. This interest will be attributed to the applicant for diversification purposes unless the applicant files a "contemporaneous" pledge to divest that interest if its application is granted. Contemporaneous is defined as being within the 30 day period set forth in Section 1.65. Woman's Broadcasting Coalition, Inc., 59 RR 2d 730 (1986).

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<sup>7</sup> The Commission considers an upper-level management position to be an attributable interest in a broadcast property. See, e.g., Reexamination of Cross Interest Policy 4 FCC Rcd 2208, 2214 (1989).

141. Rivertown did not timely report Brown's Galesburg managerial interest or his divestiture pledge. Although the amendment of July 7 was accepted for reporting purposes, the HDO specifically instructed that no applicant in this proceeding may achieve any comparative advantage from any amendment filed after the amendment-as-of-right-date. HDO, supra, at paras. 3-4.

142. As noted in the Commission's Policy Statement of Comparative Broadcast Hearings, 1 FCC 2d at n. 5, "significant managerial positions in stations and other media within and without [prescribed overlap areas] will be considered [for diversification purposes] when held by persons with any ownership or significant managerial interest in an applicant." Rivertown's failure to submit a "contemporaneous" divestiture commitment with respect to Brown's position as general manager of WAIK/WGBQ results in a slight diversification demerit to Rivertown. Thomas and Essie Collins, 93 FCC 2d 467 (Rev. Bd. 1983); J.T. Parker Broadcasting Corp., 5 FCC Rcd 4651 (1990).

143. Carmela Sample-Day is news director of KKSI Ed-dyville, Iowa. She has timely committed to resign from that position. Hence, her position at KKSI is not attributable to Sample.

144. Bruce Linder has numerous broadcast interests. However, he is an insulated limited partner and his broadcast interests are not cognizable under the Commission's policies. Anax Broadcasting, Inc., 87 FCC 2d 483 (1981); and see,

Proposals to Reform the Comparative Hearing Process 7 FCC Rcd 157, para. 34, (1990). Accordingly, Sample has no diversification demerit.

## 2. Integration of Ownership and Management

145. Sample and Rivertown claim 100% full time integration credit. However, only Sample has sustained its claim. Rivertown should receive 55% integration credit for David Brown. It has failed to prove that Ellen Bowen will have a meaningful management and policy making position with Rivertown. Moreover, the record shows that David Bowen is a joint owner of Ellen Bowen's stock in Rivertown.

146. In Richard P. Bott, II, 4 FCC Rcd 4924, 4929-30 (Rev. Bd. 1989), *rev. denied*, FCC 90-109 (released April 12, 1990) the Review Board<sup>8</sup> found that a nominally inactive spouse cannot participate in the preparation of the application, cannot be proposed to participate in any station activities and cannot assist in funding of the proposed station as a contributor, lender or loan guarantor. When a nominally inactive spouse fails to adhere to these standards he or she will be held to have a "mutual ownership stake", and will be counted as an unintegrated owner of one-half of the other spouse's interest.

147. David Bowen has a least as much, if not more, at

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<sup>8</sup> citing Absolutely Great Radio, Inc., 104 FCC 2d 1 (1986), recon denied. 2 FCC Rcd 4603 (1987)

stake as Ellen Bowen in the success of the Rivertown venture. David Bowen has involved himself with Rivertown by agreeing to loan money toward the construction and operation of the Eldon station, whereas Ellen Bowen contributed only the nominal amount of \$45 and has no further financial obligation to Rivertown. Joint funds were used to purchase Ellen Bowen's voting stock in Rivertown even though she is employed outside of the home and presumably has her own funds available. Mr. Bowen also jointly purchased David Brown's Eldon residence and Rivertown's proposed broadcast studios, remodeled this property and will be involved in the construction of the Eldon station. In addition, he has been present with Ellen at most of her meetings with David Brown and he was present at Ellen Bowen's hearing testimony in this proceeding.

148. The only reasonable conclusion is that Ellen Bowen's 45% interest in Rivertown is a marital asset in which David Bowen has a "mutual ownership stake." Consequently, Ellen Bowen's ownership interest must be divided with her husband, and reduced from 45% to 22.5%. Were she credited as holding a managerial position, she would have only a 22.5% integration in Rivertown, not the 45% claimed.

149. David Brown's integration into the management of the proposed Eldon station is enhanced by his service area residence from his birth in 1961 until 1983. Thereafter, he lived within the service area variously from April 1987 until December 1990 and from March 1992 until May 1992. This

service area residence is remote in time, occurred primarily during his youth and entitles Brown to a very slight enhancement. Linda Crook, 3 FCC Rcd 354 (Rev. Bd. 1988) (applicant lived in proposed community of license from birth until 25 years of age and then spent 50% of her time in the community thereafter).<sup>9</sup> Rivertown receives minor broadcast experience enhancement credit for the broadcast employment of Brown, a 55% owner.

150. Brown's claim for current weekend and holiday residence in Eldon occurs well after Rivertown's application was filed and, therefore, deserves de minimis credit. Harry S. McMurray, supra, n. 21. His claim for service area residence from December 1984 until July 1986 and for civic activities may not be credited because they were not described as a part of Rivertown's integration statement on file with its construction permit application on March 2, 1992, the amendment as of right date in this proceeding. As such, any credit assessed at this point would be an impermissible comparative upgrade.

151. According to the instructions for the FCC Form 301 used by Rivertown, an applicant must disclose all claims for local residence and civic activity credit in its construction

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<sup>9</sup> Whereas Linda Crook received slight credit for 25 years of residence in the proposed community of license, the weight for David Brown's 22 years of service area residence has been commensurately reduced. Residence within the proposed community of license is more heavily weighted than service area residence. Policy Statement, supra.

permit application by the amendment-as-of-right date in FM proceedings. The Commission has ruled that if "an applicant fails to disclose its integration proposal by the amendment-as-of-right date, it will receive no credit for integration in the comparative hearing." A uniform cut-off date permits parties in comparative cases "to identify the relative strengths and weaknesses in the integration proposals" and "eliminates integration gamesmanship" such as improving one's comparative position beyond the relevant date. Revision of Form 301, 4 FCC Rcd 3853, paras. 56-58 (1989). Moreover, the "submission of a standard integration statement after designation for hearing does not give rise to an opportunity to upgrade any previously submitted integration proposal." Proposals to Reform the Commission's Comparative Hearing Process, 6 FCC Rcd 3403, n. 3 (1991). It is clear therefrom that Commission policy precludes recognition of Brown's claim for civic activity credit.

152. Ellen Bowen proposes to be Rivertown's business manager. The Commission's Policy Statement on Comparative Broadcast Hearings, supra, recognizes a business manager as one of several positions meriting integration credit. In this area, however, the Commission is concerned with the actual duties of the principal and not the mere title. The applicant has the burden to prove its integration proposal. Bradley, Hand and Triplett, 89 FCC 2d 657 (Rev. Bd. 1982). Rivertown must show that Bowen will play an important role in management

and carry out policy making functions. Merely employee-type duties do not merit credit. Ft. Collins Telecasters, 103 FCC 2d 978 (Rev. Bd. 1986). What counts for determining integration credit is not who will bear a title, but who will actually manage and supervise the overall operation of the station. Sarasota-Charlotte Broadcasting Corp. v. FCC 976 F. 2d 1493; 71 RR 2d 660 (DC Cir. 1992).

153. Ellen Bowen's oral testimony at hearing was that she will perform the same functions at the Eldon station as she performed at Stations KMCD/KIHK Fairfield, Iowa, in addition to doing possibly the accounts payable. These functions consist of bookkeeper, receptionist, invoicing clerk, office manager, traffic manager, and network coordinator. They are primarily clerical, definitely non-managerial activities which have been found not to merit integration credit. Bradley, Hand and Triplett, supra. There is no evidence that Bowen will set policy, oversee, hire or fire any employees, or have any meaningful role in station management. Utah Television Associates Limited Partnership, 102 FCC 2d 1470, 1478-1479 (Rev. Bd. 1985) In Barry Skidelsky, 7 FCC Rcd 13 (Rev. Bd. 1992) citing National Communications Industries, 6 FCC Rcd 1978, 1982 (Rev. Bd. 1991), the Board held that the uncontradicted evidence that a principal will supervise, hire and fire employees, and set policy, led to integration credit. Here, however, the record contains no such evidence. On the contrary, Bowen testified that, with the possible addition of

accounts payable, she will perform basically the same duties she performed at KIIK/KMCD. These were not managerial as defined by the Commission.

154. Any doubt about Bowen's lack of future managerial status at the Eldon station is removed by the fact that Bowen has had no material involvement in the preparation, filing or prosecution of Rivertown's application. She has been virtually passive in the process. Her role has consisted chiefly of conversations with David Brown, who performed all significant functions for Rivertown. Bowen had no involvement with the Eldon allotment proceeding, with arranging for legal and engineering assistance, locating the tower and studio sites, getting the budget information, taking care of the incorporation, arranging for financing, setting up the public inspection file, or publishing the local public notices. She did not speak with Rivertown's communications counsel until nearly 18 months after the CP application was filed; she did not see Rivertown's tower site until about one month before the hearing; she knew very little about Rivertown's financial arrangements at her deposition; and there were no negotiations to arrive at her equity position in the applicant. According to the record, Ellen Bowen's only input to the application has been to write checks and make deposits to the Rivertown checking account. Rivertown's claim for Bowen's integration may not be credited. Nugget Broadcasting Company, 8 FCC Rcd 1414 (Rev. Bd. 1993), and see, Atlantic City Community

Broadcasting, Inc., 6 FCC Rcd 925 (Rev. Bd. 1991) *rev'd on other grounds*, FCC 93-335, released July 9, 1993 (principal was found not to have a bona fide role in the applicant when she deferred in the selection of the engineer and attorney; had no role in locating the transmitter site or preparing the budget or the application; and her only independent action was compilation of the EEO program).

155. Without integration credit, there is no need to review the record for any integration enhancements which may be available for Bowen. However, should she be awarded integration credit she may receive only 22.5% credit, representing her half of the joint husband/wife holding, enhanced with service area residence since 1979. As Bowen has listed mere church membership, without describing participation or involvement in any activities, she receives no civic credit for her claimed membership. Broadcast Associates of Colorado, Inc., 100 FCC 2d 616 (Rev. Bd. 1985) *rev'd on other grounds*, 105 FCC 2d 16 (1986) (no credit was awarded where there was no participation shown). Moreover, there was no mention of any civic activity for Bowen in Rivertown's application on the amendment-as-of-right date and it may not receive credit for any such claim now. Revision of Form 301, supra.

156. Rivertown's claim for a pioneer preference for having found and allotted Channel 282C3 to Eldon is not warranted. There is no Commission rule or policy which provides for a pioneer's preference under this circumstance.

The Commission is considering a Notice of Proposed Rule Making ("NPRM"), part of which concerns a possible "finder's preference" for successfully requesting the allotment of a new broadcast facility. However, that proposal has not been adopted. In addition, the Commission stated in the NPRM that it intends to apply any ultimately adopted proposals "to all applicant's not (emphasis supplied) in hearing as of the effective date of" the adoption of the proposals. This will avoid prejudice resulting from detrimental reliance on the current comparative system by applicants, such as Sample and Rivertown, that have already paid the hearing fee. Reexamination of the Policy of Statement on Comparative Broadcast Hearings 7 FCC Rcd 2664, paras. 29, 41 (1992). Rivertown's request for a pioneer preference must be denied.

157. Sample-Day, the sole general partner of Sample, has pledged to be the full time general manager of the Eldon station, working at least 40 hours per week. She is fully qualified for this position, having received a communications degree in college, devoted her professional career to broadcasting, and held an upper level broadcast management position since late 1990. She has been in direct control of the preparation and prosecution of Sample's application, making all decisions on behalf of the applicant; and, has described her managerial and policy-making duties. The totality of the record clearly evidences that she will be in complete control of the management and operation of the Eldon station.

158. Sample's 100% quantitative credit is enhanced significantly. Her local residence within the service area dates from 1988 to the present, and she proposes to establish a future residence in Eldon. She has civic involvement in the proposed service area. Newton Television Limited, 3 FCC Rcd 533, 555 (Rev. Bd. 1988). Civic enhancement credit obtains for her involvement in producing television shows on such social issues as narcotics, teen pregnancy, and agriculture. The Commission's civic enhancement credit is awarded to those applicants who demonstrate involvement with and knowledge of the needs and interests of the area they propose to serve. That some of her civic activity has been employment-related does not negate enhancement credit. Eve Ackerman 7 FCC Rcd 2493 (Rev. Bd. 1992). Sample receives broadcast experience enhancement credit for over ten years of involvement in the broadcasting field. Ackerman, supra.

159. Sample also receives minority enhancement credit for Sample-Day's Hispanic origin. Radio Jonesboro, Inc., 100 FCC 2d 941, 945 (1985). It is undisputed that her mother and maternal grandparents are full-blooded Hispanic, born in Mexico. Sample-Day lived in Mexico from 1971 to 1988, was educated there, and Spanish is her primary language. The Commission defines a member of the Hispanic minority as: "A person of Mexican ... or other Spanish Culture or origin, regardless of race." Storer Broadcasting Company, 87 FCC 2d 190, 192-193 (1981). The ancestry may be as little one-

quarter Hispanic (half as much as Sample-Day) to receive minority enhancement credit. In Hispanic Keys Broadcasting Corp., 3 FCC Rcd 3584 (1988), citing KIST Corp., 99 FCC 2d 173, 193, 195 (Rev. Bd. 1984) *modified on other grounds*, 102 FCC 2d 288, 193 (1985), a principle was granted minority enhancement credit based solely on having one grandparent of Cuban origin.

160. The fact that the FCC Form 395, Annual Employment Report, filed by KIOA(TV) for January 1990, a period when Sample-Day worked at the station, did not reflect any Hispanic employees is of no moment. The record is silent on the way KIOA's report was completed. Rivertown could have called a representative of KIOA to explain its report. It did not do so. Sample-Day does not know why she was not correctly identified as Hispanic. She told the president of the licensee that her mother was Hispanic, however, she had no involvement in preparing that report.

161. Licensees do, from time-to-time, inaccurately record the presence of minority employees on an Annual Employment Report. For example, in Dixie Broadcasting, Inc., FCC 93D-12, para. 37, released July 7, 1993, a licensee discovered in the midst of an EEO investigation by the Commission that it failed to report the presence of minority employees in two of its Annual Employment Reports. The failure of KIOA to properly reflect a Hispanic employee is more properly addressed through an investigation of the licensee of KIOA, especially in the face of undisputed testimony that Sample-Day advised the KIOA

licensee of her Hispanic background.

162. Sample also receives comparative credit for proposing to install auxiliary power at its Eldon station.

C. Ultimate Conclusions.

163. Sample is fully qualified under the basic issues added against it. It has demonstrated that its application was filed for the sole purpose of obtaining and operating the Eldon station; that O-Town and its principals will have no connection with ownership or operation of the partnership or the Eldon station; that Bruce Linder has had no involvement in the planning or developing the application; that Sample-Day is in full control of the applicant and will be so for the new Eldon station; that it has no plans to duplicate the programming of KKSI; and, that it has been completely candid and truthful with the Commission. Under the comparative issues, the following conclusions are drawn.

Diversification:

164. Sample has no attributable interests in any media of mass communications. Rivertown is assessed a slight diversification demerit for Brown's position of general manager at stations WAIK/WGBQ Galesburg, Illinois.

Integration:

165. Sample receives 100% integration credit for Carmela Sample-Day enhanced by a substantial minority preference,

service area residence and civic activities, future Eldon residence, broadcast experience and a proposal to install auxiliary power.

166. Rivertown receives only 55% integration enhanced by the service area residence and broadcast experience of David Brown.

167. Sample is the comparative winner, having a diversification advantage over Rivertown in addition to a decisive integration edge. It receives 100% integration credit, while Rivertown receives no more than 55% credit. Given this disparity,<sup>10</sup> comparison of the qualitative enhancements is not necessary. However, should Rivertown receive 100% integration credit, Sample would still prevail in that it has a diversification advantage, a substantial minority preference, current service area residence/civic credit, future local residence credit and broadcast experience, which by far exceeds the slight credit Rivertown receives for Brown's 55% vintage service area residence and minor broadcast experience credit and Bowen's 45% service area residence and three years broadcast experience. Linda Crook, supra, Radio Jonesboro, supra.

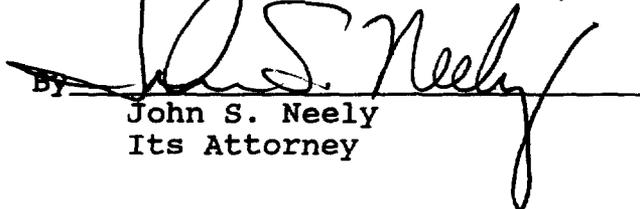
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<sup>10</sup> Even if Bowen's position is considered managerial in nature, she may receive only 22.5% integration credit, bringing Rivertown's total integration to 77.5%. The difference between Sample with 100% and Rivertown is still sufficient to overcome any qualitative advantage. Kennelwood Broadcasting Co., 6 FCC Rcd 1350 (Rev. Bd. 1991) (12.5% differential in integration credit cannot be overcome by qualitative attributes).

168. Accordingly, Sample's application must be granted  
and Rivertown's application denied.

Respectfully submitted,

SAMPLE BROADCASTING COMPANY, L.P.

By  \_\_\_\_\_  
John S. Neely  
Its Attorney

August 16, 1993

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RIVERTOWN COMMUNICATIONS COMPANY, INC.  
FORM 301  
OCTOBER 4, 1991  
EXHIBIT IV-B

David W. Brown will work full-time, a minimum of 40 hours per week, as General Manager of the Station, overseeing every aspect of station operations.

Mr. Brown's proposed integration is enhanced by (a) his local residence in Eldon since October 4, 1991, as well as his past residence in the service area from 1961 - 1983, 1987 - 1990, and (b) his broadcast experience, which includes the following:

Staff announcer at KLEE AM & FM in Ottumwa, Iowa from 1977 to 1979.

Staff announcer of KBIZ AM in Ottumwa, Iowa from 1979 to 1983.

Staff Announcer/Salesman of KNIA AM in Knoxville, Iowa from 1983 to 1985.

Operations Manager at KFMD FM in Des Moines, Iowa from 1985 to 1986.

Operations Manager at KRIT FM in Fort Dodge, Iowa from 1986 to 1987.

General Manager of KMCD AM & KIIK FM in Fairfield, Iowa from 1987 to 1989.

Announcer/Public Affairs Director of KBKB FM in Ft. Madison, IA from January 1991 to August 1991.

General Manager of KKMI in Burlington, Iowa from August 1991 to present.

David W. Brown also claims enhancement for civic activities.

Ellen Bowen will work full-time, a minimum of 40 hours per week, assuming duties as Business Manager of the Station.

Mrs. Bowen claims qualitative credit for the following enhancement factors: (a) past local residence in the service area, having lived in Fairfield since March of 1979, (b) is a female, (c) has broadcast experience, having served as Business Manager/Traffic Manager and Network Coordinator at KMCD AM & KIIK FM in Fairfield, Iowa from July, 1986 - July, 1989.

CERTIFICATE OF SERVICE

I hereby certify that on this 16 day of August, 1993, a copy of the foregoing document was placed in the United States mail, first class postage prepaid, addressed to the following:

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