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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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MM Docket No. 92-316 ✓

In re Application of

RIVERTOWN  
COMMUNICATIONS  
COMPANY, INC.

File No. BPH-911008ME

SAMPLE  
BROADCASTING  
COMPANY, L.P.

File No. BPH-911010MA

For Construction Permit for a New  
FM Station on Channel 282C3  
in Eldon, Iowa

**Appearances**

Donald E. Ward, Esq. on behalf of Rivertown Communications Company, Inc.; John S. Neely, Esq. and Jerrold Miller, Esq. on behalf of Sample Broadcasting Company, L.P.; and Norman Goldstein, Esq. on behalf of the Mass Media Bureau, Federal Communications Commission.

**INITIAL DECISION OF ADMINISTRATIVE LAW  
JUDGE JOHN M. FRYSIK**

Issued: November 2, 1993; Released: November 10, 1993

**PRELIMINARY STATEMENT**

1. The mutually exclusive applications of Rivertown Communications Company, Inc. ("Rivertown") and Sample Broadcasting Company, L.P. ("Sample"), each seeking a construction permit for a new commercial FM broadcast station at Eldon, Iowa, were designated for hearing by *Hearing Designation Order* (DA 92-1754) released January 21, 1993, under the standard comparative issues. By *Memo-randum Opinion and Order* of the Presiding Judge released March 26, 1993 (93M-124), issues were added as follows:

- (1) To determine whether the application of Sample Broadcasting was filed for the purpose, in whole or in part, of delaying action upon and grant of the application of Rivertown Communications Company, Inc.;
- (2) To determine whether O-Town Communications, Inc., and/or any of its officers, directors, and stockholders, is a real party-in-interest to the application of Sample Broadcasting;
- (3) To determine the extent of the involvement of Bruce Linder in the planning and development of the application of Sample Broadcasting;

(4) To determine the programming intentions of Sample Broadcasting, with particular reference to potential duplication of the programming of Station KKSI-FM;

(5) To determine, in light of the evidence adduced under the foregoing issues, whether the application of Sample Broadcasting affirmatively misrepresents material facts, or knowingly conceals material facts; and

(6) To determine, in light of the evidence adduced under the foregoing issues, whether Sample Broadcasting possesses the basic qualifications to be a Commission licensee.

2. A prehearing conference was held March 22, 1993. An admissions hearing session was held May 25, 1993. Hearing sessions were held June 22-23, 1993, on all issues. The record was closed June 23, 1993.

**FINDINGS OF FACT**

**Rivertown Communications Company, Inc.**

3. Rivertown is an Iowa Corporation, formed on August 21, 1991. It has a single class of stock -- common voting -- of which the owners are:

David W. Brown	55 shares	55%
Ellen M. Bowen	45 shares	45%

David W. Brown ("Brown") is the president and a director of the corporation; Ms. Bowen is the secretary, treasurer, vice president, and a director (Rivertown Ex. 1).

4. Neither Rivertown nor either of its stockholder has any interest in any medium of mass communications.

5. Rivertown claims a preference in the nature of a "pioneer's preference" for having found and successfully proposed the allocation of Channel 282C3 to Eldon in January 1991; by its Report and Order released July 26, 1991 (6 FCC Rcd 4516), the Commission made the allocation at Rivertown's request (Rivertown Ex. 1, Att. A).

6. Brown will be a full-time general manager of the proposed station, and will devote a minimum of 40 hours per week to the station's management, and will oversee every aspect of station operations. He will resign his current position as manager of Station KKMI-FM, Burlington, Iowa, following the grant of Rivertown's application and prior to the commencement of operations of the Eldon station (Rivertown Ex. 2).

7. Brown was born in Ottumwa, Iowa, (within the proposed service area) on August 13, 1961, and lived on his family's farm approximately eight miles southwest of Eldon from birth until after his graduation from high school in Bloomfield, Iowa (also within the proposed service area) in 1979 (*Id.*).

8. Following graduation from high school, Brown moved to Ottumwa where he lived until September 1983, when he moved to Knoxville, Iowa. He returned to the family farm in December 1984, and moved back to Ottumwa in May 1985, remaining until July 1986. After a brief period in Fort Dodge, Iowa, he returned to Ottumwa in April 1987, and in September 1987 he moved to Fairfield, Iowa (also in the proposed service area) where he lived until July 1989, when he returned to the family farm just south of Eldon, remaining there until December 1990 (*Id.*).

9. Brown (together with Ms. Bowen's husband) purchased a residence in Eldon in October 1991, where he lived briefly in the Spring of 1992, before moving to Illinois to manage stations in Galesburg. He spends most weekends and occasional holidays there, and would make it his full-time residence following grant of Rivertown's application (*Id.*).

10. Brown's civic activities in the community and service area are listed as follows:

- Membership on the Wapello County Cancer Society Board, 1982-1983.
- Recipient, in 1982, of the Silver Award from the Wapello County United Way for "Outstanding Service to the People of Our Community."
- Member of the Board of Care and Share, an Ottumwa non-profit organization, 1982-1983.
- Promotion of fund-raising activities for new uniforms for the Ottumwa High School Band, 1982.
- Served as Chairperson to the Great Western Expedition, a community kids challenge project (Ottumwa), 1982.
- Member of the Fairfield/Jefferson County Isaac Walton League, 1988-1989.
- Member of the Fairfield JayCeers, 1989.

(*Id.*).

11. Brown's broadcast experience dates from his high school days, when he was employed as a part-time staff announcer at Stations KLEE(AM) and -FM, Ottumwa, Iowa, from August 1977 to October 1979. He became a full-time employee after his graduation in May 1979. He was employed by KBIZ(AM) in Ottumwa from December 1979 to January 1983, first as a staff announcer and later as public service director. He returned to KLEE (AM)/KLEE-FM in January 1983 as staff announcer and salesman, leaving in September 1983 to take a similar position with KNIA(AM), Knoxville, Iowa, where he remained until November 1984. He was employed as sales manager/staff announcer at KLBA(AM) Albia, Iowa, from November 1984 to March 1985, when he was hired by Stations KXJX/KFMD at Pella/Des Moines as staff announcer and salesman and later operations manager, remaining there through July 1986, when he moved to KRIT-FM, Clarion/Ft. Dodge, Iowa, as staff announcer, operations and program director, and interim manager until March 1987 (*Id.*).

12. In June 1987, Brown was employed by KMCD(AM) and KMCD-FM, Fairfield, Iowa, as operations and program director, and later general manager, remaining until July 1989. He was program director and staff announcer at KXOF-FM, Bloomfield, from February 1990 to September 1990. From January 1991 to August 1991, he was public affairs director and staff announcer at KBKB(AM) and -FM, Fort Madison, Iowa, resigning to become general manager of KKMI(FM), Burlington, Iowa, where he was employed from August 1991 to March 1992, and from September 1992 to the present. From May 1992 to September 1992, he was general manager of Stations WAIK(AM) and WGBQ-FM, Galesburg, Illinois (*Id.*).

13. Ellen Bowen is a 45% stockholder of Rivertown, and its vice president, secretary, treasurer and a director. She will be the full-time business manager of the station and

will devote a minimum of 40 hours per week to those duties. Her principal responsibilities will include overseeing billing, collections, and accounts payable, and coordinating sales and traffic. She will resign her current employment with Excel Corporation in Ottumwa (or any other position which she may hold at the time) following grant of Rivertown's application and prior to its commencement of operation, in order to perform her duties as Rivertown's business manager (Rivertown Ex. 3).

14. Ms. Bowen's broadcast experience consists of employment at Stations KMCD(AM) and KIIK(FM), Fairfield, Iowa, from July 1986 to July 1989 in various capacities, including bookkeeper, receptionist, invoicing clerk, office manager, traffic manager, and network coordinator (*Id.*).

15. Ms. Bowen has been a resident of Fairfield, Iowa (within the proposed service area) since 1979, and her civic activities include membership in the First Assembly of God, Fairfield, Iowa (*Id.*).

#### Sample Broadcasting Company, L.P.

16. Sample is a limited partnership comprised of Carmela Sample-Day ("Ms. Sample-Day") as its sole general partner (40% equity) and Bruce Linder ("Linder") as its sole limited partner (60%) (Sample Ex. 4).

17. Sample holds no ownership or control of any medium of mass communications (Sample Ex. 1).

18. Ms. Sample-Day has been until very recently the news director at KKSI(FM), Eddyville, Iowa (since October, 1990). She timely committed to resign that position in Sample's construction permit application, and reaffirmed that commitment at hearing. Linder is the 49% general partner of Rogers Broadcasting Company, permittee of FM station KXAC St. James, Minnesota; a 25% voting shareholder, officer and director of O-Town Communications, Inc., licensee of FM Station KKSI, Eddyville, Iowa. He also holds a 9.53% voting interest in Minnesota Valley Broadcasting Company, licensee of AM Station KTOE, Mankato, Minnesota, and KDOG(FM), North Mankato, Minnesota. Minnesota Valley Broadcasting Company owns 100% of the voting stock of KMHL Broadcasting Company, licensee of KMHL(AM)/KKCK(FM), Marshall, Minnesota, and EARL(FM), Tracy, Minnesota; and owns 49% of the voting stock of Waite Park Broadcasting Company, permittee of a new FM station at Glencoe, Minnesota (Sample Exs. 1, 4).

19. Sample's limited partnership agreement states that its general partner has full and exclusive charge and control of the management, conduct and operation of the partnership in all respects and sole control over the day-to-day operations of the radio station. The agreement provides that the limited partner has investment rights only, and shall not be involved in the management or operation of the partnership's enterprises, act as an employee of the limited partnership, serve in any material capacity as an independent contractor or agent of the partnership, communicate with the general partner on matters pertaining to the day-to-day operations of the partnership business, vote on the removal of the general partner, perform any services and shall take no part in or interfere in any manner with the management, conduct or authority of the partnership business and shall have no right or authority to act for or by the partnership (Sample Ex. 1, pp. 6-7).

20. Ms. Sample-Day will be the general manager of the new Eldon radio station, working a minimum of 40 hours per week (full-time) there. She will be in charge of all

aspects of the station's operation, including but not limited to, setting all station policies, hiring and firing personnel, verifying all accounting books and assuring compliance with all federal and local laws and regulations. She will supervise all employees and will oversee the entire day-to-day operation of the station. Prior to the Eldon station commencing broadcast operations, she will resign any employment she may have in order to work full-time at the new radio station. She has no other business commitments (Sample Ex. 4).

21. Ms. Sample-Day claims minority enhancement credit as an Hispanic. Her mother and maternal grandparents are full-blooded Hispanics, born in Mexico. She was born and spent the early part of her childhood approximately 30 miles from Eldon, moving to Mexico and becoming a full-time resident there in 1971. She attended I.T.E.S.O. college in Guadalajara, Mexico, and graduated in 1985 with a four-year degree in communications. She speaks fluent Spanish and considers it to be her primary language with English as a second language. She recently accepted an on-call volunteer position assisting with a Spanish/English translation program for the local Iowa court system (Sample Ex. 2, 4; Tr. 110, 111).

22. Ms. Sample-Day worked at KIOA(TV), Ottumwa, Iowa, during the first quarter of 1990, however, she was not listed as an Hispanic employee on the FCC Form 395-B 1990 Annual Employment Report filed by the TV station during that period. Ms. Sample-Day alleges that she told the president and general manager of the KIOA licensee that her mother was Mexican, and she does not know why the station failed to properly report her minority status on the employment report (Rivertown Ex. 16, Tr. 121).

23. Ms. Sample-Day has resided in Ottumwa, Iowa, within Sample's proposed service area (1 mV/m contour), since November 1988. In the event Sample's application for Eldon is granted, Ms. Sample-Day will move her residence to within the Eldon, Iowa, city limits prior to commencing program test authority (Sample Ex. 4).

24. Ms. Sample-Day lists the following civic experience within Sample's proposed service area:

*United Cerebral Palsy Telethon:* volunteer camera work and phone assistance for live television broadcast over station KOIA-TV, Ottumwa, Iowa; Winter 1988 for approximately 12 hours;

*Created and produced drug series for television:* Dealt with the issues of illegal drug sales, drug abuse and the public services available for drug addicts in southern Iowa. Her involvement covered a period of about one week in October 1989 with an average of thirty hours spent directly on the program;

*Created and produced a 30 minute TV show about farmers in southern Iowa:* Dealt with developments in farming techniques, the effect of the competition between big and small operation farmers and the extent to which farmers rely on government subsidies to make a living. Her involvement in the project cov-

ered a period of about one week with an average of 25 hours spent directly on the program, October, 1989;

*Created and produced a 30 minute TV show about teenage pregnancy in southern Iowa:* Dealt with the incidence, attitudes, responses and government programs surrounding teenage pregnancy in southern Iowa. Her involvement covered a period of about two weeks with an average of fifty hours per week spent directly on the program. April 1990 and September 1990 through November 1990;

*Grand opening of a new business.* Invited as volunteer host and judge of a pet show. Ottumwa, Iowa; Fairfield, Iowa; May 1990 for a period of about three hours;

*Muscular Dystrophy Association:* Master of Ceremonies for local talent show. Ottumwa, Iowa; September 1990 for a period of about eight hours; and

*Oktoberfest:* Participated in the parade and volunteered in the food tent, Ottumwa, Iowa. This activity was for the benefit of all of Wapello County. September 1990 for a period of one day.

(Sample Exs. 2, 4).

25. Ms. Sample-Day's broadcast experience is as follows:

May 1982 - November 1988	Jorge Corres, Guadalajara, Mexico Translator/Script & Audio Producer for radio and television
November 1988 - February 1989	News/Production Volunteer
February 1989 - August 1990	News Reporter/Anchor KOIA-TV Ottumwa, Iowa
October 1990 - Present	KKSI(FM) Eddyville, IA News Director <sup>1</sup>

(Sample Ex. 4).

26. She was the first news director at KKSI and is responsible for establishing all policy in the news and public affairs programming area, subject to the oversight of the station general manager. She prepares and maintains the station's Quarterly Issues and Programs reports. As a department head, she coordinates with the programming, engineering and sales departments. She hired and supervised a part-time employee in the news department and is responsible for scheduling air-shift replacements for herself when she must be away from the station. As a result of the signal coverage of KKSI, Ms. Sample-Day is responsible for gathering, writing and reporting news events from sixteen counties, which has given her special insight to the needs and interests of the people in Southeastern Iowa (Sample Ex. 2).

27. Sample will install an auxiliary power source at its transmitter site so that the new station may continue to operate in the event of a failure of commercial power (Sample Ex. 4; Tr. 183).

<sup>1</sup> By amendment filed September 17, 1993, Sample reports that Ms. Sample-Day is no longer employed at KKSI. See Order,

*Sample's Basic Qualifying Issues - strike application; real party-in-interest; role of passive investor Linder; Sample's programming intentions, and misrepresentation.*

28. As indicated in Finding No. 5, above, Rivertown proposed the allocation of Channel 282C3 to Eldon in January 1991 and by its Report and Order released July 26, 1991, the Commission made the allocation at Rivertown's request.

29. Mark McVey ("McVey") is a 20% voting shareholder, officer, director and chief engineer of O-Town Communications, Inc., licensee of FM Station KKSI Eddyville, Iowa (Sample Ex. 5).

30. McVey first learned of a proposal to allot an FM channel to Eldon in the Spring of 1991 from Ben Evans, a consulting engineer whom he contacted while searching for a possible FM translator frequency for KKSI (Tr. 237).

31. In June 1991, McVey had a conversation with David W. Brown in which they talked generally about how radio stations operate. McVey and Brown have been friends for roughly ten years and have worked together on many projects (Sample Ex. 5). During this conversation, Brown claims that McVey mentioned Brown's pending petition to allot a channel to Eldon, and suggested that Brown consider rebroadcasting KKSI if he were awarded the Eldon permit. Brown responded that it was too early to think about that and asked whether the Linders were aware of the Eldon allotment petition. McVey said that they were. Brown asked if they planned to file an application for Eldon, and McVey responded that he didn't know (Sample Ex. 5, p. 4; Rivertown Ex. 4, ¶ 2). McVey's recollection of this conversation is not good in that it occurred about two years ago (Sample Ex. 5).

32. McVey disallows that it is possible that the potential new FM station at Eldon was mentioned during the 1991 conversation as it was one of Brown's projects. If such were the case, McVey assumes that he likely would have remarked that start-up operations can be very expensive, as he learned from his own experience in building KKSI. In 1991, McVey was familiar with local marketing agreements, known as LMAs, which were beginning to be used by stations as a way of keeping their costs down. McVey believes he suggested to Brown that, in his opinion, it would make sense for any new permittee at Eldon, including Brown, should he receive the construction permit, to consider a programming arrangement with a station such as KKSI. McVey thought that it might make sense for KKSI to consider such an arrangement because it would give the station a broader coverage area. Although an officer of O-Town, McVey emphasizes that any conversations he had with Brown were not in an official corporate capacity. McVey has no authority to make station policy on his own, and was not authorized to speak for KKSI. McVey had not spoken to anyone connected with KKSI about this subject prior to his conversation with Brown in 1991; anything he might have said then was strictly his own brain-storming. In April 1991, William D. Collins ("Collins") was employed by Station KKSI. According to Collins, McVey said at that time "We ought to get Carmela (Sample) to file on that (Eldon) frequency, and then what we ought to do is tie them together so you would have KKSI-FM from here to the Mississippi River." Collins did not understand McVey to be serious (Rivertown Ex. 5, ¶ 1).

33. In June 1991, before the channel was allocated, McVey had no idea who might apply for and become the permittee at Eldon, or what their programming plans might be for the station (Sample Ex. 5, p. 5).

34. After learning of the allotment, McVey thought immediately that the Eldon station could be a good business opportunity for O-Town. McVey believed it would be possible to operate it jointly with KKSI, to achieve economies of scale (Sample Ex. 5, p. 1; Tr. 231, 241, 242, 244).

35. McVey frequently notifies Bruce Linder of filing windows for new channels in hopes that they would be willing to expand the corporation's holdings. For example, he suggested filing opportunities for new FM channels at Arkansas City, Kansas, and at Albia and New Sharon, Iowa. The Albia and New Sharon allotment were made by the Commission in December 1991 for Class C3 facilities within the 1 mV/m contour of KKSI (Tr. 261-162). These suggestions were not pursued by the company, however. These notifications usually occur by phone. McVey speaks with Donald Linder about KKSI business only about five times per year (Sample Ex. 5, p. 1; Tr. 237).

36. McVey knew that the FCC had a policy which prohibited common ownership of FM stations with overlapping city-grade signal contours, and thought that this might be a consideration should O-Town want to pursue the channel. Without discussing the matter with anyone once the Eldon channel was allotted, he called Owl Engineering and commissioned a study to determine whether it would be possible for O-Town to own both stations without violating the city-grade contour overlap prohibition. He first received an area to locate map in early August. This map indicated the area where a transmitter site for the Eldon station might be located to avoid short-spacing to other stations. It did not consider KKSI's contour. About a week later he received a second map showing the area to locate an Eldon site to avoid city-grade overlap with KKSI. This showed a reasonably large area toward the southeast (Rivertown Ex. 6, 7; Tr. 264).

37. After receiving the second map, which verified that O-Town could own the Eldon station without contour overlap with KKSI, McVey called Bruce Linder and mentioned his interest in having O-Town pursue this allotment. Linder did not act interested (Tr. 243-245, 247). McVey did not consider applying for the station in his own name because he did not have the necessary financial resources and did not believe he could obtain them (Sample Ex. 5, pp. 1-2). McVey did not consider joining with Ms. Sample-Day in an application; he may have discussed with others the possibility of joining in an Eldon application (Tr. 249).

38. Although Bruce Linder was not interested in personally pursuing the channel, he thought that O-Town might be interested. He asked either Garret Lysiak of Owl Engineering or McVey whether there would be city-grade service contour overlap between KKSI and the new Eldon station (Tr. 304). From his broadcast knowledge, Linder believed that the FCC had policies (at that time) prohibiting people from having an active interest in more than one FM station with overlapping city-grade signal contours, and wanted to know if this would be a concern should O-Town decide to pursue the Eldon channel (Tr. 314). Linder believes that McVey informed him verbally that it was possible to locate the Eldon station so that its city-grade contour would not overlap that of KKSI. Shortly after learning of the Eldon allotment Linder asked Donald Linder, his father, whether he wanted to pursue the Eldon channel as an opportunity for himself or for O-Town. Donald was not interested. As a result, Bruce Linder let the matter drop for a while (Sample Ex. 3; Tr. 305).

39. After some time, Linder reconsidered his initial reaction toward the Eldon channel. He thought that it had some investment possibilities after all, and might be worth the risk of a start-up small business. He also decided that personally overseeing the Eldon operation would divert too much of his energies and attention from his required duties for KMHL Broadcasting Company, his employer in Mankato, Minnesota, and with the management at station KKSI. Linder decided that he would pursue the Eldon station only if he could combine with a qualified person who would be the active principal at the station. He wanted only a passive investment interest; one that would not require his time or attention (Sample Ex. 3).

40. Ms. Sample-Day learned about the channel allotment at Eldon from reading an article in a local newspaper in the summer of 1991. Prior to reading the article she may have been aware that the allotment had been proposed to the Commission (Tr. 113). Upon reading the newspaper article, she became very curious about the Eldon opportunity and considered filing for the Eldon facility as a sole proprietor. Two people with whom she spoke about the Eldon station were Bruce Linder and McVey (Sample Exs. 2, 3; Tr. 140).

41. Ms. Sample-Day approached McVey and said that she was interested in filing for the Eldon channel. She had known him through working at Station KKSI and was aware that he had been involved in the initial filing for the station. She respected his knowledge. She asked him to describe what was involved in the process, and whether he thought that the Eldon channel was a good idea. McVey told her that he thought that it was a good idea and that he had wanted O-Town to file for the channel (Sample Ex. 5, p. 2). McVey suggested some places where Ms. Sample-Day should look for names of engineers and consultants after she had indicated that she was interested in the Eldon channel (Tr. 253-254, 276).

42. Ms. Sample-Day had wanted to get into station ownership for quite some time. After she came to work at KKSI she would talk to McVey about his experience from time-to-time. McVey described the process of how to get into broadcast ownership because he wanted to be helpful (Tr. 251). McVey recalls discussing with Ms. Sample-Day that John and Donald Linder financed the Eddyville station. He does not recall telling her that she should seek out the Linders as a financial source for her application (Tr. 255).

43. At a luncheon meeting, Ms. Sample-Day broached the subject of the Eldon allotment to Bruce Linder and asked him if he knew what was involved in the application process. This was his first definite clue that Ms. Sample-Day had an interest in getting into ownership of the Eldon station. He gave her a very general overview of the steps involved. She then asked him if he was interested in the Eldon channel and would be willing to consider joining with her in applying for and pursuing the Eldon station (Tr. 141).

44. Linder told Ms. Sample-Day that he might be interested in joining with her in an application, but only as a passive investor with no responsibility for the management or operation of the business or the radio station. Linder told Ms. Sample-Day that he did not want to be involved with applying for or running the station, and would not be able to help her. He wanted her to take the responsibility and do the work needed for the station and the application (Tr. 311). Linder also knew that it was very important for FCC purposes that he have no active participation with the

application or the radio station (Tr. 317). He anticipated other applicants for the construction permit and he did not want a weak comparative application (Sample Ex. p. 3; Tr. 307).

45. Linder first met Ms. Sample-Day in late 1990 or early 1991, a few months after she started working at station KKSI. Through her employment there, Linder observed that she is very good at working with others and is resourceful, competent and someone who has the ambition and ability to handle a start-up business and could make a good business partner (Sample Ex. 3). They had a number of formal and informal opportunities to get to know one another, including working together on making a film in the Spring of 1991 (Tr. 301-302). He decided that Ms. Sample-Day might be someone he could trust to run the station. He arranged to visit her to discover the possibility of the two of them joining forces to apply for the station. He had planned to mention the topic to her when she raised it first (Tr. 306).

46. Linder offered to secure the financing for the project if they went ahead. They discussed that he had resources to finance a commitment of that nature (Tr. 319). They made no decision at that meeting about joining together for the Eldon project, but agreed to talk again (Tr. 141). During several subsequent discussions, they talked about radio station operation, programming and formats. They discussed the general requirements of preparing and filing a construction permit application, the risks involved with a start-up business and whether the Eldon channel was worth pursuing (Sample Ex. 2, p. 3; Sample Ex. 3).

47. To get to know Ms. Sample-Day even better, Linder asked Ms. Sample-Day about her goals, aspirations, and employment history. It was most important to Linder that he be able to trust Ms. Sample-Day, because she would be responsible for making all decisions for the joint venture and the Eldon station. Through their discussions, she learned that many of their ideals and interests complemented each other. She believes him to be intelligent and trustworthy. She has always felt comfortable with him (Sample Ex. 2, p. 2).

48. Ms. Sample-Day took some time to consider her options and interests further to make sure that she was prepared and committed to undertake the responsibility of forming and being in charge of this new business. After a few days of consideration, she decided that she wanted to pursue the Eldon construction permit. The Eldon station would be a career and business opportunity for her and a chance to build a business in her field in the same general area where she was born and her father had been a member of the business community (Sample Ex. 2, p. 3).

49. In late August 1991, Linder and Ms. Sample-Day agreed to form the limited partnership and apply for the Eldon channel. Under their partnership agreement, Ms. Sample-Day contributes services only, sweat equity (Sample Ex. 1, p. 4). Ms. Sample-Day understands that, as the general partner, she is fully liable for the construction and operation expenses of the partnership (Tr. 129).

50. Linder did not envision at the time that he became involved in Sample that the Eldon station would make station KKSI more valuable. Ottumwa is the largest community within the signal coverage contours of KKSI and Sample's proposed Eldon station. At the time that Sample's application was filed, KKSI derived approximately 30% of its revenue from Ottumwa. Currently, it derives about 50% (Tr. 338). If Rivertown receives the Eldon construction permit, it will take some advertising revenue from KKSI

and in this way compete in the marketplace (Tr. 339). Linder also testified that in Mankato, Minnesota, and Eddyville, Iowa, two markets with which he is personally familiar, when a new station entered the market with attention-getting promotions, it stimulated the merchants' interest in radio and attracted attention away from newspaper and T.V. advertising. This made it easier to sell radio advertising and created increased sales and profits from the radio stations in the market (Tr. 343).

51. Linder treats his interest in O-Town as an entirely separate business venture from his interest in Sample. As a voting shareholder of O-Town, he has a voice in the operation and management of station KKSI. There has never been any discussion between Ms. Sample-Day and Linder regarding the joint operation or programming between KKSI or O-Town and the proposed Eldon station. He has not spoken about these subjects with anyone. O-Town has made no arrangements, and has no plans or understandings with Sample or Ms. Sample Day regarding the Eldon station. There are no plans or arrangements to have any type of joint relationship between the two stations (Sample Exs. 1, 3).

52. Upon agreeing to form the limited partnership, Ms. Sample-Day began to take steps to prepare and file the construction permit application (Sample Ex. 2, p. 3; Sample Ex. 3; Tr. 301). Linder left Ms. Sample-Day in total charge of the application process. While he suggested some names and listings of consultants, Ms. Sample-Day was solely responsible for selecting and hiring all of the consultants she felt she would need to prepare and file the Eldon application. After speaking with several potential communications counsel, she selected and retained Miller & Fields, P.C. (now Miller & Miller, P.C.) (Tr. 112). She relied on communications counsel to outline the steps required for preparing and filing the Eldon construction permit application. She spoke to several broadcast consulting engineers before retaining Owl Engineering. She selected McKay, Moreland & Webber as local counsel to assist in drafting the written limited partnership agreement to memorialize the understanding which she and Linder reached. The selection of these consultants was Ms. Sample-Day's decision entirely; Linder had no control over her decision to hire any consultant (Sample Ex. 2, p. 4; Sample Ex. 3, p. 3; Tr. 127, 152).

53. At Ms. Sample-Day's request, Owl Engineering sent a map to her showing the permissible Eldon transmitter site area so that she could begin to locate a suitable site. The map was identical to the first map which Owl Engineering sent to McVey (Rivertown Ex. 6; Tr. 217). She had difficulty interpreting this map and asked McVey for help in locating a site (Tr. 258-259). At his suggestion, she obtained more detailed 7.5 minute survey maps directly from the U.S. Geological Survey Bureau. She did not understand the USGS markings and asked McVey's further assistance in locating a transmitter site (Sample Exs. 2, 5; Tr. 259).

54. Ms. Sample-Day was concerned that the larger towns such as Ottumwa might be over-saturated radio markets, did not want the Eldon station to have to rely entirely on them for revenue, and wanted to be able to offer signal coverage to advertisers in stable but less radioed areas such as Van Buren county to the south of Eldon. Ms. Sample-Day decided that she wanted to serve Fairfield, Bloomfield and Ottumwa, Iowa, and Van Buren county including such towns as Keosauqua, Iowa. By looking at the maps, McVey

was able to point out the general land area which would allow her to serve the areas she had in mind (Sample Ex. 2, 5; Tr. 209-210).

55. McVey told her that they would need to look at the area in person. He suggested that they first investigate land near the town of Leando which appeared from the map to be high, flat and near a highway and microwave tower. They went together and McVey pointed out several areas that appeared to be large enough, near a power line, accessible to the highway, and cleared of trees (Sample Ex. 2, 5). McVey and Ms. Sample-Day made a second trip to the same area to get more information. Ms. Sample-Day made a third trip on her own to look for alternate land (Tr. 154).

56. Ms. Sample-Day spoke with the owners of three potential tower sites and personally negotiated the terms of the assurance for the site she ultimately selected. No one assisted her. Later, when this site was sold, she pursued and obtained reasonable assurance of the site's continued availability from the new owner. She did not consult with Linder, and he did not offer any advice to her with regard to selecting the tower site. Ms. Sample-Day first told Linder where the tower site would be after Owl Engineering completed the engineering portion of Sample's application (Sample Exs. 2, 3).

57. At the time that he assisted in locating the tower site McVey knew that Ms. Sample-Day had joined with Bruce Linder to file the application, but he had no knowledge of the terms of the arrangement between them. Neither Linder nor Ms. Sample-Day volunteered the nature of Sample with McVey. He never asked and could only assume that Bruce Linder would be a voting shareholder of Sample (Sample Ex. 5, p. 4).

58. McVey did not consult with Bruce Linder or anyone else about the site Ms. Sample-Day selected (Sample Ex. 5, p. 10). Although Ms. Sample-Day did not mention any concern to McVey about possible overlap with Station KKSI, he assumed that she would have to select a tower site which would not cause overlap with the 70 dBu contour of KKSI (Tr. 210, 261). McVey did not ask Ms. Sample-Day to confirm this assumption. He does not know what site she selected ultimately, and has never spoken about Sample's site with Bruce Linder (Sample Ex. 5).

59. Ms. Sample-Day developed the applicant's proposed construction and operating budget from a number of independent sources. As she was preparing this budget she requested and received a written price quote from Harris-Allied and she solicited McVey's verbal opinions on the cost, availability and advisability of certain pieces of equipment which she was contemplating for use at the new station (Tr. 270, 274). He also provided additional sources for equipment costs. She did not seek any budget information from Linder. In order for him to know the exact amount of financing to secure, Ms. Sample-Day advised Linder of the total amount needed for construction and operation, after the budget was finalized. He thought the numbers seemed reasonable and did not question how she arrived at them. The partnership paid McVey for all services rendered to Ms. Sample-Day (Sample Exs. 2, 3, 5; Rivertown Ex. 11; Tr. 150, 177-178, 180-181, 204).

60. The understanding between Ms. Sample-Day and Linder from the outset was that he would finance the construction and initial operation of the station (Tr. 331-2). On October 9, 1991, Linder faxed Ms. Sample-Day two letters, each dated October 9: (1) a letter from the American Bank of Mankato, setting forth its willingness to lend Bruce Linder \$300,000 "to finance your investment in"

Sample Broadcasting Company, under terms calling for payment of interest only for the first six months, and payment of principal and interest amortized over the next 60 months, to be secured by a first lien on the station's assets and the personal guarantee of Bruce Linder; and (2) Bruce Linder's letter to Ms. Sample-Day, agreeing to loan the partnership \$300,000 on the same terms and conditions as the American Bank's letter offered to him (Tr. 333-334). Linder acknowledged that he would have the rights of a creditor against the partnership (Tr. 335).

61. Ms. Sample-Day established the applicant's bank account and is the only person who has ever been authorized to sign checks on behalf of the applicant. She receives all invoices and bills for the applicant and has been solely responsible for paying all of the applicant's bills (Sample Ex. 2).

62. She established the local public inspection file in Eldon and arranged for publication of the public notices that the application was filed with the FCC and, later, that it had been designated for hearing (Sample Ex. 2).

63. She spoke with a property owner in Eldon about a potential lease of space for a broadcast studio (Sample Ex. 2).

64. Ms. Sample-Day received an invoice from Owl Engineering dated September 23, 1991 (Rivertown Ex. 8). She assumed that the invoice reflected services she requested, and paid it without verifying the charges (Tr. 162). This bill includes a \$200 charge for a September 13, 1991, 70 dBu Overlap Study. While preparing for hearing, Ms. Sample-Day was reviewing documents with counsel when he asked her to explain the September 13, 1991, item. Ms. Sample-Day does not recall receiving anything from Owl Engineering dated September 13, 1991, and did not understand the charge. She then called Owl Engineering for an explanation. Owl Engineering told her that, indeed, she had not ordered any overlap study and that the charge was a mix-up and was meant for Mark McVey (Tr. 164, 165). Owl Engineering issued a corrected invoice to Sample and refunded the mischarged \$200 (Rivertown Ex. 9). McVey was charged for the study (Rivertown Ex. 17; Tr. 263, 281).

65. In consultation with her attorneys and engineer, Ms. Sample-Day has made all decisions and taken all other steps needed to prepare and file Sample's Eldon construction permit application. Ms. Sample-Day has never asked Linder to make a decision for her or to ratify any decision which she has made concerning the application or the proposed station. Bruce Linder testified that he has exerted absolutely no influence over her decisions concerning the Eldon station or the partnership and will not do so in the future. He has offered no advice (Sample Ex. 2, 3; Tr. 332).

66. When O-Town first applied for station KKSI, McVey was the 100% voting shareholder of the applicant corporation (Tr. 219). He paid about \$10,000 of his own money toward the preparation, filing and prosecution of the Eddyville application (Tr. 230). When the person who agreed to fund the construction and initial operation of the station died, his heir did not want to assume the financial obligation. To find substitute financing, McVey visited four lending institutions without success. He also spoke with John Linder, who was interested in the project but no terms were discussed. McVey was familiar with John Linder because he had worked for him previously. McVey continued to search for financing (Tr. 220, 280).

67. As the comparative hearing was approaching, McVey knew that he did not personally have the required funds so he reached an agreement with John Linder, the only party he had located who would provide financing (Tr. 281). John Linder and his father, Donald Linder, agreed to loan funds for the construction and operation of the Eddyville station and to pay for a settlement whereby a competing applicant would dismiss its application for cash proceeds. In exchange for the needed financing, McVey agreed to convey a 49% equity interest in O-Town to John Linder and his father with an understanding that they would acquire a controlling equity interest at some future point (Tr. 221-222). John and Donald Linder received a total of 49% voting stock in exchange for their settlement and construction loans to O-Town. They received an additional 31% through Commission approval of an FCC Form 315 application filed by O-Town in December 1990 (Tr. 225-227).

68. Sometime between March 8, 1991, and September 1, 1991, Bruce Linder acquired 25% of O-Town voting stock from Donald and John Linder. Before the conveyance occurred, McVey was consulted for his approval. At that point McVey had known Bruce Linder for about seven years (Tr. 240). McVey works at KKSI and wants to see it and O-Town succeed to the greatest extent. He is quite pleased that the station has developed beyond his original expectations (Sample Ex. 5).

69. O-Town's development has not been without frustration for McVey, however. Many of his ideas for the station have been rejected by the other shareholders of O-Town. For example, recommendations about a different studio location, that the station should be more regional in its appeal, about certain equipment purchases and about certain hiring choices have not been adopted. While he realizes that as a minority voting shareholder he cannot force O-Town to take any specific actions, he freely admits to becoming frustrated and even angry from time-to-time that more of his suggestions are not implemented. These feelings have sometimes resulted in mean-spirited statements about his fellow principals which are not based in fact (Sample Ex. 5).

70. At one instance, at 10 p.m. on January 18, 1992, McVey arrived at station KKMI, Burlington, Iowa, to perform transmitter maintenance. As KKMI's general manager, David Brown was present when McVey arrived. According to Brown, McVey brought up the subject of the Rivertown and Sample applications for Eldon and stated that the Sample application had been filed to delay the grant of Rivertown's, or to prevent Mr. Brown from getting the Eldon station. Also, that the Sample transmitter site had been selected to avoid city-grade contour overlap with KKSI, to enable Bruce Linder to have ownership interests in both stations, and that the Linders were using Carmela Sample-Day because of her minority status. Brown claims that McVey said that Ms. Sample-Day was bragging about what she was going to do with the Eldon station if her application is granted, and that, in McVey's opinion, she failed to recognize that Bruce Linder will be controlling her and the station. At approximately 11:15 p.m. McVey and Brown went to the KKMI transmitter site. Brown returned to the studios about midnight, in order to feed test signals to the transmitter to assist McVey. McVey returned to the studios shortly after 1:30 a.m. He finished his work and left about 3:30 a.m. Brown emphasized in his written testimony that the conversation concerning Eldon occurred at the KKMI studios prior to going to the trans-

mitter -- that is, between 10 and 11:15 p.m. -- *not* (emphasis in original) at 3 a.m. (Rivertown Ex. 4, ¶ 4). Under cross-examination, Brown could not recall at what point during the period between 10 and 3:30 that the discussion about Eldon took place (Tr. 93-94).

71. Mark McVey and David Brown have been acquainted for ten to twelve years, and at times have worked together at the same station (Sample Ex. 5, p. 6; Rivertown Ex. 4, p. 1). They have had at least three conversations concerning the Eldon channel allocation and the Sample application and the Sample application.

72. According to Brown, their first conversation occurred in June 1991, when Brown was visiting McVey at his home in Ottumwa, Iowa. During this visit, McVey mentioned Brown's pending petition for the allotment of channel 282 to Eldon, Iowa, and asked Brown to consider rebroadcasting KKSI-FM if he were to be awarded the Eldon permit. Brown asked McVey whether the Linders were aware of his Eldon petition, and he said that they were. Brown asked if they planned to file an application for Eldon, and McVey responded that he didn't know (Rivertown Ex. 4, p. 1).

73. Their second conversation relating to Eldon occurred on January 18, 1992, when McVey was at KKMI-FM, Burlington, Iowa (where Brown was employed as station manager), to perform maintenance on its transmitter. While they were at the studios, McVey brought up the subject of the Eldon applications of Rivertown and Sample, and (according to Brown) stated that the Sample application had been filed to delay the grant of Rivertown's, or to prevent Brown from getting the Eldon station. McVey told Brown that the Sample transmitter site had been selected to the southeast of Eldon to avoid city-grade contour overlap with KKSI-FM, to enable Bruce Linder to have ownership interests in both stations; that the Linders were using Ms. Sample-Day, KKSI's news director, because of her minority (Hispanic) status. McVey told Brown that Ms. Sample-Day was bragging about what she was going to do with the Eldon station if her application is granted, and that, in his opinion, she had failed to recognize that Bruce Linder will be controlling her and the station (Rivertown Ex. 4, pp. 2-3).

74. Their third conversation concerning Eldon took place on March 17, 1992, when they had dinner together at the Southside Pizza Hut in Ottumwa. According to Brown, McVey brought up the Eldon situation, and stated that he had been asked by the Linders to find a transmitter site for the Sample application which would enable city-grade coverage of Eldon without overlapping the city-grade contour of KKSI; that, if Sample is successful, they plan to simulcast KKSI-FM; and that, although he was not familiar with the details concerning the arrangement between Ms. Sample-Day and Bruce Linder, he was certain that the Linders would not let her manage the Eldon station, because of her lack of management experience (*Id.*, pp. 3-4).

75. McVey remembers Brown asking during dinner whether Sample would have an LMA with KKSI, should it get the station. He believes that he responded to the effect that whoever got the permit at Eldon should seriously consider a joint programming arrangement (Tr. 267). McVey was not aware of Ms. Sample-Day's plans for operating the station and would have had no basis to describe as a fact anything about her programming plans. He had not spoken to Linder, Ms. Sample-Day, or anyone else about Sample's plans for the Eldon station, and had seen

no documents describing any plans. McVey was unaware of any plans or proposals O-Town have had with respect to the Eldon station (Sample Ex. 5; Tr. 256-257, 166).

76. McVey has spoken to Ms. Sample on occasion about the progress of her application; working for the same station they see one another from time-to-time. Their conversations in this area are generally short, and do not get into detail. Ms. Sample-Day has always been very enthusiastic about the opportunity the application presents for her to manage the Eldon station and get into station ownership. However, she has never described any of her plans with McVey. She has always come across to McVey as a serious and independent applicant (Sample Ex. 5, p. 9).

77. If he made the statements Brown alleges, McVey is sure that they were the result of his feelings of frustration that more of his suggestions at KKSI were not adopted; they were not based on fact or personal knowledge. He had no knowledge of any facts and was not aware of discussions which would have led him to make such statements. He never discussed with anyone a possible motive for the filing of the Sample application. He has not seen anything in writing on this subject. He was not speaking on behalf of O-Town. If McVey made any of the statements ascribed to him by Brown, they were nothing more than off-hand comments made against Bruce Linder at a time when his frustration about KKSI was heightened (Sample Ex. 5).

78. McVey now knows that Ms. Sample-Day is to be in complete control of the Eldon station, and Linder will be a passive owner. He has known Ms. Sample-Day and Linder for a number of years and has every reason to believe that their operation will be completely above-board and that they will conform to all representations they have made to the FCC (Sample Ex. 5, p. 8).

79. Brown believes that McVey was only speculating (on January 18, 1992) that Ms. Sample-Day would find that she would be controlled by Bruce Linder. Nothing McVey said in the several conversations on other issues led Brown to believe that McVey was only expressing his personal opinions rather than his knowledge of events and decisions which had been made at KKSI. Thus, Brown believes that it was reasonable to assume that McVey's statements were both knowledgeable and an accurate reflection of the intentions of O-Town in Sample's Eldon application (Rivertown Ex. 4, ¶ 8).

80. Collins left the employ of KKSI in August 1991, to accept employment at Station KKMI, where he continues to be employed. David Brown is general manager and Collins' supervisor at KKMI. On approximately April 1, 1992, McVey telephoned Collins at KKMI, to inquire whether Collins would consider coming back to work for KKSI. McVey placed the call on his own, with no prior discussion with Bruce or Donald Linder. Bruce Linder and the KKSI general manager make the hiring decisions for the station. During the call McVey brought up the subject of tying KKSI and the Eldon station together. To Collins, these matters seemed loosely put by McVey, and more in the nature of "tossing ideas around" rather than any coherent plan (Rivertown Ex. 5, ¶ 2; Tr. 235, 236).

81. McVey testified that he has no knowledge of the reasons why the Sample Application was filed other than Ms. Sample-Day's statement that she wants to get into station ownership. He has no basis to believe that it was filed to delay action upon any other application or to keep another applicant from being granted. McVey has no knowledge nor reason to believe that anyone other than

Ms. Sample-Day has been and will continue to be in full and complete control of the Sample partnership (Sample Ex. 5, p. 10).

82. Although he thinks it makes economic sense, McVey has no knowledge of any plans or understanding to duplicate programming of KKSI on the Eldon station, regardless of who receives the construction permit. McVey is not aware of any discussions in which a possibility was considered by anyone with the authority to make such a decision at KKSI (Sample Ex. 5, p. 10).

83. McVey holds a First-Class Radiotelephone license and is a principal in a broadcast licensee. It is his responsibility and desire to be completely honest with the FCC. He regrets any comments he may have made which gave anyone the impression that KKSI and the Eldon station would be jointly operated or that Linder would control Ms. Sample-Day or be in charge of the Sample application. As he testified, he has no fact to support such comments (Sample Ex. 5, p. 10).

## CONCLUSIONS OF LAW

### Sample's Basic Qualification Issues

#### Issue (1) Strike Application

84. Rivertown does not attribute to Ms. Sample-Day any intention to delay action upon and grant of the Rivertown application. However, Rivertown maintains that Bruce Linder in behalf of O-Town Communications did intend to delay such action and took steps to do so. The bottom line for Rivertown is that O-Town Communications benefitted for at least two years by Rivertown's absence from competition. Rivertown sees Bruce Linder's actions to be directed toward this goal. Rivertown notes that although Bruce Linder was at first disinterested in the Eldon allocation, he did not explain on the record what caused him to abandon his initial disinterest. Rivertown also notes that KKSI derives 50% of its sales revenue from the city of Ottumwa and submits that Linder wanted to protect that.

85. The record proves Rivertown's allegations to be speculative. There is no record evidence of Bruce Linder's intent to delay action on Rivertown's grant. Indeed, the record demonstrates that Linder individually and O-Town Communications were free of anti-competitive motive. Neither O-Town Communications nor Bruce Linder filed comments during the rulemaking proceeding opposing the Eldon allotment. The Commission was allotting FM channels to a number of other communities in Southeastern Iowa at about the same time as the Eldon allotment. These stations would also compete in Ottumwa and yet neither O-Town Communications nor Linder took any action to retard grants for those allocations. Bruce Linder's initial disinterest is proof that he wasn't concerned over competition. Stronger proof is Donald Linder's disinterest. He is O-Town Communications' major stockholder. The record indicates that Bruce Linder became interested when he came to appreciate that Eldon would be a good investment and became convinced that with Ms. Sample-Day's involvement the operation would be feasible. The issue IS RESOLVED in Sample's favor.

#### Issues (2) and (3) - Real Party-in-Interest; Linder's Actions as Passive Investor

86. Enlarged Issue (2) seeks to determine whether O-Town Communications or any of its officers, directors, and stockholders is a real party-in-interest to the Sample application; enlarged Issue (3) seeks to determine the extent of the involvement of Bruce Linder in the planning and development of the Sample application.

87. The test for the real-party-in-interest against Sample is whether O-Town has an ownership interest or is or will be in a position to control the operation of the proposed station. *Sound Broadcasting Co.*, 6 FCC Rcd 6903, ¶ 4 (1991). The record demonstrates that O-Town, its principals and Bruce Linder have had and will have no involvement or control over Sample, and that they have no connection other than Bruce Linder's position as a passive limited partner. Under Sample's limited partnership agreement, Linder is properly insulated from involvement under the Commission's non-attribution requirements for limited partners. *Ownership Attribution*, 58 RR 2d 604 (1985).

88. Rivertown argues that documents and agreements notwithstanding, Bruce Linder is a real party-in-interest and has dominated the control over Sample's application for the following reasons:

1. It was Linder who asked McVey to determine whether the Eldon station could be engineered to avoid 70 dBu overlap with KKSI;
2. It was Linder who suggested the limited partnership arrangement;
3. Linder totally financed the prosecution of the Sample application; and
4. Ms. Sample-Day was guided through the process by McVey, O-Town's 20% stockholder; and that Ms. Sample-Day has limited broadcast experience, has no business experience and has made no financial investment.

89. Additionally Rivertown puts no stock into McVey's explanation that his statements to Brown that the Sample transmitter site was selected to avoid 70 dBu overlap with KKSI were based on his misunderstanding of the passive role of Linder. Rivertown also discounts Ms. Sample-Day's stated belief that 70 dBu overlays with KKSI was to be avoided because of interference considerations.

90. The record, however shows that Rivertown's conclusions are not warranted. The record reflects that McVey contacted Owl Engineering to commission a study of an area to locate a transmitter site for the Eldon allotment strictly on his own. McVey, of course, has no independent ability to make policy on behalf of O-Town Communications. McVey paid Owl Engineering for its services out of his own funds. Donald Linder, O-Town Communications' majority stockholder, decided that O-Town Communications was not interested in the Eldon allotment. There is no record evidence that O-Town Communications took any steps to apply. Brown concedes that McVey was only speculating that Ms. Sample-Day would be controlled by Linder and admits that he has no information of the truth of McVey's statements to him.

91. Although McVey acted as Ms. Sample-Day's consultant, he did so on an individual basis and was not acting on behalf of O-Town Communications. Ms. Sample-Day had worked for KKSI and knew of McVey's abilities. The Sam-

ple partnership paid McVey for his consulting services which consisted of locating a tower site, supplying cost estimates of certain materials as well as their availability and advisability. The record shows that McVey did not know the details of the business relationship between Ms. Sample-Day and Linder and presumed that Bruce Linder would be a voting shareholder. It was this assumption that caused him to believe that the Eldon application's 70 dBu would have to clear to 70 dBu contour of KKSI. McVey's explanation is credible and is fully credited.

92. The record also reflects that Ms. Sample-Day has a college degree in communications and ten years of broadcast experience. Linder had occasion to observe her work at KKSI. Linder told Ms. Sample-Day at the outset that he would not be able to be involved in the management of the proposed station. He wanted a strong application with a local resident willing to work at the station. Linder and Ms. Sample-Day negotiated their 60-40 equity split. Although Ms. Sample-Day made no monetary investment she was the sole driving force behind the preparation, filing and prosecution of the Sample application. As general partner she is personally liable for the debts of the partnership.

93. Ms. Sample-Day unilaterally selected her counsel and engineer. She did not clear her choices with Linder. Ms. Sample-Day was entirely free to select any consultants she felt she would need to assist her in preparing and filing the application.

94. Linder agreed to secure financing for the applicant. In this regard, Ms. Sample-Day reviewed Sample's budget with Linder so that he would know the amount of funds he would have to obtain. Linder had no involvement in developing the budget and did not attempt to change or challenge Ms. Sample-Day's figures. He had no involvement in selecting Sample's tower site, or in any other aspect of Sample's application. In short, Linder's pre- and post-formation involvement in the application is entirely consistent with his position as a passive, fully-insulated limited partner. *Evergreen Broadcasting Company*, 6 FCC Rcd 5599 (1991).

95. Ms. Sample-Day affirms that, as the general partner, she is the sole active principal of Sample. 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 (2) and (3) ARE RESOLVED in Sample's favor.

#### Issue (4) Programming Issue

96. Sample's application lists the programming it intends to provide. There is no record evidence that contradicts this representation. Although McVey thought that duplicate or shared programming made economic sense, he testified that he never meant to suggest that there was any arrangement or understanding between Sample and O-Town on the matter. As a matter of fact he never discussed with Ms. Sample-Day programming. The issue IS RESOLVED in Sample's favor.

#### Issue (5) Misrepresentation Issues

97. The basic issues were added because McVey, an officer of O-Town was unable to recall making the exact statements Brown alleges. 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. 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 Ms. 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. There is no evidence that Sample or its principals 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 IS RESOLVED in favor of Sample.

#### Standard Comparative Issues

##### Rivertown Communications Co. Inc.

98. *Diversification.* Neither Rivertown nor either of its principals have any chargeable media interests. Sample argues that David Brown ought to be charged on account of his management position at Station WAIK and WCBO, Galesburg, Illinois, in 1991 because the reporting amendment was filed late. Brown entered into a contract of employment on May 8, 1992, to commence May 26, 1992;<sup>2</sup> the contract specifically noted the pendency of Rivertown's Eldon application and reserved to him the right to terminate the employment upon ninety days notice in the event of a grant of Rivertown's application. He executed Rivertown's amendment reporting this employment, and reiterating his application pledge to divest any conflicting employment in the event of a grant of Rivertown's application, on June 30, and it was filed July 7, one day after its receipt in Washington. Thus, Rivertown's amendment was filed just 42 days after the employment commenced; and just twelve days beyond the thirty-day period specified in ¶ 1.65 of the Rules. Sample's argument here is a rehash of its predesignation argument which was considered and rejected in the *Hearing Designation Order*, at footnote 2.

99. *Integration Into Management.* Rivertown is credited with 100% full-time integration. Sample argues that Rivertown should be credited only with Brown's equity interest (55%) because it has failed to prove that Ellen Bowen will have a meaningful management and policy making position, or, at best, Rivertown should be credited with one-half of Ellen Bowen's equity interest because David Bowen is a joint owner of Ellen Bowen's stock in Rivertown. Additionally, Sample states that David Bowen has agreed to loan money to Rivertown, will be involved in construction of the proposed station, has jointly purchased David Brown's Eldon residence which will serve as Rivertown's broadcast studios and was present with his wife at most of her meetings with David Brown and at the hearing session herein. Citing *Richard P. Bott, II*, 4 FCC

<sup>2</sup> A copy of the employment agreement (redacted) is attached

to Rivertown's Exhibit 15.

Rcd 4924, 4929-30 (Rev. Bd. 1989), *rev. denied*, FCC 90-109 (released April 12, 1990), Sample believes David Bowen should be held to have a mutual ownership stake with his wife and be considered to be an integrated owner of half of his wife's interest.

100. The record, however, reflects that no decision on Rivertown's studio location has been made (Tr. 69), but that David Bowen may help install heating and air conditioning at Rivertown's studio building when one is acquired. This does not amount to being involved in the construction of the proposed station. Further, the record shows that David Brown and Ellen Bowen held meetings in the Bowen home (Tr. 67) and that although David Bowen accompanied Ellen Bowen to Washington, D.C. for a hearing, so did his daughter taking advantage of the travel for sightseeing purposes (Tr. 44). Additionally, although it is true that Ellen Bowen's stock was purchased with money from a joint account, and that David Bowen agreed to lend Rivertown \$15,000, the Review Board in *Bott, supra*, at 4929, stated that the use of funds for prosecuting the application and constructing the proposed station is not determinative of impermissible involvement. In *Lone Cypress Radio Associates, Inc.*, 7 FCC Rcd 4403 (Rev. Bd. 1992), review denied 8 FCC Rcd 972, recon. denied, 8 FCC Rcd \_\_\_\_\_, 1993, *Memorandum Opinion and Order*, adopted August 30, 1993; see Report No. DC-2486 of September 1, 1993, the husband of one of the general partners attended partnership meetings with his wife, made financial contributions to the partnership through his wife's use of their joint assets, attended the depositions and the hearing, and was kept current on the progress of the application by this wife. There, the Board found no basis for discrediting the wife's proposed integration, specifically distinguishing *Bott, supra* on its facts.

101. Ellen Bowen is proposed to work full time as a business manager. The position of "Business Manager" is recognized by the Commission as a management position entitling one to integration credit. Ms. Bowen's integration proposal and her activities in connection with the application are not significantly different from those found by the Review Board to warrant integration credit in *Harry S. McMurray*, 8 FCC Rcd 3168, 3171 (Rev. Bd. 1993). Her proposal is fully credited.

102. Rivertown's integration is enhanced by David Brown's long term residence in the service area and Ms. Bowen's residence in the service area since 1979. Rivertown's application at Exhibit IV-B did not list Brown's residence in the service area from December 1984 to July 1986. The omission was an oversight, but in any event does not significantly affect Brown's substantial long-term residence.

103. Rivertown's integration is not entitled to a civic activities enhancement. Brown lists civic activities during 1982-1983, 1988-1989. However, Brown does not, except for stating membership, identify what activities were performed. His promotion of fund raising for new uniforms for Ottumwa High School in 1982 is too remote to receive any credit. Ms. Bowen also fails to state what civic activities she may have engaged in.

104. Rivertown's claim for a pioneer preference for having found and allotted Channel 282C3 to Eldon is rejected. 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 in hearing as of the effective date of" the adoption of the proposals. *Reexamination of the Policy of Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664, ¶ 129, 41 (1992). Rivertown's request for a pioneer preference IS DENIED.

#### Sample Broadcasting Company, L.P

105. *Diversification*. Neither Sample or its principals have any attributable interest in a medium of mass communications.

106. *Integration Into Management*. Sample is credited with 100% full-time integration. Ms. Sample-Day has pledged to work full-time at least 40 hours per week. She is a college graduate having earned a communications degree. She has been the sole direct control of the preparation and prosecution of Sample's application.

107. Sample's integration is enhanced by her local residence within the service area since 1988.

108. Sample's integration is further enhanced by Ms. Sample-Day's civic activities. She was involved 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).

109. Sample's integration is also credited with Ms. Sample-Day's broadcast experience.

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

111. The fact that the FCC Form 395, Annual Employment Report, filed by KIOA(TV) for January 1990, a period when Ms. Sample-Day worked at the station, did not reflect any hispanic employees is of no significance. The record is silent on the way KIOA's report was completed. No representative of KIOA explained its report.

112. Sample is also credited with a preference for its auxiliary power proposal.

**ULTIMATE CONCLUSIONS**

113. Rivertown and Sample each are basically qualified and each have received 100% integration credit. Rivertown is credited with substantial preference for the long term local residence of its principals and substantial preference for the broadcast experience of its principals. Sample has been credited with 100% minority preference, 100% short term local residence (moderate), 100% civic activities, 100% short term broadcast experience (moderate), and auxiliary power. Sample's credits outweigh Rivertown's. Sample is the winner.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Sample Broadcasting Company, L.P. (File No. BPH-911010MA) IS GRANTED, and the application of Rivertown Communications Co. Inc. (File No. BPH-911008ME) IS DENIED.<sup>3</sup>

**FEDERAL COMMUNICATIONS COMMISSION**

John M. Frysiak  
Administrative Law Judge

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<sup>3</sup> In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall

become effective 50 days after its public release pursuant to Rule 1.276(d).