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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

|                                    |   |               |               |
|------------------------------------|---|---------------|---------------|
| In re Applications of              | ) | MM DOCKET NO. | 93-135        |
|                                    | ) |               |               |
| THE PETROLEUM V. NASBY CORPORATION | ) | File No.      | BRH-890601VB  |
|                                    | ) |               |               |
| For renewal of Station WSWR(FM)    | ) |               |               |
| Shelby, Ohio                       | ) |               |               |
|                                    | ) |               |               |
| THE PETROLEUM V. NASBY CORPORATION | ) | File Nos.     | BTCH-921019HX |
|                                    | ) | and           | BTCH-921019HY |
|                                    | ) |               |               |
| For transfer of control of         | ) |               |               |
| Station WSWR(FM), Shelby, Ohio     | ) |               |               |

TO: The Honorable Edward J. Luton  
Administrative Law Judge

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**PROPOSED FINDINGS OF FACT  
AND  
CONCLUSIONS OF LAW  
OF  
THE PETROLEUM V. NASBY CORPORATION**

*Appearances*

*Ann C. Farhat, on behalf of The Petroleum V. Nasby Corporation; Norman J. Goldstein, James W. Shook, Y. Paulette Laden, on behalf of the Chief, Mass Media Bureau.*

*Preliminary Statement*

1. This proceeding involves the applications of The Petroleum V. Nasby Corporation (Nasby) for renewal of license to operate Station WSWR(FM) on Channel 261A (3 kilowatts) at Shelby, Ohio and the transfer of control of Station WSWR(FM). The applications were designated for hearing (and notice of opportunity for hearing for forfeiture was issued) by the Federal Communications Commission (FCC or Commission) on June 14, 1993 (*Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture (HDO)*), FCC 93-241,

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8 FCC Rcd 4035 (1993); 58 *Fed. Reg.* 34050 (June 23, 1993)). The issues to be resolved are:

- (1) To determine the effect of Thomas L. Root's federal and state convictions on the basic qualifications of The Petroleum V. Nasby Corporation.
- (2) To determine, pursuant to Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's Rules, whether Thomas L. Root and Kathy G. Root engaged in the unauthorized transfer of control of The Petroleum V. Nasby Corporation.
- (3) To determine, in light of the evidence adduced pursuant to the above issues, whether grant of the renewal application of The Petroleum V. Nasby Corporation will serve the public interest, convenience and necessity.
- (4) To determine, in light of the foregoing, whether approval of the pending applications to transfer control of The Petroleum V. Nasby Corporation will serve the public interest, convenience and necessity.

The initial presentation of the evidence with respect to Issue 1 was assigned to the Mass Media Bureau (MMB or Bureau). Nasby was directed to present evidence with respect to Issues 1 through 3 and was assigned the burden of proof with respect to all issues. *HDO*, 8 FCC Rcd at 4036 (¶ 13).

2. A prehearing conference was held on August 23, 1993. *Order*, FCC 93M-373, Mimeo No. 31775, released June 17, 1993; Tr. 1-13. The hearing session was held in Washington, D.C. on December 14, 1993, wherein the record was closed at the conclusion of the hearing session. *Order*, FCC 93M-560, Mimeo No. 32300, released September 2, 1993; Tr. 97-98. Proposed findings of fact and conclusions of law were requested by the Presiding Judge to be

filed. Tr. 98.<sup>1</sup>

**PROPOSED FINDINGS OF FACT**

Issue (1) - Thomas L. Root's federal and state convictions.

3. Nasby is the licensee of Station WSWR(FM). PVN Ex. 1, p. 1. Thomas L. Root (Root) was one of three directors of Nasby and corporate secretary of Nasby from prior to May 1983 until his resignations as a director and corporate secretary of Nasby on March 21, 1990. Jnt Ex. 1, stips. 1-4. Root served as general counsel and communications counsel of Nasby from prior to 1983 until his resignation on April 25, 1990, providing those services from the law offices he maintained in Washington, D.C.<sup>2</sup> Jnt. Ex. 1, stip. 5; PVN Ex. 2, p. 4. Root was also a shareholder of Nasby until June 23, 1989, at which time he sold his remaining 15.6% interest to his parents for consideration. Jnt Ex. 1, stip. 28.<sup>3</sup> Changes in the stock ownership of Nasby reflecting that Root, individually, and as a custodian for the benefit of his minor children, no longer held stock in Nasby, Root's resignations as an officer and director of Nasby (on March 21, 1990) and his resignation as legal counsel for Nasby (on April 25, 1990), were

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<sup>1</sup> Consent motions for the extension of time to submit proposed findings and conclusions on or before March 4, 1994 and reply findings and conclusions on or before March 22, 1994 remain pending with the Presiding Judge.

<sup>2</sup> Root was disbarred from the practice of law in the District of Columbia on May 12, 1990. Jnt Ex. 1, stip. 8.

<sup>3</sup> Relevant ownership changes in Nasby will be discussed in more detail *infra* in connection with the proposed findings of fact relative to Issue 2.

first reported to the FCC in an amendment filed on April 27, 1990 to Nasby's 1989 annual ownership report and to Nasby's June 1, 1989 renewal application (File No. BRH-890601VB). Jnt Ex. 1, stip. 30; MMB Ex. 11, pp. 1, 5-13A, 25; MMB Ex. 12, p. 28.

4. On March 21, 1990 a federal indictment was returned against Root in the United States District Court for the District of Columbia (Case No. 90-0134). Jnt Ex. 1, stip. 9; MMB Ex. 1, pp. 1-45.<sup>4</sup> As stated in the indictment, Root's alleged misconduct occurred in the context of legal representation he provided as the sole principal of his law firm located in Washington, D.C. (some 400 miles from Shelby) in matters involving the representation of applicants for FM construction permits in licensing proceedings before the FCC. MMB Ex. 1, pp. 1-2; Tr. 61. The legal representation provided by Root to applicants for new FM construction permits in FCC licensing proceedings occurred for a period of time prior to Root's resignation from positions with Nasby, and included representation of applicants formed by Sonrise Management Services, Inc. (Sonrise). Jnt Ex. 1, stip. 6. Neither Nasby, nor any of its officers, directors, and/or shareholders (other than Thomas L. Root), however, had any involvement or connection with the FM construction permit applicants formed by Sonrise or with Sonrise itself, in any licensing proceedings or in any other matters. Jnt Ex. 1, stip. 7. Root's misconduct, occurring in the context of

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<sup>4</sup> On June 21, 1990 a federal indictment was returned against Root in the United States District Court for the Southern District of Illinois (Case No. 90-0376) and was consolidated with the United States District Court for the District of Columbia action on September 11, 1990. Jnt Ex. 1, stips. 10-11; MMB Ex. 2, pp. 1-5.

licensing proceedings before the FCC, wholly unrelated to Nasby and Station WSWR(FM), included, *inter alia*, the forging of a counterfeit order of an Administrative Law Judge of the FCC and submitting a counterfeit Federal Aviation Administration "No Hazard" determination in a FCC licensing proceeding. Jnt Ex. 1, stip. 13; MMB Ex. 1, pp. 10-11; MMB Ex. 3, p. 1.

5. Root entered into a plea agreement in the consolidated federal proceeding and was adjudged guilty on January 17, 1992 of two counts of altering, forging and counterfeiting public records, three counts of wire fraud and one count of transport of stolen monies obtained by fraud. As a result of the federal adjudication, Root was sentenced to a term of 33 months in federal prison, where since June 30, 1992, he continues to be incarcerated. Jnt Ex. 1, stips. 12, 14; MMB Ex. 3, pp. 1-4. Following his release from imprisonment, Root is to be on supervised release for a period of three years. A fine in the range of \$112,583 to \$340,765, the costs of supervised release (\$300) and the costs of incarceration were waived by the Court in light of Root's inability to pay. MMB Ex. 3, pp. 1-4.<sup>5</sup>

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<sup>5</sup> State court indictments were also returned against Root in North Carolina and Florida in connection with events surrounding the formation of construction permit applicants by Sonrise. On June 4, 1990 three indictments were returned against Root in Nash County, North Carolina. Jnt Ex. 1, stip. 15; MMB Ex. 4, pp. 2-4; MMB Ex. 5, pp. 2-35; MMB Ex. 6, pp. 2-100. On October 26, 1990, Root pled no contest to 90 counts of selling an unregistered security, 90 counts of failing to register as a securities dealer, 180 counts of securities fraud in violation of North Carolina statutes, and four counts of conspiracy. Jnt Ex. 1, stip. 16; MMB Ex. 4, pp. 5A-5B; MMB Ex. 5, pp. 36A-36B; MMB Ex. 6, pp. 101A-101B. On August 28, 1992, the state of North Carolina entered a Judgment and Commitment for all counts to which Root pled no contest and

6. Nasby's renewal application was initially granted by the FCC on April 27, 1990 (public notice of May 3, 1990), however, the FCC set aside the grant on May 31, 1990 (Letter of Larry D. Eads, Chief, Audio Services Division, Mass Media Bureau to Timothy J. Moore, President of Nasby). MMB Ex. 11, p. 25; MMB Ex. 12, p. 28. No specific reason for the return of the application to pending status other than the application was being returned "pending further review and consideration" was stated in the letter. *Id.* The renewal application and the transfer applications filed by Nasby on October 19, 1992 (File Nos. BTCH-921019HX and HY) were designated for hearing on June 14, 1993 for the resolution of the issues stated at ¶ 1, *supra*.

7. At hearing, Timothy J. Moore (Moore), a member of Nasby's

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Root was sentenced to 15 years in prison to be served concurrent with his federal sentence. Root was ordered to pay a fine of \$5,000, court costs and reimbursement costs for the fee to be allowed his court-appointed attorney by January 1, 1995. Jnt Ex. 1, stip. 17; MMB Ex. 4, pp. 7A-7B; MMB Ex. 5, 37A-37B; MMB Ex. 6, pp. 102A-102B. On August 13, 1990 an indictment was returned against Root, *inter alia*, in Pinellas County, Florida. On January 10, 1991 a superseding indictment was filed against Root and co-defendants Ralph M. Savage, Eugene B. White and Carl W. Hurlebaus, Jr., in Pinellas County, Florida. Jnt Ex. 1, stips. 18-19; MMB Ex. 7, pp. 1-50. Root pled no contest to charges of racketeering, organized fraud, organized securities fraud, and sale of unregistered securities on June 23, 1992 and was adjudicated guilty on that date of one count of racketeering, three counts of organized fraud, one count of organized securities, 20 counts of sale of unregistered securities, and 20 counts of securities fraud. Jnt Ex. 1, stips. 20-21; MMB Ex. 8, pp. 1-7; MMB Ex. 9, pp. 1-2. Root was sentenced to 15 years in prison to be served concurrent and coterminous with North Carolina and concurrent but not coterminous with federal charges (followed by five (5) years of probation). The Florida court imposed additional court costs of \$15,575.00 and ordered restitution to the victims, with a cap of \$200,000, as a condition of probation. Jnt Ex. 1, stip. 21; MMB Ex. 9; pp. 1-11; MMB Ex. 10, pp. 1-3.

board and President/Treasurer (elected and appointed, respectively on March 15, 1989), and since November 1, 1988, General Manager of Station WSWR(FM) (first acting, then permanent),<sup>6</sup> testified that he had no knowledge that Root was under any criminal investigation nor did Root ever inform him or the other Nasby officer or board members that he (Root) was under investigation by any federal or state authorities. PVN Ex. 1, pp. 1, 7. In March 1990 Moore received a letter of resignation from Root which stated that Root was resigning as an officer and director of Nasby. No reasons for Root's resignations were stated in the letter and Moore does not recall speaking with Root at that time to ascertain Root's reasons for resignation from his corporate positions. *Id*, pp. 6-7. Shortly thereafter, in April 1990, at the time Root resigned as legal counsel to Nasby, Moore recalled that Root was experiencing personal legal and possibly financial problems stemming from the airplane crash which Root had survived months earlier. *Id*, p. 7. Moore testified that he believed that Root resigned as legal counsel in order to shield the station and its image in the community from any negative impact concerning Root's personal and legal financial problems related to events surrounding Root's earlier airplane crash. Moore's recall was that Station WSWR(FM) like stations around the country reported on the airplane crash and through those reports he recalled speculation that the FAA was

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<sup>6</sup> Moore, along with his spouse, Susan Diane Root Moore, are the custodians of 10 shares of Nasby stock for the benefit of their minor daughter, Katherine C.R. Moore, UGMA. Moore also holds an option to acquire 50 shares of Nasby stock. PVN Ex. 1, p. 1.

considering looking into the airplane crash. Moore was not informed nor made aware by Root during this time period that Root's legal problems would have a potentially negative impact upon Nasby and WSWR before the FCC. *Id.* Following receipt of the May 31, 1990 letter from the FCC rescinding the station's license renewal which had previously been granted, Moore contacted Root (who no longer served as Nasby's legal counsel) as he was "quite surprised by the letter" which was silent as to the reason for the FCC's action taken. *Id.*, pp. 7-8. Root informed Moore that he had no idea why the FCC rescinded the station's license renewal grant.<sup>7</sup> In subsequently securing new legal counsel, Moore was made aware for the first time of the FCC's apparent concerns involving Root and the potential effect those concerns could have on the station's license renewal. *Id.*, p. 8.

8. Following his divestiture of stock interests in Nasby, and resignations as an officer and member of Nasby's three-person board, Root did not attend nor participate in any way in any corporate meetings of Nasby. Since 1990, Moore testified that he has prepared and caused to be prepared all meeting notices and minutes of Nasby and has otherwise maintained the corporate record book upon receipt of the book from Root following his resignation in April 1990 as the station's legal and FCC counsel. *Id.*, p. 6. Other than the assistance in the preparation of an annual ownership

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<sup>7</sup> Root, unsolicited by Moore, did remind Moore in this telephone conversation of the need to file an annual ownership report in June 1990 and Root assisted in the preparation of the report which Moore filed. Nasby had not secured new FCC counsel at this juncture. PVN Ex. 1, pp. 7-8; Tr. 66-67.

report filed by Moore on behalf of Nasby in June 1990 shortly following Root's resignation as legal counsel and prior to Nasby's securing new legal counsel, Root provided no other assistance to Nasby. *Id.*, pp. 6-8; Tr. 66-67.

9. Moreover, throughout the entire time period that Root served as one of three directors of Nasby and as corporate secretary, as well as holding minority stock interests in Nasby in his own name and as custodian for the benefit of his minor children, and serving as legal counsel to Nasby, as well as subsequent to his resignations from positions with Nasby and divestiture of his stock interests, Root was never involved in the day-to-day management, operation or control of Nasby and Station WSWR(FM). PVN Ex. 1, pp. 3-7; PVN Ex. 2, pp. 3-8; PVN Ex. 3, pp. 2-4. Throughout his tenure as President and General Manager of Station WSWR(FM), Moore testified that he has always exercised complete control over all facets of the day-to-day station operations, performed without any input from Root or from any other members of the Nasby three-person board. PVN Ex. 1, p. 3; Tr. 58-59. Moore has been solely responsible for the establishment and implementation of employment policies and practices of WSWR, and with the exception of two long-standing station employees hired in 1981 by the station's previous General Manager, David L. Williamson (Williamson), Moore has hired directly (or approved the hiring of salespersons by the Sales Manager) and/or terminated (by voluntary resignation or dismissal) nearly 35 employees during his tenure. All station employees report directly to Moore and he determines

salaries for all station employees except his own salary which is established from time to time by the Nasby board.<sup>8</sup> *Id.* Moore has determined all programming policy (including news and public affairs and entertainment programming) and commercial policy at WSWR, also with no input from Root or any of the other board members with whom he has served. Moore has also exercised complete control over and access to the station's checking accounts, including check signing authorization for which he is the sole signatory.<sup>9</sup>

10. Williamson also testified that during his tenure as President and General Manager, from prior to 1983 until November 1988, when Williamson resigned as General Manager and Moore assumed the position as acting General Manager, he had and did exercise complete control over all facets of the day-to-day station

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<sup>8</sup> Moore was initially hired as a farm broadcaster (with sales duties added later) in 1983 by Williamson, then the station's General Manager, and it was Williamson who offered the position of General Manager to Moore on behalf of the Nasby board. PVN Ex. 1, pp. 1-2; Tr. 57-58.

<sup>9</sup> For a period of time, from November 25, 1988 until September 7, 1993 (when in the course of the discovery phase of this proceeding Moore discovered that Root's name had not been removed by him at the time of Root's resignations in March 1990), Root also had bank signature authority. Root had previously been added to the bank signature cards in November 1988 in order to provide back-up signature authority to Moore who in November 1988 was only serving as acting General Manager. Upon Moore's learning that Root's name remained on the bank signature cards, he immediately caused his name to be removed. During Moore's entire tenure as General Manager, and as President and a director, Root **never** signed WSWR(FM) checks. PVN Ex. 1, pp. 4-5; Tr. 54-55. From prior to 1983 until he resigned as General Manager (at which time Moore became acting General Manager), Williamson was the station's sole signatory on each of the station's accounts and caused to be prepared and signed **all** WSWR checks. PVN Ex. 2, p. 4.

operations, without any input from the other two Nasby directors, Root and Emma D. Slone. Williamson was solely responsible for all employment policies and practices (all hiring, firing and setting of employee salaries) and all employees reported directly to Williamson.<sup>10</sup> Williamson also established the station's formats, and all programming (news/public affairs and entertainment) and commercial policies at WSWR. PVN Ex. 2, pp. 1-3. He also maintained complete control over the station's checking accounts maintained with a local Shelby bank, for which he was the sole signatory. During his entire tenure, Williamson caused to be prepared and signed all Nasby checks and prepared or caused to be prepared all station financial records. *Id.*, at 4. Williamson also established and executed the business policies of the station. *Id.*, at 6.

11. As a member of the three-person Nasby board, as corporate secretary, as legal counsel and as a shareholder, prior to his resignations and stock divestitures, Root attended corporate meetings of Nasby. PVN Ex. 1, p. 5; PVN Ex. 2, p. 7; PVN Ex. 3, pp. 3-4; Tr. 84.<sup>11</sup> Nasby director and shareholder meetings held annually in May, in accordance with Nasby bylaws, were presided over by Moore (during his tenure as President and a member of the three-person Nasby board) or Williamson (during his tenure). PVN

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<sup>10</sup> Williamson's salary as General Manager was determined by the Nasby board from time to time. PVN Ex. 2, p. 3.

<sup>11</sup> Other than annual attendance at Nasby corporate meetings, at a time when Root held stock in Nasby or served as corporate secretary or a director of Nasby, Root "almost never" visited the station. Tr. 56, 84; PVN Ex. 3, p. 4.

Ex. 1, p. 5; PVN Ex. 2, pp. 6-7. The meetings were informal and perfunctory. *Id.* Those shareholders who attended were informed of the station's activities in the community. Elections to the Nasby board were conducted. According to Williamson, the shareholders typically did not take an active interest at the meetings, primarily due to the fact that the shareholders (with the exception of Thomas L. and Kathy G. Root at the time) were all local citizens interested in owning a radio station which provided a "local voice" in the community and they were already aware of the station's critical (though less than profitable) success in the community. Financial information concerning station operations was typically made available to the shareholders and Root was available to answer questions or explain any legal issues involving shareholder stock ownership or any FCC issues which might have arisen relative to their stock ownership. Board meetings were held following the shareholders' meetings and were typically used by the Nasby board to discuss the station's financial status, to elect officers of Nasby, and from time to time, to set the General Manager's salary. PVN Ex. 2, p. 7. Day-to-day station operation matters were not "voted on" at the annual shareholder or director meetings held. Tr. 86. Setting the General Manager's salary from time to time was established by the Nasby board as the General Manager ultimately reports to the Nasby board. PVN Ex. 1, p. 3; PVN Ex. 2, p. 3; Tr. 86.

12. Station debt financing would from time to time require participation by members of the Nasby board. PVN Ex. 2, p. 4. At

the time Moore became acting General Manager in November 1988, he assisted Root, who was an officer and member of the Nasby board (at a time when Moore was not yet elected to such positions), in negotiations for necessary station loan refinancing with Station WSWR's local Shelby bank. PVN Ex. 1, p. 4. Root, as Secretary of Nasby, executed the loan financing documents in November 1988 on behalf of Nasby and was required to provide a personal guarantee. *Id.* Subsequent to the November 1988 loan restructuring, Moore has been solely responsible for the loan financing for WSWR, including refinancing undertaken by him in July 1992, wherein he exclusively provided the bank with a personal guarantee in the event Nasby is unable to repay the loan. *Id.*, at 4-5; Tr. 66, 69-70.<sup>12</sup>

13. Moore (and his predecessor Williamson), would from time to time, consult Root, who served as the station's legal counsel. PVN Ex. 1, pp. 6-7; PVN Ex. 2, pp. 7-8. Root's counsel was sought

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<sup>12</sup> Williamson also negotiated loan financing with Nasby's bank from time to time and executed loan documents as President of Nasby which also required that Williamson provide a personal guarantee. Root was also required to execute loan documents as Secretary of Nasby and to provide his personal guarantee. PVN Ex. 2, pp. 4-5. Williamson's actions were ratified by the Nasby board. *Id.*, p. 5. In one instance, in order to resolve an imminent IRS problem facing the station, it was recommended that since Root had the necessary funds available to him to resolve the IRS problem, that he would provide such funds to the station, rather than have the station seek loan financing from the bank. In light of Nasby's financial burdens which were not likely to be resolved in the near future, Root proposed that the funds advanced by him to Nasby be deemed a subscription for the purchase of the remaining 100 unissued shares of Nasby stock, rather than have his advance be treated as a loan to Nasby. The proposal was presented to the shareholders at a special meeting held in March 1989 and was approved by the shareholders subject to the shareholders' exercise of their preemptive rights. *Id.*, 5-6. Throughout the station's 12-year operation, it has operated at a loss. PVN Ex. 1, App. C.

from time to time for the review of contracts, inquiries regarding FCC matters, including questions relative to contests, lotteries, and political advertising. Root also represented Nasby before the FCC in connection with the filing of ownership information and applications. PVN Ex. 1, pp. 5-7; PVN Ex. 2, p. 8. Root was relied upon and handled the maintenance of the Nasby corporate book, including preparing the meeting notices and minutes, stock transactions, including the stock transactions involved in the preemptive rights matter and the stock transactions which are the subject of the first transfer of control application. Services were performed by Root in a routine manner. PVN Ex. 1, pp. 5-6; PVN Ex. 2, p. 8.

Issue (2) - Transfer of Control.

14. As of May 29, 1989, Root individually owned 120.25 shares (representing 24.5% of Nasby's total issued and outstanding stock (500)) and as custodian for the benefit of his minor children, he held an additional 50 shares (10%) of Nasby stock. On May 30, 1989, Root individually acquired 100 shares of Nasby stock (representing 20% of Nasby's total issued and outstanding stock (500)) from David L. Williamson (90 shares), and Evelyn and Lace Williamson (10 shares), of which 50 shares (representing 11.10% of Nasby's total issued and outstanding stock (450)) were then transferred by Root to Nasby on June 1, 1989 in return for the forgiveness of a corporate debt which he had previously assumed. On May 31, 1989 the custodial shares of Nasby stock (50 shares; representing 10% of Nasby's total issued and outstanding stock

(500)) held by Root were transferred by him as gifts to his minor children. One hundred (100) shares of Nasby stock (representing 22.20% of Nasby's total issued and outstanding stock (450)) individually owned by Root were also transferred by him as gifts to his minor children on June 1, 1989. On June 23, 1989, Root transferred his remaining 70.25 shares of Nasby stock (representing 15.6% of Nasby's total issued and outstanding stock) to his parents, Joanne L. Root and Thomas F. Root, JTWROS, for consideration (\$28,000, which was based on the trading price of Nasby stock at the time of \$400 per share), which Root used to meet obligations on his plane and for other matters. Jnt Ex. 1, stips. 22-26, 28; MMB Ex. 11, p. 17.

15. On June 1, 1989, Kathy G. Root, the spouse of Thomas L. Root, transferred 25 shares (representing 5.5% of Nasby's total issued and outstanding stock (450)) of Nasby stock individually owned by her as gifts to her minor children, leaving her with 33 shares of Nasby stock owned by her individually (representing 7.3% of the total issued and outstanding stock of Nasby (450)), and 50 shares of Nasby stock held by her as custodian for her minor children (representing 11.1% shares of the total issued and outstanding Nasby stock (450)).<sup>13</sup> Jnt Ex. 1, stip. 27; PVN Ex. 4,

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<sup>13</sup> In addition to the minority stock interests held by Kathy G. Root, individually (7.3%), and as a custodian for the benefit of her minor children (11.1%) and the custodial interests held by Moore and his spouse for the benefit of their minor child (2.2%), the remaining minority shareholders of Nasby who together hold 79.4% of Nasby's total issued and outstanding stock (450) are: James and Arlene Kehoe, trustees of Kehoe Family Trust, Shelby, OH; Joanne L. and Thomas F. Root, JTWROS, Plymouth, OH; Charlie and Emma Stone, JTWROS, Plymouth, OH; William Y. Humphries, Shelby, OH;

p. 1; PVN Ex. 5, pp. 3-5. The ownership changes set forth in ¶¶ 14-15 herein were first reported in an April 27, 1990 amendment to Nasby's 1989 annual ownership report and to Nasby's June 1, 1989 renewal application (File No. BRH-890601VB). Jnt Ex. 1, stip. 30. These ownership changes are also the subject of the first FCC Form 315 transfer of control application (File No. BTCH-921019HX) filed on October 19, 1992 by Nasby, which application seeks *nunc pro tunc* approval of the transactions. *Id*, stip. 29; MMB Ex. 11; PVN Ex. 5. The individual stock transactions involved less than 50% of Nasby stock being transferred; cumulatively, the transactions result in more than 50% of Nasby stock being transferred. With the exception of minority shareholder Arlene Geer, the trustee for the benefit of the minor children of Thomas L. and Kathy G. Root, qualifications of all other parties to the transfer had previously been passed upon. MMB Ex. 11, p. 1.

16. Kathy G. Root testified that it had been her intention as well as her husband's to commence the establishment of a trust for their third child, Travis S.C. Root, who was born in 1987. In December 1986, trusts had been established for the Roots' two other children -- Thomas P.J. Root (age 12) and Leslie J.L. Root (age 9). Kathy G. Root and her husband commenced the establishment of the

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Arlene T. Geer (as trustee for the benefit of Thomas P.J. Root, Leslie J.L. Root and Travis S.C. Root), Norwalk, OH; Charles and Catherine Pritchard, Plymouth, OH; David and Kris Green, JTWROS, New Washington, OH; Paul Cappelle, Willard, OH; Geraldine Corwin (trustee of the William L. Corwin Trust), Willard, OH; Meridelle and Martin Sowers, JTWROS, Willard, OH; Barbara Emery, Willard, OH; Henry and Elsie Cline, JTWROS, Shelby, OH and Martha Postema, Plymouth, OH. MMB Ex. 11, pp. 10-13.

trust for their son Travis in 1988 in order to "even things up" for all three children relative to stock ownership in Nasby. This was not accomplished, however, until after the purchase of additional Nasby stock by Root from the Williamsons' and through the preemptive rights stock purchase, events occurring in the spring of 1989. It was Kathy G. Root's understanding from her husband, that the stock transactions, which were gifts to their minor children in order to make them all equal in their respective Nasby stock ownership, were structured so as to permit the stock transfers without exceeding the \$10,000 per donee per annum gift tax ceiling, based on the fair market value of Nasby stock at the time of \$400 per share. PVN Ex. 4, p. 1. In connection with these stock transfers, which include the stock transfers to her mother, Arlene Geer, as trustee for Kathy G. Root's minor children, Kathy G. Root testified that she was not aware, nor did she focus on, the possibility that the transfers could result in the need to seek prior FCC approval, since in her mind the stock being redistributed for estate planning purposes would not result in anyone holding a majority interest in the station. *Id.*, p. 2. Consequently, Ms. Root never discussed the potential need for filing an application with her husband -- who served as the station's FCC attorney -- and who she assumed would handle whatever paperwork was necessary to effectuate the transfers. *Id.*

17. As President of Nasby, Moore signed stock certificates relating to the ownership changes which are the subject of the first transfer of control application as requested by Root, then

the station's FCC and corporate counsel who routinely handled these matters on the station's behalf. Root never advised nor informed Moore that prior FCC approval should be obtained in connection with the stock transactions. It was not until current Nasby communications counsel informed Moore in the fall of 1992 that the cumulative stock transactions may have required prior FCC approval. PVN Ex. 1, pp. 5-6.

18. The second FCC Form 315 transfer of control application (File No. BTCH-921019HY) was filed by Nasby on October 19, 1992 and seeks approval of the proposed transfer of 70.25 (representing 15.6% of Nasby's total issued and outstanding stock of Nasby (450)) shares of Nasby stock from Joanne L. Root and Thomas F. Root, JTWROS to Ginsburg, Feldman & Bress, Chartered, attorneys for Thomas L. Root, which transfer is contingent upon approval by the FCC of the first application (File No. BTCH-921019HX). Jnt Ex. 1, stip. 31; MMB Ex. 12.<sup>14</sup> The transfer of Nasby stock owned by Joanne L. and Thomas F. Root, JTWROS pursuant to the stock pledge agreement which is the subject of the proposed transfer relates to the payment of outstanding legal fees incurred by Root (and not Nasby) for matters unrelated to the station. Nasby is not a signatory to the pledge agreement nor does Nasby own the stock which is the subject of the proposed transfer. Tr. 62-66. The proposed transfer of 70.25 shares of Nasby stock does not result in

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<sup>14</sup> Both transfer applications were placed on the FCC's 30-day public comment period and no petition to deny nor informal objection was lodged against either application by any third party. Jnt Ex. 1, stip. 32.

the transfer of more than 50% of Nasby's total issued and outstanding stock of Nasby. The proposed long-form transfer of less than 50% of the stock of Nasby from Joanne L. and Thomas F. Root, JTWROS, will permit the FCC to "pass upon" the qualifications of Ginsburg, Feldman & Bress, Chartered, the proposed transferee. MMB Ex. 11, pp. 1-2; MMB Ex. 12, p. 1.

**PROPOSED CONCLUSIONS OF LAW**

Issue (1) - Thomas L. Root's federal and state convictions.

19. The basic facts of this case are largely undisputed. Nasby and the Bureau reached several stipulations concerning the nature and existence of Root's federal and state felony convictions as well as stipulations relative to Root's former ownership and corporate and legal positions with Nasby. The difference between the parties largely rests on the legal effect, if any, Root's misconduct should have on the renewal of Nasby's license. At the hearing session, the Bureau took the position that it is irrelevant as to whether Root had any role in the management, operation or control of the station, since in the Bureau's view, the licensee can never sever itself from the wrongful acts of one of its former principals. Tr. 36-37. As will be demonstrated below, this position is both factually and legally incorrect.<sup>15</sup>

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<sup>15</sup> What is surprising is that the Bureau can take this position with a straight face in light of the language in the HDO reflecting the Commission's apparent concern as to whether an individual like Root "has the potential to influence or control the operations of the station." HDO, 8 FCC Rcd at 4036 (¶ 7). Upon information and belief the HDO was drafted by Bureau counsel formerly assigned to this case before it was ultimately adopted by the Commission.

20. The Commission is empowered to consider the misconduct of a principal of an applicant in order to determine the applicant's character qualifications, including conducting an evidentiary hearing in order to resolve questions concerning the applicant's character qualifications. *Policy Regarding Character Qualifications in Broadcasting Licensing*, 102 F.C.C.2d 1179 (1986); *1990 Policy Statement*, 5 FCC Rcd 3252 (1990);, see also, *TV 9, Inc. v. FCC*, 495 F.2d 929, 939-940 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974). That inquiry, however, does not preclude the consideration of relevant factors, including Root's resignations and severance of ties with Nasby prior to his actual convictions, as well as his noninvolvement in the station's day-to-day operations, to be weighed in support of the nondisqualification of Nasby. In *TV 9*, the Commission was directed by the Court to conduct a thorough inquiry into the character qualifications of an applicant growing out of the applicant's association with an individual who had been a minority owner, a director, an officer and its general counsel, and was under federal indictment.<sup>16</sup> *TV 9, supra*, 495 F.2d at 938-940.

21. Subsequent to the Court's remand in *TV 9*, the FCC has had occasion to consider the effect of criminal convictions of a principal on the character qualifications of an applicant for a new

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<sup>16</sup> The federal indictment was apparently dismissed due to the principal's physical health which was impacted after he had been shot and severely wounded by his wife. *TV 9, supra*, 495 F.2d at 938-39. The Court, however, felt that the Commission's duty to conduct an inquiry was not dependent on the outcome of a trial on an indictment. *Id.*, at 940.

station and, of an applicant seeking renewal of its station license. First, in *Chapman Radio and Television Co.*, 57 F.C.C.2d 76 (1975), *modified on other grounds*, 45 R.R.2d 239, 242 (1979), *petition for recon. dismissed*, 46 R.R.2d 752 (1979), the FCC determined that a 26.7% shareholder, officer and director, and the controller of the corporation, was disqualified to be a Commission licensee where he had been convicted of four felony counts of "conspiring to obstruct, delay, and affect commerce . . . by extortion and under color of official right." The principal had been president and chairman of the board of a national bank, and held positions with other investment companies. He was sentenced to prison for eight years under each of the four counts, to run concurrently and fined \$10,000 on two counts. See *Chapman Radio and Television Co.*, 30 R.R.2d 1093, 1094 (I.D. ALJ Kyle 1974), *affirmed*, 47 F.C.C.2d 775, 30 R.R.2d 1089 (Rev. Bd. 1974). The applicant itself, however, was found qualified to be a Commission licensee because: (a) in accepting the principal into the corporation, it relied on the fact that his character had recently been investigated by several federal agencies in connection with the principal's successful application for a federal bank charter; (b) the applicant took several positive steps to remove the principal as a shareholder upon learning of his conviction; (c) the principal had not informed the other principals of his criminal conduct; and (d) the principal's activities did not involve broadcasting or any application before the Commission. *Chapman*

*Radio and Television Co.*, *supra*, 57 F.C.C.2d at 77.<sup>17</sup>

22. In *Sande Broadcasting Co., Inc.*, 61 F.C.C.2d 305 (1976), the Commission was faced with a renewal applicant whose application was challenged by a third party primarily on the basis of alleged deficiencies, *inter alia*, in the station's ascertainment, program service and EEO efforts.<sup>18</sup> The pertinent facts are these: In seeking to reopen the record, the petitioner provided the Commission with evidence that a 35% shareholder of the licensee, who also had served as an officer and director, had been convicted on three counts of grand larceny, and three bad check charges, resulting in his receiving a sentence of zero to seven years in a state prison, from which the principal appealed. *Sande Broadcasting, supra*, 61 F.C.C.2d at 306. The petitioner also argued that the criminal activities and the principal's ownership in the station ran concurrently, that a loan from a separate company the principal owned 50% of and which was involved in the criminal conduct financed the purchase and operation of the station, and that the other one-half owner of the separate company who remained a 35% shareholder of the licensee, was associated with the principal and the station during the same period of time. *Id.*

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<sup>17</sup> While the applicant was ultimately disqualified relative to its financial qualifications, on remand, the initial conclusion that the applicant was not disqualified by its former association with a principal with criminal convictions, remained unchanged. *Chapman Radio and Television Co.*, *supra*, 45 R.R.2d at 242.

<sup>18</sup> Petitions to deny the station's renewal were denied by the Commission, however, the Commission granted *Sande* a short-term renewal due to perceived deficiencies in its EEO efforts. *Sande Broadcasting, supra*, 61 F.C.C.2d at 305.

The record further reflected that the 35% remaining shareholder was not active in the management and operation of the separate company where the misconduct took place, that he was unaware of any problems until the dishonored checks surfaced and that the former principal of Sande did not attend any Sande corporate meetings and was not involved in the station in any way following his indictment. Moreover, the remaining 35% shareholder was investigated by the state and federal authorities in connection with his ownership of the separate company and no indictment was ever sought. *Id.*, 61 F.C.C.2d at 307.

23. In reaching a determination that no evidentiary hearing was warranted nor the imposition of any further sanction, the full Commission took into account several factors. One, while it was undisputed that the licensee's ownership was intertwined with the separate company and that some of the licensee's initial financing had come from the separate entity, the petitioner failed to present and the record did not reflect any evidence that either entity was otherwise involved with the other's day-to-day operations. Indeed, the Commission found it *significant* that the petitioner failed to allege specific facts that showed the principal involved in the day-to-day operations of the radio station. *Sande Broadcasting, supra*, 61 F.C.C.2d at 308-09. Second, and in the Commission's view, more important, the principal's acts did not involve broadcasting or any application before the Commission and the principal was removed from the corporation *prior* to his felony convictions. Citing *Chapman*, the Commission held that the

principal's activities, by themselves, should not serve as a barrier to Sande's renewal application. *Id.* The same conclusions reached by the Commission in both *Chapman* and *Sande* -- finding the applicants before it qualified to be Commission licensees notwithstanding former association with a principal with unrelated criminal convictions -- must also be reached here. As the record evidence reflects, Root was not involved in the day-to-day station operations of Nasby, nor was Nasby and any of its principals involved in any way with Root's law practice. Moreover, long prior to his federal convictions in January 1992 and state convictions thereafter, Root had ceased being an officer, director and shareholder of Nasby, as well as ceased serving as the station's legal counsel. Nor did Root attend or participate in any corporate meetings of Nasby subsequent to his resignations as an officer, director, and station legal counsel, and divestiture of his stock ownership. Root never informed the other Nasby principals of his activities which led to his convictions and there is no basis on which to impute those activities to Nasby and its principals where those activities occurred without their knowledge and/or control, in licensing proceedings and events surrounding those proceedings, which both the Bureau and Nasby agree did not involve Nasby and Station WSWR in any way. And while the Bureau may argue that the matters which Root was found to have committed wrongdoing involve "broadcasting" or "applications before the agency" they **do not** involve broadcasting matters or applications related to Nasby in any way and independently do not support the denial of Nasby's

license renewal.

24. The cases cited by the Bureau at the hearing session (Tr. 36-37, 78-79) for the proposition that the Commission does not distinguish between guilty and innocent shareholders, thereby treating the applicant as a single component (and rendering the degree of participation by the wrongdoer in the station as irrelevant), in determining an applicant's overall character qualifications, are not remotely comparable on the facts or the law to the instant case. The primary case cited by the Bureau at the hearing session was *Marr Broadcasting Company*, 2 FCCRcd 6596 (Rev. Bd. 1987). *Marr* involved a comparative renewal challenge wherein all of the principals of the incumbent licensee were found by the Presiding Judge to have been involved in a "repeated and pervasive pattern of misrepresentation and lack of candor" involving misrepresentations made directly to the Commission in letter filings and applications directly affecting the station. In denying the incumbent licensee's second proposed settlement wherein the Marr principals proposed to own nonvoting stock in the new permittee, the Review Board held that construction permits could only be awarded to fully qualified applicants, which the Marr principals were not. *Id.*, at 6596-67.

Issue (2) - Transfer of Control.

25. Having established that grant of Nasby's renewal application for a full license term is warranted, it must be determined whether grant of the cumulative stock transactions which form the basis for the first transfer of control application should