

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554
Jul 29 2 53 PM '94

DISPATCHED BY MM Docket No. 93-176

In re Application of

RICHARD RICHARDS File No. BRTTL-921116IG

For Renewal of License of
Low Power Television
Station K33CG,
Sierra Vista, Arizona

Appearances

Thomas Schattenfield, Esq. and Gerald P. McCartin, Esq. on behalf of Richard Richards; Charles E. Dziedzic, Esq. and Robert A. Zauner, Esq. on behalf of the Mass Media Bureau.

**INITIAL DECISION OF ADMINISTRATIVE
LAW JUDGE RICHARD L. SIPPEL**

Issued: July 25, 1994; Released: July 29, 1994

PRELIMINARY STATEMENT

1. This proceeding was set for hearing by the Commission on June 28, 1993, under its *Hearing Designation Order* FCC 93-305 ("HDO"), reported at 8 F.C.C. Rcd 4339 (1993). The hearing concerns the renewal of the license of low power television station K33CG, Sierra Vista, Arizona which is assigned to the station's owner Richard Richards ("Richards"). The issues to be resolved are the following:

- (a) To determine in light of Richard Richards' conviction for violating Title 21, United States Code, Sections 841 (a)(1), 841 (b)(1)(D) and 841 (b)(5), whether Richards possesses the requisite qualifications to be the licensee of station K33CG.
- (b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether the grant of the application to renew the license of station K33CG will serve the public interest, convenience and necessity.

2. This case involves the trial of the above issues in connection with Richards' application for renewal of license of low power television station ("LPTV") K33CG, at Sierra Vista, Arizona. HDO at para. 1. The LPTV station rebroadcasts the signal of Station KTBN-TV, Santa Ana, California, twenty four hours each day of the week. Richards estimates that the LPTV signal covers a population of from 50,000 to 60,000 persons. Richards believes that the LPTV station serves between 1,000 and 2,000 homes. The

programming includes talk shows, religious education, religious music, prayer, services and inspirational and family programs. (Richards Exh. 1 at 1-2.)

3. The Commission has assigned to Richards the burden of proceeding with the introduction of relevant evidence and the burden of proof with respect to the issues. See HDO at para. 5. Each of the issues is based upon multiple criminal felony convictions. Those convictions were based on pleas of guilty by Richards to a charge of felonious possession of marijuana with intent to distribute, and to a charge of the felonious cultivation of marijuana on federal property. Those charges were brought and the pleas of guilty were entered on May 4, 1992, in the United States District Court for the District of Arizona. (Bureau Exh. 2.)

4. The Presiding Judge ordered Richards to provide Bureau counsel with a summary of his proposed mitigation evidence. See *Prehearing And Trial Order*, FCC 93M-446, released July 8, 1993. A telephone conference was held on August 26, 1993. See *Order* FCC 93M-552, released August 26, 1993. Richards was granted additional time to obtain counsel and to comply with the prehearing instructions. See *Order* FCC 93M-554, released August 27, 1993. Hearings were held in Washington, D.C. on December 5, 1993, and on February 23, 1994. The record was closed for all purposes on March 14, 1994. See *Order* FCC 94M-98, released February 25, 1994. A date for the filing of Proposed Findings Of Fact And Conclusions Of Law was set initially for March 28, 1994, and a date for the filing of Reply Proposed Findings Of Fact And Conclusions Of Law was set for April 18, 1994. *Id.* Subsequent extensions of time were granted for cause and the parties were ordered to file Proposed Findings And Conclusions on April 26, 1994, and Reply Findings And Conclusions on May 17, 1994. See *Order* FCC 94M-262, released April 14, 1994. The parties have complied and the record is now set for a decision.

FINDINGS OF FACT

5. Richards has been a resident of Sierra Vista, Arizona since 1968. He has been self-employed as a grower and a distributor of food consisting largely of vegetable crops such as apples, peaches, pears, carrots and garlic. (Richards Exh. 1; Tr. 43-45.) Those crops were grown on an 82.5 acre parcel of land known as the "Montezuma Ranch," which was located approximately three-quarters of a mile from the Mexican border. The ranch was surrounded on three sides by federal land and on one side by state land. (Tr. 50.) From 1985 to 1992, Richards resided in a house that was on the property. Richards currently resides on an 80 acre plot of leased farmland in St. David, Arizona, on which he grows, harvests and sells organic vegetables. (Richards Exh. 1 at 1.)

Criminal Convictions

6. On July 25, 1991, law enforcement authorities obtained a search warrant for the Montezuma Ranch. They thereafter seized marijuana plants, eighteen scales that were available to measure quantities of marijuana, heat sealers used to seal plastic bags, marijuana debris, two mobile telephones and two pagers. (Tr. 45-48.) The debris was found in a partially hidden room where marijuana leaves were hung to dry. (Tr. 51-53.) Richards admitted that there were two marijuana plants growing on the ranch and that there were between thirty four and thirty seven marijuana plants that were growing on the adjacent federal park land. (Tr. 49.) Richards admitted that he was responsible for the

cultivation of the marijuana plants that were grown on federal property. He intentionally used the federal property to grow plants because he thought that if caught the Montezuma Ranch would not be subject to seizure. (Tr. 77, 155.)

7. On February 19, 1992, Richards was indicted for violation of Title 21 of the United States Code, Section 841 (a)(1), for his possession with intent to distribute a number of marijuana plants. (MMB Exh. 2 at 1.) Thereafter, on May 4, 1992, Richards entered into a plea agreement whereby Richards acknowledged that the following accurately described his involvement in the criminal activities that the government could prove beyond a reasonable doubt:

That on or about July 25, 1991, defendant Richard Richards was in knowing possession of between 37 and 41 marijuana plants, some plants being grown on his property and some plants being grown on national Park Service property. Richards was the owner of these plants, he knew them to be marijuana plants and he intended to distribute the plants or the processed marijuana derived from these plants to another person or persons.

(MMB Exh. 2 at 5-6.)

8. On July 31, 1992, a Judgment was entered in the criminal case against Richards specifying that he had been convicted of:

violating Title 21, United States Code, Sections 841 (a)(1), 841 (b)(1)(d) and 841 (b)(5), possess (sic) with intent to distribute less than 50 kgs (Marijuana I) and cultivating marijuana on federal property, as charged in Count I of the Indictment.

The Judgment also specified that Richards was to be placed on probation for a period of five years, that he must serve a term of seven months under house arrest, that he must submit to substance abuse testing, and that he must participate in substance abuse counseling as directed by the U.S. Probation Office. (MMB Exh. 3.)

9. As part of the plea agreement, Richards consented to a civil judgment in a concurrent civil action pursuant to which he forfeited the Montezuma Ranch and the house thereon which Richards estimated to have had a market value in 1993 of \$1 million dollars. (Richards Exh. 1 at 4; Tr. 148-50.)¹ The government did not and could not seek the revocation of Richards' broadcast license pursuant to the revocation of federal benefits provision of Title 21 [21 United States Code Section 862 *et seq.*]. (Richards Exh. 28.) See para. 29, *infra*.

¹ At the time of the forfeiture, there were existing liens on the property that were securing loans in the amount of approximately \$275,500. (Tr. 115-23.) Richards' obligations in that amount would be excused by the foreclosure procedures. (Bureau Exhs. 7 and 8.) Therefore, the forfeiture is materially mitigated to the extent that the property is used to honor Richards' debts even after the title had passed to the U.S. government.

² Under the terms of the network agreement between Richards and the Trinity Broadcasting Network, Richards may only broadcast 3.5 hours of local programming per day. (*Id.*)

Station Operations

10. Richards constructed LPTV Station K33CG by expending approximately \$42,000 of his own funds. (Richards Exh. 1 at 2.) The Commission has received no complaints about its operations. The station originates the programming of the Trinity Broadcasting Network, a religious network with affiliates throughout the United States and in other countries. (Richards Exh. 1 at 1.) The station has no employees. Richards installs antennas for users free of any installation charge. The Trinity Broadcasting Network reimburses Richards with 80% of the donations received from Station K33CG listeners which income is used by Richards to defray operating expenses. (Richards Exh. 1 at 2-3.) Richards had plans to originate up to 3.5 hours of local programming per day which he hoped would qualify for inclusion on the local cable system. (Richards Exh. 1 at 3.)² After his arrest, Richards attempted to assign the Station to Ms. Elsi Weick, his mother (File No. BALTTL-920603JC). The Bureau rejected the application because of the conviction. Richards had hoped to complete the divestment before his conviction in an effort to keep the Station on-the-air with its present format. (Tr. 144-45.)

Character Evidenced

11. Richards has offered into evidence twenty five statements under oath from persons in the community who attest to his good character. (Richards Exhs. 2-27.) These twenty-five persons are listeners of Richards' programming. The Bureau offered no objection to the receipt and consideration of this evidence. In its cumulative effect, these unrebutted statements establish that even after the conviction, Richards has a reputation for truthfulness and honesty among the listeners of Station K33CG. Richards and the listeners share a common religious orientation which they wish to have advanced on Station K33CG. They also show that Richards has a religious orientation which is reflected in the station's programming. Those religious interests are also shared by the persons submitting the testimonials. The statements also show that Richards has admitted to his listeners the legal and moral wrong of his past criminal conduct in connection with his use of marijuana. However, the statements are limited to only the opinions of listeners of Richards' programming who share Richards' beliefs. They do not establish Richards' reputation for truthfulness and honesty in the general Sierra Vista community.³

Mitigation And Rehabilitation

12. Richards represents that he has been convicted of only one additional crime, a misdemeanor conviction for domestic violence and assault in January 1990.⁴ Station

³ Richards' religious beliefs are irrelevant as an enhancement of his credibility. *Gov't Of Virgin Islands v. Petersen*, 553 F.2d 324, 328-329 (3rd Cir. 1977). Also, reputation testimony is confined to the nature of the observations and acquaintances upon which the opinion is based. *Id.* at 329. The persons submitting statements were not shown to have knowledge of Richards' reputation among non-listeners within the Sierra Vista community.

⁴ The term "domestic violence and assault" without further explanation can conjure up images of heinous conduct. It appears that Richards saw it to be in his best interest to describe

K33CG has not been cited for an FCC rule violation. The findings on "Station Operations," *supra*, which is evidence offered by Richards in mitigation, are incorporated here.⁵

13. Richards relies on evidence of rehabilitation in arguing mitigation on the following factors: (a) he has not used marijuana since December 31, 1991; (b) he has never used any other drug; (c) since the mid-1980s, Richards has been born again in the religious sense and since then he has realized that his personal use of marijuana was wrong;⁶ and (d) letters from and conversations with listeners show that Richards provides valuable programming to the community of Sierra Vista. (Richards Exh. 1 at 4-5.) Richards also pledges to continue quality programming to the community if the license for Station K33CG is renewed. (*Id.*)

14. There is no evidence to rebut Richards' assertion that he has not used marijuana since December 31, 1991, or that Richards has ever used any illegal substance other than marijuana. (Richards Exh. 1 at 4.) However, he had continued to use marijuana between the time of his arrest on July 25, 1991, and December 31, 1991. He ingested such a quantity of marijuana on December 31, 1991, that, as a consequence, Richards tested positive for marijuana use in February and March, 1992. (Tr. 108, 112-114.) Since commencing probation supervision on July 31, 1992, he has undergone random drug testing, none of which has proven to be positive. By letter to Richards' counsel dated November 26, 1993, a Probation Officer of the United States District Court reported that the random tests were all negative, meaning that there was "no evidence of drug use by Mr. Richards." (Richards Exh. 27.) Richards also has cooperated in meeting his responsibilities as a parolee. (*Id.*) However, Richards has not offered any independent or expert evidence to show that he has been cured of his substance abuse habit or that he has the habit under control. Richards has admitted that at the time of his arrest he had formed a habit for the use of marijuana. He has contended in testimony that his sole purpose for growing marijuana was to support his habit. (Richards Exh. 1 at 3-4.) Richards admits that he employed means to increase the potency of plants because "[a]s a heavy user of Mari-

juana, [Richards] had developed a tolerance to it, so potency was important to him." (Richards Exh. 30.) There is no evidence from a drug counselor on the status of his rehabilitation.

15. Even Richards' own testimony is not definitive on whether or not he might in the future resume his habit. He submitted written testimony in which he stated that in the mid-80s he had reached a realization through a religious experience that his use of the marijuana substance was wrong. (Richards Exh. 1 at 4-5.) But there is no evidence that he had attempted to give up the habit until the time that he was apprehended in July, 1991. And even after his arrest, he continued to use the substance. See Para. 14, *supra*. He states that he had justified the use of marijuana as a victimless habit. (Richards Exh. 1 at 5.) He also states that he "regrets [his past] marijuana use" and that he now looks to the future as a broadcaster of religious programming. (*Id.*)

16. The mitigation and rehabilitation evidence will be considered in light of Richards' misconduct. The evidence of "distributing" illegal drugs involved the growing and storage of ten marijuana plants for the benefit of a friend with an understanding that they be returned to the friend when they reached maturity. (Richards Exh. 1 at 3-4.) Those plants were returned to Richards' friend as agreed. Richards retained nine plants for himself which he had raised and processed in a manner that was calculated to achieve the highest degree of potency. (Tr. 152.)⁸ Thus, there is substantial evidence that shows through a conviction and admissions that Richards in fact distributed marijuana to his friend. In addition, Richards admitted that on a trip to California he had a "stash" of marijuana for his use and for the use of a companion with whom he was travelling. (Tr. 90.) The evidence of record would not support a finding of a distribution of marijuana beyond the admitted distributions of marijuana to a friend and to the traveling companion.

17. The evidence relied on by Richards for mitigation is considered under the factual setting and circumstances surrounding the crime. Therefore, taken into account is the

the assault. Richards discloses with specificity in his written testimony that "the assault involved tossing a turkey at [his] estranged spouse in the course of an argument." (Richards Exh. 1 at 4.) This misdemeanor conviction is remote in time and is not related to drug trafficking. It will not be a factor in deciding this case.

⁵ It is recognized that the weight to be given to station operations is minimal as probative of mitigation. *Cf. KQED, Inc.*, 5 F.C.C. Rcd 1784, 1785 (Comm'n 1990), 6 F.C.C. Rcd 625 (Comm'n 1990).

⁶ Richards testified:

I had justified my marijuana use by the fact that it did not harm anyone else or myself. For me, it was a mild stimulant, like coffee. I regret my marijuana use, but I am now focused on the present and the future, not on the past. I am committed to serving my community by spreading the word of the Lord through the Station. (Richards Exh. 1 at 5.)

⁷ There is also uncorroborated testimony of Richards wherein he represents that in 1988-89, he participated in an operation with the U.S. Drug Enforcement Authority ("DEA") to apprehend smugglers of marijuana from Mexico. (Tr. 161-62.) Richards conjectured that in the course of "the operation," marijuana was left in bales by the smugglers on the adjoining

federal property. This was done with DEA's knowledge according to Richards. Sometime in 1988, the smugglers were apprehended and the DEA seized the bales. (Tr. 154-55.) However, according to Richards, there were seeds that had dropped from the bales that remained dormant. In 1991, Richards was farming carrots on the Montezuma Ranch land. A sprinkler irrigation system inadvertently sprayed water on the dormant seeds on the federal land and about 100 marijuana plants sprang up. (Tr. 162-63.) At least that was Richards' "theory" [Tr. 163] which he formulated after he was arrested. (Tr. 160-61.) In early July 1991, before his arrest, Richards and a friend dug out the plants, transported them forty miles, and dumped them into the San Pedro River. (Tr. 160.) Those plants were disposed of by Richards so that he would not run the risk of the plants being discovered while he was in Chicago visiting his sick father. (Tr. 155.) There was no evidence of corroboration or that Richards notified DEA of those events. No credence shall be given to this imaginative, uncorroborated and self-serving account.

⁸ According to Richards, at a point in their growth, Richards discarded the male plants so that the female plants would be rendered seedless thereby maximizing the potency of the buds. (Richards Exh. 30 and Joint Exh. 1.) Richards admitted that he wanted to smoke only the best, i.e. the marijuana with the highest potency. (Tr. 152.)

fact that at the time of arrest, Richards had control of more than thirty seven marijuana plants. Also considered is the evidence of the scales that are designed to measure small amounts, the marijuana debris, the mobile telephones, the pagers, the heat sealers and the admission that other plants had been grown by Richards. That circumstantial evidence in the aggregate support the equally plausible inference that Richards, his friend and his companion were not the only users, or intended users, of the marijuana that was grown by Richards.⁹

Credibility Findings

18. Richards has the burden of proof on all issues of this case, including the issues of mitigation and rehabilitation. See *HDO* at para. 5. Richards' testimony is the evidence mainly relied upon to meet those burdens. There are no corroborating witnesses. The assessment of Richards' credibility is undertaken here as a separate matter in order to determine whether Richards has met his burdens. Also, Richards seeks to put the drug trafficking conviction in the most favorable light. Therefore, Richards has a clear motive to attempt to fabricate business needs or to offer seemingly innocent reasons for otherwise incriminating evidence that was found at the scene of the crime.

19. There is evidence in the record relating to Richards' credibility that tends to negate mitigation in this case. First, if Richards' uncorroborated testimony were to be believed with respect to the origin and use of the 100 plants that he disposed of shortly before his arrest,¹⁰ the facts would show that while he was a regular and heavy user of marijuana, he participated in a government sponsored operation in cooperation with the DEA. He also would have been growing marijuana on federal land at the time he was a DEA operative. There is no evidence that he disclosed to the DEA his condition as a heavy user or the fact of his marijuana growing on federal land. Richards has thus shown a capacity to grow marijuana on federal property and to use marijuana heavily while he is engaged in a government related enterprise or activity. Second, Richards purposefully chose to grow marijuana on federal land in order to seek to avoid the forfeiture of his own land should he get caught. (Tr. 77, 155.) Thus, he has shown a propensity to deal dishonestly with government property for his own advantage. This is substantial evidence of a negative trait for truthfulness and reliability.

20. Richards also has testified to exculpatory circumstances on which he asks the Presiding Judge to base findings that would support a renewal of Richards' license. Richards admits that at the time of arrest he was in possession of approximately 18 scales, including one scale (a "triple beam") that was capable of measuring weights as low as one gram. (Tr. 46.) But Richards asserts that he used the scales only in weighing produce for sale. (Tr. 79-81, 146-47.) Richards also referred to himself as a "scale

buff" who collects scales. He testified that he sold garlic, herbs, chaparral and other items by the ounce and that he would weigh plastic bags by the gram to deduct their weight from the weight of the orders which were to be shipped. (Tr. 80.) Richards argues that the scales were used only in lawful enterprises and for lawful purposes. But there is no business need shown for a scale that can weigh a plastic bag that is being filled with garlic or any other product for shipment. As to incriminating circumstances, on cross-examination Richards testified to marijuana purchases which he recorded in gram weights. (Tr. 82-83 and Bureau Exh. 5.) Marijuana was measured in gram weights and there is substantial evidence showing that Richards was a heavy user of marijuana. (Tr. 90.) There were no records of Richards introduced that would show a legitimate business purpose that required the use of gram measurements.¹¹ There was no witness called or industry literature introduced to corroborate Richards' explanation. Finally, the record does not establish that the gram scale was used exclusively for the verifying of garlic shipments and was never used for the weighing of marijuana in connection with a purchase or sale. Therefore, there is no reasonable basis for accepting the truth of Richards' testimony that the gram scale was used solely for innocent purposes.

21. Richards also lacked credibility in his testimony about a ledger that was under his control and that was seized at the time of his arrest. (Bureau Exhs. 4-5.) When first asked the question, Richards answered that he was not aware of a ledger or record showing sales of marijuana. (Tr. 54.) Richards then was shown a document (Bureau Exh. 4) and he testified that he had seen the document when his criminal lawyer showed it to him around the time of the arrest. (Tr. 56.) Richards testified that he did not know whether he had written the notations in the ledger: "I have no way of knowing for sure if it is or was my handwriting." (Tr. 57.) Richards admitted that the police found the record in a place where he stored his records and that the document was included in the police evidence report. But when asked by the Presiding Judge whether it was his handwriting, Richards answered:

I mean, I had this question in the beginning and I would -- I don't -- for the record, I don't want to say that it's not mine, but I don't want to be too quick to say that it was mine because I'm not sure.

(Tr. 58.) Richards testified that he had not ever denied that it was his handwriting. But he also testified that no one had asked that question before. (Tr. 59.) Richards admitted that he was the person who was responsible for the filing system in that area. (Tr. 66.) Later, Richards identified a name, "Terry", as his cousin. Richards then said that he was more than 50% certain that the ledger entries were in

⁹ For example, the evidence also establishes that Richards was a regular customer of a cousin from whom Richards purchased marijuana. (Tr. 71, 73 and Bureau Exhs. 4-5.) Richards has denied that there were any sales of marijuana to his cousin (Richards Exh. 1 at 3) and there was no direct proof of any such sales. However, there was ample opportunity for Richards to have also supplied his cousin with marijuana that was grown on the ranch. And Richards did not produce his cousin as a corroborating witness.

¹⁰ See fn.7, *supra*.

¹¹ Richards stated in cross-examination that crops in 1989-91 were carrots, squash and garlic. He described garlic as an expensive crop. There were no sales of garlic in the first year it was planted. There were sales in the next three years of 400 pounds, 2,000 pounds and 5,000 pounds. (Tr. 92-93.) But there were no records to show gram weighing and no corroboration that a gram scale was used solely in connection with legitimate farming and/or in selling and shipping garlic.

fact made in his handwriting. (Tr. 71.) Richards explained that the record, which was written in code, reflected that Richards had paid his cousin \$200 for marijuana. (Tr. 73.) There were a series of transactions recorded in excess of \$13,000. (Tr. 73-75.) Richards insisted that he only purchased marijuana and that he never sold marijuana. When shown a second ledger (Bureau Exh. 5) and asked to identify his handwriting, Richards flippantly answered: "assume it is." (Tr. 81-82.) Richards then explained that Bureau Exhibit 5 was a supplement to Bureau Exhibit 4. (Tr. 82.)

22. The Bureau's Exhibits 4 and 5 had been taken from Richards' custody in 1991, incident to a search warrant. They were included in a police report and they were reviewed with Richards by his criminal lawyer in connection with the plea agreement. It was a patent disregard of his duty to be forthright as a witness for Richards to hedge the identification of his handwriting. Such circumventing of the truth in this hearing is empirical evidence that supports the finding of future unreliability that is inferred from the criminal convictions. Thus, we see that Richards' future communications with the Commission cannot be trusted.

CONCLUSIONS OF LAW

23. The Commission's policy is to consider any matter coming to its attention that raises a material doubt as to whether a grant of a broadcast license would be in the public interest and that a revocation will apply for any reason that would warrant a denial of an application. *South Carolina Radio Fellowship, et. al.*, 6 F.C.C. Rcd 4823 (Comm'n 1991). The Commission's hearing designation order in this case states:

The Commission considers felony convictions relevant to our evaluation of a licensee's character. [Citation omitted.] Moreover, the Commission regards drug trafficking as a matter of the gravest concern and we have stated our intention to apply policies that reinforce both private and government efforts to eradicate drug trafficking. [Citations omitted.] In this regard, we stated our intent to take all appropriate steps, including license revocation proceedings, where information comes to our attention that Commission licensees or their principals have been convicted of drug trafficking. *Public Notice*, 4 F.C.C. Rcd 7533 (Comm'n 1989).

HDO, supra at Para. 3. Here, the burden is on Richards to make a significant showing of mitigating circumstances or rehabilitation in order to avoid a denial order. See *South Carolina Fellowship, supra* at 4824; *Character Policy Statement*, 102 F.C.C. 2d 1179, 1228 (Comm'n 1986); and *RKO General, Inc.*, 5 F.C.C. Rcd 642, 644 (Comm'n 1990). Richards has failed to meet this burden.

24. The crux of the Commission's concern with the felony conviction is the relationship between that conviction and Richards' propensity for untruthfulness in dealing

with the Commission and his unreliability in conforming with Commission rules. *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 F.C.C. Rcd. 3552 (1990). The Commission has stated its policy as follows:

[W]e believe a propensity to comply with the law generally is relevant to the Commission's public interest analysis, and that an applicant's or licensee's willingness to violate other laws, and, in particular, to commit felonies, also bears on our confidence that an applicant or licensee will conform to FCC rules and policies.

5 F.C.C. Rcd at 3253 (relevant non-FCC misconduct). Richards' intentional trespass upon federal land to carry out a criminal enterprise, his intentional misuse of federal land to avoid the consequences of his crime, and his conduct as an admitted heavy user of marijuana after his arrest constitute acts of "misconduct so egregious as to shock the conscience and evoke almost universal disapprobation." *Character Qualifications*, 102 F.C.C. 2d at 1205 n.60. He even used a portion of his home to dry out marijuana leaves. (Tr. 51-53.) The fact that children occupied or visited the home did not deter Richards. He merely boarded up the room to keep the children away or to conceal his activities or both. (Tr. 51-52.) Such conduct carried out in connection with a felonious enterprise while Richards was an admitted heavy marijuana user are circumstances above and beyond the felony conviction that in their totality further support revocation. For the Commission has found that:

[nonbroadcast misconduct] might, of its own nature, constitute *prima facie* evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee...

*Id.*¹² The fact that there were no reported FCC violations in connection with Station K33CG does not alter the conclusion that Richards is not to be trusted with government property, i.e., a broadcast license.

25. In addition to the uncontested evidence of a felony conviction and the above described related egregious conduct, each of which is an independent ground to revoke, the Commission has a specific policy with respect to drug traffickers. The Commission considers "drug trafficking as a matter of gravest concern" and it has adopted the following policy:

[A]bsent extenuating or mitigating circumstances, the Commission intends promptly to take all appropriate steps, including initiation of license revocation proceedings, where information comes to our attention that FCC licensees or their principals have been convicted of drug trafficking [Footnote omitted.]

¹² The Commission stated in 1986 that it could not then contemplate the misconduct except that there must be "specific misconduct." *Id.* The specific misconduct of Richards in cavalierly using federal land to grow marijuana to support his heavy

habit while engaging in a related drug trafficking criminal enterprise and to continue the use of marijuana even after arrest should suffice.

Public Notice, Commission Clarifies Policies Regarding Licensee Participation in Drug Trafficking, 4 F.C.C. Rcd. 7533 (1989). The Commission held in requiring a licensee to show cause in a consolidated renewal and revocation case:

We think [drug trafficking] is within the category of 'egregious' non-FCC offenses entailing such callous disregard for the welfare of fellow citizens as to place at issue the perpetrator's qualifications to be or remain a broadcaster. A doubt certainly exists as to whether someone recently found guilty of such an egregious crime against society would faithfully serve the public in exercise of their vast and important discretion that this agency entrusts to licensed broadcasters. [Footnotes omitted.]

Williamsburg County Bdcstg. Corp., supra. 5 F.C.C. Rcd 3034, 3035 (Comm'n 1990) (Order to Show Cause). Richards asks that the doubt be resolved favorably. He argues that his criminal conduct did not involve "systematic devotion to a criminal enterprise" or reflect a "callous disregard for the welfare of fellow citizens" and that therefore his criminal conviction does not amount to "an egregious crime against society." Richards even seeks to convince the Commission that:

In fact, it is a stretch to label his conduct as "drug trafficking" at all. Richards grew marijuana for his personal use and agreed to grow a friend's marijuana plants and return them to him at maturity. Only in the most technical of senses does Richards' agreement with his friend constitute an agreement to "distribute" marijuana.

See Richards' Proposed Findings and Conclusions at 32. Richards then asks for an analysis of the facts underlying the conviction to determine whether they are of such an egregious nature that they would warrant Richards' disqualification. *Id.* Facts and circumstances attendant to Richards' arrest have been considered in this decision. But a more detailed analysis of the facts attendant to the plea conviction would require a review of evidence that is not in this record.¹³ The conviction was the result of a plea bargain and therefore not all of the relevant facts are included in this record. But those facts that are in the record, including those that are relied upon by Richards for mitigation, will only support a denial of a broadcast license application. Certainly, the felony conviction was not a mere technicality. That is clear from the fact that the crime to which he pleaded guilty was no mere misdemeanor -- it was a felony. Richards' argument makes light of his crime and, significantly, at no point does Richards' recognize that through his misconduct he has breached his trust as a Commission licensee.

26. The evidence of record establishes that Richards was engaged in a systematic criminal enterprise¹⁴ in the growing and harvesting of marijuana on federal property. "Drug

trafficking" has been defined with approval in a jury instruction as "possession with intent to distribute." *U.S. v. Logan*, 998 F. 2d 1025, 1030 (D.C. Cir. 1993). There was no instruction needed on whether it was a one-time distribution or a distribution made only to one person. There also was a finding of possession with intent to distribute where narcotics were found by police on an accused's premises in an amount that was inconsistent with personal use and where the arresting officers found "tools of the trade" that included a drug ledger and an electronic scale. *U.S. v. Echeverri*, 982 F. 2d 675, 676-79 (1st Cir. 1993). Here, when Richards was arrested, the police found approximately thirty nine marijuana plants (thirty seven on federal land), a marijuana ledger, scales (including one that weighs by the gram), a heat sealer of plastic bags, mobile telephones and pagers and a concealed room set aside for drying harvested marijuana plants. As the court held in *Echeverri*, such facts were sufficient to convict. Here, as in *Echeverri*, there is no need to "paint the lily." *Id.* at 678. In one sense, the case here of drug trafficking against Richards is stronger because he was the source (the grower) and not just an intermediary. Clearly, it is no "stretch" to conclude that Richards was a "drug trafficker" as that term is used by the Commission under its policy against the licensing of "drug traffickers." Richards' conviction is further exacerbated by his admission that he continued to use heavily the marijuana drug even after his arrest and at a time that he was a Commission licensee. And Richards' personal assurance that he has received a religious conversion does not provide a reasonable assurance that there will be no recidivism on his part, particularly in light of the instances of his fanciful testimony in this proceeding.

27. The Commission has found that "all felonies are serious crimes [and] any conviction provides an indication of an applicant's or licensee's propensity to obey the law." *Policy Statement, supra* 5 F.C.C. Rcd at 3553-54. However, the Commission requires that "mitigating factors" be taken into account in determining whether a licensee has a "propensity to obey the law." *Id.* Those factors include the misconduct's willfulness, frequency, currentness, seriousness, efforts to remedy the wrong, overall record of compliance with FCC rules, and rehabilitation. *Id.* Richards did nothing to correct the wrong before he was apprehended. Richards participated personally in the misconduct. There is no evidence of efforts made to remedy the wrong such as providing assistance to the persons who were harmed by the marijuana that Richards grew and distributed or volunteer work on Richards' part with persons who are addicted to drugs. Richards has participated in drug testing only as a condition of the suspension of his sentence. But that participation is of necessity. It is not voluntary conduct that might be viewed as rehabilitative or as a remedy of the wrong. And there is not substantial evidence that Richards has gained control over his habit.

¹³ For example, such an expanded analysis would include an examination of facts and circumstances surrounding charges of Richards engaging in witness tampering in counts two, three and four of the indictment. See rejected Bureau Exh. 1. Rich-

ards has objected to any inquiry into those related counts which were not the subject of the plea bargain and his objection was sustained. (Tr. 95.)

¹⁴ An enterprise is defined as a "project or undertaking." *Black's Law Dictionary* (4th Ed). The criminal activities to which Richards has pleaded guilty meet that definition.

SUMMARY CONCLUSIONS

28. Conclusions on rehabilitation are dependent upon the facts of this case. *Policy Statement, supra*. 5 F.C.C. Rcd at n.4. Based on the evidence, Richards has not been involved in growing, distributing or using marijuana since December 1992, because he was apprehended and convicted and his land, whereon he grew the marijuana, was seized. He is now serving a suspended sentence. Richards has a good reputation among persons in the Sierra Vista community having the same programming interests as Richards. But there is not substantial evidence in the record showing that Richards will not return to using marijuana while he holds a Commission license or that he will be a truthful and reliable licensee. His felonious activities with respect to using federal land to provide a source for marijuana, his continued use of marijuana after arrest, his failures to disclose to the DEA, a federal agency, his incredible uncorroborated testimony, and his adamant refusal to identify his own handwriting on Bureau exhibits outweigh the character testimony and reinforce the adverse inferences that flow from Richards' felony convictions. *Cf. South Carolina Radio Fellowship, supra*, 6 F.C.C. Rcd. at 4824. Therefore, it cannot be concluded that Richards is rehabilitated and that he will be a truthful and reliable Commission licensee in the future.

29. Richards has admitted to willfulness in the commission of a felony. He has also admitted that as of December 31, 1991, he was a heavy user of a high quality of marijuana. His wrongful growing of marijuana on federal property and his distribution of marijuana were continuous acts which meet a standard of frequency. The arrest occurred in 1991 and the conviction took place only two years ago. Therefore, the misconduct was current. *Cf. South Carolina Radio Fellowship, supra*, 6 F.C.C. Rcd at 4824 (conviction less than four years prior is current). The fact that the prosecutors did not seek revocation of Richards' broadcast license pursuant to Title 21 is irrelevant. (Richards Exh. 28.) Title 21 covers only the "issuance" of federal benefits. It does not authorize a revocation. *See Report And Order*, 6 F.C.C. Rcd 7551, 7553 (Comm'n 1991). The Commission has been delegated the primary responsibility for the licensing of broadcast stations and, with this record, the Commission may act in the public interest by denying Richards a renewal of the license for Station K33CG. *Id.*

30. The Commission is concerned primarily with Richards' propensity for truthfulness and his reliability to conform with Commission rules. His multiple felony convictions while a Commission licensee coupled with his demonstrated propensity to use federal property in a criminal enterprise¹⁵ involving marijuana growing and distribution demonstrate a propensity for untruthfulness and dishonesty in dealing with federal property. That conclusion is further supported by Richards' continual use of marijuana while a Commission licensee for six months after his arrest and the incredible, uncorroborated and uncooperative "testimony in this case. *See South Carolina Radio Fellowship, supra*, 6 F.C.C. Rcd at 4824 (a drug conviction sufficient for revocation is reinforced by admissions of fact that compound the crime). Therefore, based

on the recent multiple felony convictions and the Commission policy with respect to drug trafficking, it is concluded that it would not be in the public interest for Richards to be trusted further with a broadcasting license.

ORDER

IT IS ORDERED that the license renewal application of Richard Richards (File No. BRTTL-921116IG) for Station K33CG, Sierra Vista, Arizona, IS DENIED.¹⁶

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

¹⁵ The wrongful use of federal property is twofold: first, the trespass on federal land to commit a crime, and second, the use of federal land to grow the marijuana crop so as to avoid an escheat of Richards' contiguous land if the law enforcement authorities learn of the activity.

¹⁶ This Initial Decision shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(b).