

ORIGINAL

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, OH	)	
	)	
THE PETROLEUM V. NASBY CORPORATION	)	File No. BTCH-921019HX
	)	File No. BTCH-921019HY
For transfer of control of Station	)	
WSWR(FM), Shelby, OH	)	

TO: The Review Board

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REPLY EXCEPTIONS  
OF  
THE PETROLEUM V. NASBY CORPORATION

Ann C. Farhat

Bechtel & Cole Chartered  
1901 L Street, N.W.  
Suite 250  
Washington, D.C. 20036  
202/833-4190

Counsel for The Petroleum  
V. Nasby Corporation

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**REPLY EXCEPTIONS  
OF  
THE PETROLEUM V. NASBY CORPORATION**

Pursuant to §§ 1.276 and 1.277 of the Commission's Rules, The Petroleum V. Nasby Corporation (Nasby) through counsel hereby submits its reply to the exceptions submitted November 21, 1994 by the Chief, Mass Media Bureau (Bureau) of the Federal Communications Commission (FCC or Commission).<sup>1</sup> As the Review Board is aware, Nasby has previously submitted its statement of support (with contingent exceptions) of the *Initial Decision of Administrative Law Judge Edward Luton*, 9 FCC Rcd \_\_\_\_ (1994), slip op., FCC 94D-11, released October 20, 1994 (I.D.). The Bureau's exceptions to the I.D., addressed below by Nasby, do not in any way detract from the ultimate decision of Administrative Law Judge Edward Luton (ALJ) granting the unconditional renewal and transfer of control applications of Nasby. The Review Board should affirm the I.D.

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<sup>1</sup> By letter of Allan Sacks, Chief for Law, dated December 6, 1994, the time for the submission of Nasby's reply exceptions was extended until December 13, 1994.

Criminal Convictions of Thomas L. Root

1. The Bureau's exceptions are fraught with the same deficiencies its findings and conclusions submitted to, and rejected by, the ALJ. In seeking an appeal of the ALJ's I.D. the Bureau's "boot strap" argument relied upon in its quest to reach its desired conclusion that Nasby should be disqualified can be summarized as follows: Root was involved in activities involving FCC licensing proceedings during a time period when he was a principal of Nasby, which certain of the activities were found at a later time period, subsequent to Root's withdrawal from Nasby, to consist of misconduct for which Root was adjudged guilty. The activities involved misconduct related to FCC licensing proceedings where Root served as legal counsel to various applicants for new FM stations formed by Sonrise Management Services, Inc. (Sonrise) and since Root had been a principal of Nasby at an earlier time, his actions according to the Bureau must arbitrarily be imputed to Nasby even though it is undisputed that Nasby had no involvement in Root's law practice nor was otherwise knowledgeable of Root's activities which took place some 400 miles away and did not involve the day-to-day management, operation or control of Nasby and Station WSWR. In order to bypass the record evidence including stipulations by the Bureau that Nasby had no connection with Root's individual actions which resulted in his convictions, the Bureau attempts to rely on FCC precedent that would purport to prohibit the separation of a wrongdoer from other shareholders in reaching a determination on the basis of an applicant's/licensee's character

qualifications. As will be demonstrated, the caselaw relied upon by the Bureau is not remotely comparable on the facts of this case and the desired result espoused by the Bureau based on its gross and purposeful misreliance on such caselaw flies in the face of direct Commission precedent which supports the grant of Nasby's applications herein.

2. There is no dispute that Root was adjudged guilty in various federal and state courts for which he has been imprisoned. However, it is also undisputed that Root resigned from all ownership positions with Nasby prior to his convictions. To sustain its sole legal argument presented in its exceptions, "that the ID erred in concluding that Nasby is qualified to remain a Commission licensee despite the criminal convictions of its principal, Thomas L. Root" (Bureau Exc., p. 3), the Bureau purposefully misstates an essential element of the record evidence. The Bureau omission -- that Thomas L. Root was a former principal of Nasby at the time of his criminal convictions -- is no accident.<sup>2</sup> Notwithstanding the fact that the Bureau drafted stipulations which were reached between Nasby and the Bureau, clearly reflecting that Root's criminal convictions were subsequent

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<sup>2</sup> The brashness of the Bureau is even more breathtaking where in the last paragraph of its Exceptions the Bureau boldly claims that the "ID erroneously relies on the fact that Root purportedly resigned from Nasby before his convictions." This is an obvious acknowledgement by the Bureau that it is aware that the record evidence establishes that Root severed his positions and ownership with Nasby prior to his convictions -- an acknowledgement obviously buried by the Bureau at the very end of its pleading in a last ditch effort to avoid the serious flaws in the preceding paragraphs of its exceptions.

to his resignation as an officer, director and as station legal counsel, and his divestiture of ownership in Nasby (see Jnt Ex. 1, Stip. Nos. 2, 4, 5, 12, 17, 21, 28), it is critical for the Bureau to be careless with this important fact. It is important because it is one important factor the Commission cited in its decision in *Sande Broadcasting, Inc.*, 61 F.C.C.2d 305 (1976), favoring against designating for hearing an application for renewal of station license. The ALJ properly relied upon the Commission's decision in *Sande* in reaching his determination that Nasby is qualified to remain a Commission licensee. See I.D. ¶¶ 24, *slip op.* at 4.

3. This omission takes on greater significance where the Bureau argues that the ID relies on the conclusion that Nasby, the corporation, has not been adjudged guilty of misconduct. In effect the ID would find any corporation qualified without regard to the misconduct of its principals." Bureau Exc. ¶ 6, p. 4. No citation is provided by the Bureau as to where in the I.D. such conclusions were reached by the ALJ and that is no accident either since no such conclusion were reached by the ALJ. Once again, the premise of the Bureau's position is based on its mischaracterization of treating Root as a current principal of Nasby. As previously demonstrated, Root was a former principal of Nasby at the time of his criminal convictions. In addition, the I.D. does not make the sweeping generalizations the Bureau attributes to it. At ¶ 23 of the I.D. (*slip op.* at 4), the ALJ was specific in his citation to the facts of this case. The ALJ noted that Nasby, the applicant, has neither been convicted of, nor accused of criminal conduct of

any kind. Rather the case is before the ALJ due to "Nasby's association (an association now plainly unfortunate) with a *former* principal, who without a doubt, violated several significant laws in significant respects (emphasis in italics added)." *Id.*

4. In ultimately reaching the conclusion that Root's "criminal taint provides no basis for imputing his criminal activities to the innocent Nasby" (*id.*), such endorsement does not stand for the wholesale generalization proffered by the Bureau that this ALJ "would find any corporation qualified without regard to the misconduct of its principals." The ALJ did not have a corporation in front of him which had principals that were involved in any misconduct. Once the record evidence was developed which clearly and indisputably reflected that Root was no longer a principal of Nasby at the time of his convictions (let alone the existence of other record evidence in support of Nasby's renewal and transfers) the Bureau was then free to view the evidence *as it actually exists* in order to seek the application of the appropriate caselaw and ultimate resolution of this proceeding based on such precedent. As the Bureau noted at the outset of its pleading, the facts of the case are not in dispute. Nasby would agree with the Bureau based on the record evidence presented and stipulations reached. Yet recognizing this it remains unfathomable how the Bureau plainly mischaracterizes the facts in its exceptions in a futile attempt to sustain its draconian request that Nasby's renewal and transfer of control applications be denied.

5. Unfortunately, the Bureau's mischaracterizations of the

record and legal precedent do not stop with the above-referenced examples. At ¶ 7 of its Exceptions, the Bureau once again ignores the totality of the record evidence in its attempt to challenge the I.D.'s reliance on *Sande, supra*, and *Chapman Radio and Television, Inc.*, 57 F.C.C.2d 76 (1975), *modified on other grounds*, 45 R.R.2d 239 (1979). In cherry-picking the one aspect of both cases which it apparently agrees -- that the Commission in both decisions considered it significant that the misconduct engaged in by the principals in those cases did not involve any broadcasting or any application before the Commission, the Bureau faults the ALJ for making a distinction that Root's misconduct involved applications and licensing proceedings unrelated to Nasby and its station. Bureau Exc. ¶ 7, p. 5. Incredibly, the Bureau finds this distinction to be "completely artificial" and once again treats Root as though he was a current principal of Nasby in order to come full circle with perhaps the most lame argument of all -- "there is no logical reason to whitewash the misconduct merely because it did not involve an application with Nasby's name on it." What kind of argument is this? How could the actions of Root, a former principal of Nasby, in his capacity as a licensed practicing attorney in Washington, D.C., representing totally unrelated applicants in licensing matters before the FCC where certain misconduct attributable to Root in his capacity as legal counsel for such applicants be an "artificial distinction"? The only "whitewash" going on here is the Bureau's refusal to accept the fact that the record evidence in this proceeding does not support

the disqualification of Nasby as a Commission licensee.

6. Nasby has never argued that Root's severance of ties with Nasby prior to Root's convictions is the only factor to be considered in support of Nasby's qualifications to remain a Commission licensee. On the other hand, it is clearly a relevant factor to consider under the United States Court of Appeals decision in *TV 9 v. FCC*, 495 F. 2d 929 (D.C. Cir. 1973) as well as other Commission precedent, e.g., *Sande, supra*, which was decided subsequent to the Court of Appeals decision in *TV 9*. When this factor is combined with other relevant factors, which include, *inter alia*, that Root had no involvement in the day-to-day management, operation or control of Nasby and Station WSWR, it is clear that the Bureau must compartmentalize its arguments and ignore record evidence in its quest to reach its desired result.

7. The Bureau also excepts (Bureau Exc. ¶ 9, p. 6) to the ALJ's conclusion that Root's involvement with Nasby "was not so pervasive as to implicate the Commission's concerns . . . ." See I.D. ¶ 27, *slip op.* at 4. Once again, what the Bureau fails to include is the complete context of the ALJ's conclusion. The Bureau left off "in this case, i.e., Nasby's propensity to obey the law. The criminal activities [of Root] do not support a denial of Nasby's application." *Id.* I guess this is just another example of an "artificial" distinction which the Bureau would argue should be discounted where it is on a quest to get Nasby's license yanked come hell or high water. In support of its latter argument, the Bureau characterizes selected portions of the record evidence to

somehow support its argument. At ¶¶ 9-10 of its exceptions, the Bureau lists activities which it believes shows involvement by Root. These activities include legal matters which Root reviewed in his position as the station's legal counsel prior to his resignation as counsel in April 1990, over two years prior to his convictions. The Bureau refers to review of matters by Root "purportedly" as the station's attorney. There is nothing in the record evidence which suggests anything other than precisely that.

8. If the Bureau had any evidence to the contrary it should have been presented to the Commission. No such evidence was provided. Extensive document production and answers to interrogatories were filed by Nasby in response to the Bureau's discovery requests which largely focussed on the management, operation and control of Nasby. The discovery responses as well as the record evidence reflect that the management, operation and control of the station rests with Timothy J. Moore (Moore), the President of Nasby and its General Manager since 1988 (first acting, then permanent), and prior to Moore, David L. Williamson (Williamson). If the Bureau chooses to ignore pertinent record evidence in order to focus on matters which required action of the board, at a time when Root was a board member, or involvement by Root in his capacity as legal counsel for the station, it does so only to further support its desired result of having Nasby disqualified. There is no doubt that Root during the course of his tenure was one of three members Nasby's board, was an officer of Nasby, was a shareholder of Nasby, or served as legal counsel for

Nasby. There is also uncontroverted evidence in the record that subsequent to Root's resignations and divestiture of stock interests which occurred prior to Root's convictions, Root had no further connection or involvement whatsoever with Nasby, other than assistance with an ownership report due to be filed shortly after Root's resignation as legal counsel and prior to Nasby's securing new counsel. Moreover, if there was any evidence that Moore (or Williamson during his tenure) was not in complete control of the station, as has been demonstrated by Nasby, the Bureau had plenty of opportunity to provide rebuttal evidence or even take the depositions of station employees, etc. It did not.

9. The Bureau's reliance on *West Jersey Broadcasting Co.*, 90 F.C.C.2d 363, 371 (Rev. Bd. 1982), is also misplaced. Bureau Exc. ¶ 8, p. 5. In *West Jersey*, an illegal settlement payment was made by an applicant to secure the withdrawal of a competitor. The condemned activity was undertaken by certain of the applicant's principals on behalf of, and with the intent to benefit, the applicant itself. These facts are not present here and the applicable precedent to be followed is that which the ALJ relied upon, *Chapman and Sande*. See I.D., ¶ 24, slip. op. at 4.

10. The fact that the Bureau is willing to take inconsistent positions as long as *its* desired result is attained, *i.e.*, disqualification of Nasby at all costs, is best exemplified by the following example. Upon information and belief, in a comparative hearing proceeding involving the award of an FM permit in Roswell, GA, the Bureau was in possession of a video tape (though none of

the competing applicants were aware of the video tape at the time) which reflected that the purported voting principal (of Johnson Broadcasting, Inc. (JBI), an application put together by Sonrise Management Services, Inc. (Sonrise), spoke to a Sonrise sales meeting. Mr. Johnson, the purported voting principal, testified at hearing that he was an innocent dupe of the Sonrise organization and that, after the application was filed, had nothing to do with Sonrise except to make an inquiry regarding a tax return and to make social calls on Sonrise's headquarters. The Bureau did not bring this information forward in the hearing proceeding. Both the Review Board and the full Commission apparently believed Mr. Johnson and awarded JBI the permit, granting leniencies to JBI, premised on Mr. Johnson's innocence. When the other applicants did become aware of the video tape, a petition was brought before the full Commission within the 15-day period provided under the FCC's rules for raising newly discovered evidence. The other applicants provided the video tape along with a transcript of the tape to the FCC, outlining the duplicity of Mr. Johnson in participating in the taped speech and in covering up that activity in false testimony at hearing. The Commission rejected the petition and the case remains on appeal.

11. While the undersigned counsel's firm represents a competing applicant in the Roswell, GA proceeding, the point being made here is that if the Bureau makes a determination to not come forward with the video tape, believing that Mr. Johnson was an innocent dupe, it is incomprehensible that the Bureau does not view

the innocent Nasby shareholders in the same vein. This is especially so based on the record evidence of this case which the Bureau directly participated in. Indeed, the Bureau drafted stipulations which Nasby agreed which clearly reflected that Nasby had no involvement with Sonrise. The stipulations also included the dates when Root ceased being an officer, director, shareholder and station attorney for Nasby, all dates prior to Root's conviction for matters totally unrelated to Nasby. Yet the Bureau supports the award of the Roswell GA construction permit to JBI, whose principal was clearly directly involved with Sonrise and urges that Nasby, whose principals had no involvement whatsoever with Sonrise, had no knowledge of Root's apparent misconduct in licensing proceedings involving other clients of Root, should be disqualified as a 12-year Commission licensee. Root has been imprisoned and fined for his adjudicated misconduct by the United States federal government (of which the FCC is surely a part) and various state governments. The only aspect remaining in this proceeding which could also be viewed as criminal is the Bureau's appeal of the ALJ's reasoned decision based on the record evidence. While the Bureau may have a technical legal right to appeal the ALJ's decision, it also has the responsibility to exercise discretion. In Nasby's view the Bureau has failed to exercise discretion instead it has chosen to embark on a misguided course of action which unreasonably and unlawfully punishes innocent people in order to indulge the Bureau's whim of extracting its "own" pound of flesh. Nasby, unfortunately, is once again the unwitting

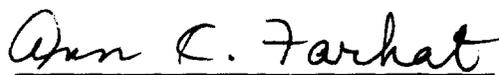
recipient of abuse -- first by the actions or inactions of Root which resulted, *inter alia*, in Nasby's qualifications being called into question, and now by the Bureau's failure to act appropriately based solely on the record evidence and caselaw which should govern the facts of the case. Fortunately for Nasby, the ALJ fulfilled his responsibilities and full expects that the Review Board will do the same.

Transfer of Control Issue

12. The Bureau did not "point out with particularity alleged material errors in the decision or ruling" of the ALJ relative to the transfer of control issue. Accordingly, its conclusory statements made only in the summary and in the closing of its pleading urging that the transfer applications (in addition to the renewal application) be denied, should be ignored. See § 1.277(a) of the Commission's Rules ("[a]ny objection not saved by exception filed pursuant to this section is waived").

For the foregoing reasons, the Initial Decision of Administrative Law Judge Edward Luton granting unconditionally the renewal and transfer of control applications filed by The Petroleum V. Nasby Corporation should be affirmed.

Respectfully submitted,



Ann C. Farhat

Bechtel & Cole Chartered  
1901 L Street, N.W.  
Suite 250  
Washington, D.C. 20036  
202/833-4190

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Counsel for The Petroleum  
V. Nasby Corporation

December 13, 1994

CERTIFICATE OF SERVICE

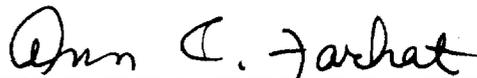
Ann C. Farhat, a member of the firm of Bechtel & Cole Chartered, certifies that on December 13, 1994, she caused copies of the foregoing *Reply Exceptions of The Petroleum V. Nasby Corporation* to be served by hand (or by U.S. first class mail, postage prepaid) on the following individuals:

The Honorable Joseph A. Marino (by hand)  
Chairman  
The Review Board  
Federal Communications Commission  
2000 L Street, N.W., Room 211  
Washington, D.C. 20554

The Honorable Marjorie R. Greene (by hand)  
Member  
The Review Board  
Federal Communications Commission  
2000 L Street, N.W., Room 206  
Washington, D.C. 20554

Allan Sacks, Chief for Law (by hand)  
Leland J. Blair, Assistant Chief for Law  
The Review Board  
2000 L Street, N.W., Room 205  
Washington, D.C. 20554

James Shook, Esquire (by first class mail)  
Hearing Branch  
Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 7212  
Washington, D.C. 20554



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Ann C. Farhat