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April 15, 1997

**BY HAND DELIVERY**

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: In the Matter of Amendment of Section 73.202(b)
Table of Allotments FM Broadcast Stations
TRL Broadcasting Company
Tylertown, Mississippi
MM Docket No. 97-45; RM-8961

Dear Mr. Caton:

Transmitted herewith on behalf of TRL Broadcasting Company are an original and four (4) copies of a "Reply Comments" as directed to the Allocations Branch.

Should any additional information be required, please contact this office.

Very truly yours,

Henry E. Crawford
Counsel for
TRL Broadcasting Company

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Federal Communications Commission
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BEFORE THE
# FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

| | | |
|---|---|---|
| In the Matter of | ) | MM Docket No. 97-45 |
| | ) | |
| Amendment of Section 73.202(b) | ) | RM-8961 |
| Table of Allotments | ) | |
| FM Broadcast Stations | ) | |
| Tylertown, Mississippi | ) | |

To: The Chief, Allocations Branch

## REPLY COMMENTS

TRL Broadcasting Company ("TRL Broadcasting"), by counsel, pursuant to 47 CFR § 1.420(b) and the *Notice of Proposed Rule Making* issued in the above-captioned matter,[1] hereby submits its Reply Comments in response to the Comments filed by Guaranty Broadcasting Corporation ("Guaranty") in the above-captioned matter.[2] The NPRM proposed amending the FM Table of Allotments, Section 73.202 of the Commission's Rules, to assign FM Channel 297A to the community of Tylertown, Mississippi. In support of its Reply Comments, TRL Broadcasting states as follows:

## I. INTRODUCTION

1. In its Comments, Guaranty includes a nearly two-page footnote containing an irrelevant stream of baseless innuendo. Guaranty never explains the purpose of this diatribe in connection with this or any other ongoing Commission proceeding. Much of the "Comments" contains material copied

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[1] *Notice of Proposed Rule Making*, MM Docket No. 97-45, RM-8961, Released February 7, 1997 ("NPRM").

nearly verbatim out of a pleading filed by Guaranty in MM Docket No. 97-8.[3] Although listed in the certificate of service, undersigned counsel was not actually served with this Amelia pleading until after he had read the instant Comments and inquired of Guaranty's counsel. Accordingly, a copy of this pleading is being simultaneously filed in MM Docket No. 97-8, in order to preserve the integrity of the record in that case.

## II. GUARANTY HAS MISUNDERSTOOD THE LAW AND MISREPRESENTED THE FACTS

### A. Guaranty Misstates The Law

#### 1) Pueblo Radio Broadcasting Service

2. Guaranty starts its attack by quoting a seven-year-old Review Board decision entirely out-of-context.[4] Cited as a case showing matters of a "questionable nature" on the part of Mr. Henderson, the only thing that is shown to be "questionable" is Guaranty's counsel's judgement in presenting a case so boldly out-of-context.[5]

3. Guaranty quotes the decision as follows:

> [I]t is devoutly hoped that all interested parties -- competitors current and potential, the local citizenry, and the Commission -- keep a keen eye upon Henderson....

Comments, p. 1, n. 1. However, the complete text reads:

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[2] Comments, filed by Guaranty on March 31, 1997.

[3] MM Docket 97-8 proposes the allotment of Channel 249C3 to Amelia, Louisiana. See, *Notice of Proposed Rule Making*, MM Docket No. 97-8, RM-8957, Released January 21, 1997.

[4] Comments, p. 1, n. 1.

> Should Henderson ultimately receive this Oro Valley permit, it is devoutly hoped that all interested parties--competitors current and potential, the local citizenry, and the Commission--keep a keen eye upon Henderson, lest he renege in the slightest.

*Roy E. Henderson d/b/a Pueblo Radio Broadcasting Service*, 5 FCC Rcd 4829, 4833 (Rev. Bd. 1990). When read in context, it is clear that the Review Board decision is narrowly concerned with Mr. Henderson's integration pledge in that specific case. There is no mention of any wrongdoing on the part of Mr. Henderson and no "questionable" conduct whatsoever.[6]

4. In *Pueblo Radio*, Mr. Henderson was recognized as an experienced broadcaster and owner of many broadcast interests. Thus, Mr. Henderson's competitors in that case argued unsuccessfully that he would not uphold his integration pledge. However, the Review Board held Mr. Henderson above blame:

> Accordingly, we affirm the ALJ's award of 100% "integration" credit to Pueblo, since there is insufficient reason at this point to question Henderson's commitment, and his ongoing broadcast transactions during the course of this proceeding are fully consistent with the Commission's recognition that principals are not expected "to remain static during often lengthy proceedings." Coast TV, 4 FCC Rcd 1786 (1989)("Coast I") (But see Separate Statement, post.) Moreover, "there has been no allegation that [Henderson's various broadcast transactions] ha[ve] contravened any outstanding Commission rule or policy; and, thus, his 'activities'

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[5] A copy of the case is attached hereto as Exhibit 1.

[6] Guaranty appears in some places to be concerned about Mr. Henderson's sales transactions. However, it is noted that Guaranty is no stranger to broadcast sales as witnessed by the 5 assignment applications that Guaranty has filed over just the past two years. See Exhibit 2.

> are irrelevant in the integration analysis." Sarasota - Charlotte Broadcasting Corp., FCC 90R-53, released June 27, 1990, at para. 12.

*Pueblo Radio*, 5 FCC Rcd at 4830-4831. Of course, the Court of Appeals for the District of Columbia Circuit subsequently held the integration criteria to be arbitrary and capricious and therefore unlawful. *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). Consequently, whatever little relevance this case may have had seven years ago, it can be of no relevance at all within the context of a present day rulemaking proceeding.

5. In sum, a full reading of *Pueblo Radio* reveals that Mr. Henderson actually won the case and that the Review Board upheld his conduct. To the extent that dicta in the case questioned Mr. Henderson's integration commitment, integration itself has since been declared unlawful. Therefore, Guaranty's citation is wholly out-of-context and represents a new low in advocacy before the Commission.

**2) Guaranty's Track Record In This Proceeding**

6. Guaranty itself has behaved curiously throughout these rulemakings. It has complained that it was not served with a Petition for Rulemaking when such service was never required by any Commission Rule and Guaranty could not point to a single reason why it should have been served.[7] Nevertheless, it was Guaranty that failed to promptly serve its Amelia pleading on counsel. It is further noted that Guaranty failed to file a timely comment in the

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[7] See, Comments of Guaranty Broadcasting Corporation in MM Docket No. 97-8 (Amealia, Louisiana), p. 1. Par. 1.

Amelia proceeding, thereby losing whatever rights it thought it possessed. Against this background, it has become evident that it is not Mr. Henderson's motives that are suspect, but Guaranty's. What it has done in the Amelia proceeding is attempt to block the award of a first local FM facility to the community of Amelia, just because it failed to timely file an upgrade for its Homa faculty.

7. In conclusion, Guaranty's slipshod behavior in these proceedings is wholly self-seeking and of no public interest value. The Commission should send a strong message to Guaranty and others like it that such conduct will not be tolerated, lest its allocation proceedings become a farce of innuendo, misquoted cases and undisciplined pleading practices.

**B. Guaranty Misstates The Facts**

8. It is important to remember that Guaranty has not claimed that either Amelia Broadcasting or TRL Broadcasting has violated any rule or regulation. At most, Guaranty has charged Mr. Henderson with having "an alternative agenda".[8] From a factual standpoint, Guaranty's pleading is equally vague and misleading.

9. Guaranty fails to mention the fact that Mr. Henderson was asked to attend the March 7, 1996 meeting at the invitation of Guaranty's president,

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[8] Comments, p. 2, n. 1. It is Guaranty that has needlessly consumed the Commission's resources with a half-hearted rulemaking agenda. See, *Houma and Chalmette, Louisiana*, 7 FCC Rcd 2189 (1992) (Guaranty withdraws modification of Station KCIL-FM after opposition filed by competitor).

George A. Foster, Jr.[9] It turns out that Mr. Foster was seeking to have Mr. Henderson purchase KCIL for $6,000,000.00.[10] Mr. Henderson agreed to meet with Mr. Foster and Guaranty's principals with the understanding that Guaranty was proceeding on a good faith basis to sell one or more of its broadcast properties.[11]

10. In the course of this discussion, Mr. Henderson's outstanding rulemaking petitions for Amelia and Tylertown arose.[12] There is nothing inappropriate about discussing these proceedings in the context of purchasing other stations in the same market. Indeed, it would have been highly inappropriate if Mr. Henderson had concealed these interests. Moreover, if Mr. Henderson were successful in purchasing a station in the market from Guaranty, it would stand to reason that he would withdraw his participation from one or both of the proceedings.

11. As to the substance of the discussion, Mr. Henderson could not accept Guaranty's offer of $6,000.000.00. Guaranty wanted to sell only the shell of a broadcast facility.[13] Guaranty would have taken the call letters, the accounts and even the station's format by virtue of an agreement not to

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[9] Mr. Foster called Mr. Henderson to invite him to the meeting. Declaration of Roy E. Henderson (attached hereto as Exhibit 3) , p. 1, Par. 2.
[10] Declaration of Roy E. Henderson, p. 1, Par. 3.
[11] Declaration of Roy E. Henderson, p. 1, Par. 4.
[12] Id.
[13] Declaration of Roy E. Henderson, p. 2, Par. 6.

compete.[14] In view of these onerous terms, Mr. Henderson's $2,000,000.00 counteroffer was appropriate.

12. Mr. Henderson has over 25 years of experience as a Commission licensee and has an unblemished record before the Commission.[15] He has been involved in many broadcast negotiations over the years.[16] In fact before entering into substantive discussions with Guaranty, Mr. Henderson obtained the verbal agreement of all concerned that these talks would be considered confidential.[17] It is disappointing that Guaranty has failed in this regard to conduct itself in good faith.

13. In sum, Guaranty has attempted to twist what appeared to be a good faith business meeting into some sort of diabolical scheme. However, if Guaranty is accusing Mr. Henderson of seeking a buy-out, that cannot be. It was, after all, Mr. Henderson who was being asked buy out Guaranty's broadcast interests. In any event, Guaranty has grossly distorted the truth and only Mr. Henderson has produced a corroborating witness.[18] Consequently, it is abundantly clear that Guaranty's pleadings are entirely without merit.

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[14] Id.
[15] Declaration of Roy E. Henderson, p. 1, Par. 1.
[16] Declaratin of Roy E. Henderson, p. 1-2, Par. 5.
[17] Id.
[18] Declaration of Susan Dixon Phillips (Exhibit 4).

## III. TRL BROADCASTING'S INTENTION TO APPLY FOR THE CHANNEL AND CONSTRUCT THE STATION

14. If the Commission assigns Channel 297A to Tylertown, Mississippi, TRL Broadcasting will apply for a construction permit and will construct a new facility upon award of that permit.

## IV. CONCCLUSION

15. Guaranty has engaged in a pointless campaign of innuendo. Nevertheless, Guaranty itself fails to claim that any Commission Rule was violated in either letter or spirit. It's allegations are trumped up and irrelevant and are of no value to either this proceeding or to the Amelia proceeding. Therefore, the Commission should treat Guaranty's Comments accordingly and summarily dismiss these pleadings from the record.

**WHEREFORE**, in accordance with the above, TRL Broadcasting Company respectfully requests that the Comments filed by Guaranty Broadcasting Corporation be dismissed and Channel 297A be assigned to Tylertown, Mississippi.

April 15, 1997

Respectfully Submitted,

TRL Broadcasting Company

By: _____
Henry E. Crawford

Its Attorney

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TRL Broadcasting Company
Reply Comments
April 15, 1997

# EXHIBIT 1

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

**MM Docket No. 88-137**

In re Applications of

| | |
|---|---|
| Roy E. Henderson d/b/a PUEBLO RADIO BROADCASTING SERVICE | File No. BPH-861002TA |
| SANCHEZ COMMUNICATIONS, INC. | File No. BPH-861002TB |
| HAL S. WIDSTEN | File No. BPH-861002TE |
| O-V COMMUNICATIONS | File No. BPH-861002TH |

For Construction Permit for New FM Station, Channel 248A, Oro Valley, Arizona

**Appearances**

*William D. Silva* and *Shaun A. Maher*, on behalf of Pueblo Radio Broadcasting Service; *David Tillotson* and *Paul J. Feldman*, on behalf of Sanchez Communications, Inc.; *Jeffrey D. Southmayd*, on behalf of Hal S. Widsten; and *Aaron P. Shainis* and *Lee J. Peltzman*, on behalf of O-V Communications.

**DECISION**

**Adopted: June 26, 1990; Released: July 26, 1990**

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN. Board Member ESBENSEN issuing Separate Statement in which Board Member BLUMENTHAL joins.

Board Chairman MARINO:

1. Pueblo Radio Broadcasting Service (Pueblo) was found to be the best comparative applicant in this proceeding because only Pueblo was awarded substantial credit (100%) for participation of ownership into management of its proposed station which outweighed a minor diversification demerit Pueblo received for its other media ownership interests. *See Initial Decision* (I.D.) of Administrative Law Judge Richard L. Sippel (ALJ), 4 FCC Rcd 7802, 7812 (1989). The proceeding is now before the Review Board on exceptions filed by each of the applicants, and reply briefs filed by Pueblo and Sanchez Communications, Inc. Oral argument was heard on April 27, 1990. For the reasons set out below, we affirm the ALJ's ultimate grant to Pueblo.

**PUEBLO**

2. Pueblo is a sole proprietorship owned by Roy E. Henderson, an experienced broadcaster, who proposes to divest his other mass media ownership interests, move to Oro Valley, and serve as full-time general manager of the station (if Pueblo is awarded the construction permit). I.D., paras. 6, 12-13. Pueblo was awarded 100% integration credit for Henderson's proposal to participate in management of the station. *Id.*, para. 63. However, the ALJ also found that Henderson's May 13, 1988 divestiture pledge came too late in the proceeding to be credited with respect to his ownership of two stations he acquired in 1987: Station KASK (TV), Las Cruces, New Mexico, and Station KGLF-FM, Freeport, Texas. *Id.*, para. 45. Later, in August 1988, Pueblo acquired a construction permit for an FM station at South Padre Island, Texas, but failed to *timely* report this acquisition or Henderson's intent to divest that station. *Id.*, para. 47. Thus, Pueblo was attributed with ownership of these three stations, and assessed a "slight to moderate diversification" demerit. *Id.*, para. 63.

3. In post-I.D. pleadings filed with the Board, Sanchez alleges that Pueblo had failed to report Henderson's acquisition of additional stations, principally Stations KFRD-AM/FM, Rosenberg-Richmond, Texas. Based on these station acquisitions, Sanchez seeks an increased diversification demerit or remand on a new reporting issue against Pueblo. *See* Sanchez "Petition to Re-Open the Record and to Enlarge Issues" and "Petition for Leave to Supplement Exceptions," both filed April 24, 1990. Pueblo has responded that it timely reported Henderson's acquisition of these additional stations and contemporaneously pledged to divest them should Pueblo prevail in its quest for the Oro Valley facility. *See* Pueblo Oppositions, both filed April 27, 1990. In particular, Pueblo stated that (a) on October 26, 1989, it had filed with the ALJ a petition for leave to amend to report the Commission's September 27, 1989 grant of the applications to transfer KFRD-AM/FM to Henderson, and to reaffirm his divestiture pledge originally set forth in Pueblo's formal "Integration and Diversification Statement," filed May 13, 1988; (b) the ALJ rejected the October 26 petition for lack of jurisdiction because, unbeknownst to Pueblo, he had three days earlier adopted the I.D. (which was not released until October 31), *see Order*, FCC 89M-2594, released November 3, 1989; and (c) Pueblo promptly refiled its amendment with the Review Board. *See* Pueblo "Contingent Petition for Leave to Amend," filed November 8, 1989.

4. Sanchez's Reply (filed May 8, 1990) admits that it "was mistaken as to whether [Pueblo] notified the Commission . . . in a timely manner . . . [and] that there is no basis for adding a Section 1.65 reporting issue against [Pueblo], and . . . [it] withdraws its request to add such an issue." *Id.* at 2. Nonetheless, Sanchez points to Henderson's post-I.D. activity in seeking to acquire six additional radio stations and beginning construction of a seventh, all located in his native Texas. *Id.* at 3-4. While conceding that Henderson has appropriately pledged to divest all these stations in the event of an Oro Valley grant, Sanchez nevertheless claims that these latest media acquisitions, and a recent Rule Making counterproposal by Henderson to improve some of his Texas facilities (*see* Fort Bend Broadcasting Co., Inc. "Comments and Counterproposal" in RM-7009, MM Docket No. 89-459, filed December 11, 1989, appended as Exh. A to Sanchez

Reply), provide "powerful circumstantial evidence on the sincerity of Henderson's bare pledge to divest himself of all of his Texas media interests."

5. We will not attribute Pueblo with any of the subsequently acquired mass media interests. In *Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 794- 795 (Rev. Bd. 1984), *recon. denied*, 100 FCC 2d 469 (Rev. Bd. 1985), *aff'd on pertinent point sub nom. Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730, 734 (1986), *aff'd sub nom. Plantation Broadcasting Corp. v. FCC*, 812 F.2d 1443 (D.C. Cir. 1987) (table), we held that a mass media ownership interest acquired by a comparative applicant after the "B" cut-off date would not be attributed provided that applicant filed a contemporaneous pledge to divest that interest if the application is granted. Shortly thereafter, in *Jerome Thomas Lamprecht*, 99 FCC 2d 1219, 1222 (Rev. Bd. 1984), *review denied*, 3 FCC Rcd 2527 (1988), we clarified that a divestiture pledge was "sufficiently contemporaneous" following acquisition of the interest, if made within the 30 day period provided by Section 1.65 of the Rules, 47 CFR §1.65, for reporting substantial and significant changes. However, in no case to date has the Board been called upon to determine, particularly in situations involving acquisition by assignment of license or transfer of control of an existing station, whether "acquisition" refers to Commission grant of the assignment or transfer application, or to the later *consummation* of the transaction.

6. Pueblo urges that its April 27, 1990 amendment reporting the acquisition of Stations KJAS(FM), Jasper, Texas and KACO(AM), Bellville, Texas and contemporaneously pledging divestiture was timely because it closely followed (within 30 days) *consummation* of the transactions, and that the earlier dates of Commission approval (each more than 30 days prior to the filing of the amendment) are not decisionally significant because no actual "acquisition" occurred on those dates. *See* Pueblo Oppositions, filed April 27, 1990, at 5-6 & nn. 3-4. Because we have not previously resolved any ambiguity, we will regard Pueblo's divestiture pledges as timely. However, to avoid gamesmanship in the comparative process, the Board has concluded that a comparative applicant *must* make a divestiture pledge within 30 days of a Commission grant of an application to acquire additional stations, regardless of whether that application is for a construction permit for a new station or the transfer of control or assignment of license of an existing station to the applicant. In future cases, we will attribute to the applicant those stations whose transfer or assignment has been granted by the Commission, and for which no timely divestiture pledge has been made (*i.e.*, within 30 days of Commission action).

7. Again, Pueblo has reported the acquisition of, and Henderson has contemporaneously pledged to divest, his additional stations within 30 days of "consummation" of the transactions. Moreover, Pueblo had earlier, on May 13, 1988, pledged that Henderson would "divest of *all* of his broadcast licenses and applications" (emphasis added), a blanket promise which appears to extend to all subsequently acquired stations, and which put all competing applicants on notice of Pueblo's divestiture intentions. To obviate any doubt, we will condition Pueblo's grant on Henderson's divestiture of *all* of his other broadcast stations. *See Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981); *Mark L. Wodlinger, supra*, 3 FCC Rcd at 3142, and Separate Statement, *post*.

8. Various exceptions urge that the magnitude of Pueblo's diversification demerit for the three stations attributed to it by the I.D. should be increased. *See* Sanchez Br. at 44 (seeking "moderate" demerit); Widsten Br. at 3-5 ("substantial" demerit); O-V Br. at 4-8 (same). We agree with the ALJ that Commission precedent establishes that Pueblo's instant Oro Valley, Arizona proposal should be assessed no more than a "slight to moderate" diversification demerit for Henderson's ownership of the two Texas FM stations (each located some 800 miles from Oro Valley) and a single New Mexico TV station (about 240 miles away). *See Omaha TV, Inc.*, 102 FCC 2d 875, 882-885 (Rev. Bd. 1985)(and cases discussed therein), *review denied in pertinent part*, 4 FCC Rcd 730 (1988).

9. Widsten challenges the ALJ's award of 100% "integration" credit to Pueblo, essentially arguing that Henderson will not be able to effectuate his pledge to devote full-time managing the proposed Oro Valley station, because the demands of his other broadcast stations will preclude him from doing so. Widsten Br. at 5-6. *See also* Sanchez "Petition for Leave to Supplement Exceptions," filed April 24, 1990, at n. 3. Sanchez also urges that Henderson's recent Texas media acquisitions and proposals (*see supra* para. 4) undermine Henderson's promise to "move to Oro Valley to construct and manage a new station" (Reply at 5) (*i.e.*, affect adversely Pueblo's "integration" proposal).

10. We deny these exceptions. "[I]ntegration credit is due when the applicant sets forth a specific integration proposal; the applicant adheres to that proposal; and there is reasonable assurance that the plan will be carried out." *Coast TV*, 5 FCC Rcd 2751, 2752 (1990)(" *Coast II* "); *Bradley, Hand & Triplett*, 87 FCC 2d 657, 662 (Rev. Bd. 1982). Henderson's direct written testimony states unequivocally that he "will terminate [his] present employment, relocate to Oro Valley and serve as general manager . . . of the new FM station on a full time basis (at least 40 hours per week)." Pueblo Exh. 1 at 1; *see also* Pueblo Exh. 2 at 3. When cross-examined, Henderson explained that he has no conflicting commitments to work at any other station he had applied for. *See* Tr. 96-101. With particular respect to his FM construction permit for South Padre Island, Texas, which permit he had recently acquired through settlement (Tr. 106), Henderson elaborated that (1) since the instant, later-filed Oro Valley application, his primary commitment has been to Oro Valley (and not South Padre Island); and (2) if the South Padre Island proceeding had proceeded to comparative hearing (rather than been terminated successfully through settlement), he would have voluntarily dismissed the South Padre Island application in order to concentrate on Oro Valley. Tr. 100-101. Moreover, Henderson has already divested two of the stations he owned and has not consummated (and has cancelled) his proposed acquisition of two additional stations. Factoring in his general divestiture pledge and our condition, he will actually own no other station if he is awarded the Oro Valley permit. In sum, the record evidence fully supports, and does not undercut, Henderson's "integration" commitment to Oro Valley. Accordingly, we affirm the ALJ's award of 100% "integration" credit to Pueblo, since there is insufficient reason at this point to question Henderson's commitment, and his ongoing broadcast transactions during the course of this proceeding are fully consistent with the Commission's recognition that principals are not expected "to remain static during often lengthy proceedings." *Coast*

*TV*, 4 FCC Rcd 1786 (1989)(" *Coast I* ") (*But see Separate Statement, post.*) Moreover, "there has been no allegation that [Henderson's various broadcast transactions] ha[ve] contravened any outstanding Commission rule or policy; and, thus, his 'activities' are irrelevant in the integration analysis." *Sarasota - Charlotte Broadcasting Corp.*, FCC 90R-53, released June 27, 1990, at para. 12.

**SANCHEZ**

11. Structured as a two-tiered corporation, Sanchez has a single "voting" stockholder, Anna M. Sanchez, who owns 25% equity in the applicant, and has one "non-voting" stockholder, B. Howard Bernstein (75% equity). I.D., paras. 7, 14-15. Although Sanchez sought 100% "integration" credit for Anna Sanchez's proposed role as full-time general manager of the station, *see id.*, paras. 35, 51, the ALJ found that the record evidence as a whole failed to provide reasonable assurance that the "non-voting" stockholder, Bernstein, would not in actuality control Sanchez, and therefore he withheld all "integration" credit from the applicant, effectively treating its proposal as a "sham". *Id.*, paras. 16-34, 51-61.

12. Sanchez excepts to the rejection of its "integration" proposal and seeks restoration of 100% credit therefor. Sanchez Br. at 5-42. It principally contends that it always intended to have a two-tier ownership structure despite the specification of only one class of stock in its original articles of incorporation, *id.* at 7-16, that Bernstein does not control the applicant, *id.* at 16-39, and that, in any event, it should at least receive 25% "integration" credit which corresponds to Anna Sanchez's equity share in the applicant. *Id.* at 40-42.

13. We deny Sanchez's exception that it is entitled to 100% integration credit. Although the Commission normally does not consider the interests of non-voting stockholders relevant in determining integration credit, it recognizes that:

> Sometimes an applicant may present a favorable formal structure on paper in order to gain a quantitative integration preference, but in reality that structure is not an accurate depiction of how the licensee's affairs will be managed. Thus, limited partners or non-voting stockholders, although nominally without influence over the applicant, may actually participate in or control the applicant's decision-making process. In those instances, the Commission disregards the applicant's formal ownership structure and treats the nominally passive owners (that is, non-voting stockholders or limited partners) as if they were active in the management of the applicant -- and thus relevant to the Commission's integration analysis. *See e.g., Signal Ministries, Inc.*, 104 FCC 2d 1481, 1494-97 ¶¶ 15-16 (Rev. Bd. 1986), *review denied* 2 FCC Rcd 1259, 1259 ¶ 2 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988); *KIST Corp.*, 102 FCC 2d 288, 292 ¶ 9 (1985), *aff'd per curiam sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 2182 (1987); *Henderson Broadcasting Co.*, 63 FCC 2d 419, 424-26 ¶¶ 10-13 (Rev. Bd. 1977). *See also Cleveland Television Corp. v. FCC*, 732 F.2d 962, 969 (D.C. Cir. 1984). "[W]here there is a basis in the record for inferring that non- voting shareholders will exercise influence or control of an ongoing business," an applicant's integration proposal will be discredited. *Victory Media*, 3 FCC Rcd 2073, 2074 ¶ 18 (1988).

*Coast I, supra*, 4 FCC Rcd at 1787. Applying this legal framework to the facts before it, the Commission found that several post-organizational actions by the limited partners, including paying bills of the applicant, "go beyond the permissible functions of limited partners and are sufficient in themselves . . . to support the conclusion that the general partners would not be the *only* active, controlling owners." *Id.* (emphasis in original). Therefore, the Commission affirmed the Board's reduction of the applicant's "quantitative integration credit from 100 percent to at most 30.74 percent (corresponding to the amended general partners' interests . . .)." *Id.* at 1786.

14. In dismissing petitions for reconsideration of *Coast I*, the Commission "perceive[d] no basis for modifying [its] award of no more than 30.74 percent quantitative credit." *Coast II, supra*, 5 FCC Rcd at 2752. It there emphasized:

> Notwithstanding [the applicant's limited partnership] agreement, the "limited" partners thereafter engaged in activities that go beyond what is permissible for a limited partner. These activities, which included active participation in initiating the application and in arranging for its financing, continued for at least three weeks *after Coast filed its application representing that these owners would be limited partners.*
>
> * * *
>
> To the extent *Victory* [ *Media, Inc.*, 3 FCC Rcd 2073 (1988),] inadvertently suggested that the involvement of an allegedly passive owner in an applicant's activities after the applicant has adopted a bifurcated form of business organization is irrelevant to the question of whether that owner will exercise influence over the management of the applicant in the future, it is hereby expressly overruled. On further reflection we hold that, where a "passive" owner is shown to be materially involved in the applicant's activities after that owner has been held out as a passive investor, that owner's interest will be considered for comparative purposes.
>
> * * *
>
> In summary, where an owner has assumed an active role after the applicant has declared that that owner will be passive, that owner's equity interest will be attributed to the applicant for integration purposes regardless of the nature of the "passive" owner's involvement.

*Id.* at 2752-2753 (emphasis in original; footnote omitted).

15. Here, it is undisputed that Sanchez's "non-voting" stockholder, B. Howard Bernstein, after making loans to the corporation of $30,000 and $50,000, retains signature authority over Sanchez's checking account. I.D., para. 21;

*see* Tr. of Oral Arg. at 1090-97. This participation requires attribution of his 75% ownership interest in Sanchez for integration purposes. *See Coast II*. Under the Commission's insulation requirements, passive investors may not "communicat[e] with the licensee or [its active managing owners] on matters pertaining to the day-to-day operations of its business." *Ownership Attribution*, 58 RR 2d 604, 619 (1985) (footnote omitted). Bernstein's retention of co-authority over the corporate checking account gives him access to knowledge about (and potential input to) some of the most crucial ongoing daily station activities, contrary to the Commission's insulation requirements. Moreover, during Sanchez's absence, Bernstein, a 75% owner, would have sole and actual control of the purse-strings of the proposed station. In fact, he has already written some checks after the adoption of the two-tiered corporate structure. In other words, Bernstein is "materially involved" in the management of the applicant. *See id.* at 618-620; *Coast II*, 5 FCC Rcd at 2752. Thus, Sanchez can receive no more than 25% quantitative integration credit.

### WIDSTEN AND O-V

16. Both Widsten and O-V proposed no "integration" in this proceeding. I.D., paras. 40-41. Moreover, O-V received a slight diversification demerit because its general partner will remain as general manager of a television station (Channel 48) in Galveston, Texas. *Id.*, paras. 9, 49. Widsten has no attributable mass media ownership interests. *Id.*, paras. 8, 44. No exceptions challenge these findings; therefore they are final. 47 CFR §1.277(a) (objections not saved by exception are waived).

### SUMMATION

17. Pueblo, with 100% quantitative credit, enjoys a substantial "integration" preference over Sanchez, which has at most 25% credit, *see Omaha TV*, *supra*, 102 FCC 2d at 882 (and cases cited therein); *Poet's Seat Broadcasting, Inc.*, 78 FCC 2d 1080, 1085 (Rev. Bd. 1980) (74.9% to 25% margin warrants substantial preference), and over Widsten and O-V, which each have no credit. Qualitative enhancements cannot affect this large quantitative gap. *See, e.g.*, *Newton Television Limited*, 5 FCC Rcd 2755, 2756 & n. 3 (1990); *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5066 (1989). Sanchez and Widsten, which have no attributable mass media ownership interests, have each been awarded a "slight to moderate" diversification preference over Pueblo and a slight preference over O-V. Because Pueblo's substantial integration preference outweighs the smaller diversification preferences awarded to Sanchez and Widsten, we affirm the ALJ's ultimate grant of Pueblo's application (I.D., para. 63). *See Omaha TV*, 102 FCC 2d at 885; *Old Time Religious Hour, Inc.*, 95 FCC 2d 713, 728-729 (Rev. Bd. 1983), *recon. denied*, 96 FCC 2d 551 (Rev. Bd. 1984), *review denied*, 57 RR 2d 1147 (1985); *see also Richard P. Bott, II*, 4 FCC Rcd 4924, 4930 (Rev. Bd. 1989) (substantial integration preference outweighs combined slight diversification and slight-to-moderate comparative coverage preferences), *review denied*, 5 FCC Rcd 2508 (1990); *see generally*, *Gilbert Broadcasting Corp.*, 91 FCC 2d 450, 469-470 (1982) (diversification advantage may be outweighed by a more significant integration advantage).

18. ACCORDINGLY, IT IS ORDERED, That the "Contingent Petitions for Leave to Amend" filed November 8, December 4, 1989, and January 19, 1990, the "Petitions for Leave to Amend" filed April 27 and June 15, 1990, and the "Motion for Leave to File Comments" filed May 16, 1990, all filed by Pueblo Radio Broadcasting Service, ARE GRANTED, and the amendments and comments ARE ACCEPTED;

19. IT IS FURTHER ORDERED, That the "Petition For Leave to Supplement Exceptions" filed April 24, 1990 by Sanchez Communications, Inc. IS GRANTED and the supplement IS ACCEPTED, and that the "Petition to Re-Open the Record and to Enlarge Issues" filed April 24, 1990 by Sanchez Communications, Inc. IS DENIED;

20. IT IS FURTHER ORDERED, That the "Petition for Leave to Amend" filed November 16, 1989 by Hal S. Widsten IS GRANTED, and the amendment IS ACCEPTED, and that the "Request for Leave Not to Participate in Oral Argument" filed March 16, 1990 by O-V Communications IS GRANTED; and,

21. IT IS FURTHER ORDERED, That the applications of Sanchez Communications, Inc. (File No. BPH-861002TB), Hal S. Widsten (File No. BPH-861002TE), and O-V Communications (File No. BPH-861002TH) ARE DENIED, and the application of Roy E. Henderson d/b/a Pueblo Radio Broadcasting Service (File No. BPH-861002TA) for a construction permit for a new FM station at Oro Valley, Arizona IS GRANTED subject to the condition that Roy E. Henderson divest himself of his interests in Stations KFRD-AM/FM, Rosenberg-Richmond, Texas; FM Translator Station K285CS, North Houston/Spring, Texas; the FM construction permits for South Padre Island (File No. BPH-850712RI) and Mason, Texas (File No. BPH-881027ML); LPTV Station KO5IL, Clear Lake, Texas; Station KACO(AM), Bellville, Texas; Station KJAS(FM), Jasper, Texas; Station KRTX(FM), Galveston, Texas; and dismiss his application for construction permit for FM Channel 236C2, Comfort, Texas.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

### SEPARATE STATEMENT OF BOARD MEMBER ERIC T. ESBENSEN IN WHICH BOARD MEMBER NORMAN B. BLUMENTHAL JOINS

The principal of the prevailing applicant here, Roy E. Henderson, has promised to personally "integrate" full-time into the management of this Class A FM facility proposed to serve Oro Valley, Arizona, and to divest of his numerous other broadcast interests. It is noted that Henderson has acquired (or has been approved to acquire) no less than *seven* different broadcast facilities during the pendency of this proceeding (just since September 1989). [1]

Although Henderson has maintained his Oro Valley "integration" pledge throughout (as well as his divestiture pledges), Henderson's active sales and acquisition pattern

of late raises inevasible skepticism as to the efficacy of both of those pledges. In its recent *Proposals to Reform the Comparative Hearing Process*, FCC 90-194, released June 26, 1990, the Commission has determined to "seek comment on appropriate measures to *ensure the future adherence to promises made in applications for purposes of enhancing an applicant's comparative standing under diversity and integration criteria.* " *Id.* at para. 15 (emphasis added).

Henderson's pledges here provide a perfect example of such considerations for Commission deliberation, and Henderson himself should acquaint himself with the Commission's recent action in *WCVQ, Inc.*, FCC 90-224, released June 26, 1990, where the Commission modified the Board's recent *Order* in that proceeding, 4 FCC Rcd 4079 (Rev. Bd. 1989), and ordered a further hearing into the question of whether an applicant had fulfilled a previous "integration" pledge. Should Henderson ultimately receive this Oro Valley permit, it is devoutly hoped that all interested parties -- competitors current and potential, the local citizenry, and the Commission -- keep a keen eye upon Henderson, lest he renege in the slightest.

## FOOTNOTE TO STATEMENT

[1] Various pleadings submitted on behalf of Henderson throughout this proceeding reveal, for example, the following (*see* Petitions for Leave to Amend, filed April 27, 1990, and June 15, 1990, respectively, by Roy E. Henderson):

Statement[s] Concerning Ownership Interests

Roy E. Henderson filed an Application For Consent For Assignment of License of radio station KGLF (FM), Freeport, Texas, from Roy E. Henderson (individually), the Licensee, to Bancora Broadcasting Co., Inc. (BALH-890828HL). As previously reported, this application was filed on 8/28/89 and was granted on October 27, 1989. This transaction was consummated on March 30, 1990 and Mr. Henderson no longer holds any interest in this station.

As previously reported, an Application For Consent For Assignment of License of radio stations KFRD AM and FM, Rosenberg, Texas, from Fort Bend Broadcasting, Inc., the Licensee, to Roy E. Henderson (individually) (BTC-890808EC and BTCH-890808ED), was approved on September 27, 1989 and closing occurred on December 5, 1989.

As previously reported, Roy E. Henderson d/b/a New Ulm Broadcasting Co. filed an application with the FCC on December 21, 1989 requesting the Commission's consent to an Assignment of License (FCC Form 314) of AM Station KACO, Bellville, Texas from J. Lee Dittert, Jr. and Dinah L. Dittert, his wife to Roy E. Henderson d/b/a New Ulm Broadcasting Co. (BAL-891221EC). That application was granted by Public Notice March 2, 1990 and Mr. Henderson acquired the station via a closing that occurred on April 17, 1990.

As previously reported, Roy E. Henderson filed an application with the FCC on December 19, 1989, requesting the Commission's consent to an Assignment of License (FCC Form 314) of FM Station KJAS, Jasper, Texas from Jasper County Broadcasting Comopany, Inc. to Roy E. Henderson (BALH-891219GU). That application was granted by Public Notice March 1, 1990 and Mr. Henderson acquired the station via a closing that occurred on April 18, 1990.

As previously reported, Roy E. Henderson d/b/a Sonoma Media Corporation filed an application with the FCC on December 14, 1989, requesting the Commission's consent to an Assignment of License (FCC Form 314) of FM Station KRTX, Galveston, Texas from Irvin Davis to Roy E. Henderson (BALH-891214GQ). That application was granted by Public Notice April 4, 1990 and Mr. Henderson expects to acquire the station at a closing to occur in the near future.

As previously reported, on December 1, 1989, an application was filed with the FCC requesting the Commission's consent to an Assignment of Licenses (FCC Form 314) of KVLG(AM) & KBUK(FM) LaGrange, Texas from Fayette Broadcasting Corporation to LaGrange Broadcasting Company (BALH-891214GQ). Roy E. Henderson is President and 100% stockholder of LaGrange Broadcasting Company. That application was granted by Public Notice March 21, 1990 and Mr. Henderson expects to acquire the station at a closing to occur in the near future.

Mr. Henderson reaffirms his original diversification statement filed in this proceeding, and will divest all of his media interests including those interests recently acquired: KACO, Bellville, Texas and KJAS, Jasper, Texas, should the *Order*, granting him the Construction Permit in this proceeding be affirmed by the Review Board and become final.

* * *

On March 21, 1990, the Commission granted an assignment of Radio Stations KVLG and KBUK (referred to previously by its prior call sign "KMUZ") from Licensee Fayette Broadcasting Corp. to Roy E. Henderson. No closing was reached on this transaction, the contact between the parties has expired and by mutual agreement the assignment has been withdrawn. Therefore, Fayette Broadcasting Corp. will remain the Licensee of these stations.

On May 23, 1990, Roy E. Henderson d/b/a Spanish Aural Services Company voluntarily withdrew his application for a new FM Station at Liberty, Texas.

Of course, under currently prevailing policy, Henderson is not required to retain these stations for any minimum period. *Applications for Voluntary Assignments or Transfer of Control*, 99 FCC 2d 971 (1985).

TRL Broadcasting Company
Reply Comments
April 15, 1997

# EXHIBIT 2

**MS BALH -970307GE** WZRH HOWES BROADCASTING CO., INC. VOLUNTARY ASSIGNMENT OF LICENSE
106.3 MHZ PICAYUNE, MS FROM: HOWES BROADCASTING CO., INC.
TO: GUARANTY BROADCASTING CORPORATION
(FORM 314)

**LA BALH -970102GE** WBBU GUARANTY BROADCASTING CORPORATION APPLICATION GRANTED TO FM BROADCAST STATION
107.3 MHZ BAKER, LA VOLUNTARY ASSIGNMENT OF LICENSE
FROM: GUARANTY BROADCASTING CORPORATION

**LA BALH -961008GI** WBBU BEBE-F BROADCASTING CORP. VOLUNTARY ASSIGNMENT OF LICENSE
107.3 MHZ BAKER, LA FROM: BEBE-F BROADCASTING CORP.
TO: GUARANTY BROADCASTING CORPORATION

**LA BALH -960523GI** WTGE-FM VETTER COMMUNICATIONS COMPANY, INC. APPLICATION GRANTED TO FM BROADCAST STATION
100.7 MHZ BATON ROUGE, LA VOL AL TO GUARANTY BROADCASTING CORPORATION FORM 314
ASNE ADDRESS: 929 GOVERNMENT STREET; BATON ROUGE, LA 70802

**LA BALH -960523GI** WTGE-FM VETTER COMMUNICATIONS COMPANY, INC. VOL AL TO GUARANTY BROADCASTING CORPORATION FORM 314
100.7 MHZ BATON ROUGE, LA ASNE ADDRESS: 929 GOVERNMENT STREET; BATON ROUGE, LA 70802

TRL Broadcasting Company
Reply Comments
April 15, 1997

# EXHIBIT 3

**COPY: ORIGINAL TO FOLLOW**

# DECLARATION

I, Roy E. Henderson, sole proprietor of Amelia Broadcasting and TRL Broadcasting Company, under penalty of perjury, hereby state and declare the following:

1. I am a broadcaster with over 25 years experience as a Commission licensee. My record before the Commission as an applicant and licensee is without blemish.

2. Sometime in early March or late February of 1997, I received a telephone call from Mr. George A. Foster, Jr. The purpose of the call was to invite me to a meeting to take place on March 7, 1997 in Baton Rouge, Louisiana.

3. I agreed to attend the meeting with the understanding that Guaranty Broadcasting Corporation ("Guaranty") wished to sell me one or more of its broadcasting properties. Mr. Foster expressed his interest in selling KCIL-FM, Houma, Louisiana for $6,000,000.00.

4. At the March 7, 1997 meeting, I engaged in what appeared at the time to be good faith negotiations involving Guaranty's broadcast properties. As our substantive talks progressed, I raised the topic of the Amelia and Tylertown rulemaking proceedings, which had been ongoing for several months prior to the meeting. The purchase of any one of the FM stations would impact those requested allocations. If I were able to purchase an existing broadcast property in the relevant market, this would obviate the need to seek an allotment.

5. Having been involved in several broadcast negotiations in the past, I specifically requested, and Guaranty verbally agreed, that the substance of our

talks would remain confidential. The purpose of the confidentiality request was to allow us to speak freely and explore all avenues to resolve the issues.

6. Guaranty explained at the meeting that it wanted to sell KCIL-FM as an empty shell of a station. As I understood Guaranty's position, it would sell me the equipment and the license, taking with it the call letters, the accounts and all of the station's good will. I would even be barred from using the same format under the terms of an agreement not to compete. Given the conditions of the sale as outlined by Guaranty, I could only offer $2,000,000.00 for the station.

7. I have reviewed the pleadings filed by Guaranty in the Amelia and Tylertown proceedings. I am dismayed that Guaranty and its counsel have chosen to distort the facts. I only agreed to attend the meeting with the understanding that we were to engage in good faith business negotiations. I believe that that good faith has been violated by the documents filed by Guaranty.

The above statements of fact are true and correct to the best of my own personal knowledge and belief.

Signed and dated this _____ day of _____, 1997.

_____
Roy E. Henderson

TRL Broadcasting Company
Reply Comments
April 15, 1997

# EXHIBIT 4

**COPY: ORIGINAL TO FOLLOW**

# DECLARATION

I, Susan Dixon Phillips, under penalty of perjury, hereby state and declare the following:

1. I am a business associate of Mr. Roy E. Henderson.

2. On March 7, 1997, I attended a meeting with Mr. Henderson in Baton Rouge, Louisiana. The meeting was with principals of Guaranty Broadcasting Corporation ("Guaranty").

3. I have reviewed Mr. Henderson's April 15, 1997 Declaration concerning a March 7, 1997 meeting with Guranty. To the best of my knowledge, the matters stated by Mr. Henderson in the Declaration pertaining to that meeting are true.

The above statements of fact are true and correct to the best of my own personal knowledge and belief.

Signed and dated this _____ day of _____, 1997.

_____
Susan Dixon Phillips

## CERTIFICATE OF SERVICE

I, Henry E. Crawford, do hereby certify that copies of the foregoing Petition for Rulemaking have been served by United States mail, postage prepaid this 15th day of April, 1997 upon the following:

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*Hand Delivered

Henry E. Crawford