

Ref. Rm. 239

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR -3 1997

In re Applications of

Martin W. Hoffman,
Trustee-in-Bankruptcy for Astroline
Communications Company Limited Partnership

For Renewal of License of
Station WHCT-TV, Hartford, Connecticut

and

Astroline Communications Company
Limited Partnership,
Proposed Assignor

and

Two If By Sea Broadcasting Corporation
Proposed Assignee

For Consent to the Assignment of
License of Station WHCT-TV,
Hartford, Connecticut

SHURBERG BROADCASTING OF HARTFORD

For Construction Permit

MIM 97-628

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

File No. BRCT-881201LG

File No. BALCT-930922KE

File No. BPCT-831202KF

PETITION FOR RECONSIDERATION

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March 3, 1997

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SUMMARY

The Letter issued by direction of the Commission on January 30, 1997, FCC 97-25 ("Letter"), should be reconsidered because (1) it does not address overriding points of law which establish that hearings are not warranted on the matters involved, (2) overturns *sub silentio* important policies and precedents that should not be overturned at all, and (3) is tainted by SBH's misleading failure to disclose that the core of its position was rejected in judicial proceedings.

Under long standing policy, Astroline's qualifications are irrelevant because WHCT-TV is in bankruptcy, the assignment will aid innocent creditors, and Astroline's principals are unlikely to benefit. Moreover, the Commission's factual conclusion about Astroline was based on SBH's failure to disclose that, after a full evidentiary hearing, a judicial determination has been made that Astroline in fact *was* minority controlled. The factual conclusion therefore should be vacated because it is irrelevant, moot, and tainted.

Hearings on TIBS' qualifications are not required because, as a matter of law, (1) the circumstances that the Letter cites occurred well outside the ten-year limitation period that the Commission has established for inquiry into character questions, and (2) TIBS principal Micheal Parker has subsequently been found qualified in applications that cited the proceeding on which the Letter relied and those grants are final.

Hearings also are not required as to whether the proposed assignment involves a bare license. As a matter of law, the pertinent inquiry is whether the assignee, not the assignor, possesses the technical ability to operate the station. The station in fact is operating, and TIBS unquestionably had the requisite ability. Moreover, as a matter of fact, the assignment application itself demonstrated that

the transaction involved a valuable asset, the lease to the tower site, and therefore involved more than a bare license.

Since it is necessary for the Commission to consider pertinent points of law that the Letter does not address, and since it is wasteful to hold hearings that are legally and factually unwarranted, reconsideration of the Letter is warranted.

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TO: The Commission

PETITION FOR RECONSIDERATION

Two If By Sea Broadcasting Corporation ("TIBS"), by its counsel, respectfully requests reconsideration of the Letter, FCC 97-25, issued by direction of the Commission on January 30, 1997 (the "Letter"). In support of this petition, TIBS respectfully states as follows:

Preliminary Statement

On January 30, 1997, the Commission released the subject Letter in which it denied TIBS' request for immediate grant of the above-referenced assignment application. The Commission reached that conclusion because, "[i]n this instance, we believe that the numerous allegations against the parties involved in this assignment raise substantial and material questions of fact which cannot be resolved in acting on the assignment without a hearing." Letter at p. 4.

The questions of fact that the Letter mentioned concerned three matters: (1) the qualifications of Astroline Communications Company Limited Partnership ("Astroline"), which was the licensee prior to Martin W. Hoffman, Trustee-in-Bankruptcy (the "Trustee"); (2) the qualifications of TIBS and its principal Micheal Parker; and (3) whether the assignment involves a bare license. Id.

However, in focusing on questions of fact, the Letter did not address overriding points of law which establish in each case that hearings are not warranted. For example, under settled doctrine, the qualifications of Astroline are irrelevant because the station is in bankruptcy, the assignment will aid innocent creditors, and Astroline's principals are unlikely to benefit. Moreover, regarding Astroline's qualifications, the Commission relied on a submission by Shurberg Broadcasting of Hartford ("SBH") that was materially misleading. Specifically, SBH failed to disclose that following a full evidentiary hearing a judicial ruling was entered that SBH's core allegation -- that Astroline was controlled by its limited partners -- was wrong and that precisely the *opposite* was true.

Reconsideration of these matters is required for several reasons. First, the legal issues presented involve important policies and precedents that should not be overturned *sub silentio*, or indeed at all.

Second, public resources should not be expended needlessly on massive, time consuming hearings into events that occurred 10-14 years ago which are irrelevant to the decisions at hand.

Third, assuming *arguendo* that Astroline's qualifications are relevant, the full evidentiary hearing already held and the judicial decision already entered, which *refute* SBH's submission to the Commission, must be considered in determining whether this agency should spend its resources duplicating those proceedings.

And fourth, SBH has asked the United States Court of Appeals for the District of Columbia Circuit to preempt the Commission's jurisdiction over the licensing decision in this case based on a Letter that does not address pivotal points of law or material facts about Astroline which SBH did not disclose.¹ Since these are matters on which the Commission should rule in the first instance, before judicial consideration, and since the Letter does not do so, reconsideration is warranted.

Astroline's Qualifications Are Irrelevant

On December 12, 1996, TIBS filed its request for immediate grant of the assignment application ("TIBS Request"). SBH opposed TIBS' Request on December 27, 1996 ("SBH Opposition"), where it argued that the application should not be granted because of allegations about the way Astroline acquired the license *ab initio*. SBH Opposition at 25-33.

TIBS replied on January 13, 1997 ("TIBS Reply"). In the reply TIBS cited precedents showing that, in the current situation involving a trustee appointed by a court to protect the rights of creditors, the qualifications of the prior licensee and the way it obtained the license are irrelevant.

¹ See "Petitioner's Supplement To 'Emergency Petition to Recall Mandate, to Set Aside Judgment, to Order Cancellation of License, and/or to Provide Other Relief in the Interest of Justice,'" filed by SBH in Case No. 84-1600 on February 10, 1997; "Opposition to Supplement to Petition to Recall Mandate," filed by TIBS in Case No. 84-1600 on February 20, 1997.

TIBS Reply at 3-4, 7-8, *citing* LaRose v. FCC, 494 F.2d 1145 (D.C. Cir. 1974); KOZN FM Stereo 99 Ltd., 6 FCC Rcd 257 (1991), 5 FCC Rcd 2849 (1990) (Bankruptcy trustee's assignment applications granted despite allegations that predecessor licensee's authorization was void *ab initio* due to alien ownership and misrepresentation in the original application about such ownership); Arthur A. Cirilli, 2 FCC 2d 692, 693 (1966) (holding that a hearing about the accuracy of the prior licensee's representations in its original applications would serve no public interest where the licensee is in the hands of a trustee in bankruptcy and is already in the process of liquidation); Dale J. Parsons, Jr., 10 FCC Rcd 2718, 2721 (1995) ("We have routinely approved involuntary assignments of license in cases where licensees have filed for bankruptcy or where courts have appointed receivers.... In such cases, no revocation hearing has ever been required."), *affirmed*, Parsons v. FCC, 1996 U.S.App. LEXIS 24135 (Aug. 8, 1996).

TIBS also replied to SBH's conjecture that Astroline's alleged wrongdoers "presumably" might benefit from the assignment. SBH Opposition at 33. TIBS showed that this conjecture was incorrect because: (1) the Astroline claim on which SBH relied is a secured claim that receives no distribution from the bankruptcy estate; (2) the Trustee will oppose any attempt to recharacterize the claim as an unsecured claim; (3) *if* such an attempt were made, and *if* it were allowed over the Trustee's opposition, Chapter 7 and Chapter 11 administrative and priority claims would be paid ahead of any distribution to Astroline, and (4) if the Trustee realized additional assets from a successful appeal against Astroline, Astroline would be liable to pay the Trustee's claim and thus could not benefit from those assets. TIBS Opposition at 4-5 and Attachment B.

On January 21, 1997, SBH filed a 17-page response to TIBS Reply, but did not dispute TIBS' showing on this point. Nor could it realistically have done so. Astroline's secured claim gets nothing

from the Estate. Moreover, the purchase price for this assignment is \$1 million. Even if Astroline's secured claim could be converted to an unsecured claim, the administrative and priority claims already submitted exceed that amount, excluding the yet to be filed claim for Trustee's legal fees, and additional administrative claims are still permitted and expected. Exhibit 1, attached. Thus, there is no reasonable likelihood that one cent of the purchase price will remain after payment of the administrative and priority claims and be available to Astroline's principals. Moreover, excluding the claim for which Astroline itself would be liable, the total value of the Estate including the purchase price for the assignment is less than \$1.4 million, while total claims (including SBH's own claim, other unsecured claims, and administrative and priority claims) exceed \$38 million. *Id.* Accordingly, the likelihood that Astroline's principals will receive any benefit from this assignment, not to say anything significant, is infinitesimal.

Under long standing policy and precedents TIBS cited, the qualifications of Astroline are irrelevant in these circumstances. In *LaRose v FCC, supra*, the Court addressed a situation where the predecessor to a receiver in bankruptcy had obtained its license through misleading representations to the Commission. 494 F.2d at 1146 ("It now appears that some of the representations made by Capital in gaining Commission approval of that transfer may have been misleading"). The misleading representations concerned the ownership of the applicant and are recited at *Capital City Communications, Inc.*, 37 FCC 2d 164, 165 (1972). The Court affirmed that, in the circumstances presented, where a receiver had been appointed and the predecessor licensee was unlikely to benefit, the qualifications of the predecessor licensee are irrelevant, stating:

"The qualifications of the original licensee are irrelevant to this determination, as are those of the receiver in bankruptcy who is at the time licensee by virtue of the involuntary assignment. In some cases an additional issue will be interjected by the

filing of an independent petition to operate on that frequency. In such a case, the Commission would conduct a comparative hearing between the proposed assignee and the other petitioner. See Arthur A. Cirilli, 2 FCC 2d 692, 693 (1966)." LaRose v. FCC, *supra*, 494 F.2d at 1148, n. 4.

That description of established policy fits this case precisely. The licensee is a trustee in bankruptcy. The predecessor licensee is unlikely to benefit from the assignment. And the case involves an independent application by SBH to operate on the frequency. In these circumstances, the qualifications of the original licensee, Astroline, are irrelevant and the comparison that the FCC must make is between the proposed assignee, TIBS, and the other applicant, SBH.

Similarly, in KOZN FM Stereo 99 Ltd., *supra*, the Commission addressed a situation where the predecessor to a bankruptcy trustee had misrepresented his citizenship on his license application. KOZN FM Stereo 99 Ltd., 5 FCC Rcd at 2849 (¶2) ("The Commission had evidence before it suggesting that Richard Green, the sole general partner of Stereo 99, Ltd., had falsified information regarding his citizenship on his license application.") The predecessor licensee's misrepresentation of his citizenship in KOZN is comparable to Astroline's alleged misrepresentation of its minority ownership here. In both cases, if the misrepresentation occurred and was known at the time, an initial grant could not have been made. Nonetheless, applying settled policy, the Commission considered the qualifications of the trustee's predecessor to be irrelevant and twice authorized the trustee to assign the license. KOZN FM Stereo 99 Ltd., 5 FCC Rcd at 2849, 6 FCC Rcd at 257.

The Commission's doctrine in this area is based on the public interest in promoting policies to protect the rights of creditors. LaRose v. FCC, *supra* (holding that the Commission must consider this interest in discharging its duties under the Communications Act). In KOZN, the Commission described its doctrine as follows:

"Under Second Thursday, a bankrupt licensee, whose character qualifications are in hearing, may transfer its station license if:

'... the individuals charged with misconduct will have no part in the proposed operations and will either derive no benefit from favorable action on the [assignment] application [] or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors.'" KOZN, supra, 5 FCC Rcd at 2849 (¶4), quoting Second Thursday Corp., 22 FCC 2d 515, 516 (¶5), recon. granted, 25 FCC 2d 112 (1970).

Here, Astroline's principals will have no part in the proposed operations and no contrary allegation has been made. Here, Astroline's principals will either derive no benefit from favorable action on the assignment or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors. This matter is squarely within the Commission's established policy that, in such circumstances, the conduct of the trustee's predecessor is irrelevant.

Though the Commission has consistently weighed the interests of innocent creditors, the Court has mandated that it do so, and TIBS directly raised the irrelevance of Astroline's qualifications, the Letter does not address this important principle of law. It is vital that the Commission do so. The doctrine described above has existed for decades. A multitude of innocent creditors have avoided losses as a result. Such an established, successful, and judicially rooted policy should not be cast aside by a Letter of precedential value that does not address it. The policy is sound, serves the public interest, and should continue. Moreover, the public interest is disserved by spending agency resources on costly, time consuming hearings into irrelevant matters. Tallahassee Branch of the NAACP v. FCC, 870 F.2d 704, 707 (D.C. Cir. 1989) (Congressional purpose is to avoid unnecessarily costly and time-consuming hearings). Further, consideration of the policy is judicially required.

In short, since established policy and precedent hold that even fraud *ab initio* by a trustee's predecessor is irrelevant in the circumstances at hand, reconsideration of the Letter is warranted.

SBH Withheld Pertinent Information

Since Astroline's qualifications are irrelevant and related hearings unwarranted as a matter of law, the Commission need not revisit the Letter's factual conclusion about Astroline. However, the Commission should be aware that, in soliciting that conclusion, SBH withheld pertinent information which contradicted the submission it made.

The core of the position about Astroline that SBH submitted to the Commission was that Astroline was not minority controlled and had misrepresented that it was. SBH Opposition at 25 ("Astroline was successful in acquiring the license in 1984 based on repeated representations that Astroline was a minority-controlled company"), 25-26 ("Astroline held itself out as a minority-controlled company"), 27 ("all the Court of Appeals and the Supreme Court knew through 1990 was that, by golly, Astroline was and had always been completely controlled by a minority individual"). SBH based that contention on nine references to documents it obtained from the Chapter 7 phase of the bankruptcy litigation and excerpts from a brief the Trustee had filed in the Second Circuit Court of Appeals. *Id.* at 28-29, 31 n. 11. SBH punctuated its submission to the Commission as follows:

"Since these internal documents were unavailable to SBH, the Commission or the courts prior to now, it cannot be said that the issue of fraud and misrepresentation has *ever* been resolved by the Commission *or any Court*. But if Astroline's initial acquisition of the license was accomplished through out-and-out fraud, as these documents demonstrate was the case, then the Commission can and should take steps to assure that that fraud is not rewarded in any way, shape or form. The most obvious way to achieve that would simply be to deny the renewal application in light of the available evidence." *Id.* at 31 (emphasis added).

However, while purporting to describe the state of judicial review of its allegations, SBH withheld material, contradictory information. In representing that the issue of fraud and misrepresentation had not "ever" been resolved by "any" Court, SBH failed to disclose that the core component of that issue and SBH's allegations to the Commission -- the charge that Astroline was not minority controlled -- *had* been the subject of a full scale judicial hearing and a Court holding that Astroline *was* minority controlled. Specifically, after an evidentiary hearing that involved over 300 exhibits and nine full days of live testimony before the Bankruptcy Court, the Court held:

"The court concludes that Astroline Company's activities in connection with the Debtor do not meet the standard of substantially the same as the exercise of the powers of a general partner. Despite the intense level of investigation undertaken by the Trustee of the Debtor's prepetition history, the court would have to engage in conjecture and surmise to find *any* control of the Debtor's day-to-day operation of the Channel 18 television station. The Court credits the testimony of Ramirez, supported by that of Planell and Rozanski, that he, as the managing general partner, exercised *fully* his powers as such, and that Astroline Company had no equal voice in his decisions." In re: Astroline Communications Company Limited Partnership, 188 B.R. 98, 105-106 (Bankr. D. Conn. 1995); Exhibit 2 attached, p. 10 (emphasis added).

The Court further held that Ramirez, the controlling minority, hired an Hispanic station manager (Planell) and the business manager (Rozanski), and that "Ramirez and Planell, together or separately handled the matters of the hiring and firing of station personnel, station programming, equipment purchases, and dealing with the Debtor's vendors;" that Ramirez and Roganski directed the preparation of checks; that every invoice Ramirez wanted paid was paid; and that the signing of checks by Astroline Company partners was reasonably explained or short lived. 188 B.R. at 101, 106; Exhibit 2 at pp. 4, 10.

In short, after "intense" investigation and a complete evidentiary hearing, the Court held that the minority general partner (Ramirez) "fully" exercised his powers to control the partnership and

could not find "any" control exercised by the limited partner (Astroline Company). The judicial ruling that Astroline was minority controlled proves false SBH's denial of "any" judicial proceedings and renders its allegations to the Commission about Astroline fundamentally unreliable. Equally misleading is SBH's contention that its submission ("these documents") comprised "the available evidence." Opposition at 31, *supra*. The documents that SBH submitted were but a fraction selected from the record of over 300 exhibits that the Bankruptcy Court considered in finding that Astroline was minority controlled. See the Joint Exhibit List from that proceeding included in Exhibit 3, attached. SBH failed to disclose that a volume of additional evidence was available from which the Court had concluded that the *opposite* of SBH's position was true.

Since SBH submitted excerpts from the Trustee's brief in the pending appeal of the Bankruptcy Court's decision and reviewed the documents in the bankruptcy litigation, it knew the issues that the Court had considered and the Court's disposition of those issues. For SBH thus to represent to the Commission that no court had ever considered its allegations without disclosing the Bankruptcy Court proceeding and disposition, to submit excerpts from the Trustee's brief without disclosing the underlying decision adverse to its position, and to fail to divulge the existence of voluminous contrary evidence from which its own stilted version of the available evidence was lifted, is a profound lack of candor.

As shown above (pp. 3-7 *supra*), Astroline's qualifications are irrelevant as a matter of law. The Commission therefore does not need (1) to revisit whether duplicating the Court's hearing on events about Astroline that are up to 13 years old is warranted now, (2) to decide whether the complete evidence available to the Court supports a conclusion different from the one the Letter reached, or (3) to weigh whether the factual allegations about Astroline should be addressed after the

appellate proceedings on the Court's decision are concluded and the Commission has the benefit of that ruling. However, because SBH's submission about Astroline was misleading and unforthright, the Letter's reliance on that submission is tainted. And, since Astroline's qualifications are irrelevant, the Letter's factual conclusion about Astroline is moot. For these reasons, in addition to granting reconsideration based on the points of law presented herein, the Commission should vacate the Letter's discussion and conclusion regarding SBH's factual allegations about Astroline. *See The Seven Hills Television Co.*, 4 FCC Rcd 4062, 4063 (OGC 1989).²

Hearings on TIBS' Qualifications Are Not Required

Concerning its own qualifications, TIBS submitted that the matters SBH cited were subject to the 10-year limitation period that the Commission has established for inquiries into character allegations, and that those matters had since been before the agency in various applications that the Commission granted. TIBS Request at 6, TIBS Reply at 5. In finding that questions of fact about TIBS' qualifications required resolution in hearing, the Letter did not address either of these points and their legal significance. That omission requires reconsideration because, as a matter of law, the contemplated hearings are inequitable and unnecessary.

² Assuming *arguendo* that Astroline's qualifications were deemed relevant, the questions in the second sentence of this paragraph would require resolution. In that event, rather than undertaking to receive and review the voluminous record from the judicial proceedings itself, the Commission should direct that the matter be resolved by the Administrative Law Judge in the context of a post-designation petition to enlarge issues and taking cognizance of the final judicial ruling. *See Bennett Gilbert Gaines*, 5 FCC Rcd 2052, 2053 (¶7) (Chief, Audio Services Division 1990) (directing that a petition to deny filed against a receiver's renewal application should be considered in the context of a post-designation petition to enlarge). The Letter did not address this aspect of TIBS Request (at 5) and TIBS Reply (at 3), which is even more appropriate now that SBH's claim that there are no related judicial proceedings has been revealed to be untrue.

In 1986, after a proceeding involving full notice and comment, the Commission issued its Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179 (1986) ("Character Policy"). The Commission there held that "the passage of time" should be considered in determining whether to hold hearings into character allegations and adopted the following policy:

"As to the time period relevant to character inquiries, we find that, as a general matter conduct which has occurred and was or should have been discovered by the Commission, due to information within its control, prior to the current license term should not be considered, and that, even as to consideration of past conduct indicating a 'flagrant disregard of the Commission's regulations and policies,' a ten year limitation should apply. The 'inherent inequity and practical difficulty' involved in requiring applicants to respond to allegations of greater age suggests that such a time limit be imposed." Character Policy, 102 FCC 2d at 1229.

See also Taft Broadcasting Co., 2 FCC Rcd 6622, 6624 (Chief, Video Services Division 1987) ("The Character Policy specifically states that consideration of even FCC related misconduct is limited to 10 years"), *recon. denied*, 3 FCC Rcd 6489 (1988).

In finding that questions of fact about the qualifications of TIBS and Mr. Parker warrant a hearing, the Letter cites the decisions in Religious Broadcasting Network, in which Mr. Parker was held to be the real party in interest in an applicant. However, that case concerns circumstances in 1983, nearly 14 years ago. Religious Broadcasting Network, 2 FCC Rcd 6561, 6566 (ALJ 1987). Those circumstances thus are well outside the "ten year limitation" of the Commission's policy. Mr. Parker was a witness but not a litigant in that case and did not present his own defense. In this situation, the "inherent inequity and practical difficulty" of requiring Mr. Parker to respond to allegations that are nearly 14 years old are extraordinarily oppressive and fall squarely within the Commission's policy designed to avoid such injustice. The Commission should reconsider, apply its

policy, and rule that spending resources for hearings into such old, musty, and essentially untriable matters is not required.

The inherent inequity in requiring hearings on TIBS' qualifications is exacerbated by the fact that the Commission has found Mr. Parker fully qualified with the same information before it. Multiple applications in which Mr. Parker was a party cited the decision in Religious Broadcasting Network, the Commission granted those applications, and those grants are final. Based on those grants, investments totaling millions of dollars have been made and Mr. Parker has taken two television stations out of bankruptcy and restored them to sound operation, a result decidedly in the public interest. Moreover, as discussed further below, based on those final grants approving his qualifications Mr. Parker and TIBS have made substantial investments in this proceeding which have benefitted the bankruptcy estate. As the Court of Appeals has stated, administrative finality

"establish[es] a structure where at some point the agency order does become final beyond its own power to reconsider, and . . . investments may be made in reliance on such order with the protections provided by Congress. In that setting the public interest in finality is dominant over the public interest in possibly improving the administrative result on further consideration." Greater Boston Television Corp. v. FCC, 463 F.2d 268, 289 (D.C. Cir. 1971), *cert. denied sub nom. WHDH, Inc. v. FCC*, 406 U.S. 950 (1972).

See also City of Chicago v. Federal Power Commission, 385 F. 2d 629, 637 (D.C. Cir. 1967) (even when changing its policy, "the agency [must] give due consideration to the equities, if any, arising out of commitments based on previous rulings"), *cert. denied sub nom. Public Service Comm'n of Wisconsin v. FPC*, 390 U. S. 945 (1968).

Since the factual questions that the Letter cites about TIBS' qualifications concern matters well outside the limitation period the Commission has established for inquiry into character questions, since Mr. Parker has subsequently been found qualified, and since substantial investments have been

made in reliance on those final actions, as a matter of law hearings on TIBS' qualifications are not required and should not be held.

The Bare License Policy Does Not Apply

The Letter's conclusion that questions of fact exist about whether the assignment involves a bare license was based on two statements: (1) "none of the parties to the application have refuted the allegation that the *assignor* held nothing more than a bare license at the time it filed the instant assignment application in 1993," and (2) "[n]or has the Trustee provided an inventory of its assets sufficient to demonstrate that it possesses the technical ability to operate WHCT-TV." Letter at 4 (emphasis in original). The first statement is incorrect factually. Further, as a matter of law, in focusing on the assets of the assignor, both statements overlook overwhelming precedent that TIBS cited which establishes that the pertinent matter is *not* the assets of the assignor, but rather the *assignee's* technical ability to operate the station. TIBS Request at 5, TIBS Reply at 2.

TIBS filed its request in order to restore WHCT-TV to operation prior to statutorily mandated license expiration on February 9, 1997. In doing so, TIBS possessed the technical ability to operate the station. After the Commission denied TIBS Request, TIBS assigned its technical facilities to the Trustee who in fact has resumed operations on WHCT-TV and entered into a time brokerage agreement with TIBS. Thus, TIBS unquestionably did possess the technical facilities required to operate the station, and the proposed assignment does not involve a bare license. American Music Radio, 10 FCC Rcd 8769, 8772 (1995); Arecibo Radio Corp., 101 FCC 2d 545, 549 (1985); Public Service Enterprises, Inc., 69 FCC 2d 967, 972-73 (1978); Davis Broadcasting Co., Inc., 40 RR 2d 1449, 1454 (1977); Van Schoick Enterprises, Inc., 58 FCC 2d 341 (1976).

Moreover, since the station *is* operating, the Trustee unquestionably "possesses the technical ability to operate WHCT-TV."

Furthermore, the tower on which the station is operating is the same tower to which TIBS *did* acquire the rights from the Trustee as part of this transaction in 1993. In the assignment application, the Trustee and TIBS submitted copies of the Purchase and Assignment Agreement the Bankruptcy Court approved, the Court's Order doing so, and the tower Lease. For convenience of reference, those documents are resubmitted herewith in Exhibit 4. The Agreement clearly provided for assignment to TIBS of the Trustee's interest in both the license *and* the Lease. Exhibit 4 at 5, §1. The Court's Order specifically approved the Trustee's assignment of the Lease to TIBS along with the station license. *Id.* at 2-3. For such assignment, TIBS was required to pay the sum of \$93,371.45 to the Estate, \$50,000 for the assignment plus \$43, 371.45 to relieve the Estate of taxes owed the towns of Avon and West Hartford under the Lease. *Id.* at 3. Contrary to arguments by which SBH has obfuscated the facts, this assignment was not subject to any rights of Robert and Martha Rose. Indeed, the Court specifically ordered "that the assignment of the right, title and interest the Trustee has in said Lease *shall be free and clear of all liens and interests of Robert & Martha Rose, Astroline Company and Astroline Company, Inc,*" and that such liens, to the extent valid, would attach instead to the \$50,000 proceeds. *Id.*³

From this, it is apparent that this transaction always has involved more than a bare license. A tower lease is an asset. Municipalities do not impose taxes on nothing; they impose them on assets. The indebtedness for \$43,371.45 in taxes under the Lease, from which TIBS relieved the bankruptcy

³ Compare SBH's Petition To Dismiss or Deny Applications, filed November 3, 1993, at ¶4 and n. 4.

estate, demonstrates that the Lease was an asset. The fact that litigation arose about the Lease which TIBS acquired does not mean that TIBS acquired nothing. The Stipulation resolving the litigation only vindicated TIBS right to use the tower and antenna. TIBS Request at 4-5 and Attachment A. And the successor site owner has recognized the validity of TIBS' right. TIBS Reply at 2 and Attachment A. All of TIBS rights to the tower and antenna flow directly from the Court's 1993 Order authorizing the Trustee to assign the license *and* the Lease to TIBS. The application on its face demonstrated that the Trustee had more than a bare license to assign and that more than a bare license was being assigned. The Letter's contrary conclusion, a result of SBH's obfuscation, requires reconsideration and reversal.⁴

In short, as a matter of law, since the assignee possessed the technical ability to operate the station, the bare license policy does not apply. And, as a matter of fact, since the application shows that the transaction *ab initio* involved more than a bare license, the bare license policy does not apply. Accordingly, reconsideration is warranted.

Conclusion

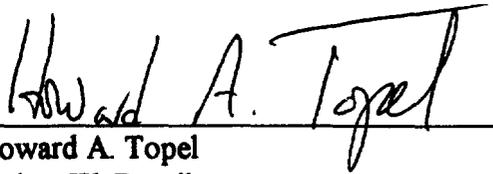
For the foregoing reasons, since it is necessary for the Commission to consider pertinent points of law that the Letter does not address, and since it is imprudent and wasteful for the

⁴ Concerning the stipulated resolution of the litigation about the lease, SBH's position that the Lease had terminated initially was tentative, "for the time being and absent any contrary final disposition of that litigation." Reply of Shurberg Broadcasting of Hartford, filed January 26, 1994, at n. 5. However, once the parties reached a final disposition of the litigation that affirmed TIBS' right to use the tower, SBH has sought to discount that disposition. However, the upshot of that notion would be for the Commission itself to try the merits of a civil dispute to which the parties themselves have reached agreement. That would be an extremely wasteful and illogical expenditure of Commission resources.

Commission to hold hearings that are legally and factually unwarranted, TIBS respectfully requests that the Commission grant the reconsideration requested herein.

Respectfully submitted,

TWO IF BY SEA BROADCASTING CORPORATION

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RE: Astroline Communications Company
Limited Partnership / Debtor No. 88-21124

Dear Attorney Topel:

As a supplement to my letter to you dated January 10, 1997 (a copy of which is attached hereto), please be advised that, with regard to the \$1,000,000.00 payment expected by TIBS for the FCC license, the Trustee is aware of the following Chapter 11 and Chapter 7 administrative claims and priority claims which total in excess of said \$1,000,000.00 and would have priority over any unsecured claim of Astroline Company, Inc.:

Trustee's commission (3% of said one million dollars)	\$ 30,000.00
Baker & Hostetler	120,727.09
Schatz & Schatz	246,005.28
City of Hartford (Adm.) (Priority)	174,632.62* 112,814.71
Day, Berry & Howard	50,000.00
Hartford Whalers	unknown but in excess of \$37,800**
A.C. Nielson	45,271.07
Affiliated Business Credit Corp.	14,000.00
Zeisler & Zeisler	101,339.99
Town of Avon	74,958.24***
Connecticut Dept. of Labor	920.02
John Jordan	2,000.00
Ferando Marinez	305.28
Lenny Colon, Jr.	964.69
G.V. Knapp	195.92

* Disputed

** Information taken for debtor's schedules

*** \$117,799.27 less \$42,841.03 paid by TIBS

Howard Topel, Esquire

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February 28, 1997

Sandra Doerr	807.68
Robin Desjardins	740.40
Jeffrey Blanch	458.54
Sheila Graham	855.73
Gladys Godgart	2,120.00
Steven Pyszkowski	900.00
Anne Browning	259.62
Thomas Frost	4,153.86
Alfred Rozanski	2,000.00
Jeffrey Cronenberghs	845.56
William Graf	678.43
Glen Conticello	276.46
Michael Buntin	504.79
Terry Planell	8,961.53
Richard LaSarcina	<u>985.54</u>
Total	\$1,036,482.30

Please note that all the above claims are further subject to review and objection by the Trustee and the U.S. Trustee's office and Bankruptcy Court approval, after notice and a hearing. Also, the above figures do not include the Attorney for the Trustee's fee. Please also note that no bar date has been set for filing administrative claims, so additional administrative claims may be filed. The Trustee anticipates this happening because many proof of claims filed as "unsecured" appear to include debts arising during the period the Debtor was in Chapter 11 (12/1/88 - 4/9/91), and therefore portions of these claims may qualify for administrative priority status. While the Trustee does have approximately \$355,704.22 on hand, there are in excess of \$30 million of unsecured claims (excluding Alan Shurberg's \$7,000,000 claim which the Trustee has objected to and is pending before the Bankruptcy Court). Based upon known administrative and priority claims, administrative claims which may be filed, the Attorney for the Trustee's fee, the Trustee's commission (including the commission on said \$355,704.22) it is extremely unlikely, at this time, that Astroline Company, Inc. would receive a distribution or anything more than a diminimus distribution if it amends its secured claim to an unsecured one (and if the Trustee's anticipated objection is overruled).

Very truly yours,


Martin W. Hoffman

MWH/kcs

Enclosure

cc: Peter O'Connell, Esquire

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1/10/97

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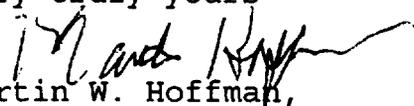
Re: Astroline Communications Company Limited Partnership
Case No. 88-21124

Dear Attorney Topel,

With regard to Alan Shurberg's "Formal Opposition" to your letter seeking emergency relief, please be advised that the argument made by Mr. Shurberg that Astroline Company, Inc. (an alleged insider of the debtor) is going to receive money from the bankruptcy estate is incorrect. Astroline Company, Inc. filed proof of claim #46 (a copy of which is enclosed) in the amount of \$7,537,703.00 as a secured claim. Pursuant to 11 U.S.C. § 726 (a copy of which is attached hereto), secured claims do not receive a distribution from the bankruptcy estate, instead they have to look to their collateral.

Furthermore, in the event that Astroline Company, Inc. files an amendment to its claim seeking to recharacterize it as an unsecured claim, the Trustee would object to same. In addition, in the event that such an amendment is allowed by the Bankruptcy Court, it is unlikely, at this time, that Astroline Company would receive a distribution due to Chapter 7 and Chapter 11 administrative and priority claims in this case. While the Trustee does have a pending appeal against Astroline Company which may bring additional money into the estate, if said appeal is successful, Astroline Company would then be liable for all the debts in the estate, rendering Mr. Shurberg's argument irrelevant (since Astroline Company would end up paying its own claim).

Very truly yours


Martin W. Hoffman,
Attorney for the Trustee

Enclosures