

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

| | | |
|--|---|------------------------|
| In re Applications of |) | MM DOCKET NO. 97-128 |
| |) | |
| MARTIN W. HOFFMAN, |) | |
| Trustee-in-Bankruptcy for Astroline |) | File No. BRCT-881201LG |
| Communications Company Limited |) | |
| Partnership |) | |
| |) | |
| For Renewal of License of |) | |
| Station WHCT-TV, Hartford, Connecticut |) | |
| |) | |
| SHURBERG BROADCASTING OF HARTFORD |) | File No. BPCT-831202KF |
| |) | |
| For Construction Permit for a New |) | |
| Television Station to Operate on |) | |
| Channel 18, Hartford, Connecticut |) | |
| |) | |
| TO: The Honorable John M. Frysiak | | |
| Administrative Law Judge | | |

OPPOSITION OF SHURBERG BROADCASTING OF HARTFORD TO
"PETITION FOR EMERGENCY RELIEF AND STAY OF PROCEEDINGS"

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SUMMARY

The "Petition for Emergency Relief and Stay of Proceedings" must be denied. It is, in effect, nothing more than a petition for reconsideration of a hearing designation order ("HDO"). Such petitions are not authorized by the Commission's rules in circumstances such as the present case, see Section 1.106(a) of the Commission's Rules, and even if such a petition were authorized, it would not be properly filed with the Presiding Judge. The Presiding Judge has no authority to grant the relief requested by Mr. Ramirez's petition, and the petition should therefore be denied.

But even if the Presiding Judge were inclined to consider the substance of the petition, the petition would still have to be denied. The gist of the petition is that the matters designated for hearing in this case have already been disposed of in the bankruptcy court. That is wrong.

As is clear from Judge Krechevsky's opinion, the issue before the bankruptcy court was a narrow one relating not to any Commission rule or policy, but rather to questions of Massachusetts limited partnership law and the Bankruptcy Code. Those questions are completely distinct from the issues in the instant proceeding, which relate to the bona fides of the supposed limited partnership structure of Astroline Communications Company Limited Partnership under the rules, policies, and precedents of the Commission relating to limited partnerships. Those rules, policies and precedents are not

addressed anywhere in Judge Krechevsky's decision, because they were immaterial to his resolution of the narrow, non-Commission question before him. Accordingly, even if the Presiding Judge had the authority to reconsider an HDO issued by the full Commission, no basis for such reconsideration exists.

With respect to Mr. Ramirez's claim that some Second Thursday relief should be made available, it suffices to note that the Commission fully addressed precisely that question in the HDO, explaining the overriding importance and the unique circumstances presented here. Under these circumstances, that aspect of Mr. Ramirez's petition must be rejected as well.

1. Alan Shurberg d/b/a Shurberg Broadcasting of Hartford ("SBH") hereby submits its Opposition to the "Petition for Emergency Relief and Stay of Proceedings" filed in the above-captioned proceeding by Richard Ramirez. As set forth in detail below, even if the Presiding Judge were deemed, arguendo, to have the authority to take the extraordinary actions suggested by Mr. Ramirez, no basis whatsoever exists for such actions, with one exception. Further, while Mr. Ramirez's request for a temporary stay of this proceeding pending resolution of his pleading is similarly without merit, for the reasons (and subject to the limitations) set forth below, SBH believes that an extension of procedural dates herein may be salutary.

Preliminary Matters

2. As an initial matter, Mr. Ramirez's Petition is nothing more nor less than a petition for reconsideration of the Commission's hearing designation order ("HDO") commencing this proceeding. Essentially, Mr. Ramirez argues that the Commission should not have designated this case for hearing and that the Presiding Judge should somehow abort the proceeding notwithstanding the HDO. But the Presiding Judge has no authority to reconsider or review the correctness of an HDO. To the very limited extent that any relief from an HDO may be available, such relief would ordinarily be obtained only from the authority which issued the HDO in the first place. ^{1/} Since

^{1/} Of course, the Commission's rules make clear that petitions for reconsideration of an HDO will not normally be entertained. See Section 1.106(a)(1).

Mr. Ramirez is thus asking the Presiding Judge for substantive relief which the Presiding Judge is powerless to provide, the Petition can and should be denied.

3. Ignoring this basic jurisdictional problem, Mr. Ramirez repeatedly claims that he could not have raised any objections to the HDO (or with respect to the matters discussed therein) at any earlier point. That is simply wrong. SBH's various pleadings have been a matter of public record, and had Mr. Ramirez been the least bit concerned, he could have obtained copies from the Commission, or from Martin Hoffman, trustee-in-bankruptcy for Astroline Communications Company Limited Partnership ("ACCLP").^{2/} But even if Mr. Ramirez was not sufficiently interested to seek out such copies, the fact is that, by letter dated January 30, 1997, the Commission put the world on notice that the full Commission was very concerned about the accuracy of ACCLP's representations to the Commission. See Attachment A hereto. That letter was issued publicly by the Commission and was referenced in the Commission's Daily Digest. It was no secret. The fact is that, notwithstanding the issuance of that letter in January, Mr. Ramirez did not seek to participate in these matters until May 29, 1997, a month after the HDO was issued, when he sought to intervene herein. And even after he

^{2/} Since 1991, ACCLP has been in the hands of Mr. Hoffman as trustee. SBH served all pleadings on Mr. Hoffman in that capacity. At Footnote 2 to his Petition, Mr. Ramirez correctly points out that SBH has not served any post-1991 pleadings on Mr. Ramirez -- for the simple reason that SBH did not have to, since by then Mr. Hoffman, not ACCLP (or Mr. Ramirez), was the licensee.

was permitted to intervene (by Order of the Presiding Judge dated June 20, 1997), Mr. Ramirez waited yet another month before filing his Petition. In view of these circumstances, Mr. Ramirez's claims of previous inability to raise these questions are clearly unsupported and unsupportable. ^{3/}

4. And finally, contrary to Mr. Ramirez's apparent belief, the Commission was well aware of the decision of the bankruptcy court on which Mr. Ramirez relies. Two If By Sea Broadcasting Corporation ("TIBS"), another intervenor in this proceeding, twice provided copies of Judge Krechevsky's decision to the Commission -- once in February, 1997, in connection with TIBS's response to an SBH pleading in the Court of Appeals, and again on March 3, 1997, in connection with TIBS's petition for reconsideration of the January 30, 1997 letter ruling by the Commission. Thus, as of April 28, 1997 (the date of the HDO), the Commission was clearly on notice of Judge Krechevsky's decision. ^{4/}

^{3/} It should also be pointed out that, while Mr. Ramirez bemoans the supposedly terrible burdens imposed on him by the instant proceeding, see, e.g., Petition at 8, the fact is that Mr. Ramirez himself voluntarily elected to seek party status herein. That is, far from being dragged kicking and screaming into this proceeding, Mr. Ramirez invited himself to the party. Having done so, he cannot credibly complain that the participation he himself sought out may impose some burden on him.

^{4/} Mr. Ramirez is correct when he notes that SBH did not notify the Commission of Judge Krechevsky's decision. That is because, as set forth herein, SBH does not believe Judge Krechevsky's decision to be decisional with respect to any of the issues before the Commission. While the factual record underlying Judge Krechevsky's decision is in a number of respects
(continued...)

Background

5. ACCLP was an entity formed in 1984 in order to enable certain non-minority persons to take advantage of the Commission's minority distress sale policy. It is well-established ^{5/} that those non-minority persons, having failed to reach agreement with one minority person (one Joseph Jones) and facing what they perceived to be an imminent deadline, first met Mr. Ramirez during a two-hour meeting in late May, 1984 and then, after caucussing among themselves outside of Mr. Ramirez's presence for approximately one hour, offered him a general partnership position in ACCLP. See, e.g., In re Astroline Communications Company Limited Partnership ("Astroline"), 188 B.R. 98, 100 (Bkrtcy. D. Conn. 1995).

6. The record thus far developed establishes, at a bare minimum, that:

- (a) ACCLP consistently claimed that Mr. Ramirez held a 21% ownership interest in ACCLP and was its controlling general

^{4/}(...continued)
 relevant hereto, the decision itself does not address the Commission's rules and policies (or ACCLP's compliance with those rules and policies), and thus SBH does not believe that it was required to provide copies of the decision to the Commission.

^{5/} A number of factual issues relevant to the disposition of the question before the Presiding Judge in this case have already been addressed on the record in the Hartford bankruptcy proceeding concerning ACCLP. In view of Mr. Ramirez's strongly-articulated belief that that proceeding takes care of everything, Mr. Ramirez will presumably not quarrel with the evidence which was adduced in that proceeding, particularly since he himself was able to participate in the development of the record in the bankruptcy proceeding. As will be addressed later herein and contrary to Mr. Ramirez's repeated suggestions, SBH was NOT a party to the adversary bankruptcy proceeding, and thus SBH did NOT participate in the development of that record.

partner. But Mr. Ramirez's actual financial contribution to ACCLP amounted to only \$210; by contrast, the non-minority participants contributed well in excess of \$20,000,000.00 (Twenty Million Dollars). In federal tax returns filed between 1985-1988, Mr. Ramirez's "ownership interest" in ACCLP was stated to be less than one percent, a figure which was considerably more consistent with Mr. Ramirez's actual investment in ACCLP. See Attachment A hereto.

(b) from its formation in May, 1984 until late in 1988 (at which point ACCLP was placed into bankruptcy), there was no checkbook for any ACCLP account in the Hartford offices where Mr. Ramirez worked; rather, the ACCLP checkbooks were maintained in the non-minority participants' offices outside Boston. See, e.g., Astroline, supra, 188 B.R. at, e.g., 102. Signatories on ACCLP's accounts included four of ACCLP's non-minority, supposedly passive principals. See id. Those non-minority principals signed multiple checks on those accounts, including at least two of which appeared to be for the benefit of non-minority principals and without the knowledge of Mr. Ramirez. Id.

(c) all revenues received through operation of the station in Hartford were deposited into a "lock box account" in Hartford, from which they were automatically "swept" twice a week to an account in Boston, an account on which the four non-minority, supposedly passive principals were signatories and which those four signatories could empty without notice to or approval from Mr. Ramirez. Id. at 101, 106.

(d) Mr. Ramirez consulted with non-minority, supposedly passive principals of ACCLP on a wide variety of operational matters, including the programming to be broadcast on the station, the particular ACCLP accounts payable which were to be paid, and even the windows to be installed in the station's Hartford facility,. E.g., id. at 101-102. Virtually every expense of the station's operations was recorded on "transmittal" sheets which were sent, by station personnel (including Mr. Ramirez) in Hartford to the non-minority principals' offices outside Boston for review and preparation of checks. See Attachment B. Copies of transmittal sheets bear the initials and "OK" of at least one of ACCLP's non-minority principals. See Attachment C (initialled transmittals).

(e) In at least one document submitted to a bank, ostensibly in order to initiate a deposit and borrowing relationship for ACCLP, identified four non-minority persons, but not Mr. Ramirez, as the general partners of ACCLP. See Attachment D hereto.

7. Based on documents generally demonstrating the

foregoing facts, the Commission designated this proceeding for hearing on the question of whether ACCLP engaged in misrepresentation when it repeatedly held itself out -- to the Commission, the Court of Appeals and the Supreme Court -- as a bona fide minority-controlled limited partnership within the meaning of the Commission's policies.

8. Mr. Ramirez now quarrels with that designation, claiming that that issue has already been litigated. Mr. Ramirez is wrong.

Argument

9. According to Mr. Ramirez, the issue in this case has already been "fully litigated" in the adversary proceeding before the Bankruptcy Court. Ramirez Petition at, e.g., 7. But even casual review of the opinion of Judge Krechevsky, on which Mr. Ramirez places primary (if not sole) reliance, demonstrates that the focus of the bankruptcy proceeding was far more limited than Mr. Ramirez lets on. According to Judge Krechevsky, the question then before the court was one arising under the Massachusetts Limited Partnership Act and the Bankruptcy Code, not the Commission's policies. Astroline at 103. That question was whether any limited ACCLP partner(s) had in fact "participat[ed] in the control of ACCLP" in a manner "substantially the same as the exercise of the powers of a general partner". Id. Indeed, neither the Commission nor its policies are mentioned in Judge Krechevsky's opinion except in very brief (and non-substantive) passing.

10. The question in the instant hearing is substantially different from that addressed by Judge Krechevsky. Here the question is whether ACCLP in fact complied with the Commission's policies relative to limited partnerships and whether ACCLP lied to the Commission and the Courts when it represented that ACCLP did so comply. Judge Krechevsky's conclusion was governed by Massachusetts partnership law; by contrast, the instant case must be governed by Commission policies. Judge Krechevsky was concerned solely with questions of financial liability; by contrast, the instant case involves the truthfulness and candor of representations made to the Commission and the Courts. Judge Krechevsky's decision does not in any way, shape or form dispose of the issue designated herein by the Commission. ^{6/}

11. As a threshold observation, SBH is constrained to point out that, contrary to the repeated suggestion of Mr. Ramirez, SBH did NOT participate in the adversary proceeding in the bankruptcy action. It is therefore not at all true that the "allegations advanced by [SBH]" have been "thoroughly examined" or "fully addressed" in connection with that action. See, Ramirez Petition at, e.g., n. 2; 10; see also 9 (apparently referring to SBH as a "party" to the bankruptcy case). Nor, for that matter, is SBH

^{6/} To be sure, the factual record developed before Judge Krechevsky may overlap the factual record to be developed with respect to the issues herein. But there are obviously additional facts which need to be developed here which were not addressed -- and which did not need to be addressed -- in the bankruptcy action. And the bottomline legal issue to be addressed herein is completely different from the legal issue before Judge Krechevsky.

subject to any "preclusion" doctrine limiting its ability to explore factual or legal issues herein; by contrast, the parties to the adversary bankruptcy proceeding are subject to such preclusion.

12. Without limiting its assessment of the proper scope of the issue in this case (pending further discovery), and solely for the purpose of the instant Partial Opposition, SBH offers the following observations concerning matters which are clearly at issue here, but which were, equally clearly, not addressed in the adversary bankruptcy proceeding.

13. The Commission's willingness to accord preferential regulatory treatment to limited partnerships is based on the understanding that, in a bona fide limited partnership, the supposedly limited partners are purely passive, with no capacity for involvement in the partnership's business. E.g., Minority Ownership of Broadcasting, 92 FCC2d 849, 854, 52 R.R.2d 1301 (1982); Ownership Attribution, 58 R.R.2d 604 (1985); Family Media, Inc., 59 R.R.2d 165, 166-67, n. 4 (Rev. Bd. 1985). The Commission's analysis thus addresses not merely the question of whether or not a supposedly limited partner has actually exercised control, but whether that limited partner has the potential to exercise such control. E.g., Atlantic City Community Broadcasting, Inc., 8 FCC Rcd 4520 (1993); Gloria Bell Byrd, 7 FCC Rcd 7976 (Rev. Bd. 1992), aff'd, 8 FCC Rcd 7126

(1993); Family Media, supra, 59 R.R.2d at 166-67, n. 4 ^{2/}.

14. This factor alone distinguishes the instant case from the bankruptcy case, for there Judge Krechevsky himself specifically noted that "[t]here is a critical distinction between the actual exercise of control and the potential to exercise control". Astroline at 105 (emphasis in original). Judge Krechevsky was looking specifically for actual exercise of control sufficient to trigger liability under Massachusetts partnership law. That inquiry is relevant to, but certainly not dispositive of, the inquiry which the Commission has mandated here. As the Review Board has noted, "legitimate limited partnership agreements may bestow upon limited partners powers which under the Commission's regulatory objectives would" preclude special treatment. Family Media, Inc., supra. In other words, the standards which apply to limited partnerships in a conventional, non-Commission, state law setting are different from the standards applied by the Commission in the implementation of its various policies. Thus, Judge Krechevsky's inquiry relative to partnership liability -- an inquiry governed by conventional, non-Commission, Massachusetts law -- is neither inconsistent with, nor in any way dispositive of, the issue designated by the Commission.

15. To be sure, the factual record compiled before Judge

^{2/} In Family, for example, the Review Board observed that, for Commission purposes, special treatment "for limited partnership interests only applies . . . where the limited partner in fact lacks the power to control or influence the affairs of the licensee." 59 R.R.2d at 167, n.4.

Krechevsky may be relevant to the Commission's inquiry. For example, that record (as noted above) establishes that supposedly non-voting individuals were signatories on ACCLP's checking accounts. For the Commission's purposes, the mere authority to sign a limited partnership's checks -- whether or not that authority was ever exercised -- has been deemed to undermine the bona fides of a claimed limited partnership. See Byrd, supra ^{8/}. Cf. Religious Broadcasting Network, 2 FCC Rcd 6561, 6566 (Rev. Bd. 1987). A fortiori, the exercise of such authority is even more conclusive of the lack of a bona fide limited partnership. Here, the evidence establishes that supposedly passive non-minority principals did indeed write checks on ACCLP's accounts.

16. Another focus of the Commission's analysis of limited partnerships is the precise nature and extent of the supposedly general partner's actual interest in the partnership. That is, the Commission will look behind the facile claims that a limited partnership might make about its "ownership" and delve into the actual rights of the parties. See, e.g., Praise Broadcasting Network, Inc., 8 FCC Rcd 5457, 5459, n.4 (Rev. Bd. 1993).

17. For example, where a partnership agreement required

^{8/} In Byrd, the Commission observed that the fact that all parties to a supposedly limited partnership knew that a supposedly passive principal had check-signing authority was "prima facie proof that they intended him to have this prerogative and contemplated his exercising it under some possible contingency, which is inconsistent with the representation that [the limited partner] was merely a passive investor." 8 FCC Rcd at 7126, ¶13 (emphasis added).

that the general partner obtain consent of the limited partners with respect to any and all borrowing, the Commission concluded that the limited partnership was not bona fide, since the general partner was not sufficiently insulated from influence by the supposedly passive limited partners. See, e.g., Atlantic City Community Broadcasting, Inc., 8 FCC Rcd at 4520-21. Here, the ACCLP agreement (at Section 4.2) required limited partner consent before the general partner could mortgage or pledge the partnership's assets. See Attachment E.

18. Similarly, in Praise, the Review Board found the bona fides of a limited partnership in question where, inter alia, a supposedly controlling general partner holding a 20% equity interest in the overall limited partnership would receive only 5% of the partnership's profits and losses until the limited partner's capital contribution was repaid with interest. Here, while Mr. Ramirez was consistently held out as holding a 21% equity interest in ACCLP, the record establishes that, by amendment of the ACCLP partnership agreement in late 1985, he was entitled to less than 1% of any profits, losses or distributions until the limited partners' contributions were repaid with the equivalent of interest. See Ramirez Petition, Exhibit I, p. 8. ^{2/} Clearly, the facts here are far more aggravated than

^{2/} As far as SBH has been able to determine thus far in this proceeding, ACCLP did not submit a copy of the December, 1985 amendment to its partnership agreement to the Commission or to the Court (where the matter was pending at that time), or otherwise advise the Commission or the Court of the amendment when it was adopted. Indeed, it does not appear that Astroline
(continued...)

were the facts in Praise. ^{10/}

19. The question of the actual level of Mr. Ramirez's ownership interest in ACCLP is also a matter which Judge Krechevsky left unresolved. In his Petition, Mr. Ramirez boldly claims that the Bankruptcy Court "extensively considered the issue of whether [he] retained his 21% ownership interest". Ramirez Petition at 12. But Mr. Ramirez's ensuing elaboration on that claim contains no citations whatsoever to Judge Krechevsky's decision. And, indeed, review of that decision does not disclose any discussion of the question of Mr. Ramirez's quantitative interest, because that question was fundamentally irrelevant to the bankruptcy proceeding.

20. Again, the focus of Judge Krechevsky's concern was whether the supposedly limited partners' actual "participation in the control of [ACCLP] was substantially the same as the exercise of the powers of a general partner." Astroline, 188 B.R. at 103. Given this focus, the precise quantification of Mr. Ramirez's interest was irrelevant to Judge Krechevsky.

21. That is not the case here, however. ACCLP claimed for

^{9/} (...continued)
ever disclosed the precise terms of that amendment -- which reduced Mr. Ramirez's share of profits, losses and distributions to significantly less than 1% -- to the Commission or the Courts.

^{10/} See also Saltaire Communications, Inc., 8 FCC Rcd 6284 (1993). There, in a corporate setting, the Commission concurred with the Review Board that, where the supposedly passive investors' "rights to earnings and assets leaves the voting stockholder with little of value to offer as an inducement for capital contributions from new investors", the "passive" investors had power to influence the applicant's affairs.

some six years -- before the Commission, the Court of Appeals and the Supreme Court -- that it complied with the Commission's minority distress sale policy. And in order to comply with that policy, at least 20% of ACCLP had to be owned by a minority. Minority Ownership of Broadcasting, supra. Thus, the quantification of Mr. Ramirez's interest is a factor of major independent significance here before the Commission, but not before the bankruptcy court. ^{11/}

22. As noted above, the evidence of record demonstrates that ACCLP reported to the Internal Revenue Service from 1985-1988 that Mr. Ramirez's ownership interest in ACCLP was less than 1%. See Attachment A. In his Petition, Mr. Ramirez attempts to sidestep this by claiming that the "IRS returns . . . simply reflected the tax allocation" of profits, losses and cash flow which had been recommended by ACCLP's accountants. Ramirez Petition at 13.

23. The trouble with that is that the IRS forms themselves ask three separate and distinct questions: (1) what is the individual partner's percentage of profit sharing; (2) what is the individual partner's percentage of loss sharing; and (3) what is the individual partner's ownership. Id. If Mr. Ramirez's explanation were accurate, then the IRS forms as filed would be expected to reflect approximately 0.75% in response to the first

^{11/} Indeed, even if Judge Krechevsky's decision were deemed, arguendo, to dispose of the question of the bona fides of ACCLP's partnership structure (and SBH does not concede that point), the question of ACCLP's compliance with the Commission-imposed 20% ownership requirement was not addressed by Judge Krechevsky.

two questions (i.e., the "tax allocation" of profits, losses, etc. supposedly suggested by the accountant) and 21% in response to the third. As the Presiding Judge will note, that is not how ACCLP responded to the third question.

24. Thus, the question of the precise quantification of Mr. Ramirez's interest is of obvious importance here, it was not of any particular importance in the bankruptcy proceeding, and it has not previously been resolved.

25. A further factor separating the bankruptcy proceeding from the instant Commission proceeding is the fact that the Commission's treatment of limited partnerships is based not on the mere metes and bounds of civil partnership law, but rather on broader public interest considerations which necessitate broader inquiry. Thus, for example, the Commission's consideration of the bona fides of limited partnership arrangements will look beyond the boundaries of the written partnership agreement and will consider, instead, whether the business relationship in question is, e.g., "irreconcilable with sound business judgment", Royce International Broadcasting, 5 FCC Rcd 7063, 7065, n. 10 (1990) and Evergreen Broadcasting Company, 6 FCC Rcd 5599, 5602, ¶20 (1991); "far-fetched", Mableton Broadcasting Company, Inc., 5 FCC Rcd 6314, 6318, ¶13 (Rev. Bd. 1990); or "unreal", Byrd, supra, 7 FCC Rcd at 7980, ¶13. ^{12/}

^{12/} See also, e.g., Moore Broadcast Industries, Inc., 2 FCC Rcd 2754, 2761-62, 2766 (Frysiak, ALJ 1987). There, as here, the partnership agreement was drafted by the limited partners' counsel. There, the supposed general partner was not required to
(continued...)

26. Comparison of these cases with the facts which are already established relative to ACCLP strongly support the conclusion that the ACCLP structure was, in fact, an "unreal", "far-fetched" design completely inconsistent with "sound business judgment". For example, in Evergreen, the supposedly passive investor had no previous relationship with the general partner -- just as the non-minority ACCLP investors had never met Mr. Ramirez until approximately two hours before they offered him a controlling general partnership interest in ACCLP. Also in Evergreen, the Commission found it incredible that any experienced investor would entrust exclusive managerial control to a person who would be making at most a nominal investment (\$100) in the enterprise; here, ACCLP would have the Commission believe that the non-minority ACCLP principals entrusted a \$20,000,000+ enterprise exclusively to Mr. Ramirez, whose personal investment was only \$210. The Commission in Evergreen refused to believe that, under these circumstances, the supposedly passive investor had really "given away the store".

27. Similarly, for another example, in Mableton, a limited

^{12/}(...continued)

make any capital contribution, while the limited partners were obligated to pay up to \$100,000; here, the supposed general partner's total capital contribution amounted to \$210, while the limited partners' contributions exceeded \$20,000,000. There, as here, the general partner submitted bills to the limited partners for payment. There, as here, the partnership agreement imposed no constraints on communications between general and limited partners concerning station operations. There, as here, the general and limited partners did indeed discuss station operations. In Moore, the Presiding Judge correctly concluded that the partnership did not appear to be a bona fide limited partnership.

partnership was rejected where the general partner was a stranger to the limited partner until shortly before filing, where the basic arrangements had been made by the limited partners before the general partner joined, and where the general partner would be making no investment in the enterprise in return for her supposed 20% ownership interest. The Review Board compared this situation with Metroplex Communications, Inc., 4 FCC Rcd 8149 (Rev. Bd. 1989), aff'd, 5 FCC Rcd 5610 (1990), where the limited partners had "given away" a mere 4% equity share under similar circumstances. 5 FCC Rcd at 6318, ¶13. The Commission in Metroplex found that proposal "unworthy of credence". The Board, in Mableton, found the proposal to give a general partner a 20% equity share "a fortiori, more far-fetched". Id. In the instant case, Mr. Ramirez was supposedly receiving a 21% controlling interest -- putting it comfortably in the "more far-fetched" range.

28. Of course, none of this substantial Commission authority was addressed in any way in Judge Krechevsky's decision -- because it was not material to the issue before the bankruptcy court. In view of all of the foregoing, it is crystal clear that, contrary to Mr. Ramirez's wishful thinking, the matters of concern to the Commission have not been resolved. Accordingly, the HDO properly designated those matters for hearing, and no reason exists for interrupting that hearing.

29. In a footnote, Mr. Ramirez seems to recognize his problem here. At page 14 of his Petition, he asserts that,

during the period May, 1984-December, 1984, the Commission's standard for evaluating the bona fides of a limited partnership was essentially the same as governing state standards. But in Footnote 10 to that assertion, Mr. Ramirez acknowledges that any such overlap of standards was eliminated by the Commission in June, 1985. Presumably, Mr. Ramirez intends to argue that, having gotten in under the wire with a limited partnership which plainly does not comply with the 1985 standards, ACCLP did not need to worry about any subsequent changes in Commission standards.

30. But that approach is contrary to both the law and the facts. In Family Media, the Review Board made clear that, even where the supposed limited partnership was created before the adoption of the Commission's 1985 standards, those standards -- and not the Uniform Limited Partnership Act standards -- provided the applicable criteria. Family Media, 59 R.R.2d at 168, ¶6. The Commission itself has taken the same position in Atlantic City Community Broadcasting, supra, 8 FCC Rcd at 4522, n. 10 (limited partnership deemed not to qualify as "limited" under Commission policies because it did not provide adequate insulation between limited and general partners, even though the partnership agreement "complied with the insulation standards in existence when the agreement was signed."). Thus, Mr. Ramirez and ACCLP cannot avoid those criteria.

31. And from a factual perspective, Mr. Ramirez's argument ignores certain important considerations. For example, while the

original ACCLP assignment application was filed in 1984, that application was still pending through June, 1990. Even though the Commission acted on the application in December, 1984, SBH filed a timely appeal of that action, and that appeal was pending at least through June, 1990. Thus, the action did not become final during that period, and the application was "pending" for purposes of the Commission's rules. See Section 1.65(a) of the Commission's rules. Under these circumstances, ACCLP's application was plainly subject to the standards announced in 1985 with respect to limited partnerships.

32. This is especially true for two separate reasons. First, the bona fides of the ACCLP partnership structure were at all times -- from 1984 to 1990 -- in issue before the Commission and the Courts. SBH specifically, expressly and repeatedly challenged that structure. And ACCLP specifically, expressly and repeatedly claimed that it was a bona fide limited partnership within the meaning of the Commission's rules and policies. Note that ACCLP never suggested that it was bona fide only insofar as the Commission's policies prior to 1985 might be concerned; rather, ACCLP simply asserted that it was bona fide. In view of its constant insistence that it was bona fide long after 1985, Mr. Ramirez's attempt to rely on an exceedingly narrow reading of the applicable standards cannot be credited.

33. This is especially so because in 1988, ACCLP -- on advice of ACCLP's communications counsel based on the applicable Commission limited partnership standards -- did attempt to amend

its structure and operations to cure some of the more obvious defects. See Attachment F. ^{13/} That is, ACCLP seemingly acknowledged, by its conduct, that it could not legitimately rely on the claim that, if its structure complied with Uniform Limited Partnership Act standards, it need do no more. Because of this effective admission, Mr. Ramirez's current, self-serving claim can and must be rejected.

34. In summary, then, the Commission's assessment of the bona fides of a limited partnership entails at least two separate inquiries: first, whether the minority general partner owns at least a 20% interest in the partnership, and second, whether the supposedly passive, limited, non-minority principals have any potential (whether or not that potential is realized) for controlling the partnership notwithstanding their supposedly "passive" role. By contrast, the sole focus of Judge Krechevsky's inquiry in the bankruptcy proceeding was whether any of the supposedly passive principals had in fact actually engaged in conduct "substantially the same" as a general partner. Clearly, Judge Krechevsky's inquiry did not need to address --

^{13/} Attachment F is a memorandum, dated November 10, 1988, from Baker & Hostetler ("B&H") to ACCLP. At that time B&H was (and had been since at least 1986) ACCLP's communications counsel. The B&H memorandum to ACCLP clearly and unequivocally sets forth the Commission's absolute insistence that "limited" partners be "passive" (see Attachment F hereto at 3, emphasis in original). While the memorandum cites a 1988 Review Board decision (Doylan Forney, 3 FCC Rcd 6330 (Rev. Bd. 1988), mis-cited in the memorandum as Stanley Group Broadcasting, Inc., FCC 88R-56), the fact is that the standard referenced in that memorandum had been clearly and repeatedly articulated since at least 1985. See cases cited in the text, supra.

and did not in fact address -- the questions which are at issue in the instant hearing. As a result, Mr. Ramirez's claim that those questions have already been litigated and resolved is wrong and must be rejected. ^{14/}

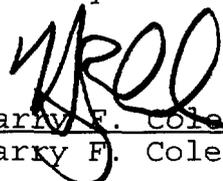
35. Mr. Ramirez also suggests that the designation of this proceeding is somehow inconsistent with the Commission's decision in MobileMedia Corporation, FCC 97-197, released June 6, 1997 to the extent that, in the HDO herein, the Commission declined to consider any Second Thursday relief. But the Commission's decision not to consider such relief is fully explained in the HDO, and is not in any event subject to reconsideration or review by the Presiding Judge. Moreover, the unique circumstances presented by this case -- including, in particular, the fact that ACCLP's apparent misrepresentations undermined the integrity not only of the Commission's administrative processes, but also of the judicial processes of the Court of Appeals and the Supreme Court -- plainly support the HDO in this respect.

36. Finally, with respect to Mr. Ramirez's request for a stay, SBH notes that Mr. Ramirez's showing falls far short of the showing required for such extraordinary relief. Nevertheless, SBH does believe that, in light of the pendency of Mr. Ramirez's request and the volume of materials already produced during discovery thus far, it would be appropriate for the Presiding

^{14/} For the same reason, Mr. Ramirez's argument concerning Article III courts and the full faith and credit clause are inapt here: the instant hearing does not entail any inappropriate "review" of Judge Krechevsky's decision.

Judge to extend all procedural dates in this case for 60 days from the latter of (a) the currently established procedural dates or (b) the date on which Mr. Ramirez's Petition is finally resolved. For reasons set forth in a Petition for Modification of Procedural Dates being filed simultaneously herewith, SBH is proposing such an extension in order to facilitate the completion of discovery and the preparation of exhibits for presentation at trial.

Respectfully submitted,


/s/ ~~Harry F. Cole~~
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