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OCT 23 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 23, 1998

HAND-DELIVERED

CORRESPONDENCE
FILE

Ms. Magalie Roman Salas
Secretary
FEDERAL COMMUNICATIONS COMMISSION
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Hicks Broadcasting of Indiana, LLC, et al., MM Docket No. 98-66

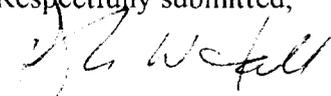
Dear Madam Secretary:

On behalf of Hicks Broadcasting of Indiana, L.L.C., I enclose, for filing, an original and six copies of the Joint Motion of Hicks Broadcasting of Indiana, L.L.C. and Pathfinder Communications Corp. To Exclude Deposition Testimony From Prior Unrelated Civil Proceeding.

Copies of this Joint Motion were provided to the service list by facsimile and/or hand delivery on October 22, 1998.

Kindly stamp and return to this office the enclosed copy of this filing designated for that purpose. You may direct any questions concerning this matter to the undersigned.

Respectfully submitted,


Douglas W. Hall

Enclosures

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION OCT 23 1998
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re)
)
HICKS BROADCASTING)
OF INDIANA, LLC)
)
Order to Show Cause Why the License for)
FM Radio Station WRBR(FM),)
South Bend, Indiana, Should Not Be Revoked;)
)
AND)
)
PATHFINDER COMMUNICATIONS CORP.)
)
Order to Show Cause Why the License for)
FM Radio Station WBYT(FM),)
Elkhart, Indiana, Should Not Be Revoked.)
)
AND)
)
Applications of)
)
MICHIANA TELECASTING CORP.)
(ASSIGNOR))
)
and)
)
PATHFINDER COMMUNICATIONS CORP.)
(ASSIGNEE))
)
For assignment of the licenses of:)
)
WNDU-AM-FM, South Bend, Indiana)

MM Docket No. 98-66

File Nos. BAL-960809GQ &
BALH-960809GR

To: The Chief Administrative Law Judge

**JOINT MOTION OF HICKS BROADCASTING OF INDIANA, L.L.C.
AND PATHFINDER COMMUNICATIONS CORP. TO EXCLUDE
DEPOSITION TESTIMONY FROM PRIOR
UNRELATED CIVIL PROCEEDING**

SUMMARY

At the conclusion of the deposition testimony of Steven Kline -- a witness called by the Mass Media Bureau ("Bureau") to testify in its case in chief -- the Bureau sought to introduce as substantive evidence certain portions of a deposition given by Mr. Kline in a civil litigation several years ago, in which neither Mr. Kline, Pathfinder Communications ("Pathfinder"), nor Hicks Broadcasting of Indiana ("HBI") were parties. The Bureau also intends to introduce as substantive evidence lengthy portions of five other depositions taken in that same civil litigation. HBI and Pathfinder jointly object to the admission of the designated portions of the depositions for the following three reasons.

The Bureau's proposed wholesale use of this deposition testimony instead of or in addition to presenting live hearing testimony from the same witnesses is not consistent with or permitted by either Commission Rule 1.321 -- the specific Commission rule regarding the use of depositions at hearing -- or the Federal Rules of Evidence ("FRE"). Presenting testimony through depositions would rob this tribunal of its ability to assess the demeanor and credibility of the witnesses and would deny HBI and Pathfinder their right of cross-examination on the issues raised in the deposition testimony -- a particularly critical issue here as neither HBI nor Pathfinder were parties to the previous litigation and there is no identity of subject matter between that suit and the current proceeding. The Commission recognized this concern when it enacted Rule 1.321, as it rejected a proposal that would permit broader use of depositions at hearing for fear that "many Commission proceedings would be converted into trials by deposition."^{1/} Finally, fundamental

^{1/} In the Matter of Amendment of Part 1 of the Rules of Practice and Procedure to Provide for Discovery Procedures, 11 F.C.C.2d 185, 190-91 (1968).

fairness suggests that the Commission should not be able to meet its burden of proof in this fashion and/or silently impeach witnesses who will testify live in this proceeding. Each of the witnesses whose depositions have been designated by the Bureau was subpoenaed in this proceeding, and all were, or could have been, subpoenaed by the Bureau to testify at the hearing. Use of their deposition testimony from other unrelated civil litigation as substantive evidence is unfair under these circumstances. For all of these reasons, the Bureau's effort to introduce excerpts from the Crystal litigation depositions as substantive evidence in this proceeding should be denied.^{2/}

BACKGROUND

David Hicks is HBI's President and owns a 51 percent interest in the company. On September 1, 1993, before becoming involved with HBI, Mr. Hicks merged a prior company which owned two radio station licenses in eastern Michigan with Air-Borne, Inc., a company which owned a third station in that area and which was controlled by Edward J. Sackley, III and his friends and members of his family. Mr. Hicks obtained a 32 percent interest in the merged company, known as Crystal Radio Group, Inc. ("Crystal"). Mr. Hicks was named Chairman of the Board, Treasurer, and Director of Sales for Crystal.

The Crystal Shareholders Agreement contained a "forced sale" provision that permitted either Mr. Hicks or Mr. Sackley to make an offer after January 1, 1995 to buy all of the other shareholders' stock. The other shareholders had the option of selling the stock on the terms specified in the forced sale provision or buying the offeror's stock on the same terms.

^{2/} Should any of the Crystal litigation deponents testify in this matter, HBI and Pathfinder do not object to the Bureau's use of their previous sworn testimony as impeachment material, if appropriate.

In late 1993 and early 1994, the relationship between Mr. Hicks and the other Crystal board members began to become strained. Part, but by no means all, of the reason for the strain was Mr. Hicks' plan to form HBI to purchase radio station WRBR in South Bend, Indiana. The Crystal board claimed that Mr. Hicks failed to present the WRBR opportunity to Crystal before pursuing it himself, and expressed concern over the effect that the WRBR acquisition could have on Mr. Hicks' availability to perform his duties for Crystal's stations in Michigan and on Crystal's licenses should FCC violations occur at WRBR.

In July 1994, the dispute between Mr. Hicks and the Crystal board came to a head when the board suspended Mr. Hicks and placed him on administrative leave without pay from his position as Director of Sales. Subsequently, the Crystal board terminated Mr. Hicks as an employee and removed him from the board, and the Crystal shareholders amended the Shareholders Agreement to delay and ultimately eliminate Mr. Hicks' ability to exercise the forced sale provision.

These actions caused Mr. Hicks to institute a state court action in Kalamazoo County, Michigan against the Crystal board and shareholders in December 1994 for wrongful termination and shareholder oppression under Michigan law. David L. Hicks v. Edward J. Sackley III, et al., No. B94-3603-NZ (the "Crystal litigation"). The defendants in the Crystal litigation filed two counterclaims, claiming conversion and breach of fiduciary duty. The latter counterclaim was based on the defendants' allegation that Mr. Hicks had usurped corporate opportunities from Crystal relating both to the acquisition of WRBR and to Mr. Hicks' involvement with a sign company in Kalamazoo. The Crystal litigation was brought by Mr. Hicks alone, in his personal capacity, and neither HBI nor Pathfinder was a party thereto.

Both parties to the Crystal litigation moved for summary disposition. On August 5, 1996, the court found that there was "no genuine issue of material fact that the removal of the Forced Sale Provision from the Shareholders Agreements by the shareholders was, in fact, willfully unfair and oppressive action in violation of the Michigan Business Corporation Act."^{3/}

The Bureau obtained copies of several depositions taken by the parties to the Crystal litigation, including the depositions of Mr. Hicks; John Dille, III; Robert Watson; Mr. Kline; John Dille, IV; and Sarah Dille. During the course of this proceeding, the Bureau deposed all six of these individuals. Despite the fact that each of these individuals was available to testify at the hearing -- and Messrs. Watson and Kline were designated by the Bureau to testify in its case in chief and Mr. Hicks and John Dille IV were subpoenaed by the Bureau -- the Bureau included all of their depositions among its proposed exhibits. On the first day of the hearing, the Administrative Law Judge *sua sponte* raised the issue of the Crystal litigation materials, and ordered the Bureau to designate those portions of the materials that the Bureau claimed were relevant, rather than the entire transcripts, "so that the parties will know what they have to argue about."^{4/} Nevertheless, when the Bureau submitted its list of designations on October 13, 1998, it included virtually the entire transcript of the depositions of Mr. Kline, Mr. Watson, Ms. Dille, and John Dille, IV,^{5/} and lengthy portions of the depositions of Mr. Hicks and John Dille, III.

^{3/} See August 5, 1996 order (HBI Exhibit 48) at pages 5-6. The court found that the balance of the issues were not ripe for summary disposition. *Id.* at page 3. As part of the parties' subsequent settlement of the lawsuit, they agreed to set aside the court's August 5, 1996 opinion. See HBI Exhibit 53 at page 3.

^{4/} Transcript of October 6, 1998 hearing at pages 45-46.

^{5/} Apart from the instructions from the attorney taking the deposition, colloquy among the lawyers, questions concerning the witness's preparation for the deposition, and a few

Mr. Kline testified at length in the Bureau's case in chief, during which the Bureau used portions of his Crystal litigation deposition which it thought were inconsistent. After examination by the other parties and the Administrative Law Judge, the Bureau sought to introduce Mr. Kline's Crystal deposition testimony as substantive evidence.

ARGUMENT

I. THE FEDERAL RULES OF EVIDENCE DO NOT PERMIT THE WHOLESALE ADMISSION OF THE CRYSTAL LITIGATION DEPOSITIONS

As is discussed in detail in Section II, below, Commission Rule 1.321(d) sets forth the exclusive means by which depositions may be used in Commission hearings. However, even if it were proper to analyze the admissibility of the Crystal litigation depositions under the Federal Rules of Evidence rather than Rule 1.321(d), they would not be admissible *en masse*, as the Bureau proposes. The specific hearsay rule concerning the admissibility of former testimony, FRE 804(b)(1) is inapplicable, both because the witnesses are not "unavailable" as defined by FRE 804(a), and because neither HBI nor Pathfinder "had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" in the Crystal litigation. FRE 804(b)(1).

That leaves only FRE 801(d)(2)(D), which excepts from the definition of hearsay statements "by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." The rule specifically provides that a statement of an agent or servant of a party is only admissible against that party. See Brown v. R.J. Reynolds Tobacco Co., 852 F. Supp. 8, 10 (E.D. La. 1994) (statement admissible only

isolated areas of questioning, the Bureau designated these depositions in their entirety.

against the party making it), aff'd, 52 F.3d 524 (5th Cir. 1995). Thus, to be able to offer a statement against one of the parties to this proceeding under FRE 801(d)(2)(D), the Bureau would have to show: (1) the existence of the agency or employment relationship with that party, which relationship cannot be established by the contents of the statement alone;^{6/} (2) that the statement offered concerned a matter within the scope of the declarant's agency or employment relationship with that party; and (3) that the statement was made during the existence of the relationship with that party. Holding the Bureau to its proof with respect to each of these factors is particularly critical here given that there are two separate respondents, as a statement might be admissible against one respondent but not the other if the statement related to an agency or employment relationship that the declarant had with just one of the respondents.^{7/} Moreover, some of the declarants had agency or employment relationships with both respondents at various times.

A telling example of the need to specify the precise statements which the Bureau seeks to introduce against each party is the deposition testimony of Mr. Watson. At various times, Mr. Watson was acting in several different roles, including: (1) as an officer of Pathfinder; (2) as an agent for HBI under its accounting agreement with Pathfinder; and (3) on behalf of the interests of the minority shareholders in HBI in their dealings with Mr. Hicks. Statements he made in one

^{6/} See FRE 801(d)(2) ("The contents of the statement shall be considered but are not alone sufficient to establish ... the agency or employment relationship and scope thereof under subdivision (D)....") (emphasis added).

^{7/} For example, statements made by John Dille, III, Pathfinder's President, that concern a matter within the scope of his employment relationship with Pathfinder might be admissible against Pathfinder under FRE 801(d)(2)(D), but would not be admissible against HBI, with which Mr. Dille had no agency or employment relationship.

of these roles would not be admissible against all of the parties to this proceeding under Rule 801(d)(2)(D). Similarly, Mr. Kline testified at length that he had two separate and distinct employers -- Pathfinder and HBI. A statement made by Mr. Kline concerning his activities as general manager of WBYT would not constitute a matter within his employment at WRBR, and vice versa.

At a minimum, the Bureau must identify with specificity each statement it seeks to offer and which of the respondents it seeks to offer the statement against so the respondents and the Administrative Law Judge can determine whether the statement concerned a matter within the declarant's agency or employment relationship with that particular party. This undoubtedly would be a laborious and time-consuming task, made necessary only by the Bureau's unprecedented effort to conduct a trial by deposition rather than through live testimony.^{8/} That bridge need not be crossed, however, because Rule 1.321(d) makes the Crystal litigation depositions inadmissible in their entirety.

II. UNDER THE COMMISSION RULE GOVERNING THE USE OF DEPOSITIONS AT HEARING, THE CRYSTAL LITIGATION DEPOSITIONS MAY NOT BE USED AGAINST HBI OR PATHFINDER IN THIS PROCEEDING

Commission Rule 1.321 governs the use of depositions in Commission proceedings. Subsection (d) of that rule, which tracks much of the language of Rule 32(a) of the Federal Rules of Civil Procedure ("FRCP"), states in pertinent part as follows:

At the hearing (or in a pleading), any part or all of a deposition, so far as admissible, may be used against any party who was present or represented at the taking of the deposition or who had due notice thereof, in accordance with any one of the following provisions:

^{8/} HBI and Pathfinder were unable to locate any previous instance in which the Bureau -- or any other party for that matter -- even attempted to introduce as substantive evidence at hearing deposition testimony from a prior civil proceeding.

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, or managing agent of a public or private corporation, partnership or association which is a party may be used by an adverse party for any purpose.

* * * * *

(5) Substitution of parties does not affect the right to use depositions previously taken; and, when an action in any hearing has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

Commission Rule 1.321(d).^{2/} The Crystal litigation depositions cannot be admitted under Rule 1.321(d) for several reasons.

A. The Crystal Litigation Depositions May Be Admitted Only If They Satisfy The Requirements Of Rule 1.321(d)

Though Rule 1.321(d) is based on FRCP 32(a) and tracks much of the language of that rule, there is a critical difference between the two that is dispositive of the Bureau's attempted use of the Crystal litigation depositions here: FRCP 32(a) explicitly provides that, in addition to

^{2/} Rule 1.321(d)(3) permits a prior deposition to be used if the witness is unavailable, either because of death, sickness, age, imprisonment, or being outside of the United States, or, upon application by the offering party, if "exceptional circumstances" are shown to exist. None of the six Crystal litigation deponents are unavailable; to the contrary, all were deposed during the course of this proceeding, two were called by the Bureau as part of its case in chief, and two others are included on the respondents' witness lists. Nor can the Bureau credibly argue that "exceptional circumstances" exist justifying a departure from the typical practice of requiring live testimony where possible. See Allgeier v. United States, 909 F.2d 869, 876 (6th Cir. 1990) (trial court abused its discretion in admitting deposition under "exceptional circumstances" rationale; "how exceptional the circumstances must be under Rule 32(a)(3)(E) is indicated by its companion provisions"); Angelo v. Armstrong World Industries, Inc., 11 F.3d 957, 963 (10th Cir. 1993) (quoting Allgeier, court finds no "exceptional circumstances" justifying use of deposition in light of the party's "lack of diligence in getting [the witness] to appear").

permitting the use of depositions from prior matters involving the same parties and same subject matter, a deposition taken in a previous case also may be used as permitted by the Federal Rules of Evidence.^{10/} Rule 1.321(d), on the other hand, does not contain a provision like that in FRCP 32(a) permitting previous depositions to be used as permitted by the Federal Rules of Evidence separate and apart from whether it was taken in a previous Commission hearing concerning the same subject matter and among the same parties. Therefore, Rule 1.321(d) should be interpreted as the sole method by which depositions may be used in Commission proceedings.

This conclusion is buttressed by both Rule 1.351, which is the Commission rule regarding the use of the Federal Rules of Evidence at hearing, and the Commission's comments in enacting Rule 1.321(d), which demonstrate its desire to provide a more restrictive use of depositions in Commission hearings. Rule 1.351 provides that "[e]xcept as otherwise provided in this subpart, the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern formal hearings." (Emphasis added.) By providing a specific rule exclusively governing the use of depositions at hearing, the Commission has "otherwise provided" that the Federal Rules of Evidence do not apply to that issue.

The Commission's motivation for creating a more restrictive rule governing deposition usage at its hearings can be found in its concern that hearings could be turned into "trials by deposition," as expressed in the Commission's rejection of a proposal that there be unlimited use

^{10/} See FRCP 32(a)(4) ("[W]hen an action has been brought in any court of the United States or any State and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter action as if originally taken therein. A deposition previously taken may also be used as permitted by the Federal Rules of Evidence.") (emphasis added).

of depositions where the witness is located more than 100 miles from the hearing location. The Commission observed that its subpoena power is far greater than that of a federal court, and thus witnesses in its hearings are often much further than 100 miles from the place of the hearing. Expressing its concern that "many Commission proceedings would be converted into trials by deposition," if unlimited use of depositions were permitted, it concluded that the 100-mile proposal "would not be appropriate in Commission proceedings." The Bureau's request would turn this proceeding into the very "trial by deposition" that the Commission expressed concern over when it enacted Rule 1.321(d).

B. Neither HBI Nor Pathfinder Were Parties To The Crystal Litigation

It is beyond dispute that the Crystal litigation involved a suit brought by Mr. Hicks in his personal capacity as a shareholder and former employee of Crystal -- as opposed to his capacity as an officer or member of HBI or as an employee of Pathfinder -- against Crystal's shareholders and the members of its board. The claims that Mr. Hicks asserted in the Crystal litigation sought relief for his wrongful termination as a Crystal employee and for violation of his rights as a Crystal shareholder. The counterclaims, likewise, were directed at Mr. Hicks personally, as they sought to hold him liable for conversion and for breaching his fiduciary duty as a Crystal officer and director. Neither HBI nor Pathfinder -- the two respondents in this proceeding -- was ever a party to the Crystal litigation.

A threshold requirement for permitting the use of depositions against a party under Rule 1.321(d) is that the party was "present or represented at the taking of the deposition or ... had due notice thereof." This prerequisite is not satisfied with respect to the Bureau's attempt to use the Crystal litigation depositions against HBI and Pathfinder in this proceeding. The corporations

were not parties, the issues in the Crystal litigation did not directly affect them, and they had no reason to attend or cross-examine the witnesses at the deposition. The Bureau should be precluded from introducing the Crystal litigation depositions on this ground alone.

C. Commission Rule 1.321(d) Only Permits The Use Of Depositions Taken In Prior Commission Proceedings, Not Unrelated Civil Litigation

FRCP 32(a), on which Rule 1.321(d) is based, specifically provides that depositions from any action "brought in any Court of the United States or any State" may be used in a subsequent action involving the same parties and the same subject matter. Rule 1.321(d)(5), on the other hand, only permits the use of depositions from prior Commission proceedings under appropriate circumstances, and is silent regarding depositions from prior civil matters. Therefore, under the doctrine of *inclusio unius est exclusio alterius*, Rule 1.321(d) must be interpreted as excluding depositions taken in prior civil suits in subsequent Commission hearings.

Even if Rule 1.321(d) was found to apply generally to depositions in civil actions, it would not permit the use of the Crystal litigation in this case. The use of depositions from prior Commission hearings is limited to cases which involved the "same subject matter" between the "same parties or their representatives or successors in interest." The subject matter of the Crystal litigation -- the propriety of the actions taken against Mr. Hicks by the Crystal board and shareholders -- certainly is not the same as the subject matter of this proceeding. Nor are the parties to the Crystal litigation -- Mr. Hicks, on the one hand, and Crystal's board of directors and shareholders, on the other -- identical to the parties in this proceeding, HBI, Pathfinder and the Bureau. The Bureau's attempt to use the Crystal litigation depositions as substantive evidence must be denied on this ground as well.

D. Certain Of The Crystal Litigation Depositions Are Also Inadmissible Under Rule 1.321(d) Because The Deponents Were Not Officers, Directors, Or Managing Agents Of HBI Or Pathfinder

In addition to the other impediments discussed above to the Bureau's effort to use the Crystal litigation depositions, Rule 1.321(d) only permits the use of depositions as substantive evidence -- as distinguished from impeachment material -- where the deponent was an "officer, director, or managing agent" of a corporate party. At least two of the six Crystal litigation deponents whose testimony the Bureau seeks to introduce (Sarah Dille and John F. Dille, IV) were not officers, directors, or managing agents of either HBI or Pathfinder. Therefore, their depositions may not be used as substantive evidence, but only for purposes of impeachment should they testify at the hearing. For the same reason, because neither John Dille, III nor Mr. Watson were officers, directors, or managing agents of HBI, their Crystal litigation deposition testimony could not be offered against HBI, and Mr. Hicks, who was not an officer, director, or managing agent of Pathfinder, could not have his Crystal litigation deposition testimony be offered against Pathfinder.

E. The Bureau Must Offer Specific Portions Of The Crystal Litigation Transcripts In A Manner Which Preserves Respondents' Right To Raise Objections To Specific Parts Thereof

Even if a deposition generally would fall within the scope of Rule 1.321, the portions that are sought to be introduced must otherwise be admissible under the applicable rules of evidence. See Rule 1.321(d) ("any part or all of a deposition, so far as admissible, may be used against any party who was present or represented at the taking of the deposition or who had notice thereof, in accordance with any one of the following provisions") (emphasis added). Rule 1.321(b) specifically provides that, with exceptions not germane to this matter, "objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would

require the exclusion of the evidence if the witness were then present and testifying." Of course, the party offering testimony also bears the burden of demonstrating its admissibility. See, e.g., Allgeier, 909 F.2d at 876 ("The party seeking to admit a deposition at trial must prove that the requirements of Rule 32(a) have been met.").

Under these precepts, if the Bureau is to be permitted to introduce any portion of the Crystal litigation depositions as substantive evidence in its case in chief, it should be required to do so in such a way as to preserve the respondents' right to raise objections thereto. There undoubtedly are portions of the designated transcript excerpts that contain objectionable material, such as testimony that is irrelevant or immaterial to the issues in this proceeding, testimony that is cumulative with other evidence already presented in the Bureau's case in chief, or testimony that is based on hearsay or the deponent's speculation. The Administrative Law Judge attempted to address this concern by having the Bureau designate the portions of the transcripts it felt were relevant, so that respondents would be in a position to address those excerpts, rather than the entire depositions. Regrettably, the Bureau's wholesale designation of "relevant" excerpts leaves respondents in the same position as where they began -- forced to form objections to virtually the entire transcripts. At a minimum, the Bureau should be compelled to identify more specifically which statements from the depositions it proposes to introduce in its case in chief so that the respondents' right to object is maintained.

III. USE OF THE DEPOSITION TESTIMONY FROM THE CRYSTAL LITIGATION IN THIS PROCEEDING VIOLATES FUNDAMENTAL FAIRNESS

Mr. Kline was called by the Bureau. He testified for an entire day, and the Bureau cannot be heard to argue that it lacked a full and complete opportunity to question Mr. Kline on any topic -- including his deposition in the unrelated Crystal litigation. Indeed, the Court specifically

raised the question of whether it is fair to accept into the record parts of Mr. Kline's deposition from the earlier proceeding, about which he had not been questioned. It is not fair, and Rule 403 of Federal Rules of Evidence permits the Court to exclude evidence under these circumstances.

Each of the witnesses whose depositions that the Bureau has designated were deposed by the Bureau in this proceeding, at a time when HBI and Pathfinder were present and represented by counsel and when the importance of the issues to the parties was obvious. Yet the Bureau does not seek to introduce that deposition testimony. Instead, it seeks to introduce testimony from an unrelated proceeding involving Mr. Hicks' personal claims for wrongful termination and shareholder oppression. Though Mr. Sackley and the other Crystal litigation defendants did raise allegations concerning the propriety of the WRBR transaction as a justification for the actions they took against Mr. Hicks, neither HBI nor Pathfinder had any reason to think that the testimony taken in that case would later be used against them, and thus did not attend or send counsel to the Crystal depositions. It would be patently unjust to permit that testimony to be used against HBI and Pathfinder now in a matter of such significant and direct importance to them.

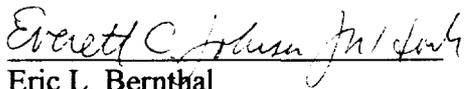
Moreover, all six individuals whose Crystal litigation depositions are being offered by the Bureau were or could have been subpoenaed by the Bureau to testify live in this proceeding as part of its case in chief. It is manifestly unfair to allow those depositions to be used later (for example in a post-hearing brief) to suggest an inconsistency between the then-testimony of the witness and the current testimony of the witness, and yet provide them no opportunity to explain their testimony. Indeed, fundamental fairness requires that to the extent that the Bureau intends to suggest that any witness' testimony in this proceeding is different from or inconsistent with prior testimony, that witness ought to be given an opportunity to explain. For the Bureau to keep its powder dry, and cast aspersions in a post-hearing brief that the witness cannot then respond to

would be an injustice.

CONCLUSION

For all of the reasons set forth herein, HBI and Pathfinder respectfully request that this tribunal exclude all of the excerpts from the Crystal litigation depositions that the Bureau seeks to introduce as substantive evidence in this proceeding. Alternatively, HBI and Pathfinder request that the Court order the Bureau to identify with greater specificity and particularity the portions of the Crystal litigation depositions that it proposes to introduce so that HBI and Pathfinder can raise all objections thereto.

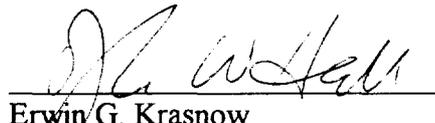
Respectfully submitted,


Eric L. Bernthal

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Counsel for Pathfinder Communications
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Dated: October 22, 1998


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CERTIFICATE OF SERVICE

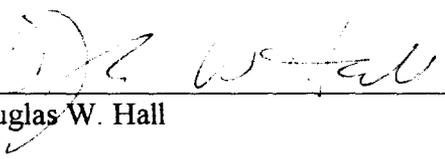
I hereby certify that I have this twenty-second (22nd) day of October, 1998, caused a copy of the foregoing Joint Motion of Hicks Broadcasting of Indiana, L.L.C. and Pathfinder Communications Corp. to Exclude Deposition Testimony From Prior Unrelated Civil Proceeding to be served by facsimile and/or hand delivery on each of the following:

The Honorable Joseph Chachkin
Chief Administrative Law Judge
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