

88. It was Ramirez's understanding that the general and limited partners' functions in ACCLP needed to conform to the Uniform Limited Partnership Act ("ULPA"), and it was determined in the Connecticut bankruptcy proceeding that the partners' functions in ACCLP in fact conformed to the requirements of the Massachusetts ULPA. (TRT Ex. 2, p. 21; TRT Ex. 3, pp. 11-14).

89. Between February 1985 and the time that the station went into Chapter 11 bankruptcy, a number of ownership reports and related filings were made at the FCC. All of ACCLP's ownership reports were prepared by its communications attorneys. ACCLP first used Collier, Shannon, Rill and Scott when Mr. Hart was at that firm, and subsequently used Baker & Hostetler after Mr. Hart joined that firm. ACCLP continued to use Baker & Hostetler after Mr. Hart left the firm in the early fall of 1988. Ramirez trusted that ACCLP's filings with the FCC would be complete and accurate. He reviewed the filings but relied on the attorneys to prepare the reports and to ensure that the details were correct. (TRT Ex. 2, p. 21; Tr. 301). By the time this case was designated for hearing, Ramirez could not be certain what reports and filings were made at what times because he learned that the ownership files at the FCC are missing all of the relevant materials and he has not been able to find complete files anywhere. It was ACCLP's intent at all times to comply with the Commission's rules and policies. Ramirez had no personal recollection of ACCLP being late or failing to file required documents with the FCC. (TRT Ex. 2, pp. 21-22; TRT Ex. 5).

90. An Amended and Restated Limited Partnership Agreement and Certificate was effective on December 31, 1985. (TRT Ex. 2, Appendix F). The purpose of this amendment was to reconcile the agreement with the special allocation of profits and losses for tax purposes which

had been recommended by Arthur Andersen, as described in ¶¶ 75-86 above. The December 31, 1985 amendment further provided that if there was a sale of the station, after each general and limited partner recovered their capital contributions, Ramirez and Tom Hart would split \$1,000,000 and the balance would be allocated among the partners in accordance with their respective ownership interests. The amendment did not alter Ramirez's 21% ownership interest, as reflected in Schedule A to the Amended and Restated Limited Partnership Agreement. (See TRT Ex. 2, Appendix F, p. 39). Every schedule that has ever been prepared for ACCLP has reflected Ramirez's 21% ownership in ACCLP. (TRT Ex. 2, Appendix G; Tr. 317). (See also ¶ 86, supra).

91. Although the Amended and Restated Limited Partnership Agreement was effective December 31, 1985, it was signed by the respective parties at various times after that date. A draft of the Amended and Restated Agreement was circulated to Ramirez and Thomas Hart by memo dated January 31, 1986. (Shur. Ex. 46). Four copies of the Amended and Restated Agreement were subsequently sent to Thomas Hart for signature on February 26, 1986. (Shur. Ex. 47). On March 3, 1986 the Agreement was sent to Ramirez for his signature and the signatures of Danielle Webb and Terry Planell. (Shur. Ex. 50). On March 14, 1986, Carter Bacon sent copies of the agreement signed by Ramirez, Thomas Hart, Terry Planell and Danielle Webb to Fred Boling, Jr. (Shur. Ex. 52). Copies of the agreement were forwarded to Ramirez for his records and the Public Inspection file on September 2, 1986. (Shur. Ex. 53). Subsequently, changes occurred that had a bearing on that amended agreement. Specifically, in the spring of 1987, Tom Hart retired as a general partner, transferring his equity and voting interests to WHCT Management, Inc. In addition, Joel Gibbs died, and his interest in WHCT Management, Inc. and

Astroline Company passed to his estate; and Richard Gibbs was divorced. (TRT Ex. 2, p. 24).

92. Despite repeated searches of FCC files, no ownership reports for WHCT-TV or agreements pertaining to the station's ownership by ACCLP in the 1980s could be located either at the FCC's office in Washington or at the Federal Records Center. (TRT Ex. 5). Therefore, Ramirez was not able to locate any FCC receipt-stamped document demonstrating that the December 31, 1985 Amended and Restated Limited Partnership Agreement was filed with the FCC. (Tr. 330). Ramirez testified that he expected ACCLP's FCC counsel to make timely filings as required, and there was no intent on his part to hide the December 31, 1985 amended and restated agreement. He was not aware of any failure to file the December 31, 1985 agreement. (TRT Ex. 2, pp. 24-25). Ramirez had received a copy of the December 31, 1985 Amended and Restated Partnership Agreement for his public file in September 1986, and Mr. Bacon had forwarded to Dale Harburg in Tom Hart's office copies of the December 31, 1985 Amended agreement along with other partnership documents on July 28, 1987. (TRT Ex. 2, Appendix I). Moreover, a December 7, 1988 ownership report filed by ACCLP refers to a "First Amendment to Amended and Restated Limited Partnership Agreement" which suggested to Ramirez that the December 31, 1985 Amended and Restated Agreement was on file at the FCC. (TRT Ex. 2, p. 25 and Appendix D, p. 123). The Amended and Restated ACCLP Partnership Agreement bears a receipt stamp reflecting that it was filed with the Secretary of State of the Commonwealth of Massachusetts, and it was therefore a public document. (Shur. Ex. 9; Tr. 521-522).

93. After ACCLP closed on its acquisition of WHCT-TV, it filed an ownership report with the Commission on February 22, 1985. (TRT Ex. 2, Appendix D, pp. 3-40). A supplemental ownership report was filed on May 16, 1985 and a revised ownership report was

filed on September 13, 1985 (TRT Ex. 2, Appendix D, pp. 41-67). On October 31, 1985, ACCLP filed an additional supplemental ownership report reflecting, inter alia, the interests that had been assigned to management-level personnel. (TRT Ex. 2, Appendix D, pp. 68-110). Ramirez realized after the fact, during the Connecticut bankruptcy proceeding, that over the years there were some minor errors in ACCLP's ownership reports and occasionally in other documents.<sup>6/</sup> For instance, because ACCLP and Astroline Company were both limited partnerships with similar names, there were occasions when Astroline Company or one of its principals was inadvertently called a general partner. Other errors were made because there were a series of attorneys at Baker & Hostetler working on the ACCLP reports and they were unfamiliar with the facts. Ramirez tried as best he could to carefully review the ownership reports but he admitted that there were unintentional errors. (TRT Ex. 2, p. 25-26).

94. In 1984, the Commission amended Section 73.3615 of its rules to require licensees of commercial broadcast stations to file annual ownership reports. Almost immediately, however, the Commission suspended the requirement until the form on which the report was to be made, FCC Form 323, could be redesigned. On March 11, 1987, the Commission issued a Public Notice announcing that the revised ownership report was effective and available for use. The Notice directed licensees who were not exempt from the annual reporting requirement "to file initially a revised Form 323 on or before August 3, 1987." Baker & Hostetler sent a copy of the Public Notice to its clients. (TRT Ex. 2, Appendix H).

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<sup>6/</sup> For instance, a document entitled "Authority for Deposit and Borrowing" with State Street Bank and Trust Company listed Messrs. Boling, Sostek, Joel Gibbs and Richard Gibbs as general partners of ACCLP when, in fact, they were general partners of WHCT Management, Inc., general partner of ACCLP. (Shur. Ex. 103). That document was part of the material considered in the bankruptcy proceeding. (Tr. 130-131).

95. On May 5, 1987, Ramirez sent a letter to Tom Hart stating that he was forwarding the ownership report due August 3, 1987 but asking Mr. Hart to complete the report and return it for his signature. The letter advised Mr. Hart to bear in mind that Terry Planell had been provided two additional percentage points for a total of 3%. Mr. Hart wrote a note on the May 5th letter stating "Dale, are we ready to begin the annual ownership report for WHCT-TV?" (Shur. Ex. 75). Mr. Hart expected Dale Harburg, an associate at the firm, to begin preparation of the ownership report. (Tr. 589). On July 7, 1987, Tom Hart sent questionnaires seeking information for the ownership report to Ramirez, Fred Boling, Jr., William Lance, Herbert Sostek and William D. Kerchick. Messrs. Boling, Sostek, Lance and Kerchick were asked to supply information pertaining to WHCT Management, Inc. Mr. Kerchick was representing the estate of Joel Gibbs. (Shur. Exs. 76-80; Tr. 589-591). Also on July 7, 1987, Baker & Hostetler sent another memo to broadcast clients reminding them of the August 3, 1987 filing date. Mindy Vasquez, the Communications Director of WHCT-TV noted on the memo she received that pursuant to a telephone conversation with attorney Dale Harburg, Baker & Hostetler would be preparing the WHCT-TV report. (Shur. Ex. 81; Tr. 592-593).

96. There were numerous drafts of an ownership report dated July 1987 in Baker & Hostetler's files but no final completed report. All of the drafts contained notes and/or handwritten corrections. (Shur. Exs. 82, 84, 86, 87, 89 and 91). On August 3, 1987, Mr. Hart filed a letter setting forth the ownership structure of ACCLP in lieu of the ownership report form. Mr. Hart's August 3, 1987 letter stated that "Astroline is currently in the process of resolving a number of matters that have arisen as a result of the recent Court of Appeals Order in Shurberg v. FCC, No. 84-1600 (D.C. Cir., June 25, 1987) (remanding case to FCC); the death of Joel A.

Gibbs, one of the Limited Partners of Astroline Company, and an internal reorganization.” The letter reported the ownership of ACCLP, of WHCT Management, Inc. and of Astroline Company. (TRT Ex. 2, Appendix D, p. 111-112; Shur. Ex. 21).

97. Shurberg questioned Dale Harburg and Linda Bocchi, former Baker & Hostetler associates, about this matter during their depositions. Ms. Bocchi stated that she worked on the ACCLP appeals in the Court of Appeals and Supreme Court and did not recall handling FCC matters. (Shur. Ex. 140, p.9). Ms. Harburg had a recollection of having worked on ownership reports for some of the firm’s clients in addition to being involved in FCC comparative hearings, but she had no recollection of the preparation of the July 1987 draft reports for ACCLP or the August 3, 1987 letter. (Shur. Ex. 139, pp. 8-21). Ms. Harburg knew who Richard Ramirez was but did not know who Fred Boling was. (Shur. Ex. 139, pp. 38, 43). She did not recall who Carter Bacon was and was not familiar with the Boston law firm of Peabody & Brown. (Shur. Ex. 139, p.25).

98. Shurberg questioned Mr. Bacon, Mr. Hart and Ramirez extensively during the hearing concerning the circumstances surrounding the filing of the August 3, 1987 letter. Mr. Bacon, a partner at Peabody & Brown in Boston, testified that he is a business lawyer and his area does not include expertise relative to FCC regulatory matters. His firm was retained in May 1984 to serve as corporate counsel for ACCLP. On April 9, 1985, Mr. Bacon sent a letter to Tom Hart with some comments on the ownership report filed by ACCLP on February 22, 1985. Among other things, Mr. Bacon stated with respect to ACCLP (for which he used the acronym “ACC” in his letter):

Exhibit 1, the separate Form 323 for WHCT, appears to have been filed in response to Instruction 4 of Form 323 which requires that 'a separate Form 323 should be submitted to report changes in the officers, directors or stockholders of a corporation which either controls the licensee or has a 25% or greater ownership interest in the licensee. Since WHCT does not either control ACC or have a 25% equity interest in it, the filing of the Form 323 seems unnecessary and leaves the record ambiguous as to the real control of ACC. Attachments 3 and 4, consisting of the WHCT By-Laws and Articles of Organization which appeared to have been filed in response to Question 6 of the WHCT Form 323, also seem unnecessary since they do not relate to the control of ACC. Finally, on page 3 of the Form 323 filed on behalf of WHCT, it is stated that Herbert A. Sostek and Fred J. Boling, Jr. are general partners of Astroline Company and they are authorized to vote the stock of WHCT. I don't understand why this sentence is included. In fact, Joel A. Gibbs and Richard H. Gibbs are also general partners of Astroline Company, and although general partners have the authority under the Partnership Agreement and the Uniform Limited Partnership Act to bind Astroline in dealings with third parties, none of the General Partners has any express authority to vote the stock of WHCT.

(Shur. Ex. 68, pp. 1-2; Tr. 488-489). Mr. Bacon testified that although he did not have any responsibility for compliance with FCC regulations, he worried about the impression that might be created by "having what was clearly in my mind a limited partner being described as someone who might be a control person." (Tr. 492-494). Mr. Bacon did not recall that ACCLP was required to file an ownership report in August 1987 and did not recall any discussions about the ownership report during the late July-early August 1987 time frame. (Tr. 493-497).

99. Mr. Hart testified that there was still information that they were trying to pull together during the late July 1987 time period. He recalled sending out the questionnaires and was not sure that they had all been returned. He also recalled that the people acting for the Joel Gibbs estate were not very cooperative or responsive during that period of time. According to

Mr. Hart, ACCLP was in severe financial straits, and he was trying to get additional investors into the deal while other investors wanted to get out of the deal. There were ongoing discussions with potential investors. He described the organization as “in somewhat of a state of flux.” (Tr. 606-609).<sup>7/</sup> The loss of the first appeal of the Shurberg case made the situation worse. Mr. Hart noted that the principal investors who had put up a substantial amount of money were trying to decide what they were going to do with their investment. (Tr. 609). Mr. Hart testified: “We weren’t hiding anything. There was nothing to hide. The ownership is reflected here in the letter.” (Tr. 618). Mr. Hart acknowledged that the letter filing did not contain a list of contracts but he noted that many of those documents had already been filed and others were on record in other places. (Tr. 620).<sup>8/</sup> In addition, Mr. Hart admitted that he is not an expert on ownership reports, and he did not read the instructions to the ownership report form and was not familiar with the question seeking a certification from a limited partnership. He relied on associates at Baker & Hostetler who had prepared such reports. (Tr. 623-624; 632).<sup>9/</sup>

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<sup>7/</sup> For example, Baker & Hostetler’s statement to ACCLP dated July 27, 1987 describes services for “conference with Communications Equity Associates regarding investment in WHCT, conference with UNC Ventures regarding same.” (Shur. Ex. 93, p. 1).

<sup>8/</sup> At a minimum, the December 31, 1995 Amended and Restated Partnership Agreement was filed with the State of Massachusetts. (Tr. 521-522). It cannot be determined just what was filed with the FCC, although nearly all of ACCLP’s ownership materials appear to have been filed with the FCC. (TRT Ex. 2, Appendix D).

<sup>9/</sup> Shur. Ex. 87, p.1, a memo dated July 31, 1987 from Dale Harburg to Carter Bacon with a draft ownership report attached, contains a handwritten note from Tom Hart stating “Dale, Here are my comm. Let have a conf call with Carter & Rich on Monday AM. Please see me 1st” [sic]. The August Baker & Hostetler legal bill does not reflect such a call. It does reflect however that there was a telephone conference regarding the possible sale of WHCT and restructuring of the corporation and that there was a telephone conference with Bill Lance regarding Astroline Company and the Gibbs. (Shur. Ex. 94).

100. With respect to the circumstances surrounding the filing of the August 3, 1987 letter report of ownership, Ramirez testified that there were some seminal events in late 1987 and 1988 relating to funding for the station. He noted that Mr. Hart's letter made reference to the death of Joel Gibbs and he recalled some discussion and efforts relating to whether the resolution of the Joel Gibbs estate would be achieved and the impact on the company. (Tr. 288, 349-350). In fact, ACCLP's tax returns reflect that the company sought extensions from the IRS for the filing of information on April 12, 1987, on June 12, 1987 and on August 12, 1987. The extension requests stated that "Information necessary to file a complete and accurate return is not yet available" and "We are accumulating information necessary to make a Sec. 754 election."<sup>10/</sup> (Shur. Ex. 27, pp. 13, 14 and 15). Ramirez also recalled that the case had been remanded to the FCC by the Court of Appeals and "[t]here were clearly lots of matters being discussed" concerning the case. (Tr. 350). Ramirez stated that he has "zero recollection of any discussion, plan, plot, inference or anything to not submit anything that was required" and it has been his belief to this day that "my lawyers were not acting to conspire or deceive me in any way." (Tr. 331, 354). It was Ramirez's belief then and now that he was complying with the "letter and the spirit of the Commission's rules and policies." (Tr. 348).

101. Toward the end of 1988, attorneys at Baker & Hostetler brought to the attention of Ramirez certain recent comparative broadcast cases involving limited partnerships and new FCC interpretations concerning the insulation of limited partners. (TRT Ex. 2, p. 25). Specifically, Baker & Hostetler sent various memos to Ramirez noting that an application for

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<sup>10/</sup> Section 754 of the tax code permits a partnership to elect to adjust the bases of its assets with respect to a buying partner.

renewal of the WHCT-TV license was due to be filed on December 1, 1988 and that competing applications would be accepted by the Commission up until March 1, 1989. Baker & Hostetler recommended a restructuring of ACCLP to take into account the possibility that ACCLP would not be entitled to a renewal expectancy, which would affect its chances of prevailing in a comparative license renewal proceeding. (Shur. Exs. 58, 59, 60 and 61). In particular, Baker & Hostetler referred to a recent Review Board decision in a comparative broadcast proceeding for a construction permit, Stanley Group Broadcasting, FCC 88R-56 (Rev. Bd. 1988),<sup>11/</sup> in which the Review Board refused to ignore the equity interest of a non-voting stockholder where the stockholder had been more than a “passive investor,” and reduced the applicant’s integration credit from 98% to 60%. Baker & Hostetler advised that in light of this case, “[n]o partners should hold dual roles as limited and general partners.” (Shur. Ex. 58, p.3).

102. ACCLP had been formed prior to the cases and interpretations mentioned in the Baker & Hostetler memos, and Ramirez believed that the FCC was fully informed of ACCLP’s unique nature and purpose and that ACCLP’s structure fully complied with the Commission’s minority distress sale policies. (TRT Ex. 2, p. 25; Tr. 342, 364, 372, 418). Nevertheless, because WHCT-TV was due to file a license renewal application and faced a comparative renewal challenge from Shurberg and possibly other applicants, at the suggestion of Baker & Hostetler, the five stockholders of WHCT Management, Inc. transferred 100% of the stock in that company to Ramirez. They also resigned as officers and directors of WHCT Management, Inc. and Ramirez became the sole officer and director. (TRT Ex. 2, p. 25 and Appendix D). A pro forma FCC Form 316 transfer of control application was filed on November 22, 1988 and an ownership

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<sup>11/</sup> Stanley Group Broadcasting, 3 FCC Rcd 5017 (Rev. Bd. 1988).

report reflecting consummation of the transfer was filed on December 7, 1988. In the meantime, creditors forced the station into bankruptcy and on December 14, 1988 a pro forma FCC Form 316 application was filed for an involuntary assignment of the license to Astroline Communications Company Limited Partnership, Debtor-in-Possession. (TRT Ex. 2, Appendix D, pp. 121-138).

**ACCLP's Representations to the Federal Courts**

103. The HDO states that Shurberg's allegations "suggest that Astroline engaged in ongoing misrepresentations to both the Commission and to the federal courts, including the Supreme Court, concerning whether it qualified as a minority-controlled entity under the distress sale." HDO, para. 11. However, Shurberg did not introduce at the hearing any briefs or other submissions that ACCLP made to the Supreme Court. Nor did Shurberg cross-examine anyone concerning his allegation of misrepresentations to that body. Thus, the record is bereft of any evidence at all of ACCLP's representations to the Supreme Court, and certainly contains no evidence that any of those representations were intentionally false.

104. Shurberg submitted one brief which ACCLP filed with a lower federal court. (Shur. Ex. 18). Similarly, however, Shurberg failed to examine any witness on that document, and the record contains no evidence of intentional misconduct in connection with the brief. To the contrary, Lee Simowitz, a partner at Baker & Hostetler since 1979<sup>12/</sup> was lead counsel for ACCLP in the case of Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F. 2d 902 (D.C. Cir.

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<sup>12/</sup> Mr. Simowitz received his B.A. degree cum laude from Harvard University and his J.D. from Yale Law School. Following law school he was law clerk to the Honorable Harold H. Greene, Chief Judge of the Superior Court of the District of Columbia and subsequently served as Attorney Advisor to Calvin J. Collier, Chairman of the FTC. (TRT Ex. 4, p.1).

1989). Mr. Simowitz also served as counsel of record for ACCLP in the Supreme Court and was principally responsible for writing the certiorari petition and the briefs on the merits for ACCLP. Mr. Simowitz testified that the record before the FCC, on which the court case was based, was completed with the Commission Memorandum Opinion and Order granting the assignment of WHCT's license to ACCLP in December 1984. Consistent with principles of appellate review of agency action, all the factual statements in briefs prepared by Baker & Hostetler to the United States Court of Appeals and the Supreme Court were based on the administrative record as compiled before the FCC in 1984 or before. The record contains no evidence suggesting that Mr. Simowitz or anyone else on behalf of ACCLP made intentional misrepresentations about that record to the court. (TRT Ex. 4, pp. 1, 2; Tr. 544).

105. Mr. Simowitz further stated that he dealt with Ramirez, the General Partner of ACCLP, during the entire pendency of the case in the United States Court of Appeals for the District of Columbia Circuit and the United States Supreme Court where the case was joined with a companion case under the caption Metro Broadcasting Inc. v. FCC, 497 U.S. 547 (1990). To the best of Mr. Simowitz's recollection, all instructions with regard to the conduct of the court case or comments on drafts that he received directly from ACCLP came from Ramirez. He could not recall receiving any substantive comments or instructions from the limited partners of ACCLP at any time; and he understood that Ramirez was in control of ACCLP at all times during the court case. (TRT Ex. 4, pp. 1-2).

### **III. Proposed Conclusions of Law**

#### **A. ACCLP Accurately Represented Its Status to the Commission and the Courts**

106. The HDO designated an issue to determine whether ACCLP misrepresented facts to the Commission and the courts in statements that it made concerning its status as a minority-controlled entity. The issue of misrepresentation is “composed of two elements: a material false statement made to the Commission and an intent to make such a statement.” Stockholders of CBS, Inc., 11 FCC Rcd 3733, 3753 (1995) (citing Pinelands, Inc., 7 FCC Rcd 6058, 6065 (1992); Fox River Broadcasting, Inc., 93 F.C.C. 2d 127, 129 (1983)). As the Commission has consistently stated, “[i]ntent to deceive is a necessary element of misrepresentation or lack of candor.” California State University Sacramento, 13 FCC Rcd 17960, 17964 (1998) (citing Bluegrass Broadcasting Co., 43 FCC 2d 990, 993 (1973); Fox River Broadcasting, Inc., 93 FCC 2d 127 (1983)). Therefore, in order for a party to make a misrepresentation, there must be “a false statement of fact made with an intent to deceive the Commission.” Hicks Broadcasting of Indiana, LLC, 13 FCC Rcd 10662, 10668 (1998). (citing Fox River Broadcasting, 93 FCC 2d 127, 129 (1983)).

107. As discussed below, there is no evidence of any material false statement or any intent to deceive in this case, much less the type of conclusive evidence necessary for a finding as serious as misrepresentation. Accordingly, the issue must be resolved favorably to Astroline, Ramirez and the Trustee.

**(1) There Was No Material False Statement**

108. In 1978, the Commission expanded its existing policy of permitting distress sales where a licensee was bankrupt or physically or mentally disabled to include distress sales where the prospective purchaser had a significant minority ownership interest. Statement of Policy of

Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979 (1978). In taking this step, the Commission stated:

It is apparent that there is a dearth of minority ownership in the broadcast industry. Full minority participation in the ownership and management of broadcast facilities results in a more diverse selection of programming. In addition, an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the spectrum.

Id. at 981. The Commission did not define what it meant by a “significant minority ownership interest” and said instead that “cases should be reviewed as they arise to determine that the objectives of our policies will be met.” Id. at 983. Indeed, the Commission specifically refused to adopt a rigid rule on such sales. Id.

109. The cases that followed the adoption of the “minority distress sale policy” reflect that the Commission evaluated distress sales as well as tax certificates on a case-by-case basis. See William M. Barnard, 44 R.R.2d 525 (1978); Grayson Enterprises, Inc., 77 F.C.C.2d 156 (1980); Letter to Patrick Henry, 79 F.C.C.2d 393 (1980); Letter to Jerald N. Fritz, Esq., 48 R.R.2d 1243 (1981). For instance, in William M. Barnard, supra, the Commission granted a tax certificate where the sole general partner was a minority group member, even though he would not be personally in charge of the station’s daily operations.

110. In 1982, the Commission revisited its minority ownership policies in light of recommendations it had received from the Advisory Committee on Alternative Financing for Minority Opportunities in Telecommunications (“Advisory Committee”). Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 F.C.C.2d 849 (1982). In particular, the Commission adopted the Advisory Committee’s recommendation that it consider

issuing tax certificates and authorizing distress sales in transfers to limited partnerships where the minority general partner or partners own more than 20 percent of the broadcasting entity. Id. at 855. The Commission commented that “[l]imited partnerships are designed to encourage trade by uniting parties who possess capital to invest with parties who are willing to expend their energies and efforts actively running a business.” Id. at 854. In its 1982 Policy Statement, the Commission announced that it was delegating authority to the Mass Media Bureau to process and grant those petitions for distress sale that were consistent with established policy and did not involve novel questions of fact, law or policy.

111. The union of Ramirez and Astroline Company in ACCLP was a union of an experienced minority broadcaster who was ready, willing, able and eager to expend his energies and efforts actively running a television station with those possessing capital to invest. It was precisely the kind of union that the Commission had in mind in its 1978 and 1982 Policy Statements. ACCLP may have been somewhat unique because it had two general partners -- a minority general partner and a corporate general partner composed of individuals who were also partners in the sole limited partner, Astroline Company. However, this unique structure was not hidden from the Commission. It was fully set forth in the petition for distress sale and assignment application which were reviewed by the full Commission. The Commission thoroughly considered ACCLP’s structure and held that “Astroline’s ownership structure complies with our distress sale policy.” Faith Center, Inc., supra, 99 F.C.C.2d at 1173.

112. ACCLP conducted its affairs in compliance with its representations to the Commission. From its formation in May 1984 until late 1988 when the station was going bankrupt, ACCLP had two general partners and one limited partner. At all times Ramirez was the

majority general partner with full decision-making authority and the general manager of Station WHCT-TV. At all times during this period Ramirez had a 21% ownership interest in ACCLP.

**(a) Ramirez Controlled Astroline**

113. The record overwhelmingly establishes that Ramirez, a career minority broadcaster with vast experience (in contrast to the limited partners' complete lack of industry experience), had hands-on, day-to-day control and decisional authority over WHCT-TV. Ramirez's control encompassed the personnel, programming, and financial decisions for the station. While the Commission has no exact formula for evaluating whether a party is in *de facto*, or actual control, of an entity, the case precedent indicates that the Commission examines who has the right to determine the basic operating policies of the station, that is, to affect decisions concerning the personnel, programming or finances of the station. See WHDH, Inc. v. FCC, 406 U.S. 950 (1972); Mutual Radio of Chicago, Inc., 98 F.C.C.2d 330, 338 (1984) (citing Southwest Texas Public Broadcasting Council, 85 F.C.C.2d 713, 715 (1981)). The record here leaves no doubt that Ramirez had the right to determine the basic operating policies of WHCT-TV, and did determine those policies. (See Findings, ¶¶ 20-33, 37, 49-72).

114. As the minority general partner of ACCLP and the general manager of WHCT-TV, Richard Ramirez exercised *de facto* control over the operation of ACCLP and its licensed station. He determined and implemented the company's and station's policies in every facet of WHCT's operations, and particularly in each of the three key areas of personnel, programming and finances. (Findings ¶¶ 49-72). Ramirez organized the search for employees and determined the number and types of employees to hire. Ramirez personally hired all of the station's department heads and senior level personnel and was solely responsible for setting staff salaries.

He managed the staff and station operations on a day-to-day basis. None of the limited partners were in any way involved in the personnel decisions for the station. (See Findings, ¶¶ 50-52, 55, 57-59, 73).

115. Similarly, Ramirez made all of the programming decisions for WHCT. From determining the type of programming that the independent station would carry to negotiating contracts and overseeing production of original programming, Ramirez controlled every aspect of the station's programming decisions. With the assistance of the station manager and sales manager that he had hired and the consultants that he had retained, Ramirez formulated and executed programming policies for WHCT. The limited partners did not make suggestions or decisions regarding the station's programming and did not exercise any control over programming. (See Findings, ¶¶ 50-54, 60-64).

116. Ramirez also brought his experiences as a minority broadcaster to bear on his hiring of personnel and his programming decisions for WHCT. The record reflects that Ramirez, as a minority broadcaster, made a point of hiring many management-level personnel who were minorities. (TRT Ex. 12). Ramirez included religious programming, bilingual programming and special programming responsive to the Hispanic-American and African-American communities. He made these decisions with an awareness of the underrepresentation of minorities in the broadcast industry as well as in response to the needs of Hartford's minority communities. Ramirez's personal values and experiences were reflected in the programming that he broadcast on WHCT-TV. The limited partners of ACCLP never exercised any influence over the type of programming that Ramirez chose to air. (See Findings, ¶¶ 31, 52, 63, 73).

117. Ramirez also exercised control over ACCLP's finances. He created annual budgets, decided what purchases would be made, set staff salaries, directed the station's financial decisions, and determined the monthly payables. From ACCLP's inception, Ramirez was the one who determined what needed to be done to revitalize WHCT and he had the authority to spend the money necessary to make the station competitive. Ramirez directed the finances at his disposal in accordance with his business plan for rebuilding and modernizing WHCT. Every liability of the station was incurred at Ramirez's decision, and no partner or employee of Astroline Company ever entered into a contract or created an obligation for ACCLP. (See Findings, ¶¶ 50-58, 64).

118. Ramirez directed the payment of WHCT's expenses and implemented the use of the Columbine computer system to handle and track the station's finances. Ramirez tracked and managed the station's expenditures, revenues and fiscal planning. Prior to and during the bankruptcy proceeding, all of the station's bills were paid in accordance with Ramirez's decisions. He instructed the Astroline Company accounting department which invoices needed to be paid and the necessary checks were returned for his signature. When the partnership faced possible bankruptcy, Ramirez re-negotiated numerous obligations and extended payment schedules in an attempt to keep the struggling station afloat. Ramirez, and not the limited partners, controlled ACCLP's financing decisions. (See Findings ¶¶ 64-70).

119. Essentially, *de facto* control is "the ability to dominate the management of corporate affairs." Fox Television Stations, Inc., 10 FCC Rcd 8452, 8514 (1995) recon. denied, 11 FCC Rcd 7773 (1996). Richard Ramirez's activities in the areas of personnel, programming and finances reflect his total dominion over the affairs of ACCLP and WHCT. As the record

reflects, Ramirez was the partner with the broadcast experience and expertise who was in charge of the daily operations of the station. The partners of Astroline Company had no working knowledge of the broadcast industry and no interest in running a television station.

120. In determining where the control of a licensee lies, the Commission has stated that “the ultimate question is not the source of the funds. It is instead the control of the licensee’s finances.” Fox Television Stations, Inc., *supra*, 10 FCC Rcd at 8515-8516 (quoting Univision Holdings, Inc., 7 FCC Rcd 6672, 6676-77 (1992), *recon. denied*, 8 FCC Rcd 3931 (1993)). The Commission does not “typically find that a large financial investment by itself conveys control.” *Id.* at 8515. Thus, the fact that Astroline Company provided the financial backing for ACCLP’s venture in no way diminishes Ramirez’s control of all the aspects of the station’s operation, from personnel to programming and finances. The record establishes that Ramirez controlled ACCLP.

**(b) Ramirez Always Had 21% Ownership of ACCLP**

121. Shurberg’s allegation that the ACCLP tax returns reflected a reduction of Ramirez’s ownership to below 21% has been completely disproved. Shurberg is comparing apples to oranges. In each of 1985, 1986, 1987, and 1988 -- the period when Shurberg alleges that the ownership held by ACCLP’s general partners (including Ramirez) fell to 1% or less based on the K-1 tax forms -- Arthur Andersen produced an audited financial statement for ACCLP reporting that the general partners’ ownership interests remained at 28%, including the 21% interest that Ramirez held from the outset. During that same period, every other schedule of ACCLP’s ownership reflected Ramirez’s same 21% ownership. Kent Davenport, the Arthur Andersen accountant who prepared the tax returns, explained that the returns did not contradict, but instead were consistent with, the audited financial statements which showed the general

partners holding much higher ownership. Davenport explained that the K-1's reflected a commonly used allocation he recommended for tax purposes to allow limited partners to utilize losses that general partners could not, thereby benefitting the whole partnership by lowering the overall cost of financing. The tax allocation merely represented a hypothetical situation which assumed that: (a) the partnership had already dissolved and was no longer an ongoing business, and (b) the partnership business did not include an unrecorded intangible asset. While that allocation was valid for tax purposes, it was not significant in measuring actual ownership because the hypothetical assumptions on which it was based were not real. Specifically: (a) ACCLP actually had not dissolved, but remained an ongoing business; and (b) ACCLP's business actually did include a valuable intangible asset, namely, the value of the FCC license. Based on the different purposes and assumptions underlying the documents, it was entirely consistent, as Davenport said, for Arthur Andersen: (a) to produce audited financial statements correctly reporting the general partners' combined ownership as 28%, while (b) concurrently producing tax returns reporting the general partners' combined percentage of profits, losses, and capital at 1% or less. The record establishes that Ramirez always held 21% ownership of ACCLP.

(See Findings at ¶¶ 75-86).<sup>13/</sup>

**(2) The Record Establishes That There Was No Misrepresentation to the Federal Courts**

122. ACCLP certainly made no misrepresentation to the federal courts. As Mr. Simowitz, the lawyer who handled ACCLP's briefs to the D.C. Circuit and the Supreme Court,

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<sup>13/</sup> Ironically, the special allocation that gave rise to Shurberg's misguided argument would not have been necessary had it not been for the cloud on the license created by Shurberg's appeal of the Commission grant to ACCLP. ACCLP had intended to rely upon bank financing but was unable to obtain funds from banks because the grant of the WHCT assignment was not final. (See Findings, ¶¶ 38, 48, 50, 79).

made clear, the record before the courts terminated with the Commission decision granting the assignment of WHCT-TV to ACCLP in December 1984. (TRT Ex. 4). Shurberg's allegation that there was a misrepresentation to the federal courts derives from Shurberg's argument that Ramirez did not have control of ACCLP during the period 1985 to November 1988 and was not a 21% owner during that time period, but nothing in that time period had any relevance in the courts or to statements made to the courts. And in any event, as shown above, Shurberg's underlying premises are not valid. Moreover, Shurberg made the same arguments about Ramirez's supposed lack of control and allegedly reduced ownership in urging the Trustee to pursue a claim against ACCLP's limited partner in the Connecticut bankruptcy proceeding. The Bankruptcy Court and the federal courts that reviewed the Bankruptcy Court's decision resolved these matters in ACCLP's favor. Although Shurberg raised the same issues again before the FCC (without disclosing the outcome of the bankruptcy proceeding), he failed completely to pursue his allegations on this matter during the hearing and, indeed, had nothing to pursue given the outcome of the Connecticut court proceeding. Shurberg made no showing to support his allegation that there were misrepresentations to the courts, and failed to present any witnesses or question any witnesses on this subject.

**(3) The Record Establishes That There Was No Misrepresentation to the Commission**

123. Nor was there any misrepresentation to the Commission. ACCLP's structure, as approved by the full Commission in December 1984, did not change. The Commission was well aware that ACCLP had two general partners - Ramirez, an individual general partner, and WHCT Management, Inc., a corporate general partner. The Commission was also well aware that WHCT Management, Inc. was composed of individuals who were also partners in Astroline

Company, the limited partner of ACCLP. With full knowledge of these facts, the Commission granted the assignment of WHCT-TV to ACCLP. (See Findings ¶ 8.)

124. At the time the assignment was granted, the Commission's policies concerning minority distress sales were set forth in the 1978 Policy Statement and the 1982 Policy Statement. Neither of these Policy Statements addressed the issue of attribution of limited partners or insulation of limited partners. The only other guidance to broadcasters at that time concerning the structure of limited partnerships was provided in the Commission's Report and Order on Attribution of Ownership Interests, supra, released April 30, 1984, which stated that limited partners would be exempt from attribution where the limited partnership conformed to the Revised Uniform Limited Partnership Act of 1976 (the "RULPA"). Attribution of Ownership Interests, 97 F.C.C. 2d 997, 1023 (1984). While the Commission subsequently revised its attribution standards in June 1985, Ownership Attribution, 58 R.R.2d 604 (1985), it did not apply its changes retroactively to grants made earlier. And similarly, when Review Board cases in 1988, such as Stanley Group Broadcasting, supra, began to articulate a standard for evaluating how limited partnerships should be treated under the then existing integration criterion of the standard comparative issue, there was no reason for ACCLP to believe that its original structure, formed in 1984, was affected. Indeed, Ramirez testified that when he received the memos in 1988 from Baker & Hostetler on the recent Review Board decisions in comparative broadcast cases for new facilities, he did not believe that ACCLP's status as an entity that had received Commission approval through a distress sale was in jeopardy. (Tr. 418). And there was no reason for either Ramirez or ACCLP to believe that its distress sale status was in jeopardy. It is a generally accepted axiom that "[r]etroactivity is not favored in the law . . . . [C]ongressional enactments

and administrative rules will not be construed to have retroactive effect unless their language requires this result.” Bowen v. Georgetown University Hospital, 488 U.S. 204, 208, 109 S.Ct. 468, 471 (1988).

125. The record reflects that Shurberg was instrumental in instituting the suit brought against ACCLP’s limited partner, Astroline Company, and its partners in the Connecticut bankruptcy proceeding. In his purported role as a creditor of the bankrupt estate, Shurberg raised allegations of “possible fraud” and claimed that the Trustee had a statutory duty to investigate. The Trustee conducted a thorough investigation which included a full inquiry encompassing ACCLP’s tax returns and Ramirez’s exercise of control. The Bankruptcy Court did not accept the contention that the tax returns reflected a reduction of Ramirez’s ownership below 21%, and found that Ramirez “fully exercised his powers” as managing general partner. (See Findings ¶¶ 15-18). Significantly, the Bankruptcy Court determined that the ACCLP limited partnership complied with the Massachusetts Limited Partnership Act under which it was organized, which was the applicable FCC standard at the time. The Bankruptcy Court’s findings were affirmed on appeal and have become final. Even assuming arguendo that the decisions reached by the federal courts are not entitled to full faith and credit by the Commission (but see Section B below), the Bankruptcy Court decision is nevertheless entitled to decisive weight in resolving the issue here. The misrepresentation issue concerns the operation of a limited partnership. If the partnership properly conducted its operation and the general partner maintained control under prevailing state law, there can be no finding of misrepresentation and certainly no intentional deception. The state in which the limited partnership conducted its business is in the best position to determine whether that conduct has been fraudulent. Moreover, the Connecticut Bankruptcy Court conducted a far

more rigorous inquiry than the FCC with very extensive discovery, numerous depositions and a nine day trial. In contrast, Shurberg deposed only a few former attorneys for ACCLP (who were mostly lower-level associates), and the hearing lasted less than four full days. And the bulk of the record consisted of exhibits previously introduced in the bankruptcy proceeding. (Id.; See also Tr. 21-161).

126. Shurberg raised the same allegations at the FCC that he raised in the Connecticut bankruptcy court without disclosing the most critical fact - the resolution of the suit in favor of ACCLP and Ramirez. As shown above (¶¶ 113-121), the duplication of the bankruptcy proceeding before this agency produced a record that requires the same outcome. It is clear that Richard Ramirez held *de jure* control of ACCLP at all times. Ramirez was the majority general partner holding a 21% equity interest and 70% of the voting power. Neither of these percentages changed until late 1988 when Ramirez acquired sole ownership of WHCT Management, Inc. and thus owned all of the general partnership interests with 100% of the voting power. All the parties involved in the partnership understood that Ramirez was the majority general partner with authority to act on behalf of ACCLP. For instance, Mr. Bacon's March 1985 opinion letter in connection with the purchase of the studio property is evidence of this fact. (TRT Ex. 15). Moreover, it was Ramirez, and no one else, who determined the basic operating policies of the station in every respect. ACCLP's representations to the Commission were true. No misrepresentation occurred. The additional weight that derives from the federal court's similar determination addressing similar allegations further fortifies that result.

**(4) The Record Establishes That There Was No Other Misrepresentation By ACCLP**

127. Once this case was designated for hearing, Shurberg spent little time on the

matters that had formed the basis for the addition of the misrepresentation issue. Instead, realizing that the allegations he had brought to the Commission's attention had been rejected in the Connecticut bankruptcy proceeding, Shurberg commenced a fishing expedition to see if there were any other matters that could be raised. However, Shurberg never sought an expansion of the existing issue or the addition of any other issues in this proceeding. Therefore, Shurberg cannot now attempt to expand the misrepresentation issue to include matters not raised in the HDO. More than a half century ago in Morgan v. United States, 304 U.S. 1, 18-19, 58 S.Ct. 773, 776 (1938), the Supreme Court declared:

The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

See also, Hill v. Federal Power Commission, 335 F.2d 355 (5th Cir. 1964); Rodale Press, Inc. v. F.T.C., 407 F.2d 1252 (D.C. Cir. 1968).

128. At the hearing, Shurberg appeared to be focusing on matters that were never part of his allegations to the FCC and that he could have raised years earlier if he indeed thought these matters serious. For instance, Shurberg now appears to be faulting ACCLP because no receipt stamped copy of the December 31, 1985 Amended and Restated Limited Partnership Agreement could be located. Whether the amended agreement was filed with the FCC or not (a fact that cannot be known definitively because the FCC has no records from that period of time), the

matter does not constitute misrepresentation. The record reflects that ACCLP had a record of informing the FCC of changes in its ownership. A number of ownership reports were filed during the period of time when the FCC was not requiring the filing of annual ownership reports. The reports that were filed show that ACCLP had a record of updating its ownership materials. The December 31, 1985 Amended and Restated Partnership Agreement was publicly filed with the State of Massachusetts and it was an exhibit in the Connecticut bankruptcy proceeding. Moreover, an ownership report that ACCLP filed on December 7, 1988, which was signed by Ramirez, referred to the Amended and Restated Limited Partnership Agreement. (TRT Ex. 2, Appendix D, p. 123). There is no evidence that any misrepresentation occurred.

129. Shurberg also attempted to make something of the fact that ACCLP's attorney filed a letter report setting forth the partnership's ownership structure on August 3, 1987 instead of an FCC Form 323. Once again, the filing of the letter simply does not constitute misrepresentation on the part of ACCLP. The August 3, 1987 letter from FCC counsel to the FCC stated that "Astroline is currently in the process of resolving a number of matters that have arisen as a result of the recent Court of Appeals Order in Shurberg v. FCC, No. 84-1600 (D.C. Cir., June 25, 1987) (remanding case to FCC); the death of Joel A. Gibbs, one of the Limited Partners of Astroline Company; and an internal reorganization." (TRT Ex. 2, Appendix D, p. 111). The record reflects that this explanation was truthful. ACCLP was in difficult straits with some partners hesitant to invest further money and the company was actively seeking additional investors. The Gibbs estate was still in probate and Arthur Andersen had sought several extensions of time during this period to file income tax forms. While Shurberg appears to place significance on the issue of whether or not ACCLP was an insulated limited partnership, that

matter is irrelevant because ACCLP was not an insulated limited partnership when the FCC granted its application in 1984. (See ¶¶ 111, 123-124 above.) Finally, Shurberg asked numerous independent witnesses about the circumstances surrounding the August 3rd letter. The fact that no one could recall the circumstances is powerful evidence that it was not filed to hide anything at all. Indeed, the letter filing largely mirrors the information requested on the Form 323 and other ownership material, such as the partnership agreement and amendments thereto had already been filed with the FCC and/or with the State of Massachusetts.

130. In any event, ACCLP cannot be faulted for actions or inactions of its FCC counsel. In Fox Television Stations, Inc., 10 FCC Rcd 8452 (1995), recon. denied, 11 FCC Rcd 7773 (1996), the Commission refused to conclude that Fox had misrepresented facts or lacked candor concerning the extent of its alien ownership where Fox had relied on counsel, stating: "We do not think it appropriate to find a lack of candor where a licensee has not second guessed its own attorneys, as long as the advice rendered appears reasonable and is relied on in good faith. We do not wish to create an environment in which licensees are discouraged from seeking and following the advice of legal counsel." 10 FCC Rcd at 8501, n.68. See also Roy M. Speer, 3 R.R.2d 363, 382 (1996); WEBR, Inc. v. FCC, 420 F.2d 158, 167-168 (D.C. Cir. 1969). The record reflects that Ramirez reasonably relied upon FCC counsel to timely file ownership reports and partnership materials and that he reasonably relied upon FCC counsel when the August 3, 1987 letter was filed. Ramirez had no reason to believe that there was anything wrong with ACCLP's filings with the FCC. Under these circumstances, and particularly given the lack of notice to ACCLP that these matters would even be in issue in this proceeding, the misrepresentation issue must be resolved in favor of ACCLP, Ramirez, and the Trustee.

**(5) There Was No Intent To Deceive**

131. When reviewing allegations of misrepresentation, it is hornbook law that:

A necessary element in misrepresentation is willfulness. Bluegrass Broadcasting Co., 43 F.C.C.2d 990, 993 (1973). Carelessness, exaggeration or slipshoddiness, which lack that necessary element, do not constitute misrepresentation. John C. Roach, 43 F.C.C. 2d 685, 689 (Rev. Bd. 1973).

F.B.C. Inc., 3 FCC Rcd 4595, 4597 (M.M. Bur. 1988). The mere existence of an error without intent to deceive does not constitute misrepresentation.<sup>14/</sup> In the present case, the evidence regarding ACCLP's lack of intent to deceive the Commission is un rebutted and dispositive.

132. Moreover, a high degree of proof is required in matters relating to misrepresentation. See Scott & Davis Enterprises, Inc., 88 F.C.C. 2d 1090, 1099 (Rev. Bd. 1982) ("Misrepresentation and lack of candor charges are very grave matters. They ought not be bandied about. The duty to come forward with a prima facie showing of deception is particularly strong where a misrepresentation issue is sought.") Where any doubt remains, the Commission has resolved issues of misrepresentation in favor of the applicant and against a finding of misrepresentation. See Grenco, Inc., 39 F.C.C. 2d 732, 736-37 (1973) ("[W]hile we have no hesitancy in resolving the issue. . . it behooves us, of course, to do so with full awareness of the drastic consequences of an adverse ruling.")

133. As is discussed herein, no evidence of an intent to deceive has been presented in

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<sup>14/</sup> Chief Washakie TV, 46 R.R.2d 1594, 1597 (1980) (where ownership information regarding several of applicant's other business interests was inaccurately put forth on assignment application, "mere existence of an inaccuracy in an application, without any indication that the applicant meant to deceive the Commission, does not elevate such a mistake to the level of an intentional falsehood or otherwise raise a question of fact that must be resolved in an evidentiary hearing.").

this case, much less the type of conclusive evidence necessary for such a serious finding as misrepresentation. Every ownership schedule for ACCLP that was prepared, including the audited financial statements prepared year end, told Ramirez that he owned 21%. There is no evidence that he or anyone else associated with ACCLP ever doubted the accuracy of the schedules or believed that Ramirez owned any less. There was no reason for them to believe that the information they received was wrong. Lacking any such evidence of deceptive intent, the issue must be resolved in favor of ACCLP, Ramirez, and the Trustee.

**B. The FCC Must Accord Full Faith and Credit to the Decisions of the United States Bankruptcy Court for the District of Connecticut, the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit**

134. The factual predicates for Shurberg's allegations have already been rejected by three federal courts, and the Commission must afford these decisions full faith and credit. The hearing in this proceeding covered an inquiry into the legal and de facto relationship between ACCLP's general partners, Ramirez and WHCT Management, Inc., and limited partner Astroline Company -- an inquiry that was already extensively undertaken by the Bankruptcy Court in 1995. By seeking to re-litigate issues that were resolved by the Bankruptcy Court for the District of Connecticut, and affirmed by the United States District Court and the United States Court of Appeals, Shurberg has attempted to bypass the constitutional requirement that the Commission must accord these court decisions full faith and credit.

135. The allegations that Shurberg has raised in this hearing have been fully addressed by the Bankruptcy Court for the District of Connecticut.<sup>15/</sup> Though the legal issue was technically

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<sup>15/</sup> The record in this proceeding contains numerous documents from the bankruptcy  
(continued...)

different, the allegations that the Trustee raised, and that the court ultimately settled, are essentially the same as those at issue in this hearing. The Trustee initiated a lawsuit for the benefit of ACCLP's creditors and sought to recover over \$30 million. The case was vigorously contested by prominent law firms who conducted extensive discovery, deposed numerous witnesses, litigated a nine day trial, and introduced over 300 trial exhibits. The focus of the bankruptcy proceeding was not limited in nature; rather, it extensively addressed the same matters that this hearing sought to cover. The ACCLP limited partnership agreements, the FCC ownership reports, the ACCLP tax returns, the memos from ACCLP's accountants and numerous other exhibits demonstrating Ramirez's ownership and control of ACCLP were all introduced into evidence in the bankruptcy court proceeding and were the subject of argument before the court.

136. In addition, the Trustee had argued to the Bankruptcy Court that because of the income tax allocations, Ramirez no longer owned a 21% ownership interest in ACCLP. Affidavits, testimony of tax partners from Arthur Andersen, income tax filings, and documentation of Ramirez's partnership interest, such as the ACCLP Limited Partnership Agreement and amendments thereto, were all submitted to the Bankruptcy Court. Ultimately, the court considered the wealth of information including Ramirez's 21% ownership interest. (TRT Ex. 3, pp. 1-9). The Bankruptcy Court trial and decision fully addressed the aspects of control and found in favor of ACCLP, and both the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit affirmed the decision

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<sup>15/</sup>(...continued)  
proceeding. (See Tr. 21-161).

of the lower court. (See Findings ¶¶ 15-18; TRT Ex. 3).<sup>16/</sup>

137. Furthermore, the Bankruptcy Court examined the conduct of ACCLP's limited partners and the operation of ACCLP under the provisions of the Massachusetts Limited Partnership Act (the "MLPA") Mass Gen. L. ch. 109, as revised in 1982, pursuant to which ACCLP was organized. The MLPA, as revised in 1982, is based upon the RULPA which is the standard the Commission adopted in its Report and Order released April 30, 1984. Attribution of Ownership Interests, supra. The Commission's Report and Order stated that limited partners would be exempt from attribution where the limited partnership conformed in all significant respects to the provisions of the RULPA. 97 F.C.C.2d at 1022-23. ACCLP's application to acquire WHCT-TV was filed in May 1984 and granted in December 1984, during the period in which the Commission's standard for evaluating attribution of limited partners was compliance with the RULPA. For purposes of evaluating ACCLP's application, compliance with the MLPA, which was based on the RULPA, constituted compliance with the Commission's standards.<sup>17/</sup>

138. The Bankruptcy Court has already determined that ACCLP and its limited partners

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<sup>16/</sup> The District Court affirmed the judgment on the grounds that the Trustee lacked standing to assert his claim against the limited partners. The Second Circuit held that even if the Trustee had standing, the Limited Partners were not liable under Massachusetts partnership law. The Second Circuit specifically reviewed and affirmed the Bankruptcy Court's factual findings. (TRT Ex.3, pp 10-14).

<sup>17/</sup> The Commission subsequently revised its Attribution Rules to establish new criteria for determining compliance of limited partnerships with the Commission's minority policies. See Multiple and Cross-Ownership of AM, FM, TV and CATV Systems, 55 R.R. 2d 604 (released June 24, 1985). These new guidelines, however, did not become effective until July 31, 1985, after the assignment of WHCT to ACCLP had been granted and consummated. Additionally, because ACCLP was formed in 1984, it was subject to the Commission's earlier standard of compliance with the RULPA, and not the stricter insulation standards that became effective in 1985.

complied with the MLPA, which was the same standard underlying the applicable attribution rules. The court determined that neither Astroline Company nor its principals exercised any control over the day-to-day operations of the station, and that Ramirez fully exercised his powers as managing general partner. The U.S. Court of Appeals for the Second Circuit affirmed the Bankruptcy Court's factual findings, stating that "the Limited Partners did not participate in and did not exercise any quantum of control over numerous and significant aspects of the Debtor's business. Their control of the Debtor was not 'substantially the same as the exercise of the powers of a general partner.' See Mass. Gen. Laws 19." (TRT Ex. 3, p. 13). Consequently, the factual findings of the Connecticut Bankruptcy Court concerning a matter of partnership law (namely, that ACCLP complied with the MLPA and the RULPA), must be accorded full faith and credit by the Commission.

139. In order to prevent Article III courts from rendering advisory opinions, neither the executive nor legislative branch of government may review an Article III court decision. Town of Deerfield, New York, 992 F.2d 420, 428 (2nd Cir. 1993). "Since neither the legislative branch nor the executive branch has the power to review judgments of an Article III court, an administrative agency such as the FCC, which is a creature of the legislative and executive branches, similarly has no such power." Id. An administrative agency may not:

choose simply to ignore a federal-court judgment. "Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned *or refused faith and credit* by another Department of Government."

Deerfield, 992 F.2d at 428. (emphasis in original) (quoting Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103, 113 (1948)). This, however, is precisely what

Shurberg is attempting to accomplish by raising the same issues that the courts have already settled in favor of ACCLP and Ramirez. By re-litigating the issues of Ramirez's control of ACCLP and the effect of the K-1 tax forms on Ramirez's 21% ownership, Shurberg seeks to have the Commission "arrogate to itself the power to (a) review or (b) ignore the judgments of [Article III] courts," a goal which is "impermissible as a matter of law." Deerfield, 992 F.2d at 430.

140. Moreover, the Commission should not interfere with the decisions of the Bankruptcy Court, and thereby disrupt the policies and goals of bankruptcy proceedings. Applying the Commission's holding in Arlie L. Davison and Associates, Inc., 11 FCC Rcd 15382, 15388-15389 (1996), to this proceeding:

The Commission has consistently declined to consider what, in essence, is a collateral attack on a bankruptcy court determination . . . . To the extent that this dispute may be 'enveloped in smoke,' Malloy Broadcasting, 9FCC Rcd 4822, 4820 [75 RR 2d 1405] (Rev. Bd. 1994), it appears to be solely of [Shurberg's] manufacture.

The Commission has acknowledged that it must seek to "minimize, to the extent possible, any conflict between Commission policy and that of federal bankruptcy law." Fox Television Stations Inc., 8 FCC Rcd 5341 (1993) (citing LaRose v. FCC, 494 F.2d 1145 (1974)). LaRose v. FCC emphasizes the notion that "agencies should constantly be alert to determine whether their policies might conflict with other federal policies and whether such conflict can be minimized." Id. at 1146 n. 2. To achieve that purpose, full faith and credit to the federal court decisions is required here.

**C. Shurberg is Barred By Collateral Estoppel From Re-litigating the Same Issues That Were Before the Bankruptcy Court**

141. The doctrine of collateral estoppel bars Shurberg from re-litigating the issue of

Ramirez's control of ACCLP. The Bankruptcy Court has already rendered a decision on the issue of ACCLP's compliance with the MLPA and the issue of whether any of the limited partners ever acted as general partners. The Commission has stated that:

In order to promote the goals of efficiency and finality in adjudication, federal agencies, like the federal courts, apply the doctrines of *res judicata* and collateral estoppel to administrative proceedings. The United States Supreme Court has specifically approved the application of *res judicata* principles in administrative proceedings where the agency is acting in a judicial capacity. And the Commission has applied both the doctrines of *res judicata* and collateral estoppel to its own licensing cases with the imprimatur of the courts.

Montgomery County Media Network, Inc., 4 FCC Rcd 2609, 2610 (Rev. Bd. 1989) (citations omitted). See also, United Broadcasting Co., 86 FCC 2d 452 (1981) (quoting Nasem v. Brown, 595 F.2d 801, 806 (D.C. Cir. 1979)). ("Application of the doctrine of collateral estoppel represents a decision that the need of judicial finality and efficiency outweigh the possible gains of fairness and accuracy from continued litigation of an issue that previously has been considered by a competent tribunal.")

142. Collateral estoppel, or issue preclusion, prevents a party from attempting to relitigate an issue which was settled in a previous adjudication. "Under the doctrine of collateral estoppel, 'once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits.'" Westel Samoa, Inc., 13 FCC Rcd 6342, 6346 (1998) (quoting Montana v. United States, 440 U.S. 147, 153 (1979)).

According to the Commission:

[T]he prior adjudication of an issue is not binding in a subsequent proceeding unless (1) the identical issue was previously litigated; (2) the issue was actually litigated; (3) the previous determination

was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action.

Id. (citing Raytech Corp v. White, 54 F.3d 187, 190 (3rd Cir. 1995)). In this case, all of the elements of collateral estoppel are satisfied.

143. First, the issues involved in the bankruptcy litigation and the current hearing are substantively identical. The Bankruptcy Court previously litigated the issue of whether Ramirez, the general partner, actually controlled ACCLP and WHCT-TV, or whether the limited partners of ACCLP were acting as general partners. Similarly, the Bankruptcy Court litigated the issue of whether or not ACCLP complied with the Massachusetts Limited Partnership Act (the “MLPA”), and consequently the issue of whether ACCLP complied with the RULPA, the Commission’s then-existing attribution standard. The nine-day trial, with numerous witnesses and hundreds of documents, determined the very same issues that are currently in contention in this hearing. There is no substantial difference between the issues that were settled in the previous lawsuit and the issues before the Commission. (See Findings ¶¶ 15-18).

144. Second, these issues were actually litigated and decided. As the focus of the Bankruptcy Court’s inquiry, the factual issues of Ramirez’s ownership and control of ACCLP and compliance with the MLPA were completely and thoroughly litigated. ACCLP’s tax returns and audited financial statements were exhibits in the bankruptcy court proceeding and two of its accountants from Arthur Andersen (Mr. Davenport and Mr. Neble) testified in the proceeding. These issues formed the basis of the Trustee’s entire case, as he sought to establish that the limited partners had exercised control over the daily operations of ACCLP. The litigation before the Bankruptcy Court judge examined these issues in detail. (Id.; TRT Ex. 3).

145. Third, the determination of these issues was necessary to the decision. As the central and sole focus of the bankruptcy case, the ultimate determination of these issues was essential to the court's decision. The court's decision found that Ramirez did in fact exercise control over ACCLP and that the partnership complied with the MLPA. These were the determinative issues in the case and thus necessary to the court's decision. (Id.)

146. Fourth, the party being precluded from re-litigating the issue was fully represented in the bankruptcy court. It was Shurberg who presented the Trustee with allegations that he believed the Trustee had a fiduciary duty to explore. The Trustee's lawsuit sought to maximize the potential distribution to creditors, of which Shurberg claimed to be one. As such, the Trustee's interests and goals were identical to that of Shurberg, namely maximizing the assets of the debtor and obtaining justice for the creditors of ACCLP. Shurberg cannot have it both ways. He cannot charge, as he did, that the Trustee had a fiduciary obligation to represent him as a creditor of the estate, and now argue that the Trustee did not so represent him. Shurberg's interests were fully represented by the Trustee's vigorous litigation of the same issues currently under scrutiny. (See Findings ¶¶ 12-14).

147. The elements of collateral estoppel are clearly satisfied and in light of the need for judicial finality and efficiency, Shurberg is barred from obtaining a different decision on matters that have already been adjudicated and resolved by the Bankruptcy Court.

**D. The Commission May Not Undo A Grant Which Became Final Six Years Earlier**

148. The assignment of the WHCT-TV license from ACCLP as Debtor in Possession to the Trustee became final on July 10, 1991. Under well-settled principles of administrative finality, the Commission could not undo that grant six years later. If the Commission were to adopt a

policy of reconsidering its actions regarding license assignments years after the assignments have become final, licensees and third parties would not be able to rely on the validity of FCC grants. By reconsidering an assignment that occurred years earlier, the Commission could negate an entire chain of subsequent assignments and commercial transactions relating thereto.

149. There is a strong policy in favor of administrative finality which has been endorsed by the Commission and the courts. The Commission has stated:

Strict adherence to the principle of administrative finality in licensing matters advances the public interest. This policy promotes the prompt initiation of service without undue delay. We are sensitive to the legitimate expectation of broadcasters and lenders that the Commission will enforce reconsideration and review deadlines and recognize that consistent application of the rules establishing finality advances orderly operation of the media transactional marketplace.

Crystal Radio Partners, 11 FCC Rcd 4680 (1996) (citations omitted). Similarly, the U.S. Court of Appeals for the D.C. Circuit has stated that 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. 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).

150. While there is an exception to the strong policy in favor of administrative finality permitting the reopening of proceedings that have become final where there has been fraud on the processes of the agency or the court, Radio Para La Raza, 40 FCC2d 1102 (1973) (citing Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238 (1944)), that exception obviously has no bearing here where there has been no fraud and where there has been a formal judicial determination in the

Bankruptcy Court that rejects the allegations of fraud advanced by the petitioner to deny.

**E. The Public Interest, Convenience, And Necessity Will Be Served By Grant Of the Trustee's Renewal Application**

151. Designated Issue 2 seeks a determination whether, in light of the evidence adduced under the misrepresentation issue, the public interest will be served by a grant of the Trustee's renewal application.

152. Since Astroline made no misrepresentations, the public interest will be served by grant of the Trustee's Application.

153. Since there is no evidence that Astroline ever intended to deceive the Commission or the courts, the public interest will be served by grant of the Trustee's application.

154. Since preserving the station's value as an asset for innocent creditors promotes public policy, the public interest will be served by grant of the Trustee's application. LaRose v. FCC, supra ¶ 140 (holding that the Commission is required to weigh the interests of innocent creditors in bankruptcy proceedings in making the agency's determinations under the public interest standard). As the Trustee testified, "a denial by the FCC would deprive the estate of a valuable resource from which payments to creditors could otherwise be made." (TRT Ex. 1, p. 5, ¶ 17).<sup>18/</sup>

155. Since duplicative litigation regarding matters that have already been judicially addressed wastes public and private resources, cannot be countenanced, and must be discouraged,

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<sup>18/</sup> Although the HDO denied a request to affirm the Trustee's qualifications without a hearing on Astroline's conduct under the Commission's Second Thursday doctrine (HDO ¶ 11), that ruling does not mean that the interests of innocent creditors are irrelevant to the public interest determination to be made once the hearing has been held. Indeed, the LaRose decision precludes such treatment and mandates that the Commission weigh creditors' interests under the public interest standard.

the public interest will be served by grant of the Trustee's renewal application. Town of Deerfield supra; Arlie L. Davison and Associates, Inc., supra; Long Distance Service of Washington, Inc. v. Bell Telephone Company of Pennsylvania et al., 7 FCC Rcd 6510, ¶ 2 (CC Bur. 1992). ("We are satisfied that dismissal of the complaints will serve the public interest by eliminating duplicative litigation and the need for expenditure of additional time and resources of the parties and of this Commission.").

156. Since rewarding Shurberg for concealing from the Commission the decisions of the federal courts on the very matters he raised will encourage others to conceal facts and undermine the Commission's strong policy requiring candor from its applicants, the public interest will be served by grant of the Trustee's renewal application.

157. Since preserving the Commission's action by final grant of the assignment application by which the Trustee became licensee upholds the integrity and reliability of Commission action, the public interest will be served by grant of the Trustee's renewal application. See Greater Boston Television Corp. v. FCC, supra.

For these reasons, each individually and all collectively, Issue (2) must be resolved in favor of the Trustee.

**ULTIMATE CONCLUSION**

For the reasons set forth in the foregoing findings of fact and conclusions of law, the issues designated in the HDO must be favorably resolved to Astroline, Ramirez and the Trustee.

Respectfully submitted,

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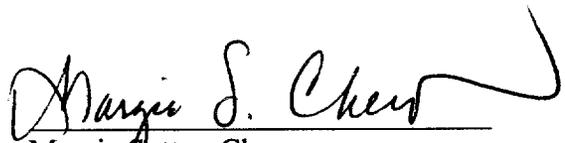
**CERTIFICATE OF SERVICE**

I, Margie Sutton Chew, a secretary in the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., do hereby certify that true copies of the foregoing **“JOINT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF MARTIN R. HOFFMAN, TRUSTEE-IN-BANKRUPTCY, RICHARD P. RAMIREZ AND TWO IF BY SEA BROADCASTING CORPORATION”** was served this 8th day of December, 1998, by first-class, postage prepaid mail to the following:

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