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127

Mass Media Bureau
Ex. 127

Request No. _____
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Reporter _____
Date _____

Federal Communications
Request No. MM 98-66 Exhibit No. 127
Presented by MASS Media Bureau

Dispostion { Identified X / Received X 0 of 26 pg / Rejected _____

Reporter HOLG
Date 10-26-98

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39830		2-12-96

Federated Media

PATHFINDER COMMUNICATIONS CORPORATION
P.O. Box 487
Elkhart, IN 46515

INVOICE DATE	INVOICE / CONTRACT NUMBER	DESCRIPTION	GROSS AMOUNT	DISCOUNT	NET AMOUNT
2-12-96		Hicks Broadcasting of Indiana			$75,000.00*--
		See Konnie			
		TOTALS			

DETACH AND RETAIN THIS STATEMENT
THE ATTACHED CHECK IS IN PAYMENT OF THE ITEMS DESCRIBED ABOVE.
IF NOT CORRECT, PLEASE NOTIFY US PROMPTLY. NO RECEIPT REQUIRED.

Mass Media Bureau Ex. 128

EXCERPTS FROM DEPOSITION OF STEVE KLEIN TAKEN ON JANUARY 30, 1996, IN HICKS v. CRYSTAL RADIO GROUP, INC., ET AL.

Page 14

(21) Q Who do you report to?
(22) A David Hicks.
(23) Q How often do you report to David Hicks?
(24) A At least weekly.
(25) Q How often does David Hicks come physically to the radio

Page 15
(1) station?
(2) A Once a month, if that.
(3) Q How do you report to him on a weekly basis?
(4) A Phone conversations. But he also receives weekly sales
(5) figures.
(6) Q Do your phone conversations have a regular format that
(7) you follow when you report to him?
(8) A No. No.

Page 17

(9) Q Who hired Phil Britten?
(10) A I did.
(11) Q When did you hire him?
(12) A January, I believe, of 1994. I came in September of
(13) '93. Yes, January of 1994.
(14) Q How did you become aware of Phil Britten's availability
(15) to serve as a program director?
(16) A I was aware that he was available as an unemployed
(17) program director.
(18) Q How did you know about his availability?
(19) A I don't remember.
(20) Q Did David Hicks bring him to your attention?
(21) A I don't believe so.

Federal Communications Commission
Docket No. MM 98-66 Exhibit No. 128
Presented by Mass Media Bureau

Dispostion
Identified X
Received X 11-2-98
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Reporter HOLG
Date 11-1-98

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NOV 15 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

In re Applications of	)	
	)	
Michiana Telecasting Corp. for Consent to Assign the Licenses of **WNDU(AM)/WNDU-FM**, South Bend, Indiana, to Pathfinder Communications Corporation	)	File No. BAL-960809GQ File No. BALH-960809GR
	)	
Pathfinder Communications Corporation for Consent to Assign the License of **WAKX(FM)**, Holland, Michigan, to Clear Channel Radio Licenses, Inc.	)	File No. BALH-961015GL
	)	
Pathfinder Communications Corporation for Consent to Assign the License of **KOAS(FM)**, Broken Arrow, Oklahoma to Clear Channel Radio, Inc.	)	File No. BALH-960415GE
	)	
Pathfinder Communications Corporation for Renewal of Licenses for **WHWD(AM), WOWO(AM), WMEE(FM), and WAKX(FM)**	)	File No. BR-960329B7 File No. BR-960329B8 File No. BRH-960404ZA File No. BRH-960603WF

POSTED 11/19/96

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AUDIO SERVICES DIVISION

To: Chief, Mass Media Bureau - **Mail Stop 1800B**

CONSOLIDATED OPPOSITION TO INFORMAL OBJECTION

Pathfinder Communications Corporation

Peter Tannenwald
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November 15, 1996

Federal Communications Commission

Docket No. MM 96-6 Exhibit No. 129

Presented by Mass Media Bureau

Disposition { Identified X
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Date 11-3-98

TABLE OF CONTENTS

Summary 1

Introduction 2

History of the JSA and Sale of WRBR 3

Pathfinder's Desire to Keep the JSA in Effect; Selection of Hicks as Buyer 4

Full Disclosure in FCC Filings 7

Formation and Operation of Hicks Broadcasting, LLC 9

Operation and Control of WRBR by Hicks, an Experienced Broadcaster 10

Niles' Specific Allegations Raise No Issues 12

- Dille Children's Option 12
- Candor in FCC Filings 14
- Investors' Financial Stake in WBRR 14
- No "Financing" of WBRR by Dille 16
- Proper Role of Dille Children 17
- Hicks' Employment by Pathfinder 19
- No Agreement for Future Transfer of Ownership 21
- Dille Children not "Fronts" for Dille 23
- Full Disclosure Made in Financial Section of Assignment Application 24
- No Pathfinder Loans to Hicks 25
- No Other Pathfinder Financing of Hicks 27
- Stockholder Call Provision a Normal Investment Tool 30

Legal Arguments 32
Standard of Review 32
Determination of De Facto Control 34
Conclusion 35

SUMMARY

The petitioner, Niles Broadcasting, Inc. ("Niles"), using documents improperly obtained in violation of a judicial protective order,[1] has taken a few facts and added unsupported allegations, misstatements, and leaps of logic and suppositions to craft an inaccurate and unwarranted conspiracy theory surrounding WRBR(FM), South Bend, Indiana ("WRBR"). Niles alleges that Pathfinder Communications Corporation ("Pathfinder") or its controlling stockholder, John F. Dille, III ("Dille"), *de facto* acquired control of WRBR, a station it could not lawfully own, through a limited liability company ("LLC") owned by David L. Hicks ("Hicks") and Dille's children, and through a joint sales agreement ("JSA") with WRBR.

The facts, however, are that Pathfinder entered into a JSA with the prior licensee, Booth American Company ("Booth American"), an entirely independent entity. The JSA involved the sale of advertising time only, and not programming time, and thus was perfectly lawful and did not constitute an attributable ownership interest for Pathfinder. When Booth American decided to sell WRBR, Pathfinder was not able to buy the station, absent a rule waiver, because of its other media interests in the area. Pathfinder wanted to continue the JSA in effect, however, so it helped Booth American find a buyer that would be willing to preserve the JSA. Hicks, who already had shown interest in purchasing WRBR, agreed to form an LLC to become the licensee of the station. Dille felt that the investment opportunity was a good one, so he suggested that his children become minority investors in the enterprise, he provided them with the funds they needed to do so, and he facilitated financial arrangements that made it feasible for Hicks to

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[1] *See* n.9, *infra*.

participate so that the JSA would remain in force. Hicks at all times has maintained control of WRBR as the 51% single-majority shareholder, so the interests of Dille's children are not attributable to the children themselves, let alone Dille.

Since the Hicks entity acquired WRBR, the JSA has remained in effect; Pathfinder has provided accounting services that are not uncommon under JSAs; the Dille children have remained passive investors, commensurate with their minority ownership role (Niles strangely criticizes them for not becoming more involved when they have no power to do so); and Dille has never exercised any authority or control over WRBR's programming.

This case involves a very simple question: may Pathfinder and Dille have a JSA with WRBR and protect that JSA by helping to find a friendly buyer when the original licensee decided to sell? The answer is yes, so long as JSA's are not considered attributable ownership interests, which they have never been and are not today. If the rules change, of course, Pathfinder and Dille will abide with the changes.

Niles has attempted to build a set of perfectly innocent facts into a crescendo of fire and to drop Pathfinder and Hicks into a vortex under *Roy M. Speer*, FCC 96-258, rel. June 14, 1996. But unlike in *Speer*, the licensee of WRBR is not complaining about any loss of control; Pathfinder has supplied no programming to WRBR; and Pathfinder did not participate in the construction or development of the WRBR business enterprise, which existed long before Pathfinder came on the scene. Instead, this case involves a series of legitimate transactions relating to a JSA and financing, well within established precedent, and is more appropriately considered under *Kern Broadcasting Corp.*, 10 FCC Rcd 6594 (1995). Moreover, all the

transactions that Niles claims were concealed with the Commission that require reporting were all reported when they occurred.

Niles should be roundly criticized for making smoke where there is no fire, and especially for attempting to tie up legitimate business transactions by Pathfinder that are unrelated to the station at which misconduct has been alleged. Pathfinder has a complex series of tax-free asset exchanges at issue, with impending contract deadlines and substantial escrow deposits at stake. The Commission must act quickly to vindicate the integrity of its processes and to discourage petitioners like Niles from bogging down the administrative process.

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Before the
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Washington, D.C. 20554

In re Applications of	)	
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AUDIO DIVISION

To: Chief, Mass Media Bureau, **Mail Stop 1800B**

CONSOLIDATED OPPOSITION TO INFORMAL OBJECTION

Pathfinder Communications Corporation ("Pathfinder"), by its counsel, and pursuant to Section 1.45(a) of the Commission's Rules, 47 C.F.R. § 1.45(a), hereby submits this Consolidated Opposition[1] to the Informal Objection ("Informal Objection") filed by Niles

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[1] Niles originally filed the Informal Objection on October 29, 1996 against the WNDU(AM)/WNDU-FM assignment application, and filed a letter on November 2, 1996 regarding the other captioned applications requesting that the issues raised in the Informal Objection be applied against those applications as well. Since the same issues have been raised against all of the captioned applications, Pathfinders responses apply equally to all. The

Broadcasting, Inc. ("Niles") on October 29, 1996, regarding the above-captioned assignment and renewal applications.

1. Introduction

In the Informal Objection, Niles has taken a few facts and added unsupported allegations, misstatements, leaps of logic and suppositions, and sheer repetition to craft a conspiracy theory surrounding WRBR(FM), South Bend, Indiana ("WRBR"), of which Oliver Stone could be proud. An accurate chronological review of the pertinent facts, as follows, demonstrates that Pathfinder and its principal, John F. Dille, III ("Dille"), have taken no improper action with respect to WRBR, or any other station. Rather, Pathfinder had a pre-existing, perfectly lawful, joint sales agreement with a prior licensee of WRBR, and when the owner of that station elected to sell, Pathfinder helped find a buyer who would keep the joint sales agreement in effect. Dille also perceived WRBR to be a good investment for his children, and he funded his children's investment as is perfectly normal and legitimate for a father to do, and his children remained totally passive investors as is appropriate where there is a single-majority shareholder. Therefore, the Informal Objection should be dismissed or denied, and the above-captioned applications granted.

This Opposition addresses each of Niles' allegations and demonstrates why they have no merit. The futility of Niles' effort is underscored by the fact that no affidavit is required from

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allegations are particularly irrelevant to the non-South Bend markets, since Niles has no presence in those markets, and Pathfinder is not seeking to acquire stations there.

Pathfinder, Dille, or Hicks to support this pleading. All of the facts in support of Pathfinder's position are set forth in material Niles itself has already submitted to the Commission.

2. History of the JSA and Sale of WRBR

The only formal business relationship that Pathfinder or Dille now has or has ever had with WRBR is a Joint Sales Agreement dated December 18, 1992 (the "JSA"),[2] which originally was between Pathfinder and Booth American Company ("Booth American"), the licensee of WRBR at the time. The JSA involved the provision of administrative support and an arrangement for the joint sale of advertising time on WRBR and one of Pathfinder's stations licensed to Elkhart, Indiana, which is permitted under the Commission's rules.[3] Pathfinder and Booth American, and their principals, Dille and John L. Booth ("Booth"), respectively, considered the JSA mutually beneficial in light of economic conditions and their respective stations' position in the market at that time.[4]

Sometime after entering into the JSA but prior to August, 1993, Booth determined that Booth American should sell WRBR as soon as possible and contacted several local broadcasters identified by a broker as potential buyers, including Pathfinder (or Dille) and David L. Hicks ("Hicks"), a broadcaster in Michigan.[5] Of the potential buyers contacted, only three expressed

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[2] A copy of the JSA is attached to the Informal Objection as Exhibit B.

[3] *See Revision of Radio Rules*, 7 FCC Rcd 2755, 70 RR 2d 903 ¶ 58 (1992); *recon. granted in part*, 7 FCC Rcd 6387 (1992), 9 FCC Rcd 7183 (1994).

[4] *See* Informal Objection, Exhibit D at 39 ("Dille Deposition")(mutual business advantage in JSA, or "win-win"); *see also* Informal Objection, Exhibit E at 11 ("Booth Deposition")(for better position in market to sell advertising as combined effort).

[5] *See* Booth Deposition at 15-22.

an interest in the station: (1) Midwest Family, which only proposed a station swap in which Booth American was not interested; (2) Hicks, who was interested in purchasing WRBR, but not at the $750,000 price Booth American was seeking at the time; and (3) Pathfinder, which recognized that waiver of certain Commission ownership rules would be required.[6]

3. Pathfinder's Desire to Keep the JSA in Effect; Selection of Hicks as Buyer

Without question, Pathfinder was interested in acquiring WRBR at that time, and still would be interested in acquiring the station today, but at all times Pathfinder has been aware that it could not acquire WRBR without a waiver because of its other media interests in the area.[7] However, Pathfinder's primary goal in 1993 -- as reflected even in depositions[8] submitted by Niles as exhibits to the Informal Objection -- was to preserve the JSA and the economic benefits it provided to the stations involved.[9]

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[6] *See* Booth Deposition at 15-24.

[7] *See* Dille Deposition at 44-48 and 52-55.

[8] The depositions attached by Niles as exhibits to the Informal Objection were taken from a civil suit (*David L. Hicks v. Crystal Radio Group, Inc.*, File No. B 94-3603-NZ, Circuit Court for the County of Kalamazoo, Michigan) brought by Hicks against Crystal Radio Group, Inc. ("Crystal Radio"), a licensee of radio stations in Michigan in which Hicks was a substantial investor, officer and director. Summary judgment has been entered in favor of Hicks on the core issue of the unlawful removal of a forced sale clause by Crystal Radio from a shareholder agreement to which Hicks was a party. Although neither Pathfinder nor Dille were parties to that suit and have no interest in Crystal Radio or Hicks' investment therein, Niles has obviously benefitted from using materials from that suit to thwart a potential competitor in the South Bend market. Furthermore, certain materials from that proceeding used by Niles were covered by a protective order that appears to have been violated by their use in the Informal Objection. If a court so finds, its ruling may reflect on Niles' qualifications as a licensee.

[9] *See* Dille Deposition at 49, 105 and 120; *see also* Booth Deposition at 25-26; *see also* Informal Objection, Exhibit F at 157 ("Hicks Deposition").

Recognizing that a ruling on the waiver request necessary for Pathfinder to purchase the station would cause considerable delay, which conflicted with Booth American's desire to sell WRBR as soon as possible,[10] around or before August, 1993, Booth indicated to Dille that he would begin seeking other buyers for WRBR.[11] At about that time, Booth American and Pathfinder began to discuss finding a buyer that would continue the JSA (Pathfinder's primary goal), with whom Pathfinder would be comfortable under the JSA, and who was an experienced broadcaster who was not a competitor in the South Bend market but was within a reasonable distance of that market.[12]

Booth and Dille discussed Hicks, and both considered Hicks to be an appropriate candidate.[13] Dille had been acquainted with Hicks for several years, primarily through industry trade associations, and Hicks had previously expressed some interest in WRBR, so at some point Dille contacted Hicks to determine whether Hicks still had any interest in acquiring WRBR.[14] In making this contact, Dille essentially was serving as a "facilitator" or in a broker-like role, to assist Booth American in finding a potential buyer that would be compatible with and friendly to Pathfinder's own interest in preserving the JSA arrangement.[15] In preliminary discussions,

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10 *See* Booth Deposition at 18.

11 By this point, Pathfinder and Booth had negotiated terms, a purchase price, the assets to be acquired, and perhaps even had circulated and commented on a draft purchase agreement, but were at an impasse over timing due to Pathfinder's need for a waiver of the Commission's ownership rules. *See* Dille Deposition at 51 and 57.

12 *See* Dille Deposition at 49-51; *see also* Booth Deposition at 22-24.

13 *See* Dille Deposition at 49-50; *see also* Booth Deposition at 22-25, 40 and 50.

14 *See* Dille Deposition at 48-51 and 55-59; *see also* Hicks Deposition at 157-159.

15 *See* Dille Deposition at 82; *see also* Booth Deposition at 29.

Dille and Hicks reviewed the deal that Pathfinder negotiated with Booth American, the benefits of the JSA to a buyer, and an ownership structure which included Dille's three adult children[16] as non-controlling minority investors.[17] As early as August 17, 1993, at least Dille had an "idea" that the Dille Children could have an option to acquire Hicks' controlling majority interest, as reflected in his vague reference to such an "arrangement-option-agreement" in a brief memo to Booth, and at some point Dille discussed the idea of an option for the Dille Children with Hicks as well.[18]

At this point, however, the discussions of an ownership structure and such an option were only preliminary, and certainly had not been negotiated in detail or formally agreed to by Hicks or the Dille Children.[19] For ease of discussion, the new entity to be formed -- which ultimately

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[16] Dille's three children are Sarah Dille Dunkel ("Sarah Dille"), Alec C. Dille ("Alec Dille") and John F. Dille, IV ("Flint Dille", with Sarah Dille and Alec Dille referred to collectively herein as the "Dille Children").

[17] *See* Dille Deposition at 48-51 and 55-59; *see also*, Hicks Deposition at 157-159.

[18] *See* Dille Deposition at 58, 62 and 103 (discussion of option with Hicks "at some point"), and 105 and 108 (only "goal" or "idea" of Dille's at time of note to Booth); *see also*, Hicks Deposition at 159 (no discussion of option with Dille at early meeting at Holiday Inn), 226(3)-(9) and 260 (option discussed with Dille in "initial discussions"), 258(19)-259(15) (discussions but not agreement with Dille about option as of August 1993).

[19] *See* Dille Deposition at 103-104 (negotiations but no agreement on option as of August 17, 1993), 106-112 (no recollection whether agreement on option at time of November 1993 escrow payment), and 114-115 (option not final when Application filed December 22, 1993); *see also*, Hicks Deposition at 170 (buy-out right first discussed after August 17, 1993), 226 (option discussed but not agreed to as of August 17, 1993), 228 (no option when Application signed in December 1993), and 258-260 (contradictory statements as to whether agreement on option by August 1993).

became Hicks Broadcasting of Indiana, L.L.C. ("Hicks Broadcasting LLC") -- was referred to simply as "Newco".[20]

Once Hicks had expressed his interest in WRBR under that general arrangement, further negotiations for the sale of WRBR were conducted between Hicks and Booth (or their respective attorneys, Brown and Honigman), with Dille acting simply as a facilitator, particularly with regards to the Dille Children's minority investment in Hicks Broadcasting LLC.[21] These negotiations culminated in Booth American and Hicks Broadcasting LLC entering into the Asset Purchase Agreement dated November 30, 1993 (the "APA"), and the filing of a Form 314 assignment application (the "Application") with the Commission on December 22, 1993.[22] The APA included provisions for a purchase price of $660,000, and for payment of the purchase price over time under a note to be held by Booth American.[23]

4. Full Disclosure in FCC Filings

In response to Section II, Question 15 of the Application, Hicks properly indicated that there were no documents, contracts or understandings relating to future ownership of the station,

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[20] *See* Dille Deposition at 56-57; *see also*, Informal Objection at Exhibit G.

[21] *See* Dille Deposition at 82; *see also* Booth Deposition at 29.

[22] A copy of the Application (File No. BALH-931222GE) is attached to the Informal Objection as Exhibit A, and the APA is attached as Exhibit 1 to the Application.

[23] The purchase price and payment provisions were more favorable than the terms Booth American was seeking when it originally approached Hicks, and Hicks anticipated that Hicks Broadcasting LLC could meet its obligation under the note from the cash flow of the station. *See* Booth Deposition at 20-21 (Hicks not interested at $750,000 purchase price), 40 and 50 (final deal to include Booth American promissory note for $660,000 purchase price primarily secured by operation of station), and 56 (delay in negotiations because Hicks not satisfied with price negotiated by Dille).

including options, since at that time no such agreement or understanding existed -- Hicks and the Dille Children had not negotiated a governing document or the terms thereof, other than some general agreement as to the ownership percentages and control of the entity to be formed.[24] As previously stated, Hicks and Dille had discussed the idea of an option, but these preliminary discussions had not resulted in any final understanding or agreement.

Exhibit 2 to the Application fully disclosed the family relation between Dille and the Dille Children, Pathfinder's interests in other stations in the same market as WRBR, the JSA between Pathfinder and Booth, and the extent of Dille's and the Dille Children's interests in the Truth Publishing Company ("Truth"), which publishes *The Elkhart Truth*, a daily newspaper published in Elkhart, Indiana. In response to an informal inquiry from the Commission staff, Dille also clarified in an amendment to the Application filed on February 24, 1994, that neither he nor his father (the late John F. Dille, Jr.) would finance or guarantee the purchase of the station by Hicks Broadcasting LLC or be involved in the day-to-day operation of WRBR.[25] The Commission granted the Application on March 16, 1994, and the closing was held on March 31, 1994. As a condition to Booth American's obligation to close, Booth American's rights and obligations under the JSA were assigned to and assumed by Hicks Broadcasting LLC at the closing.

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[24] *See* nn.18 and 21, *supra*.

[25] *See* Informal Objection at Exhibit C (the "Application Amendment").

5. Formation and Operation of Hicks Broadcasting, LLC

Among other preparations for closing on the assignment, Hicks caused the formation or organization of Hicks Broadcasting LLC, with its formal existence beginning March 28, 1994. Also in late March, Hicks and the Dille Children negotiated and executed the Operating Agreement of Hicks Broadcasting of Indiana, L.L.C., an Indiana Limited Liability Company (the "Operating Agreement")[26] and a side letter dated March 31, 1994 (the "Side Letter") which supplemented the Operating Agreement with certain additional terms.[27] The Operating Agreement and Side Letter grant the Dille Children a "call" right whereby the Dille Children may purchase all of Hicks' interest in Hicks Broadcasting LLC for a price based on a multiple of the cash flow of the station, subject to prior Commission approval, and grant Hicks a reciprocal "put" right on the same terms after three years.[28] All of these arrangements are common and legitimate tools used by investors to protect their financial interests. As required by the Commission's rules, Hicks Broadcasting LLC filed a Form 323 ownership report with the Commission on April 29, 1994, within thirty days of the closing.[29] As noted, the

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[26] Pathfinder understands that the Operating Agreement was executed by Hicks and the Dille Children on or about March 23, 1994.

[27] Copies of the Certificate of Organization, Articles of Organization, the Operating Agreement, and the Side Letter (among other documents) were filed as Exhibit B to the Form 323 ownership report filed with the Commission on April 29, 1994. A copy of the ownership report date-stamped as filed on April 29, 1994 is attached to this Consolidated Opposition as Exhibit 1.

[28] *See* Section 7.4(b) of the Operating Agreement and Section 2 of the Side Letter.

[29] *See* n.27, *supra*. The Informal Objection incorrectly suggests that the ownership report was not filed until July 20, 1994, *see* Informal Objection at 26, n.50 (citing Exhibit P to the Informal Objection), even though the first page of Exhibit P itself indicates that the ownership report was filed on April 29, 1994. *See* Informal Objection, Exhibit P; *see also*, Consolidated Opposition, Exhibit 1 (date-stamped copy of ownership report).

ownership report properly disclosed the Operating Agreement and Side Letter, which included the agreement on the call provision which was part of those documents, as well as other required documents.[30]

6. Operation and Control of WRBR by Hicks, an Experienced Broadcaster

Since acquiring WRBR, Hicks Broadcasting LLC has properly fulfilled its obligations as a Commission licensee. Hicks Broadcasting LLC, and its controlling shareholder, Hicks, have maintained control of the programming and day-to-day operation of the station, while continuing to conduct fully permissible joint sales of advertising time and other administrative functions with Pathfinder under the JSA.[31] Hicks has also leased space from Pathfinder, and entered into a contract for Pathfinder to perform certain financial and accounting functions.[32]

Hicks is in control of the licensee, Hicks Broadcasting LLC, under the terms of the Operating Agreement, and is not under the control of Dille, not by means of any agreement, understanding or other obligation, written or oral or otherwise, nor by any sort of "mind

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[30] *See* n.27, *supra*.

[31] *See* Dille Deposition at 87-91 (Dille, the Dille Children nor Pathfinder involved in control, operation, personnel or programming of WRBR).

[32] *See* Hicks Deposition at 214 and 276 (accounting and payroll functions performed by Pathfinder); *see also* Informal Objection, Exhibit K at 18, and 26-39 ("Watson Deposition")(Pathfinder performs accounting functions under contract for, and leases space to, Hicks Broadcasting LLC). The use of Pathfinder checks to pay certain obligations of Hicks raises no issue, because many expenses are shared between the sales entity and the licensee. There is no showing that each entity was not properly charged for its own expenses, and in fact the record demonstrates that each entity was properly charged.

control."[33] Hicks is an experienced and capable broadcaster, clearly capable of operating WRBR in his own right.[34] Dille has not provided funds to Hicks, or guaranteed his obligations,[35] as alleged by Niles. Dille simply facilitated Hicks' participation in a transaction in which Hicks was already interested, which was structured so that little would be required in the way of a capital contribution since the purchase price could be paid over time, hopefully using the cash flow of the station.[36] And there is nothing wrong with Dille's doing that to help keep a valuable JSA alive.

The Dille Children are non-controlling minority investors in Hicks Broadcasting LLC, satisfied with the manner in which Hicks is operating WRBR and managing the affairs of Hicks Broadcasting LLC.[37] Nothing in the Commission's rules precludes them from holding minority

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[33] *See* Hicks Deposition at 170, 173, 177, 321 and 331 (not acting for Dille in transaction), 207 (Dille did not fund acquisition of WRBR), and 266-270 (Hicks incurred cost and risk of letter of credit and contributed to repayment of Booth American promissory note); *see also*, Dille Deposition at 77 (Hicks had independent counsel for non-FCC business matters during transaction), 81 (no oral or informal agreements with Hicks); and 82 (Hicks negotiated directly with Booth American, independently of Dille).

[34] *See* Hicks Deposition at 13-18 and 21-32 (describing Hicks' broadcasting experience); *see also*, Dille Deposition at 49 and Booth Deposition at 50 (regarding Hicks qualifications as a broadcaster).

[35] *See* Hicks Deposition at 165 and 207-208 (indemnity from Dille Children in Side Letter suggested by business counsel to Hicks), 185 ("not true" that Dille providing funds), and 266-273 (Hicks contributed personal funds for various obligations); *see also*, Dille Deposition at 71 and 78-81 (Dille did not guarantee or indemnify Hicks financially).

[36] *See* nn.6 and 23, *supra*.

[37] *See* Informal Objection, Exhibit M at 6-9, 14, and 17-19 ("Sarah Dille Deposition")(strictly investment opportunity; invested based on Dille's advice; satisfied with Hicks operation of station); *see also* Informal Objection, Exhibit N at 5-10, 12-13, 17-18 and 21-23 ("Flint Dille Deposition")(strictly investment opportunity; invested based on Dille's advice; satisfied with Hicks operation of station, i.e, investment in "safe hands" with Hicks).

interests in Hicks Broadcasting LLC; nor does anything require them to be more than passive investors, especially since there is a single majority shareholder. Moreover, their ownership interest in Hicks Broadcasting LLC and WRBR have been expressly approved by the Commission. Granted, the Dille Children clearly have benefitted from having Dille as their father, including: (i) the advantage of their father's experience and guidance; (ii) the referral of a beneficial investment opportunity; and (iii) even the good fortune of a father who is capable and willing to arrange the loan of funds to them to make the investment. However, the Commission's rules do not preclude a parent from loaning (or even giving) a child funds for an investment opportunity in a broadcast station.[38]

7. **Niles' Specific Allegations Raised No Issues**

The pertinent facts having been put into proper perspective, the specific allegations raised by Niles will be addressed seriatim.

A. **Dille Children's Option**. Niles alleges that the Dille Children's option (*i.e.*, the "call" rights under Section 7.4(b) of the Operating Agreement) was not disclosed in the Application, with the intent to deceive the Commission.[39] Niles' allegation is based on the erroneous assumption that, since Dille expressed this idea to Booth in a note dated August 17, 1993, some agreement or understanding had been reached or finalized between Hicks and the

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[38] *See North Idaho Broadcasting*, 8 FCC Rcd 1637, 72 RR 2d 360 at ¶ 14 (1993); *Magdalene Gunden Partnership*, 2 FCC Rcd 5513 at ¶ 14 (Rev. Bd. 1987); *High Sierra Broadcasting*, 96 FCC 2d 423 ¶ 14 (Rev. Bd. 1983).

[39] *See* Informal Objection at 3, 10, 12, 16 and 25-26.

Dille Children prior to the filing of the Application,[40] when no such agreement or understanding had been reached at that point.[41]

Niles also relies on one equivocal statement in a deposition of Hicks for the fact that an actual agreement existed on or before August 17, 1993,[42] when Hicks repeatedly and clearly stated otherwise throughout the rest of his deposition.[43] The reference by Hicks to what ended up being a call provision as "first rights of refusal"[44] may itself be indicative that the discussions with Hicks to that time had not culminated in agreement. The single statement relied upon here by Niles cannot be accorded much weight, if any, since it is overwhelmingly contradicted by multiple statements by the same party, as well as by unequivocal statements from another party, Dille.[45]

Since the facts offered by Niles do not support a finding that the Application failed to disclose any agreement or understanding in existence at that time, without drawing conclusions based on those facts, the Informal Objection does not raise any issue of misrepresentation to be

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40 *See* Informal Objection at 10 and 25-26.

41 *See* nn.18 and 19, *supra*. As noted herein, the Operating Agreement was duly filed after it was entered into. Thus there was no concealment from the Commission.

42 *See* Informal Objection at 26 (citing the Hicks Deposition, Exhibit F at 226). In response to a questions whether by August 17, 1993 he had agreed with Dille that the Dille Children would have an arrangement or option to purchase his 51% interest, Hicks responded that "we did discuss the first rights of refusal," and that he and Dille had agreed that would be one of the terms. *See* Hicks Deposition at 226(10)-(18). In response to the next question about the timing, as to whether such a term was agreed to before August 17, 1993, Hicks responded equivocally that "it appears that way." *Id.* at 226(19)-(20).

43 *See* n.18, *supra*.

44 *See* Hicks Deposition at 226(15).

45 *See, e.g., KERN Broadcasting*, 10 FCC Rcd 6584, 78 RR 2d 1142 at ¶ 12 (1995).

addressed by the Commission, particularly where, as here, the facts presented more clearly indicate a different conclusion.[46]

B. **Candor in FCC Filings.** The facts also do not support a finding of lack of candor or that facts that may have been omitted, if any, were omitted with the intent or motive to deceive the Commission. Rather, the facts demonstrate that Hicks Broadcasting LLC acted in good faith. Hicks Broadcasting LLC filed the Operating Agreement with the Commission once an agreement or understanding was reached, and even assuming for the sake of argument that an oral "agreement" was reached prior to the execution of a binding document, any resulting delay in the filing of the Operating Agreement and the call provision contained therein does not evidence the intent to deceive necessary for a finding of misrepresentation or lack of candor.[47]

C. **Investors' Financial Stake in WRBR.** Niles alleges that neither Hicks nor the Dille Children had a meaningful financial stake in the station.[48] Niles suggests that Hicks' financial stake was not meaningful because it was limited to a $510 capital contribution and a $5,100 member loan,[49] where the Dille Children's stake was also similarly limited, to a $490 capital contribution and their member loans.

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[46] *See KERN Broadcasting* at ¶¶ 10-11.

[47] *See, e.g., Cannon's Point Broadcasting*, 93 FCC 2d 643, 53 RR 2d 953 at ¶ 20 (Rev. Bd. 1983); *Fox River Broadcasting*, 93 FCC 2d 127, 53 RR 2d 44 at ¶ 4 (1983).

[48] *See* Informal Objection at 4, 26 and 32.

[49] *See* Informal Objection at 17 and 32.

It is not clear why Niles' allegations are relevant to the issue of control of WRBR; but in any event, the facts demonstrate that Hicks incurred a financial risk, even considering the aspects of the business deal negotiated with the Dille children that are raised by Niles. While his initial capital contribution was limited to $510, it was proportionate to the $490 initial capital contribution of the Dille Children. Hicks personally bore the expense of obtaining the letter of credit he provided,[50] even after signing the Side Letter on March 31, 1994, and he bore the risk of the letter of credit until that date (and even after that date bore the risk of collecting on the guaranty). Under the Operating Agreement, Hicks is subject to making his proportionate share of capital contributions, although to date most funds provided to Hicks Broadcasting LLC have been in the form of member loans (which do not require a proportionate contribution since such debt is repaid prior to any distributions based on equity).[51]

The Commission has established that a non-controlling minority investor may loan funds to a licensee in proportions that do not reflect the investors percentage of equity investment without raising a concern that the minority investors control the licensee.[52] In this case, the member loans made by the Dille Children were not significantly out of proportion to their investment such that control should be attributed to them.

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[50] *See* Hicks Deposition at 266-267 (Hicks paid expense of obtaining letter of credit from personal account, and not reimbursed by Dille Children).

[51] Niles concedes that "virtually all" of the Dille Children's member loans to Hicks Broadcasting LLC have been repaid to them, and that they have not repaid Dille. *See* Informal Objection at 18 and 22. Niles appears surprised that a father with sufficient means would help his children make a sound business investment. *Id.* at 18.

[52] *See BBC License Subsidiary L.P.*, 10 FCC Rcd 7926, 78 RR 2d 98 at ¶ 36 (1995).

C. <u>No "Financing" of WRBR by Dille</u>. Niles alleges that Dille, in the Application Amendment, falsely and fraudulently represented that Dille was not financing the acquisition of WRBR.[53] Niles correctly states that Dille provided the funds to the Dille Children to invest in WRBR,[54] and it acknowledges that Booth American provided 100% seller financing for Hicks Broadcasting LLC's acquisition of the station.[55]

Dille's statement in the Application Amendment was made and intended literally, that he would not "finance or guarantee the purchase of the station by Hicks Broadcasting [LLC]," since Booth American was providing seller financing in the form of the promissory note disclosed in the Application. Form 314 does not inquire about the source of funds for an individual investor, and therefore information about the source of the Dille Children's funds was not required. If the Application Amendment did not fully address the Commission's concerns, the Commission clearly could have requested a further amendment, which it did not. Regardless, an applicant not providing information not required or requested does not demonstrate the intention to deceive the Commission necessary for a finding of misrepresentation or lack of candor.[56] Furthermore, family members are permitted to give or loan funds to other family members for investment in broadcast stations, under Commission precedent.[57]

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53 *See* Informal Objection at 4-5, 12, 16 and 18.

54 *See* Informal Objection at 5, 19 and 21.

55 *See* Informal Objection at 5.

56 *See* n.47, *supra*.

57. *See, e.g., North Idaho Broadcasting* at ¶ 14; *Cannon's Point* at ¶¶ 21-24; *High Sierra Broadcasting* at ¶ 24.

D. **Proper Role of Dille Children**. Niles argues that the Dille Children lack knowledge about or any interest in WRBR, and suggests that approach is consistent with Niles' allegation that Hicks is a front for Dille and inconsistent with the Dille Children's position as owners.[58] Niles suggests, without citation or support, that passive, non-controlling minority investors such as the Dille Children should: (i) be more aware of their rights under the governing Operating Agreement; (ii) have been more aware of the provisions of the APA; (iii) attend annual meetings, receive financial statements and monitor the performance of Hicks Broadcasting LLC; and (iv) be better able to recall the capital contribution and loans made to Hicks Broadcasting LLC.[59]

Contrary to Niles unsupported conclusions, the Dille Children's oversight of Hicks Broadcasting LLC and WRBR is fully consistent with their positions as non-controlling minority investors, who trust and rely on the experience and skills of the experienced broadcaster who is the controlling 51% investor to manage and operate the station.[60] In entering into their business relationship with Hicks, the Dille Children sensibly relied upon the advice of another experienced and successful broadcaster (their father) and independent legal advice on the business aspects of the transaction.[61]

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[58] *See* Informal Objection at 5 and 34-40.

[59] *See* Informal Objection at 34-38 and 40.

[60] In fact, if the Dille Children were to take a more active interest and role in the management of Hicks Broadcasting LLC and the operation of WRBR, their roles could be more readily construed as "principals" with control. *See WLOX Broadcasting*, 260 F.2d 712 (D.C. Cir. 1958).

[61] The Dille Children's legal counsel on business (i.e., non-FCC) matters drafted the Operating Agreement and other documents, and negotiated with Hicks through his legal counsel for business matters regarding those documents.

Nothing in the facts suggests that the Dille Children should be concerned about their investment, since WRBR appears to be a healthy, viable business. Even if the Dille Children wanted to change or control the manner in which Hicks is operating WRBR, they would have little ability to force such changes short of exercising their call rights to buy Hicks' interests, at a price based on a multiple of the station's cash flow. Indeed, the "single majority shareholder" exception to the Commission's attribution rules is premised upon full operating control being lodged with owners such as Hicks. In short, until some disagreement or concern arises between Hicks and the Dille Children, they should be entitled to be satisfied with the course of their own business arrangements.

Niles correctly states that the Dille Children were "merely nominal owners" of Hicks Broadcasting LLC -- which is exactly how Dille, Pathfinder, Hicks and the Dille Children themselves consider the relationship, since the Dille Children consistently have been and have described themselves as non-controlling minority investors -- but incorrectly alleges, without citation or support, or any showing of relevancy, that the Dille Children are controlled by Dille.[62]

Absent some evidence to the contrary, the Commission does not attribute one party with control of another based solely on familial relationships.[63] In this instance, there is no evidence to suggest that Dille has or could assert control over the Dille Children, and in fact the evidence is to the contrary. For example, Dille has loaned funds to the Dille Children with few strings attached so that they could take advantage of a solid investment opportunity, and has not been

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[62] *See* Informal Objection at 38.

[63] *See* n.57, *supra*.

overly concerned with repayment on those loans, since he conceived of the investment opportunity and was obviously aware of its financial merit.[64] But even assuming, solely for the sake of argument, that Dille could control the Dille Children, he still would not be able to exert control over Hicks Broadcasting LLC or WRBR, since the Dille Children are only non-controlling minority investors, absent the drastic step of exercising the call rights to buy out Hicks, subject to the Commission's consent and the scrutiny which that would entail.

E. **Hicks' Employment by Pathfinder**. Niles alleges, without citation or support, that Hicks is controlled by Dille, or has "come under the total influence of Dille," and that Hicks is "an admitted front" for Dille.[65] To the contrary, the evidence submitted by Niles demonstrates that Hicks is not under Dille's influence or control.[66]

Niles states, almost correctly, that Hicks became employed by Pathfinder in "the Fall of 1994" (the actual date is January 1995), after his termination by Crystal Radio, presumably suggesting, without citing any precedent, that the employment at a Pathfinder station in a distant market (Grand Rapids, Michigan) market would give Pathfinder sufficient influence over Hicks to amount to control by Pathfinder over Hicks Broadcasting LLC and WRBR in the South Bend market.[67] An employer-employee relationship alone is not indicative of control of an employee's other activities, and therefore an employer would not necessarily control a station

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[64] *See Magdalene Gunden Partnership* at ¶ 14 (whether loan from father to child repaid not important).

[65] *See* Informal Objection at 5, 17-18 and 33.

[66] *See* n.33, *supra*.

[67] *See* Informal Objection at 33.

licensed to another entity controlled by its employee.[68] In the present case, no evidence suggests that a resignation by Hicks, or a termination of Hicks by Pathfinder, would have any effect on Hicks' separate ownership and control of Hicks Broadcasting LLC or WRBR. Niles also alleges, without factual support, that Dille "secretly" controls the programming for WRBR.[69]

Niles also alleges that the Hicks' subsequent employment with Pathfinder was not reported in the Application.[70] It is not surprising, however, that the Application did not report an employment relationship that did not exist at the time, because Hicks was still employed by Crystal Radio when the Application was filed and granted.[71] Hicks Broadcasting LLC and Hicks personally have also maintained full control over the programming for WRBR, both through Hicks' personal involvement and through an independent programming consultant retained and paid by Hicks Broadcasting LLC, whom Hicks supervises and directs.[72]

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[68] *See Ray E. Kent*, 50 RR 2d 67 (Broadcast Bureau 1981).

[69] *See* Informal Objection at 7.

[70] *See* Informal Objection at 17.

[71] Indeed, the employment relationship arose only after Hicks was dismissed by Crystal Radio, of which he is an approximately 32% shareholder and, at the time of the closing on WRBR, he was employed full-time by Crystal Radio at its stations in Kalamazoo, Michigan. As indicated *supra* at n.9, this proceeding appears to be motivated by someone who is smarting over losses in litigation involving Crystal Radio trying to strike at Hicks in any available forum.

[72] *See* Hicks Deposition at 215-217 (employee of Hicks Broadcasting LLC, Joe Turner, responsible for programming on WRBR, and only WRBR, under Hicks' supervision); *see also*, JSA at § 6.3 (Hicks Broadcasting LLC, as assignee of Booth American, and Pathfinder "remain in complete control of the programming aired on their respective station"); *see also*, Dille Deposition at 87(7)-(12) (Hicks determines programming on WRBR) and 87(18)-(22) (Dille has never controlled programming on WRBR, and has no intention of doing so).

F. **No Agreement For Future Transfer Of Ownership.** Niles alleges, without citation or support, that Hicks described his interest in WRBR to a third party as an "accommodation" to Dille, and that Dille was the "real party in interest."[73] Niles also misstates that Hicks stated that "he proposed to acquire the station on Dille's behalf and transfer it to Dille at a later date,"[74] where in fact a third party made that statement in the cited deposition, and the third party did not claim in that deposition that Hicks had made such a statement.[75] Hicks directly contradicts these allegations in the evidence on record.[76]

Niles cites as support an agenda for a board meeting for Crystal Radio that states that Hicks possible acquisition of another station (presumably WRBR) "would be undertaken in connection with a planned subsequent transfer to a third party" (allegedly Dille or Pathfinder).[77] In the cited deposition, Hicks disputes whether the alleged statement was made, since the agenda was prepared by a third party, and clearly states that there "was no intent to transfer [the station] to a third party," other than a provision which may grant a "right of first refusal and buy-out"

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[73] *See* Informal Objection at 6 and 29.

[74] *See* Informal Objection at 29 (citing Sackley Deposition, Exhibit Q).

[75] *See* Informal Objection, Exhibit Q at 3, ¶ 7.

[76] *See* Hicks Deposition at 177(3)-(5); *see also*, n.45, *supra*. Hicks does refer in the record to a statement he made to the effect that "if it was necessary for [Hicks] to make payment on any [guarantee to Booth American], John Dille would be at [Hicks'] doorstep," but explains that when taken in the context it was made, the statement was clearly a humorous "tongue-in-cheek" comment, in jest, and simply not true based on the structure of his deal with the Dille Children, and not Dille. *See* Hicks Deposition at 184-186.

[77] *See* Informal Objection at 29-30 (citing Hicks Deposition, Exhibit F at 176). The passage from the agenda is actually in the Hicks Deposition at 175.

to a third party.[78] Again, Niles has cited hearsay evidence of a third party which is directly refuted by other direct evidence on the record.[79]

Niles misstates, without support from the cited deposition, that Hicks "told one or more directors that Dille would, if necessary, step in and make Hicks whole against any financial loss that Hicks might incur from the arrangement."[80] The portion of the deposition cited includes no such statement, and is directly contradicted by other evidence in the record. Since Niles' allegation of this hearsay statement is not supported by any evidence, and is contradicted by evidence on the record, the allegation must not be considered or accorded any weight by the Commission.[81]

Niles misstates that at an early meeting with Hicks, "Dille told Hicks that Booth American had already approved [a plan for Hicks and the Dille Children to buy the station]".[82] The cited portion of the Hicks Deposition does not include any discussion of whether Booth had even discussed, much less approved, such an ownership plan. Rather, the cited passage indicates only that Dille had discussed a purchase price and other terms during Pathfinder's own negotiations for the purchase of WRBR, which were never consummated.

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[78] *See* Hicks Deposition, Exhibit F at 176(1)-(10) (Hicks did not write agenda and did not recall the agenda passage); at 176(15)-(24) (no intent to transfer to a third party, and disputing any other interpretation of agenda passage).

[79] *See* n.45, *supra*.

[80] *See* Informal Objection at 30 (citing Hicks Deposition, Exhibit F at 176).

[81] *See KERN Broadcasting* at ¶ 12 (unsupported hearsay had little probative value where contradicted by other evidence).

[82] *See* Informal Objection at 10 (citing the Hicks Deposition, Exhibit F at 159).

Niles' allegation of this hearsay statement is not only not supported by any evidence, but is in fact contradicted by evidence on the record; therefore the allegation must not be considered or accorded any weight by the Commission. Even assuming, for the sake of argument, that Dille and Booth once discussed a plan for Hicks to acquire WRBR, such discussions are irrelevant to any allegations of misconduct made by Niles in the Informal Objection, since the record demonstrates that Hicks negotiated his own terms with Booth American after he joined the negotiations.[83]

G. **Dille Children Not "Fronts" For Dille.** Niles alleges, without citation or support, that Hicks and the Dille Children were used by Dille as "fronts" to acquire WRBR.[84] Niles appears to rely largely on the fact that Dille previously had negotiated terms for Pathfinder's purchase of WRBR from Booth American, before Hicks became involved in the transaction, and that Dille negotiated with Hicks on behalf of the Dille Children.[85] Niles does not explain how the previous negotiations by Pathfinder, or even Dille's subsequent assistance to his children, necessarily result in Hicks and/or the Dille Children serving as "fronts," nor does Niles cite any Commission precedent which suggests that such actions are violations of any Commission rules or policy. The Dille Children are investors, using their father's money, and that fact does not justify any sinister inference.

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83 *See* Booth Deposition at 20.

84 *See* Informal Objection at 12, 26, 29 and 34.

85 *See* Informal Objection at 29.

Since the facts offered by Niles do not support a finding that Hicks or the Dille Children served as "fronts," the Informal Objection does not raise a genuine control issue to be addressed by the Commission where, as here, the facts presented support a different conclusion.

H. Full Disclosure Made In Financial Section of Assignment Application. Niles correctly states that the Application did not disclose that Dille would supply funds for the Dille Children's participation.[86] As previously discussed herein, the Commission's Form 314 assignment application does not request or require information on individual investors' sources of funds, but rather only requests (in Section III, Assignee's Financial Qualifications) a "yes or no" certification from the applicant (in this case, Hicks Broadcasting LLC) whether "sufficient net liquid assets are on hand or are available from committed resources to consummate the transaction and operate the facilities for three months." Hicks Broadcasting LLC properly checked "yes" for this certification, based on the seller-financing arrangements for the purchase price, and where the operating costs could be met with the cash flow of the station and the members' financial resources.

Niles alleges that the letter of credit and checks written by the Dille Children (which were attached to the escrow agreement which was among the schedules and exhibits attached to the APA filed with the Application as Exhibit 1) were "designed to mislead the Commission," and specifically that the checks were designed to mislead the Commission that the Dille Children had funds at risk in Hicks Broadcasting LLC.[87] The letter of credit and the Dille Children's

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[86] *See* Informal Objection at 12.

[87] *See* Informal Objection at 12, 13 and 19-20.

checks were attached as a part of the escrow agreement, which in turn was simply submitted to the Commission as part of Exhibit 1 to the Application, since the escrow agreement was an exhibit to the APA. Form 314 requires the filing of the agreement between the assignor and the assignee (in this case, the APA), and the customary practice of whether to file none, some, or all exhibits or schedules to such agreements with Form 314 varies widely. Hicks Broadcasting LLC clearly did not intend, and it stretches the imagination to suggest that there was intent, to mislead the Commission by including the letter of credit and checks with the Application, simply by the manner in which they were submitted.

Furthermore, the Dille Children were at financial risk in the transaction, in several respects. The Dille Children made personal pledges to Booth American as part of the security for the promissory note and indemnified and protected Hicks to a certain extent against any obligation he may incur under a similar pledge to Booth American. Also, since Dille loaned funds to the Dille Children that they used to make member loans to Hicks Broadcasting LLC, if Hicks Broadcasting LLC became unable to repay those member loans, the Dille Children would have to make repayment to Dille using other resources, or seek forgiveness of those loans.

I. **No Pathfinder Loans To Hicks.** Niles alleges that "Pathfinder underwrote all of the operating losses of WRBR with interest free loans," and that such underwriting, together with providing funds to the Dille Children, constituted Dille's financing of the acquisition of the station, contrary to his affidavit in the Application Amendment.[88] Here again, Niles blows

[88] *See* Informal Objection at 12-13 and 23.

much smoke, but there is no fire. Most of what Niles alleges is conclusionary and based on facts that violate no rule or policy, and as already discussed, there is nothing wrong with Dille providing funds to his children by loan, gift, or otherwise.

Niles misstates, or at best mischaracterizes, that Dille provided the funds to pay the $660,000 promissory note held by Booth American, by: (i) directly providing the Dille Children with all the funds to pay their proportionate share of the indebtedness; and (ii) Pathfinder underwriting, on an interest-free basis, the operating losses of WRBR.[89] Niles correctly states that Pathfinder keeps a cash receipts book and prepares financial statements for Hicks Broadcasting LLC as part of its accounting services; that employees of and vendors for Hicks Broadcasting LLC are paid with checks written on a checking account that bears Pathfinder's name (and marked with a stamp as being for Hicks Broadcasting LLC); and that record keeping (*i.e.*, accounting) functions have been subcontracted to Pathfinder.[90]

Hicks Broadcasting LLC hired Pathfinder to do its accounting for WRBR, and Pathfinder performed that function using a bank account maintained for Pathfinder, with the cash balances and other financial data recorded on books separately for each entity (including Hicks Broadcasting LLC) using generally accepted accounting principles.[91] To the extent that payments made on behalf of Hicks Broadcasting LLC exceeded receipts from time to time, or

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[89] *See* Informal Objection at 16 and 20-21.

[90] *See* Informal Objection at 23 and 39.

[91] *See* Watson Deposition at 18, 30 and 34-35 (Hicks Broadcasting LLC contracted with Pathfinder to perform accounting services for $1000 per month, per a letter agreement), 36 (Hicks did not maintain separate bank account), and 46-52 (payments made by Pathfinder on behalf of Hicks in effect were "loans" to the extent such payments may have exceeded the cash balance available from and attributable to Hicks Broadcasting LLC at any point in time).

receipts exceeded payments, corresponding accounts payable and accounts receivable entries were made on the books of Hicks Broadcasting LLC and Pathfinder, respectively. This ebb and flow of cash surpluses or deficits can hardly be characterized as formal "loans" constituting "financing" of one party by the other. Accordingly, since this aspect of the accounting services performed for Hicks Broadcasting LLC cannot be characterized as "financing" the acquisition or operation of the station, there was never any intent to deceive the Commission that is required for a finding of misrepresentation or lack of candor regarding the statements in the Application Amendment.

J. **No Other Pathfinder Financing Of Hicks.** Niles alleges that the Application failed to disclose that the Dille Children guaranteed Hicks' performance under the letter of credit.[92] However, Niles correctly notes that the Dille Children did not indemnify Hicks against any loss or expense due to the letter of credit until March 31, 1994, upon the execution of the Side Letter.[93] Accordingly, since agreement on the indemnity or guaranty had not been reached when the Application was filed (or likely even by the time the Application was granted, since otherwise the provision could have been included in the Operating Agreement executed on or about March 23, 1994), there was nothing to disclose in the Application -- the guaranty did not yet exist and, once created, the agreement was filed with the Commission.

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[92] *See* Informal Objection at 17 and 26-27.

[93] *See* Informal Objection at 27-28.

Niles also suggests that since the letter of credit cost Hicks only $500, it was a "sham," and Hicks did not incur a financial risk as a result of the letter of credit.[94] Niles does not explain or cite relevant authority which supports a theory that it should cost more than $500 to obtain a $25,500 letter of credit, and therefore some sort of a "sham" occurred, or reconcile the fact that Hicks would be at risk with his bank if the letter of credit were properly submitted to the bank for payment (at least for that time up until March 31, 1994, when Hicks received the guaranty from the Dille Children, and even then he was at risk to the extent that he would have to collect on the guaranty). The letter of credit was returned to Hicks by Booth American unredeemed when the $105,000 payment required by the promissory note was made on the first anniversary of the closing.

Niles alleges, without citation or support, that the indemnification provision regarding the letter of credit and repayment of the Booth American promissory note is "totally inconsistent with [Hicks] role as a 51% member" of Hicks Broadcasting LLC, and that it was "designed to protect Hicks from his *pro rata* obligation as a 51% member."[95] Although shareholders of a licensee may have an obligation to make proportionate equity contributions, Niles cites no support for the proposition that one shareholder may not indemnify or guarantee another shareholder regarding obligations or security on a debt, or regarding the order of recourse on a debt.[96] Indeed, it was in the Dille Children's interest to extend themselves financially to help Hicks succeed, since they needed him to manage the business and enhance the value of their

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[94] *See* Informal Objection at 27.

[95] *See* Informal Objection at 31.

[96] *See Quincy D. Jones*, 11 FCC Rcd 2481, 2 CR 486 at ¶¶ 28-30 (1995).

investment. Furthermore, it was also in the Dille Children's interest to ensure that the $105,000 payment on the Booth American note was paid on the first anniversary of the closing, since with that payment the letter of credit was returned to Hicks and the Dille Children would no longer be liable to indemnify Hicks under the Side Letter for any liability he may incur due to the letter of credit.[97]

Niles correctly states that the Dille Children made member loans of $35,000 each to Hicks Broadcasting LLC so that Hicks Broadcasting LLC could make the $105,000 payment due to Booth American in March 1994 under the promissory note, and that Hicks himself made no contribution or loan for that purpose.[98] Niles cites no support for the proposition that members of a limited liability company must make member loans to the entity in proportion to their percentage interest.

The Operating Agreement clearly states that "any one or more of the Members may, but shall not be obligated to" advance funds as a member loan to Hicks Broadcasting LLC, and that any such loans shall not be treated as a capital contribution.[99] The Operating Agreement and Side Letter provide only for an initial capital contribution, in the total amount of $1,000.[100] Therefore, the use of member loans from some but not all of the members was a perfectly acceptable means of meeting the financial obligations of Hicks Broadcasting LLC. Furthermore, it has been demonstrated that the Dille Children had a legitimate interest in ensuring the

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[97] *See* Informal Objection, Exhibit A, Escrow Agreement at § 2(f) (letter of credit returned after $105,000 of purchase price paid under APA).

[98] *See* Informal Objection at 21 and 33.

[99] *See* Operating Agreement at § 4.2(b).

[100] *See* Operating Agreement at § 4.1; Side Letter at § 1.

$105,000 payment under the Booth American promissory note, to terminate their indemnity to Hicks with regards to the letter of credit.

Niles alleges, without citation or support, that Hicks Broadcasting LLC repaid member loans from the Dille Children using funds from Pathfinder.[101] The evidence in the record demonstrates, without contradiction, that most of the member loans made by the Dille Children were repaid to them at the end of 1995, upon the instruction of Hicks, after consultation with Pathfinder in its role of providing financial accounting services to Hicks Broadcasting LLC, using a cash surplus available to Hicks Broadcasting LLC from WRBR's earnings to do so.[102] Member loans were repaid to the Dille Children first, rather than to Hicks, because the member loans made by the Dille Children were significantly larger than the member loans payable to Hicks, if any.[103]

K. Stockholder Call Provision A Normal Investment Tool. Niles suggests that the call provision accorded the Dille Children by the Operating Agreement and Side Letter is "extraordinary" and incorrectly states that it is unilateral (i.e., that the Dille Children may buy out Hicks at any time, but that Hicks has no such reciprocal right).[104] Far from being extraordinary, however, such a provision is a common protection for minority shareholders in a closely held private business, since without such a provision a minority investor has little or

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101 *See* Informal Objection at 24.

102 *See* Watson Deposition at 57-59.

103 *See* Watson Deposition at 57-59.

104 *See* Informal Objection at 30.

no recourse in the event of a disagreement with a controlling majority shareholder. Hicks also has a reciprocal "put" right, per Section 2 of the Side Letter, to require the Dille Children to purchase his interest in Hicks Broadcasting LLC after the first three years, for the same purchase price and on the same terms as the Dille Children's call rights.

Furthermore, Niles makes no attempt to demonstrate that such a call provision would be contrary to any Commission rules or policy, even assuming for the sake of argument that the call provision were unilateral. On the contrary, the Commission has expressly acknowledged that provisions such as the call provision here are perfectly acceptable methods for minority shareholders to protect their investments.[105]

The suggestion by Niles that Hicks' contributions to the enterprise were "de minimis" or should not "merit a 51% controlling interest in an FM radio station,"[106] are subjective and irrelevant. The business arrangement was negotiated by competent parties, represented by independent legal counsel (with respect to the business aspects of the deal) and other advisors, and the parties continue to be satisfied with their venture. Therefore, a third party's subjective assessment of the relevant merits of the deal is irrelevant.

Moreover, considering that each of the members (i.e., Hicks and the Dille Children) have made capital contributions in proportion to their respective interests, and that the majority of any member loans were repaid relatively quickly, it is misleading to suggest that Hicks contributions to the enterprise have been out of proportion to the Dille Children's contributions -- in fact, after some initial operating losses during the first few months, the revenues of the station have largely

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105 *See Quincy D. Jones* at ¶¶ 28-29.

106 *See* Informal Objection at 32.

covered the operating expenses and the obligations to Booth American under the promissory note for the acquisition price. As a result, Hicks and the Dille Children have simply benefitted proportionally from a sound investment.

Niles alleges that the Application was only approved by the Commission because of misrepresentations and omissions.[107] Pathfinder has demonstrated that each of the specifically alleged misrepresentations or omissions were either unsupported by the record, relate to disclosure of alleged "agreements" or "understandings" which did not exist or were only being discussed as ideas during negotiations when the Application was filed, or regarded information for which the Form 314 assignment application does not request information and for which the Commission did not request supplemental information from the applicant, Hicks Broadcasting LLC. Therefore, none of the alleged misrepresentations or omissions could have had any bearing on the Commission's consideration and approval of the Application.

III. Legal Arguments

A. Standard of Review.

In reviewing the *de facto* control allegations raised in the Informal Objection, the Commission must consider whether "the [pleading] and its supporting affidavits contain specific allegations of fact sufficient to show that a grant of the application would be *prima facie*

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[107] *See* Informal Objection at 4. Specifically, Niles refers to its allegations that: (i) Hicks was a "strawman" for Dille and would transfer the station to Dille; (ii) the Dille Children had an undisclosed option to acquire Hicks interest in Hicks Broadcasting LLC; and (iii) the Dille Children made undisclosed financial guarantees and indemnifications to Hicks. *Id.*

inconsistent with the public interest."[108] The Commission must assume that all facts set forth in the pleading are true, but allegations that consist of "ultimate, conclusionary facts or more general affidavits ... are not sufficient."[109] If the pleading satisfies this threshold standard, the Commission must decide whether the petitioner presents a substantial and material question of fact and, if it does, the Commission must designate the matter for hearing.[110]

In this case, the Commission must conclude that there is no support in the few facts set forth by Niles which support a finding that any of the violations alleged against Pathfinder or Dille are true, even assuming that all of the few facts alleged by Niles are true, and therefore there is no basis for designating this matter for hearing or denying the above-captioned applications. As set forth above, each and every specific allegation made by Niles requires some unjustified conclusion to be drawn from the many facts in the record submitted by Niles.

Specifically: (i) the allegations of misrepresentation or lack of candor related to the Application would require a conclusion to be drawn that the call provision existed before it was agreed to by the parties, and that information was presented in the Application or the ownership report in a manner intended to deceive the Commission (which has been demonstrated was not the case); (ii) the allegations regarding Pathfinder's or Dille's control over Hicks, the Dille Children and WRBR would require ignoring all of the legal documentation of those parties' rights and interests in Hicks Broadcasting LLC, to reach the conclusion that Pathfinder or Dille had some undisclosed means of controlling those parties; and (iii) the allegation that Pathfinder

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108 *See KERN Broadcasting* at ¶ 8 (citing *Gencom, Inc. v. FCC*, 832 F.2d 171, n.11 (D.C. Cir. 1987)).

109 *See KERN Broadcasting* at ¶ 8.

110 *See KERN Broadcasting* at ¶ 8.

or Dille financed the acquisition and operation of WRBR would require ignoring the structure of the seller financing of the acquisition of the station.

B. Determination of *De Facto* Control.

The test for determining whether a party exercises *de facto* control over a licensee is whether that party has an ownership interest, or is or will be in a position to actually or potentially control the operation of the station.[111] The Commission is "governed chiefly by the demonstration of [a party's] power to dominate the management of corporate affairs."[112]

Neither Pathfinder nor Dille hold any ownership interest in Hicks Broadcasting LLC, and therefore control clearly does not arise through ownership. The only theoretically possible means specifically alleged by Niles for such control, then, is through: (i) the family relationship between Dille and the Dille Children; and (ii) the employment relationship between Hicks and Pathfinder.

Parties alleging a real party-in-interest or *de facto* control issue based on a family relationship "bear a heavy burden since the Commission recognizes that even independent family relationships may have attributes such as financial ties which in a non-family relationship would be persuasive indicia of real party status."[113] By relying largely on assumptions and

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[111] *See, e.g., KERN Broadcasting* at n.10; *KOWL, Inc.*, 49 FCC 2d 962, 31 RR 2d 1589 at ¶ 4 (Rev. Bd. 1974); *see also, WLOX Broadcasting Corp. v. FCC, supra.*

[112] *See, e.g., Arnold L. Chase*, 5 FCC Rcd 1642, 67 RR 2d 815 at n.5 (1990)(citing *Benjamin L. Dubb*, 16 FCC 274, 289 (1951)).

[113] *See North Idaho Broadcasting* at ¶ 9; *Cannon's Point Broadcasting* at ¶ 22; *see also, High Sierra Broadcasting* at ¶24.

conclusions, which Pathfinder has demonstrated herein to be contradicted by the facts in the record, Niles has not met this heavy burden of showing that Pathfinder or Dille exercises control over the Dille Children. Even assuming, for the sake of argument, that Dille does control the Dille Children, such control would not translate into control of Hicks Broadcasting LLC or WRBR, since the Dille Children hold only a non-controlling minority interest in Hicks Broadcasting LLC, absent exercise of the call provision. Furthermore, even assuming Dille controlled the Dille Children and their 49% investment in Hicks Broadcasting LLC, attributing control to Dille because of the call provision would require speculation that Dille would in fact exercise such call rights, an event (if it were to occur) which would require Commission approval and an opportunity for Commission scrutiny. The Commission has also ruled that a father loaning funds to a child to use for a non-controlling minority investment in a licensee, as in the present case, is not sufficient to demonstrate control, regardless of whether the child ever repays the father.[114]

The Commission has found in other circumstances that employment relationships do not provide an employer control over an employee, particularly where the employer and employee specifically state that control does not exist.[115]

IV. Conclusion

As indicated in the Summary, Niles has attempted to build a set of perfectly innocent facts into a crescendo of fire and to drop Pathfinder and Hicks into a vortex under *Roy M.*

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[114] *See Magdalene Gunden Partnership* at ¶ 14.

[115] *See Ray E. Kent*, 50 RR 2d 67 (Broadcast Bureau 1981).

Speer. But unlike in *Speer*, the licensee of WRBR is not complaining about any loss of control; Pathfinder has supplied no programming to WRBR; and Pathfinder did not participate in the construction or development of the WRBR business enterprise, which existed long before Pathfinder came on the scene. Instead, this case involves a series of legitimate transactions relating to a JSA and financing, well within established precedent, and is more appropriately considered under *Kern Broadcasting Corporation* and the other cases cited herein. Moreover, all the transactions that Niles claims were concealed with the Commission that require reporting were all reported when they occurred, so no charge of lack of candor or misrepresentation can be sustained.

Wherefore, the above premises being considered, Pathfinder respectfully requests that the Commission dismiss or deny the Informal Objection and grant the above-captioned applications.

Respectfully submitted,
PATHFINDER COMMUNICATIONS CORPORATION

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November 15, 1996