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

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

CONSOLIDATED REPLY  
OF SHURBERG BROADCASTING OF HARTFORD  
TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Harry F. Cole

Bechtel & Cole, Chartered  
1901 L Street, N.W.  
Suite 250  
Washington, D.C. 20036  
(202) 833-4190

Counsel for Alan Shurberg d/b/a  
Shurberg Broadcasting of Hartford

January 8, 1999

No. of Copies rec'd 076  
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SUMMARY

The doctrine of judicial estoppel precludes Martin W. Hoffman from taking factual positions here which are inconsistent with position he has taken before the Courts and which the Courts have not addressed. The judicial estoppel doctrine is intended to prevent parties from playing fast and loose in the adjudicatory process, shifting positions solely to gain some private advantage (or avoid some adverse consequence). That is precisely what Hoffman is seeking to do here. That effort falls within the doctrine of judicial estoppel, and he should be prevented from doing so.

With respect to the misrepresentation issue, both the Bureau and the joint parties fail to address the totality of the record or the clearly relevant governing authority. Instead, they tend to focus on the self-serving latterday testimony of Messrs. Richard Ramirez and Thomas Hart, while ignoring the plain meaning of the substantial documentary record compiled herein.

As SBH has previously demonstrated in its Proposed Findings, the record evidence, when assayed in its totality, clearly establishes that "complete control" -- as the Commission defines that term in connection with limited partnerships -- of Astroline Communications Company Limited Partnership ("ACCLP") was not held by Ramirez, nor did Ramirez own more than 20% of ACCLP. Each of those conditions was essential to ACCLP's claim that it was a qualified minority limited partnership within the meaning of the

Commission's rules and policies. Since ACCLP did not meet either of those conditions, and since ACCLP principals and its counsel knew that it did not meet those conditions, ACCLP's persistent claims to the Commission that ACCLP did satisfy the Commission's standards were misrepresentative (or at the very least lacking in candor).

While Hoffman, Ramirez and TIBS claim that collateral estoppel or "full faith and credit" considerations preclude SBH from seeking denial of the captioned application, that is clearly wrong. The narrow issue which was litigated in the bankruptcy litigation (and which Hoffman/TIBS/Ramirez claim has a preclusive effect here) was completely separate and distinct from the issue here. The standards for assigning general partner liability to limited partners under the Massachusetts Limited Partnership Act are substantially different from the Commission's own clear standards relative to limited partnerships. Moreover, SBH was not a party to the particular litigation which Hoffman/TIBS/Ramirez claim to be preclusive here.

Contrary to the claims of Hoffman/TIBS/Ramirez, the issues in this proceeding have not been improperly "expanded" at all. The evidence introduced at the hearing was all directly relevant to the designated issues.

Finally, the instant proceeding does not entail reconsideration of the grant of Hoffman's 1991 pro forma assignment application.

1. Alan Shurberg d/b/a Shurberg Broadcasting of Hartford ("SBH") hereby submits his Reply to the Proposed Findings of Fact and Conclusions of Law ("Proposed Findings") submitted in the above-captioned proceeding by (a) Martin W. Hoffman ("Hoffman"), Two If By Sea Broadcasting Corporation ("TIBS") and Richard P. Ramirez ("Ramirez") (collectively, "Hoffman/TIBS/Ramirez") and (b) the Mass Media Bureau ("Bureau").

I. The Doctrine of Judicial Estoppel Precludes Hoffman From Taking Factual Positions Which Are Inconsistent With Positions He Has Taken Before The Courts And Which The Courts Have Not Addressed.

2. As a preliminary matter, SBH submits that any and all Proposed Findings submitted by Hoffman/TIBS/Ramirez which are inconsistent with factual assertions advanced by Hoffman in the bankruptcy litigation and which have not been rejected by any court must be disregarded here under the doctrine of judicial estoppel. That doctrine is an equitable doctrine designed to prevent litigants from playing fast and loose with the courts. E.g., Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 361 (3d Cir. 1996); Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 2122 (1st Cir. 1987). In essence, it precludes a party from taking one position before one forum and then intentionally taking an inconsistent or incompatible position before a second forum. Id.; Guinness PLC v. Ward, 955 F.2d 875, 899 (4th Cir. 1992). <sup>1/</sup>

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<sup>1/</sup> Some courts have held that the judicial estoppel doctrine requires that, to be subject to the estoppel, the party to be estopped must also have gained some advantage from the position taken in the initial forum. E.g., Astor Chauffered Limousine  
(continued...)

3. As the Presiding Judge is aware, Hoffman has been involved in litigation relative to certain matters concerning Station WHCT(TV) in the Bankruptcy Court in Hartford. In that litigation Hoffman has presented not only to the Bankruptcy Court, but also to the Second Circuit, a number of factual representations concerning Astroline Communications Company Limited Partnership ("ACCLP") and Ramirez's relationship thereto. For example, Hoffman argued to the Bankruptcy Court that "Ramirez's interest [in ACCLP], which had been reflected as 21% on the 1984 ACCLP tax return, was shown to have been reduced to below 1% on the 1985, 1986 and 1987 tax returns." SBH Exh. 30, pp. 12-13.

4. The Bankruptcy Court did not address that particular factual assertion in its opinion, Hoffman/TIBS/Ramirez Exh. 3, 1088 B.R. 98, presumably because the quantum of Ramirez's ownership in ACCLP was not relevant to the disposition of the narrow question which the Court was called upon to resolve.<sup>2/</sup> Despite that, Hoffman presented precisely the same factual

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<sup>1/</sup>(...continued)

Company v. Rennfeldt Investment Corporation, 910 F.2d 1540 (7th Cir. 1990). However, other courts have observed that that additional condition is not an absolute requirement. E.g., Allen v. Zurich Ins. Co., 667 F.2d 1162, 1167 (4th Cir. 1982) ("Though perhaps not necessarily confined to situations where the party asserting the earlier contrary position there prevailed, it is obviously more appropriate in that situation").

<sup>2/</sup> As discussed in more detail below at 31-36, the narrow question which was before the Bankruptcy Court was whether certain limited partners of ACCLP had "participat[ed] in the control of ACCLP" in a manner "substantially the same as the exercise of the powers of a general partner" and were, therefore, subject to general partnership liability under Massachusetts partnership law. Hoffman/TIBS/Ramirez Exh. 3, 188 B.R. at 103.

assertion to the U.S. Court of Appeals for the Second Circuit: "Notwithstanding the FCC minority preference guidelines, the amendment [of the ACCLP partnership agreement as of December 31 1985] resulted in Ramirez no longer owning 21% of the equity in ACCLP". SBH Exh. 31, p. 11. Like the Bankruptcy Court, the Second Circuit found no need to address that particular allegation in any way. Hoffman/TIBS/Ramirez Exh. 3, pp. 16-24.

5. Having staked out his position vis-à-vis Ramirez's ownership interest before not one, but two separate courts, Hoffman now asserts a position which is completely inconsistent with that earlier position. Now Hoffman suddenly argues that Ramirez really did own 21% of ACCLP at all times, and that his ownership interest never sank below that level. See Hoffman/TIBS/Ramirez Proposed Findings at, e.g., 66-67. That claim cannot, under any imaginable set of circumstances, be squared with Hoffman's earlier claims. The sole conceivable explanation is that Hoffman finds himself in a different forum in which the facts as he argued them earlier now happen to work against his interests. Rather than accept the understandable and reasonable consequences of those facts, Hoffman has simply reversed himself. <sup>3/</sup>

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<sup>3/</sup> SBH notes that, in the Hoffman/TIBS/Ramirez Proposed Findings, there are multiple references to Hoffman's "fiduciary duties", as if he undertook the bankruptcy litigation against his own will but out of some sense of obligation, the implication being that therefore Hoffman should not be held responsible for the arguments he advanced in that litigation. See Hoffman/TIBS/Ramirez Proposed Findings at, e.g., 10. The fact is, however, that Hoffman is an officer of the court (both as an attorney and a court-approved trustee), and he therefore had (and  
(continued...)

6. That is precisely the fast and loose, chameleonic approach to factual allegations which the doctrine of judicial estoppel is intended to prevent. A party cannot be permitted to advocate a particular factual position repeatedly when it believes that position is to its advantage, and then suddenly advocate precisely the opposite position just to derive some alternate advantage (or avoid some adverse consequence) in a different forum. The integrity and dignity of the adjudicatory process are completely undermined when a litigant acts as if truth and fact are matters of infinite flexibility to be bent and twisted as necessary to accommodate the litigant's private interests.

7. Hoffman clearly had ample opportunity, in the course of the bankruptcy litigation, to review the available evidence and to determine what that evidence established relative to Ramirez and ACCLP. Having done so, Hoffman then presented his determinations to the Bankruptcy Court and to the Second Circuit. While those fora may have disagreed with the ultimate legal conclusions Hoffman would have drawn from the evidence, they did not quarrel with certain core factual assertions made by Hoffman,

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<sup>3/</sup>(...continued)  
continues to have) an ethical obligation to advance bona fide positions to the fora before which he appears. See also Fed. R. Civ. P. 11. It therefore does no good for Hoffman to suggest that he pursued the bankruptcy litigation only because something other than his own judgment made him do so, whether that something was a fiduciary duty, or SBH, or some other creditor, or the man in the moon. Hoffman chose to stake out his positions clearly, forcefully and repeatedly in the bankruptcy litigation, and he cannot now be permitted to abandon those positions because they don't happen to work to his advantage here.

and there is no apparent basis for Hoffman's sudden about-face -- other than the obvious explanation that Hoffman's previous factual assertions are fatal to his position before the Commission. Again, those assertions included particularly the statement that "[n]otwithstanding the FCC minority preference guidelines, the amendment [of the ACCLP partnership agreement as of December 31 1985] resulted in Ramirez no longer owning 21% of the equity in ACCLP". SBH Exh. 31, p. 11. That being the case, Hoffman is precluded from arguing otherwise here. Accordingly, those portions of the Hoffman/TIBS/Ramirez Proposed Findings which are factually inconsistent with the positions taken by Hoffman in the bankruptcy litigation, and which were not otherwise contradicted by the courts in the bankruptcy litigation, must be disregarded. <sup>4/</sup>

8. One of the arguments most obviously subject to this judicial estoppel is the argument that Ramirez always owned 21% of ACCLP. As Hoffman correctly (and repeatedly) argued in the bankruptcy litigation, Ramirez in fact owned significantly less than one percent of ACCLP as of 1985. See SBH Proposed Findings at, e.g., 94-102. But if that was the case, then it is clear

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<sup>4/</sup> Rejection of those portions of the Hoffman/TIBS/Ramirez Proposed Findings is appropriate even though such rejection means that TIBS and Ramirez will also be forced to forego those arguments. TIBS and Ramirez clearly had ample opportunity to familiarize themselves with the record of the bankruptcy litigation, including Hoffman's positions therein, and to decide whether to join with Hoffman or to file separate Proposed Findings. Having voluntarily elected to join Hoffman, TIBS and Ramirez must accept the consequences of that election, i.e., preclusion of the factual claims which are inconsistent with those advanced by Hoffman in the bankruptcy litigation.

that ACCLP engaged in misrepresentation (or at least lack of candor), because if Ramirez owned less than one percent of ACCLP, then ACCLP could not claim to be a bona fide minority-owned limited partnership within the meaning of the Commission's rules and policies, and ACCLP's contrary representations to the Commission and the Court would be misrepresentations. Thus, Hoffman -- who bears the ultimate burden of proof in this case -- can never hope to meet that burden, because he has already conceded a core element of the case.

II. The Record Establishes That ACCLP Engaged In Misrepresentation Or Lack Of Candor.

9. Putting aside the question of judicial estoppel, the proposed findings and conclusions of the Bureau and Hoffman/TIBS/Ramirez are flawed in many of the same respects. Both sets of proposed findings and conclusions fail to acknowledge the inescapable impact of clear and express Commission policies and precedents. Both sets generally ignore the historical documents which, on their face, flatly contradict the glib, self-serving and inherently incredible testimony of individuals who professed an ability to recall a wide variety of detailed information, but who were strangely unable to recall or explain the circumstances surrounding documents which plainly put the lie to their testimony. And both sets fail to address the facts in their historical context -- because to do so completely undermines the fanciful notion, advanced by both the Bureau and Hoffman/TIBS/Ramirez, that ACCLP had no real reason to misrepresent its structure to the Commission and the Courts.

A. The Record Establishes That "Complete Control" Of ACCLP Was Not Held By Ramirez As Required By Commission Policy And Precedent.

10. Both the Bureau and Hoffman/TIBS/Ramirez spend considerable energy claiming that the evidence establishes that Ramirez did have some requisite level of control of ACCLP, apparently in a failing effort to establish that ACCLP was a bona fide limited partnership. See Bureau Proposed Findings at, e.g., 29-31; Hoffman/TIBS/Ramirez Proposed Findings at, e.g., 28-39. Factually, however, the Bureau and Hoffman/TIBS/Ramirez offer only a partial, self-serving glimpse of the evidence. And legally, the standards which both those parties cite are irrelevant here.

11. With respect to the factual claims advanced by the other parties, both parties argue at length that Ramirez performed numerous managerial functions at Station WHCT(TV). But both parties ignore what the evidence actually shows. For example, both the Bureau and Hoffman/TIBS/Ramirez claim that Ramirez was solely in charge of all programming decisions. See, e.g., Bureau Proposed Findings at 14-15; Hoffman/TIBS/Ramirez Proposed Findings at 34-35. But the evidence actually shows that Ramirez repeatedly consulted with Fred Boling ("Boling") and Herbert Sostek ("Sostek"), non-minority principals of ACCLP limited partner Astroline Company, relative to programming matters. See, e.g., SBH Exh. 116 (Ramirez consults with Boling/Sostek concerning making a bid for Red Sox broadcast rights); SBH Exh. 126 (Ramirez consults with Boling/Sostek

concerning contacts with Hartford Whalers representatives); SBH Exh. 130 (Ramirez "strongly recommends" that the station "go after summer baseball"); SBH Exh. 133 (Ramirez urges bid for "Who's The Boss").

12. The Bureau and Hoffman/TIBS/Ramirez engage in oxymoronic semantics on this point. The Bureau, for example, acknowledges that Ramirez "advised" Boling and Sostek "about programming decisions and asked about their willingness to fund certain programs", but "never consulted with them about his programming choices". Bureau Proposed Findings at 14-15, 30. Hoffman/TIBS/Ramirez make essentially the same claim. Hoffman/TIBS/Ramirez Proposed Findings at 34-35. But that claim makes no sense. What, after all, does "consulting" mean if it does not include "advis[ing] about programming" and "asking about their willingness to fund certain programs"?

13. More fundamentally, though, the evidence clearly establishes that Boling and Sostek were integrally involved in programming decisions because, in order to arrange for any programming for the station, Ramirez was (in his own words) "totally dependent on these gentlemen [i.e., Boling and Sostek] for funding". Tr. 295. <sup>5/</sup> Ramirez himself acknowledged that he

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<sup>5/</sup> The difficulty that the Bureau and Hoffman/TIBS/Ramirez have on this point is that ACCLP was not operated like a conventional limited partnership. The normal expectation in a limited partnership is that the limited partners will make their investment into the partnership, thus providing the partnership with cash with which to operate; the general partner will then have access to that cash to carry out her/his operating plan, whatever it might be, without regard to the on-going day-to-day wishes of the investing limited partners.

(continued...)

had involved Boling and/or Sostek in "the MCA package", "the Warner Brothers deal", "Who's the Boss", and "Cosby". Tr. 298.

14. Similarly, while the other parties claim that Ramirez was solely involved in renegotiating programming agreements (Bureau Proposed Findings at 14-1, Hoffman/TIBS/Ramirez Proposed Findings at 36), the documentary evidence indicates that that also was not true. See SBH Proposed Findings at 61-65.

15. As another example, both the Bureau and Hoffman/TIBS/Ramirez claim that Ramirez was in charge of all hiring at the station, and that that demonstrates that he was in control. Bureau Proposed Findings at 15-16; Hoffman/TIBS/Ramirez Proposed Findings at 33-34. But even Hoffman/TIBS/Ramirez acknowledge that, in fact, Ramirez hired only department heads; those department heads then hired their own employees. Hoffman/TIBS/Ramirez Exh. 2, p. 17; Hoffman/TIBS/Ramirez Proposed Findings at 33-34. So unless Hoffman/TIBS/Ramirez are willing to concede that the various department heads shared control of

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<sup>5/</sup>(...continued)

ACCLP, however, worked differently. It appears from Ramirez's testimony that, irrespective of any funding commitments which Boling, Sostek or Astroline Company may have made to ACCLP, limited partnership funding for ACCLP occurred on a "cash and carry" basis, Tr. 415. Ramirez had to go back to Boling and Sostek each time he wanted cash to do anything, and he had to explain to them what he wanted to do, and he had to get their approval in order to get the cash. E.g., id.; Tr. 295. While Ramirez claims that he could have done whatever he wanted regardless of how Boling and Sostek felt about it, the fact is that he was "totally dependent" on them for funding. Tr. 295. And the only instance of any supposedly independent action by Ramirez in this regard involved the bid for The Cosby Show -- where the wishes of Boling and Sostek prevented Ramirez from making a successful bid for the show. See SBH Proposed Findings at 59.

ACCLP, hiring authority cannot be deemed to have been an indication of control.

16. The record amply demonstrates that, in a wide variety of contexts, Ramirez may have made suggestions (SBH Exhs. 119 and 120), or recommendations (e.g., SBH Exh. 30) <sup>6/</sup>, or offered advice (e.g., Tr. 293), but the bottomline was always that, if Ramirez wanted to do anything, he had to get the cash from Boling and Sostek, and they insisted on "see[ing] where the investments were going" (Tr. 415) before making the cash available in response to each separate funding request.

17. This, of course, raises the matter of ACCLP's cash control system, pursuant to which the partnership's checkbook was maintained in the Astroline Company offices in Boston rather than in Hartford. While Hoffman and his joint parties expound at length on how autonomous Ramirez was in his supposed control of ACCLP's finances (Hoffman/TIBS/Ramirez Proposed Findings at 36-39), Hoffman told a different story to the Second Circuit:

Ramirez testified [in the bankruptcy proceeding] that ACCLP could not obtain a check from Astroline Company's office in Massachusetts without submitting the proper documentation; as Ramirez put it, ACCLP 'had to dot all the I's and cross the T's' in order to get a check. . . . Astroline Company

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<sup>6/</sup> In their Proposed Findings (at page 29), even Hoffman/TIBS/Ramirez indicate that Ramirez "recommended" the hiring of a Hartford law firm. If Ramirez had really held complete control of ACCLP, he would not have needed to "recommend"; rather, he would presumably have been in a position simply to hire that firm without further ado. And with further regard to ACCLP's counsel, the record demonstrates that Boling, at least, apparently believed that he (Boling) had the authority to order Hart and B&H not to communicate with Ramirez without Boling's approval. SBH Exhs. 134 and 135. See also SBH Exhs. 119 and 120 (Ramirez acknowledges getting "go ahead" from Sostek for certain aspects of building renovation).

demanded that this procedure be followed, notwithstanding the fact that ACCLP had a fully functional office in Hartford, at least from the beginning of 1985, and, thereafter, had a sophisticated computer system specifically designed to accomplish automatically the functions performed by Astroline Company. . . .

SBH Exh. 31, p. 13. Hoffman also asserted that

Significantly (and remarkably), Boling rejected Ramirez's repeated requests that [ACCLP] be allowed to maintain its checkbook in its own office in Hartford.

SBH Exh. 31, pp. 12-13 (emphasis in original). If Ramirez had really been in control, he could, should and would simply have taken the checkbook to Hartford. He did not do so.

18. Ramirez himself confirmed that Boling's "approval" was needed to "release the funding" even though Ramirez had supposedly already determined that various expenses should be paid. Tr. 283. And, as noted above, Ramirez recognized that he was "totally dependent" on Boling and Sostek for funding and, therefore, had to run virtually every station expense past them for review. Tr. 415. So while Hoffman/TIBS/Ramirez may claim that Ramirez incurred "every liability of the station", Hoffman/TIBS/Ramirez Proposed Findings at 65, the record demonstrates that Ramirez's ability to do so was at all times subject to the ultimate approval of Boling and/or Sostek. <sup>2/</sup>

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<sup>2/</sup> In any event, the claim that "every liability of the station" was incurred "at Ramirez's decision" is not true. As the Bankruptcy Court found, at least two ACCLP checks were written and executed by Boling or another Astroline Company principal without any apparent involvement by Ramirez at all. See Hoffman/TIBS/Ramirez Exh. 3, 188 B.R. at 102, 106. Similarly, while Hoffman/TIBS/Ramirez seem to claim that Ramirez was in control of all of ACCLP's spending, it is clear from the record that Boling himself could and did reprioritize the expenses which Ramirez himself had deemed critical. See, e.g., SBH Proposed Findings at 55-56.

19. In effect, then, Ramirez functioned as a conventional general manager, with the authority to handle a range of routine day-to-day responsibilities, but always ultimately subject to the control of the station's actual controlling owners, in this case Boling and Sostek. <sup>8/</sup>

20. The focus of the Proposed Findings of the Bureau and Hoffman/TIBS/Ramirez with respect to Ramirez's supposed "control" of ACCLP is misdirected because both the Bureau and Hoffman/TIBS/Ramirez fail to address the relevant and applicable Commission policies and precedent. The relevant question is whether ACCLP was a bona fide minority-owned and controlled limited partnership within the meaning of the Commission's rules and policies. The governing Commission standards, then, are those which relate to limited partnerships.

21. SBH reviewed the relevant policies and precedents in some detail in its proposed findings. See SBH Proposed Findings at, e.g., 11-16. As far as the Bureau's findings indicate, the Bureau is not even aware that these authorities exist, much less that they are directly applicable here. For their part, Hoffman/TIBS/Ramirez at least acknowledge that the Commission has

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<sup>8/</sup> Ramirez's actual lack of control is further conclusively demonstrated by the fact that Ramirez had no involvement in or apparent familiarity with a telex sent by Boling on December 31, 1985 effectively modifying the terms of the ACCLP partnership agreement. SBH Exhs. 44 adn 45; Tr. 316-318. Normally, if Ramirez really was the sole controlling principal in ACCLP, Ramirez would have been the one to initiate changes in the partnership agreement -- or at least he would have been involved in that process. And yet, Ramirez was clearly out of the loop with respect to Boling's telex. This point is not addressed by either Hoffman/TIBS/Ramirez or the Bureau.

adopted policies specifically defining "limited partnerships" for the Commission's regulatory purposes; Hoffman/TIBS/Ramirez, however, attempt unsuccessfully to side-step those policies.

22. To recap briefly, the Commission has always held that, to qualify as a "limited partnership" for the Commission's purposes, an entity's supposed "general partner" must have "complete control" of the entity. In 1984, the Commission indicated that it would be satisfied on this score if the purported limited partnership complied with the Uniform Limited Partnership Act ("ULPA"). Corporate Ownership Reporting and Disclosure by Broadcast Licensees ("Ownership Attribution"), 97 FCC2d 997, 55 RR2d 1465 (1984). But in June, 1985, the Commission expressly and emphatically reversed itself on precisely that point because the ULPA (and the Revised Uniform Limited Partnership Act ("RULPA")) allowed the possibility of influence or control by the limited partner over the partnership's activities, a possibility which was unacceptable to the Commission. Corporate Ownership Reporting and Disclosure by Broadcast Licensees, ("Ownership Attribution Reconsideration"), 58 RR2d 604 (1985).

23. In the place of the ULPA/RULPA compliance standard, the Commission announced in its 1985 Ownership Attribution Reconsideration decision a set of criteria which would be applicable to purported limited partnerships in the context of the Commission's regulatory activities. To satisfy those criteria, a limited partnership agreement would have to expressly provide that limited partners could have no material involvement

in the management or operation of the station. Such agreements would have to state expressly that the limited partner "is prohibited from becoming actively involved in the management or operation of the media businesses of the partnership", and would restrict limited partners from communicating with the general partner "on matters pertaining to the day-to-day operations of its business". 58 RR2d at 619, 620.

24. The Bureau did not bother to mention this governing precedent, much less attempt to explain how ACCLP could conceivably be thought to satisfy the Commission's criteria.

25. Hoffman/TIBS/Ramirez at least acknowledged that the Commission announced its 1985 criteria. Hoffman/TIBS/Ramirez Proposed Findings at 69-70. They argue, however, that those criteria were not to be applied "retroactively". Id. at 69. No authority for that argument is offered, however, presumably because Commission precedent in fact establishes that the Ownership Attribution Reconsideration criteria were applied to applicants whose pending applications had been prepared and filed long before the adoption of the new criteria. E.g., Family Media, Inc., 102 FCC2d 752, 59 RR2d 165 (Rev. Bd. 1985); Religious Broadcasting Network, 3 FCC Rcd 4085 (Rev. Bd. 1988).

26. Hoffman/TIBS/Ramirez suggest that, since the initial ACCLP assignment application was granted in 1984 -- before the adoption of Ownership Attribution Reconsideration -- the criteria announced there should not or could not be applied to ACCLP. Hoffman/TIBS/Ramirez Proposed Findings at, e.g., 68. There are multiple problems with this suggestion. First, while the ACCLP

assignment application may have been initially granted in 1984, that grant was immediately appealed by SBH, and the grant did not become final until late 1990. As a result, notwithstanding the 1984 action, the application was pending at all times between June, 1984 (when it was filed) and September, 1990 (when the grant became final). See Section 1.65 of the Commission's Rules. It is clear from, e.g., Family Media, Inc., supra, that the Commission intended its limited partnership criteria to be applied to pending applications, irrespective of when those applications might have been filed. Accordingly, those criteria were applicable to ACCLP.

27. Further, even if the Ownership Attribution Reconsideration criteria were deemed, arguendo, not applicable to partnership agreements entered into before June, 1985, ACCLP still is no better off: in 1986, almost a year after the release of Ownership Attribution Reconsideration, the ACCLP partners entered into a revised partnership agreement (the December 31, 1985 Amended Partnership Agreement). Unquestionably, a "limited partnership" agreement entered into by a Commission regulatee after the announcement of the criteria in Ownership Attribution Reconsideration was subject to those criteria.

28. Generally ignoring this plainly relevant and governing authority, the Bureau and Hoffman/TIBS/Ramirez attempt to establish that Ramirez may have exercised enough control to satisfy standards developed in cases involving, e.g., unauthorized transfers of control (see, e.g., Southwest Texas Public Broadcasting Council, 85 FCC2d 713 (1981), cited by

Hoffman/TIBS/Ramirez at page 63 of their Proposed Findings). Those efforts are obviously misdirected. The question here is not whether there was some unlawful transfer of control. Rather, the question is whether ACCLP was a "limited partnership" within the meaning of that term as the Commission has defined it for the Commission's own regulatory purposes.

29. As discussed in SBH's Proposed Findings, it is clear that ACCLP did not satisfy, either de facto or de jure, the Commission's criteria for limited partnerships. Neither the original ACCLP partnership agreement nor the December 31, 1985 Amended Partnership Agreement assured Ramirez of the "complete control" required by the Commission. Moreover, both those agreements affirmatively contemplated that limited partners might, in fact, control the partnership's activities. SBH Exh. 2, p. 10 (§4.5); SBH Exh. 9, p. 14 (§4.5). And there were no restrictions on communications between general and limited partners; indeed, as a practical matter, Ramirez communicated with Boling and Sostek routinely (as often as weekly, if not daily) about virtually every aspect of the station's operations. <sup>2/</sup>

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<sup>2/</sup> Not to mention the fact that Ramirez did not even possess, much less control, the ACCLP checkbook, which was maintained in the offices of ACCLP's limited partner, whose principals all had check-signing authority. See Gloria Bell Byrd, 7 FCC Rcd 7976 (Rev. Bd. 1992), where the fact that a limited partner had the authority to sign checks was deemed to undermine the bona fides of a claimed limited partnership. Similarly, Ramirez had to obtain the approval of the limited partners to sell his own interest in ACCLP, borrow money against that interest, or sell or borrow money against the station. See SBH Exh. 9, pp. 12, 18. See also Atlantic City Community Broadcasting, Inc., 8 FCC Rcd (continued...)

30. The bottomline is that, contrary to the claims of the Bureau and Hoffman/TIBS/Ramirez, under well-established Commission policy and precedent, ACCLP was not a legitimate limited partnership in which the general partner wielded "complete control" as the Commission defined that term.

B. The Record Establishes That Ramirez Did Not Own More Than 20% Of ACCLP As Required By Commission Policy And Precedent.

31. The Bureau and Hoffman/TIBS/Ramirez also claim that Ramirez at all times held a 21% ownership in ACCLP. However, neither cites the Commission decisions in which the Commission itself specifically and expressly addressed the manner in which "ownership" in a "limited partnership" was to be calculated for the Commission's regulatory purposes. See SBH Proposed Findings at 14-15, discussing Citizenship Requirements of Section 310, 58 RR2d 531 (1985), on reconsideration, 1 FCC Rcd 12, 61 RR2d 298, 306-07 (1986). In those decisions, the Commission made clear that such "ownership" would be calculated based on the "equity contributions" of the partners; the Commission expressly and emphatically rejected reliance on such notions as "sweat equity" and "partnership shares" which have no component in reality and which can be changed arbitrarily by the partners.

32. Ramirez himself acknowledged that he put no money into ACCLP beyond his initial \$210 capital contribution. In contrast, the limited partners made more than \$22,000,000 in capital

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<sup>2/</sup>(...continued)  
4520 (1993), where such limitations were deemed to undermine claims of control.

contributions -- meaning that Ramirez's equity contribution amounted to less than one one-thousandth of one percent of ACCLP's total capital. That is, obviously, less than the "more than 20%" standard imposed by the Commission.

33. To support their 1998 position <sup>10/</sup>, Hoffman/TIBS/Ramirez rely simply on Ramirez's testimony, backed up to some degree by the testimony of Kent Davenport ("Davenport"). But Ramirez's testimony consisted of little more than self-serving assertions, and re-assertions, that he really did think that he owned 21% of ACCLP, based apparently on the fact that ACCLP kept listing his "partnership interest" as 21% in various documents. See, e.g., Hoffman/TIBS/Ramirez Proposed Findings at, e.g., 46-47. <sup>11/</sup> But as noted above, the

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<sup>10/</sup> As discussed above, Hoffman has already argued, in the bankruptcy litigation, that Ramirez actually owned less than 1% of ACCLP. See supra at 1-6. In view of that prior position which is inconsistent with the position now being advanced by Hoffman, Hoffman's current claims must be rejected. But even if they were, arguendo, to be given any credence, as discussed in the text above, there is no basis on which Ramirez could be thought to have owned 21% of ACCLP.

<sup>11/</sup> Ramirez's reliance on the unsupported statements, which appeared in an addendum to the ACCLP partnership agreements and in various financial statements cited by Hoffman/TIBS/Ramirez, to the effect that Ramirez "owned" 21% of ACCLP is inappropriate. Those statements are no more valid than if the addendum and financial statements had included a statement that the sky is green -- while Ramirez could still point to such statements and claim that they meant that the sky is green, the fact of the matter is that the sky is blue and no amount of self-serving contrary assertions by ACCLP can change that. So too with Ramirez's ownership interest: given the specific terms of the December 31, 1985 Amended Partnership Agreement concerning distributions of proceeds, and given the extent of capital contributions by the limited partners (which at all times exceeded the apparent fair market value of the station), Ramirez could not reasonably be said to have ever owned a 21% interest in

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Commission rejected reliance on "partnership share" or similar "measures" with respect to calculation of ownership interests in limited partnerships.

34. Moreover, when cross-examined on his claim of 21% ownership, Ramirez appeared to be basing that claim in large part on the notion that, if the station were ever to have been sold, he would have been entitled to 21% of the proceeds. Tr. 227. But as SBH demonstrated in detail in its Proposed Findings, the terms of the December 31, 1985 Amended Partnership Agreement effectively prevented Ramirez from realizing any return from any sale of the station at or near the station's apparent fair market value, had there ever been a buyer at such a price. See SBH Proposed Findings at 40-45.

35. For his part, Davenport confirmed that Ramirez's fanciful and self-serving sense of his own ownership share was inconsistent with reality. According to Davenport, had ACCLP been liquidated at any time from 1985-1987, Ramirez's share of the distribution would have been less than 1%. Tr. 440. <sup>12/</sup>

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<sup>11/</sup>(...continued)

ACCLP at least as of December 31, 1985 (the effective date of the December 31, 1985 Amended Partnership Agreement). It is significant that, while ACCLP was willing to include the fictional 21% ownership interest in its various internal documents (such as the addendum to the partnership agreement and the internal financial statements), when it came time to report "ownership of capital" to the Internal Revenue Service, the fiction was replaced with reality, and Ramirez's ownership interest was listed as less than 1%. See SBH Exhs. 26, 27 and 28.

<sup>12/</sup> At one point in his testimony, Davenport speculated on what Ramirez might have received had the station been sold for \$20 million at a point when the limited partners had invested only  
(continued...)

That is consistent with what ACCLP reported to the Internal Revenue Service. Hoffman/TIBS/Ramirez suggest that the figures which were reported in ACCLP's tax returns were "hypothetical assumptions" which "were not real", Hoffman/TIBS/Ramirez Proposed Findings at 67. But that is exactly backwards. Davenport testified that the figures in the tax returns represented how ACCLP's assets would have been distributed had the partnership been liquidated in the year in question. Tr. 440. There was nothing hypothetical about the figures reported to the IRS.

36. The Bureau and Hoffman/TIBS/Ramirez also attempt to discount to the point of inconsequentiality the fact that, under the December 31, 1985 Amended Partnership Agreement, Ramirez was entitled to receive less than 1% of the partnership's profits and losses. But that fact also undermines Ramirez's claim to 21% ownership, as SBH demonstrated in its Proposed Findings. See SBH Proposed Findings at 99-102, discussing, inter alia, Pacific Television, Inc., 2 FCC Rcd 1101, 62 RR2d 653 (Rev. Bd. 1987). <sup>13/</sup> Not surprisingly, the authorities cited by SBH are

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<sup>12/</sup> (...continued)

\$10 million. Tr. 441-443. The trouble with that testimony is that it bore no relationship whatsoever to reality. The station was never apparently worth more than approximately \$17 million, and by the time an offer anywhere near that level came in the limited partners had invested approximately \$22 million.

<sup>13/</sup> In Pacific, the purported controlling general partner testified that she really did believe that she "owned a 20% interest in the equity [of the applicant], and believed that the 20% representation showed the 'true nature' of the ownership", 62 RR2d at 656, even though the governing partnership agreement limited her to a 1% share of the partnership income, expenses and distribution until the limited partner had received repayment of 100% of his contributed capital. Ramirez finds himself in

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not even mentioned by Hoffman/TIBS/Ramirez.

37. In summary, then, the other parties' claims concerning Ramirez's supposed ownership interest in ACCLP are inconsistent with the Commission's very clear precedent, are based on nothing more than the self-serving assertions of Ramirez and ACCLP, and are inconsistent with the substantial documentary evidence as discussed in SBH's Proposed Findings.

C. ACCLP Engaged In Misrepresentation Or Lack Of Candor.

38. Having ignored the record evidence and the relevant precedent unfavorable to their position, the other parties have no problem concluding that ACCLP did not engage in misrepresentation or lack of candor relative to whether or not it was a bona fide minority-owned and controlled limited partnership within the meaning of the Commission's policies. Their real problem, though, is that not only do the record evidence and the relevant precedent clearly establish that ACCLP was NOT such a partnership, but the documentary and testimonial evidence demonstrates that ACCLP knew that and did in fact seek to mislead the Commission and the Courts on that point.

39. First, it is a given that ACCLP consistently and repeatedly held itself out -- to the Commission, to the Court of

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<sup>13</sup>/(...continued)  
precisely the same position and, while he, too, has testified that he really believed that he held a 21% ownership interest in ACCLP, the plain meaning of the ACCLP partnership agreement demonstrates otherwise. See also Praise Broadcasting Network, Inc., 8 FCC Rcd 5457, 5459, n. 4 (Rev. Bd. 1993).

Appeals, and to the Supreme Court <sup>14/</sup> -- as a minority-owned and controlled entity in compliance with the Commission's standards. Second, as discussed above and in SBH's Proposed Findings, the evidence establishes that ACCLP was not, in fact, such an entity.

40. And the record establishes that ACCLP recognized this. ACCLP's communications counsel, in July, 1987, specifically focused on the fact that ACCLP could not certify that it met the Commission's insulation standards for limited partnerships. E.g., SBH Exhs. 82, 83, 87. Ramirez signed not one, but two draft Ownership Reports in which ACCLP acknowledged that it could not certify that it met the Commission's insulation requirements, SBH Exhs. 82, 91. ACCLP's communications counsel expressly and repeatedly reaffirmed that conclusion a year later. E.g., SBH Exh. 96. And ACCLP ultimately sought to change its structure in late 1988 to bring itself into compliance with the Commission's standards. SBH Exh. 23. <sup>15/</sup> The documents conclusively

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<sup>14/</sup> Hoffman/TIBS/Ramirez claim that there is no record evidence establishing that ACCLP so held itself out to the Supreme Court. However, ACCLP was itself the petitioner in the Supreme Court litigation, and Justice Brennan's majority opinion in that case specifically referred to ACCLP as a "a minority applicant". Under these circumstances, it is difficult to understand how Hoffman/TIBS/Ramirez could claim that ACCLP did not hold itself out in that manner before the Supreme Court.

<sup>15/</sup> Hoffman/TIBS/Ramirez argue that the change in structure in October, 1988 was undertaken solely in connection with an anticipated comparative proceeding. Hoffman/TIBS/Ramirez Proposed Findings at, e.g., 57. There are multiple problems with that argument. First, the Commission's policies governing limited partnerships affect all limited partnerships, not just those about to go into a comparative proceeding. Second, the lack of proper limited partner insulation had been noted no later than July, 1987 -- 15 months before the October, 1988 changes in ACCLP occurred -- without any reference to any comparative

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establish that ACCLP was well aware, at least as of July, 1987, that it did not conform to the Commission's standards for limited partnerships. Moreover, since the insulation standards had been in effect since June, 1985, and since Hart and Ramirez both testified that they had followed developments in that area as they had occurred (Tr. 583-584, 231-232), it may be inferred that ACCLP was aware of its non-compliance long before July, 1987.

41. It is also clear that ACCLP was well aware of the Commission requirements that ACCLP notify the Commission concerning changes in its partnership agreement. As early as February-May, 1985, even ACCLP's business counsel (Peabody & Brown ("P&B")) -- which professed to have only limited familiarity with Commission requirements -- advised Ramirez that changes involving the partnership agreement would have to be reported to the Commission. SBH Exhs. 37 (p. 4), 39 (p. 7). And in March, 1987, ACCLP's communications counsel advised it

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<sup>15/</sup>(...continued)  
proceeding. E.g., SBH Exhs. 82, 83, 87. The result at that point was that ACCLP chose not to file an Ownership Report which would have required disclosure of its own non-insulation. Third, Hart's September, 1988 letter advised, without any reference to comparative matters, that ACCLP had to revise its structure to provide the necessary insulation. SBH Exh. 96.

The claim that ACCLP's 1988 concern about its structure was limited to comparative matters is also fundamentally at odds with ACCLP's claim that the Ownership Attribution Reconsideration insulation standards were applicable to ACCLP because ACCLP's original application pre-dated those standards. If that claim were true, then ACCLP presumably need not have worried about complying with those standards for any purpose. But ACCLP and its counsel obviously did worry about such compliance. By acknowledging that ACCLP was in fact subject to the Ownership Attribution Reconsideration insulation standards at all, Hoffman/TIBS/Ramirez cannot maintain that ACCLP was not subject to those standards in 1985-1988.

specifically of the need to file a complete ownership report.

SBH Exh. 74.

42. And yet, ACCLP did not bother to submit a copy of the December 31, 1985 Amended Partnership Agreement to the Commission as required by Section 73.3613 of the Rules <sup>16/</sup>, nor did it file an Ownership Report as required on August 3, 1987, or at any time thereafter until December, 1988.

43. Those circumstances alone support the conclusion that ACCLP was seeking affirmatively to withhold information from the Commission. But there is considerably more documentary evidence to support that conclusion. The documents demonstrate that ACCLP and its counsel had drafted an Ownership Report for submission on August 3, 1987 -- indeed, Ramirez himself had signed not one, but two versions of that Report, SBH Exh. 82, 91. But on the very eve of the filing deadline, ACCLP decided not to file a report because of "the implications", see SBH Exh. 88. <sup>17/</sup>

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<sup>16/</sup> In their Proposed Findings, Hoffman/TIBS/Ramirez allude to the fact that the annual ownership report requirement (first adopted by the Commission in 1984) had been suspended temporarily. Hoffman/TIBS/Ramirez Proposed Findings at, e.g., 51. The suggestion seems to be that ACCLP was under no continuing obligation to submit its revised partnership agreement during that suspension. But the suspension related only to the filing of annual ownership reports pursuant to Section 73.3615 of the Rules; the suspension did not relate to the filing of agreements pursuant to Section 73.3163 of the Rules. That is, at all times during the temporary suspension of the annual ownership report requirement, licensees were still required to file certain agreements, including revised partnership agreements.

<sup>17/</sup> The Bureau suggests that the filing of a letter in lieu of an Ownership Report was suggested by a "group of experts" at Baker & Hostetler ("B&H"). Bureau Proposed Findings at 25. But the documents demonstrate that B&H's "experts" had had no apparent difficulty preparing an Ownership Report and had in fact  
(continued...)

44. And instead of a full Ownership Report, ACCLP filed a letter which provided much of the information which would have been included on an Ownership Report, but which failed to include two items which would have flagged ACCLP's shortcomings: ACCLP's letter did not include a copy of the December 31, 1985 Amended Partnership Agreement, and it did not include any indication that that agreement did not comply with the insulation requirements imposed by the Commission on limited partnerships. SBH Exh. 21.

45. Those omissions further confirm that ACCLP was withholding information from the Commission.

46. But there is more. In his August 3, 1987 letter "in lieu of Ownership Report", ACCLP's communications counsel (and former general partner) Thomas Hart ("Hart") offered three reasons why ACCLP could supposedly not file a full Ownership Report. SBH Exh. 21. But NONE of those reasons in fact precluded the preparation and submission of an Ownership Report, and none of them precluded the inclusion of a copy of the December 31, 1985 Amended Partnership Agreement or a certification regarding insulation. Given the opportunity to explain why those items were not included in his August 3, 1987 letter, Hart was unable to do so. Tr. 625-626; 608-609; 627-629. So, too, were Ramirez and Carter Bacon, a P&B attorney who was

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<sup>17/</sup>(...continued)

provided such a report to Ramirez for his final review and signature. SBH Exhs. 86, 91. It was only on July 31, 1987 -- the last business day before the August 3 filing deadline -- that Bacon suggested to Dale Harburg (one of the B&H "experts") that the report should not be filed because of the "implications". SBH Exhs. 88, 89.

involved in the decision not to file an Ownership Report.

Tr. 349-353; 495-496.

47. The documentary evidence overwhelmingly supports the conclusions that: ACCLP knew full well that it had to file a copy of the December 31, 1985 Amended Partnership Agreement and an insulation certification; ACCLP was able to so; despite that ability, ACCLP declined to do so; and ACCLP offered the Commission a baldly misleading explanation for why it did not do so. <sup>18/</sup>

48. Hoffman/TIBS/Ramirez acknowledge that the witnesses questioned about the circumstances leading up to the filing of the August 3, 1987 letter all claimed not to be able to recall anything about those circumstances. Hoffman/TIBS/Ramirez Proposed Findings at 74. According to Hoffman/TIBS/Ramirez, this is "powerful evidence that [the letter] was not filed to hide anything at all". Id. To the contrary, the universal

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<sup>18/</sup> At page 73 of their Proposed Findings, Hoffman/TIBS/Ramirez claim that Hart's explanation in his August 3, 1987 letter was "truthful". That claim is obviously wrong. None of the three factors which Hart cited in that letter -- i.e., the June 25, 1987 Court of Appeals Order, the death of an Astroline Company principal more than a year before, or some supposed "internal reorganization" (which Hart ultimately acknowledged did not in fact occur, Tr. 627-629) -- had any effect at all on ACCLP's ability to prepare an Ownership Report. Indeed, Hoffman/TIBS/Ramirez effectively concede as much when they acknowledge that the August 3, 1987 letter "largely mirrors the information requested on the Form 323" (Hoffman/TIBS/Ramirez Proposed Findings at 73): if ACCLP was able to provide such information in a letter, then ACCLP was equally able to provide that information on an Ownership Report form. Again, while the August 3, 1987 letter included some information, it omitted any copy (or even any reference to) the December 31, 1985 Amended Partnership Agreement, and it failed to address the insulation question.

professions of lack of recollection simply confirm the conclusions to which the documents inevitably lead. If there had been some purely innocent explanation for the sudden decision not to file a full Ownership Report complete with partnership agreement and insulation certification, somebody would presumably have been able to come up with that explanation, especially when shown all the documents leading up to the submission of the letter. All the witnesses were shown those documents, and all were given ample opportunity to explain what happened -- and all they could say was that they did not recall.

49. Far from being "powerful evidence" of innocence, this universal memory lapse supports the contrary conclusion, i.e., that there was no benign reason to withhold the Ownership Report and that, as reflected in the documents, ACCLP's decision not to file was motivated by a desire to avoid "the implications" which such a filing would present.

50. Moreover, while the documentary evidence is plentiful concerning the August 3, 1987 letter, it should also be noted that ACCLP was under an obligation to file the December 31, 1985 Amended Partnership Agreement within 30 days of its execution, which occurred in early 1986. Further, ACCLP remained under that on-going obligation even after the August 3, 1987 letter, as Hart himself acknowledged in that letter when he advised the Commission that a full Ownership Report would be filed "as soon as possible." SBH Exh. 21. And yet at no point did ACCLP ever file a copy of the December 31, 1985 Amended Partnership

Agreement.<sup>19/</sup> Nor did it ever provide a certification concerning whether that agreement contained the Commission-prescribed insulation provisions. So while the circumstances surrounding the August 3, 1987 letter provide a detailed, documented glimpse into ACCLP's misconduct, it is clear that that misconduct was on-going for a period of years extending before and after August 3, 1987.

51. Neither the Bureau nor Hoffman/TIBS/Ramirez address this body of evidence in any detail. Hoffman/TIBS/Ramirez seems to try to sidestep it by claiming that, in any event, Ramirez "was not aware of any failure to file" the December 31, 1985 Amended Partnership Agreement. Hoffman/TIBS/Ramirez Proposed Findings at 50. The trouble with that claim is that Ramirez was personally and substantially involved in the aborted preparation of the Ownership Report which was not filed in August, 1987. He signed at least two versions of that report, SBH Exhs. 82, 91, and he had been provided with not only the Ownership Report form

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<sup>19/</sup> Hoffman/TIBS/Ramirez suggest that, because the Commission's own files for Station WHCT(TV) may be in some disarray, it is possible that ACCLP did file the December 31, 1985 Amended Partnership Agreement. Hoffman/TIBS/Ramirez attempt to buttress this suggestion by noting that "nearly all of ACCLP's ownership materials appear to have been filed with the FCC". Hoffman/TIBS/Ramirez Proposed Findings at 55. But this cuts against their claim. Irrespective of any incompleteness of the Commission's files, the fact is that the parties to this case were able to locate stamped "received" copies of the ACCLP materials which ACCLP did file with the Commission, and those copies reflect reasonable diligence on ACCLP's part, at least through October, 1985 and after October, 1988. But there is no stamped "received" document proving that ACCLP filed a copy of the December 31, 1985 Amended Partnership Agreement. It is fair to conclude that, in light of the availability of the other "received" copies, ACCLP did not file a copy of that agreement.

itself, but also the instructions to that form which made it clear that a copy of the December 31, 1985 Amended Partnership Agreement and an insulation certification would have to be included with the filing. SBH Exh. 74. A limp claim that Ramirez "was not aware" is inherently incredible in the face of the substantial documentary evidence demonstrating that Ramirez clearly was aware of all the circumstances surrounding ACCLP's failure to provide the required information. <sup>20/</sup>

52. Hoffman/TIBS/Ramirez also suggest that there was no reason for ACCLP to hide anything and that that undermines any claim of misrepresentation here. E.g., Hoffman/TIBS/Ramirez Proposed Findings at 76. That ignores reality. ACCLP had elected to consummate its acquisition of Station WHCT(TV) before its grant had become final. As a result, any investments ACCLP made following that consummation were made at the risk that the

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<sup>20/</sup> Hoffman/TIBS/Ramirez also seem to argue that, even if there were an inappropriate failure to notify the Commission of important information, that failure was really the fault of ACCLP's counsel, and not ACCLP. Hoffman/TIBS/Ramirez Proposed Findings at 74. Putting aside the fact that ACCLP's counsel was Hart, who had been a general partner of ACCLP from September, 1985-April, 1987 -- i.e., during the period when the failure to file was occurring -- there is a further problem with Hoffman/TIBS/Ramirez's argument. It is well-established that applicants are bound by the acts of their agents. E.g., Pontchartrain Broadcasting Co., Inc., 7 FCC Rcd 1898, 1903, ¶18 (Rev. Bd. 1992), rev. denied, 8 FCC Rcd 2256 (1993), aff'd, 15 F.3d 183 (D.C. Cir. 1994); Black Television Workshop of Los Angeles, Inc., 8 FCC Rcd 4192, 4200, n. 51 (1993), recon. denied, 8 FCC Rcd 8719, aff'd by mem. sub nom. Woodfork v. FCC, No. 94-1031 (D.C. Cir., filed September 1, 1995) ("the attorney is the client's agent and the client thus cannot escape responsibility for the inappropriate action or inaction of his attorney"). That being the case, even if Ramirez really had been kept in the dark -- and the evidence demonstrates that was not the case -- and even if the fault lay with ACCLP's counsel, ACCLP still could not escape the consequences.

grant might be reversed at some point in the appellate process. In that process, SBH was challenging the bona fides of ACCLP's partnership structure. The last thing that ACCLP would want to do, then, would be to alert the Commission and SBH to shortcomings in its structure.

53. Hoffman/TIBS/Ramirez argue that there were no shortcomings in that structure because the Commission had granted ACCLP's initial assignment application in 1984. But that application remained pending for six years thereafter, during which time the Commission released Ownership Attribution Reconsideration (in June, 1985) clearly elucidating the Commission's definition of "complete control" in the context of limited partnerships. And after that, ACCLP modified its partnership agreement.

54. Hart and Ramirez both testified that they were familiar with the development of the Commission's policies on limited partnerships, Tr. 583-584, 231-232, so both presumably were aware that the December 31, 1985 Amended Partnership Agreement did not conform with those policies. Hart, Ramirez and Bacon all acknowledged that they were aware that, if ACCLP filed materials with the Commission, SBH would probably obtain copies. SBH Exh. 37 (p. 4); Tr. 352, 616. Thus, ACCLP had a clear motive for not filing the agreement with the Commission, since it had reason to believe that to do so would have substantially increased the risk (if not guaranteed) that all of ACCLP's investment -- more

than \$20 million by 1987 -- would be lost. <sup>21/</sup>

III. Judicial Doctrines Such As Collateral Estoppel And "Full Faith And Credit" Are Inapplicable To This Case.

55. Hoffman/TIBS/Ramirez repeatedly suggest that the bankruptcy litigation involved "the identical issue involved in this case". Hoffman/TIBS/Ramirez Proposed Findings at 12, see also 76-77. From that erroneous suggestion they conclude, also erroneously, that various legal doctrines (such as collateral estoppel or "full faith and credit") somehow either preclude further Commission consideration of this matter or, at least, dictate the result which the Presiding Judge should reach. Hoffman/TIBS/Ramirez are wrong on all these points.

56. First, the matters which were at issue in the bankruptcy litigation are plainly distinct from those at issue here. To be sure, both proceedings arise from an overlapping set of facts. But the legal issues involved in each are not at all the same.

57. What was at issue in the bankruptcy litigation was Hoffman's effort, as ACCLP's trustee-in-bankruptcy, to hold certain ACCLP limited partners liable as, in effect, general partners under the terms of the Massachusetts Limited Partnership Act ("MLPA"). Hoffman's theory was that those limited partners

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<sup>21/</sup> The position suggested by Hoffman/TIBS/Ramirez actually makes no sense. If ACCLP really did believe that the December 31, 1985 Amended Partnership Agreement did not raise any questions insofar as its partnership structure was concerned, then ACCLP would ordinarily have filed that agreement. Its failure to do so is inexplicable if ACCLP really didn't have anything to hide.

had acted sufficiently like general partners to make them liable as general partners. Under the MLPA, such liability can be imposed on limited partners whose participation in the control of the limited partnership's business is "substantially the same as the exercise of the powers of a general partner." Mass. Gen. L. Ch. 109, §19(a); see Hoffman/TIBS/Ramirez Exh. 3, 188 B.R. at 103. Thus, the sole question in the bankruptcy litigation was whether the limited partners had met that MLPA statutory standard for purposes of imposing potential monetary liability on those limited partners. <sup>22/</sup>

58. The bankruptcy litigation did NOT involve the Commission's standards governing limited partnerships for the Commission's own regulatory programs. As discussed above (and in SBH's Proposed Findings), the Commission expressly and emphatically abandoned any reliance on ULPA or RULPA standards for limited partnerships (and, therefore, state statutes such as the MLPA which are based on the RULPA, see Hoffman/TIBS/Ramirez Proposed Findings at 82) in June, 1985, significantly before ACCLP's December 31, 1985 Amended Partnership Agreement. Instead, the Commission announced its own standards which it recognized were different from, and more stringent than, the ULPA/RULPA standards.

59. For example, the Commission's standards for limited partnership preclude any involvement by limited partners in the day-to-day operation of the business, and even proscribe

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<sup>22/</sup> Even Hoffman/TIBS/Ramirez appear to agree with this. See Hoffman/TIBS/Ramirez Proposed Findings at 8.

communications between limited and general partners. E.g., Ownership Attribution Reconsideration. ULPA, RULPA and MLPA standards do not. Commission precedent also demonstrates that check-signing authority on the part of a limited partner (whether or not that partner actually exercises that authority) undermines the bona fides of a limited partnership. Gloria Bell Byrd, supra. Such check-signing authority (and even the exercise of such authority) does not have such an effect under the ULPA, RULPA and MLPA.

60. The record in the bankruptcy litigation (and in the instant litigation) clearly establishes that ACCLP limited partners were routinely involved in ACCLP's business and that they routinely conferred with Ramirez. Such involvement and communication did not satisfy the relatively high threshold set in the MLPA for imposing general partner liability on limited partners. But such involvement and communication on their face ran directly afoul of the Commission's standards, thereby precluding any claim that, for Commission purposes, ACCLP was a bona fide limited partnership. Similarly, the bankruptcy litigation establishes that ACCLP limited partners not only had check-signing authority, but they routinely exercised that authority, again undermining ACCLP's claim of compliance with Commission standards.

61. Even more far-fetched is the Hoffman/TIBS/Ramirez claim that the bankruptcy litigation somehow resolved the question of exactly what Ramirez's ownership interest in ACCLP was. In fact, the quantum of Ramirez's ownership interest was completely

immaterial to the legal issue before the Bankruptcy Court (i.e., whether the limited partners had exercised "substantially the same" control as a general partner). It made no difference at all to the disposition of the bankruptcy litigation whether Ramirez owned 21% of ACCLP, or 0.001%, or 99%, or some other percentage. By contrast, under the Commission's policies, in order to qualify as a minority distress sale buyer, more than 20% of ACCLP had to be owned by a minority. Thus, the quantum of Ramirez's ownership, while completely immaterial to the bankruptcy litigation, was (and remains) absolutely crucial before the Commission. <sup>23/</sup>

62. The Presiding Judge himself recognized precisely this point in his Memorandum Opinion and Order, FCC 97M-140, released August 21, 1997. At that time, Ramirez had attempted to derail this proceeding by claiming, as Hoffman/TIBS/Ramirez do now, that the bankruptcy litigation disposed of all relevant issues. The Presiding Judge rejected that effort, concluding inter alia that the bankruptcy proceeding "did not decide all relevant matters

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<sup>23/</sup> As discussed above, notwithstanding the general immateriality of the quantum of Ramirez's interest to the bankruptcy litigation issues, Hoffman believed that factual matter to be germane thereto, and he repeatedly argued that the bankruptcy record established, as a factual matter, that Ramirez's ownership interest had fallen below 20% to less than 1%. Neither the Bankruptcy Court nor the Second Circuit, to which Hoffman advanced that factual position, addressed it at all, since it was immaterial to their disposition of the liability issue. There is, therefore, no reason to believe that Hoffman's factual assessment was wrong in any respect. Having committed himself to that factual position before two courts, and having been given no contrary factual indication by either court, Hoffman cannot now claim that the facts were really other than what he has previously asserted.

regarding compliance with the Commission's minority distress sale policy." Id. at 4.

63. For its part, the Bankruptcy Court has similarly recognized and respected the clear distinctions between bankruptcy issues, on the one hand, and Commission issues on the other. As an example of this recognition, at a hearing before Bankruptcy Judge Krechevsky in May, 1997, Judge Krechevsky stated as follows to Mr. Shurberg:

you have arguments with the FCC as to the license continuation or transfer or approval, that's before the FCC. I'm not going to make any rulings about whether or not their standards are being complied with or not complied with. I have no expertise in that, and you should go there if you have a complaint.

Transcript of Hearing in In re Astroline Communications Co., Case No. 88-21124, May 30, 1997, at 36-37.

64. As a result, the disposition of the legal issues in the bankruptcy litigation has virtually no effect on the issues in the instant hearing.

65. Similarly, Hoffman/TIBS/Ramirez's reliance on "full faith and credit" is misplaced here. Hoffman/TIBS/Ramirez are wrong in asserting that the instant hearing is in any way intended to review, reverse or ignore the judgments in the bankruptcy litigation. As noted above, the bankruptcy litigation was directed to the limited question of the potential monetary liability to be imposed on certain ACCLP limited partners. In the instant hearing there is no question at all about such potential monetary liability. The bankruptcy litigation involved interpretation and application of MLPA standards; the instant

litigation involves interpretation and application of Commission standards which are expressly different and distinct from MLPA, ULPA and RULPA standards.

66. This is particularly so in view of the fact that the ACCLP December 31, 1985 Amended Partnership Agreement came into being well after the Commission abandoned the ULPA/RULPA standards. But it is that very agreement which ACCLP failed to file with the Commission and about which it failed to advise either the Commission or the Courts.

67. Finally, and perhaps most obviously, the real issue in this proceeding is whether ACCLP engaged in misrepresentation or lack of candor before the Commission. That question was not presented in the bankruptcy litigation in any way, shape or form.

68. In summary, while the instant proceeding and the bankruptcy litigation both involve certain overlapping facts, each proceeding involves its own separate and distinct set of facts and legal issues. The resolution of the bankruptcy litigation has no effect on the Commission's proceeding as suggested by Hoffman/TIBS/Ramirez. <sup>24/</sup>

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<sup>24/</sup> As set forth in the Proposed Findings of Hoffman/TIBS/Ramirez, the doctrine of collateral estoppel can be invoked only when, inter alia, "the identical issue is being litigated" and "the issue was actually litigated" and "the party being precluded from relitigating the issue was fully represented in the prior action." Hoffman/TIBS/Ramirez Proposed Findings at 81-82. As discussed in the text, above, the issues in the instant case are substantially different from those in the bankruptcy litigation, so it is clear that "collateral estoppel" cannot be invoked here in any event. For the record, SBH also notes that SBH was not a party to the particular adversary proceeding in the bankruptcy litigation which resulted in the decisions included in Hoffman/TIBS/Ramirez Exh. 3 -- as may be  
(continued...)

IV. Miscellaneous Matters.

A. The Issues Have Not Been "Expanded".

69. Hoffman/TIBS/Ramirez also claim that the issues in the instant proceeding have somehow expanded beyond their permissible metes and bounds. Hoffman/TIBS/Ramirez Proposed Findings at, e.g., 72. Hoffman/TIBS/Ramirez are wrong.

70. The issues in this proceeding are framed broadly to permit inquiry into whether ACCLP engaged in misrepresentation concerning its status as a minority-owned limited partnership within the meaning of the Commission's rules and policies. SBH's evidentiary focus has been exclusively on matters relating to that question, including inter alia the formation and re-formation of ACCLP's partnership structure and the representations made by ACCLP to the Commission and the Court's concerning that structure.

71. Hoffman/TIBS/Ramirez complain, though, that SBH should not be allowed to inquire about matters relating to ACCLP's December 31, 1985 Amended Partnership Agreement, and whether ACCLP filed that agreement with the Commission. See Hoffman/TIBS/Ramirez Proposed Findings at 71-73. As

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<sup>24/</sup>(...continued)  
determined from the listing of parties in the headings of those opinions. If Hoffman were really representing SBH's interests -- as Hoffman/TIBS/Ramirez seem to claim, Hoffman/TIBS/Ramirez Proposed Findings at 83 -- then Hoffman would obviously be precluded from taking any position in this proceeding which is inconsistent with the position(s) taken, supposedly on SBH's behalf, in the bankruptcy litigation. See discussion of judicial estoppel, supra at 1-6. For that separate and independent reason collateral estoppel is inapplicable here.

Hoffman/TIBS/Ramirez correctly point out, an important starting point for the misrepresentation issue involved ACCLP's tax returns, which clearly state that Ramirez owned less than 1% of ACCLP, notwithstanding ACCLP's claim to the Commission that Ramirez really owned 21%. Inquiry into those tax returns disclosed that the ownership information included therein was based on the terms of the December 31, 1985 Amended Partnership Agreement. It was therefore well within reason -- and well within the scope of the designated issues -- to inquire into the circumstances surrounding the preparation of the December 31, 1985 Amended Partnership Agreement. It was also particularly appropriate to inquire into whether ACCLP ever notified the Commission of that agreement or submitted a copy thereof. Hoffman/TIBS/Ramirez's complaint about supposedly inappropriate expansion of the issues is without merit.

B. No Reconsideration Of The Grant Of Hoffman's 1991 Pro Forma Assignment Application Is At Issue Here.

72. In the closing pages of their Proposed Findings, Hoffman/TIBS/Ramirez also assert that the Commission "may not undo a grant which became final six years earlier". Hoffman/TIBS/Ramirez Proposed Findings at 83. The thrust of this particular argument seems to be that the instant proceeding involves reconsideration of the grant of Hoffman's 1991 Form 316 application pursuant to which he took control of the Station WHCT(TV) license. But Hoffman/TIBS/Ramirez are wrong to suggest that any such reconsideration is involved. As set forth in detail in the Hearing Designation Order herein, the

extraordinary facts relative to ACCLP's ownership, structure and operation raise serious questions concerning the legitimacy of its initial acquisition of the station's license. That being the case, the Commission concluded that a hearing was warranted to determine whether that acquisition should be reversed in light of ACCLP's apparent misrepresentations.

73. As trustee-in-bankruptcy for ACCLP, Hoffman can hold nothing more and nothing less than ACCLP. If ACCLP was not entitled to a license, then Hoffman (as ACCLP's trustee) is no more entitled to a license. That is what is at issue here, not any reconsideration of Hoffman's 1991 pro forma acquisition of the license of Station WHCT(TV) as ACCLP's court-appointed trustee-in-bankruptcy. <sup>25/</sup>

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<sup>25/</sup> In an apparent effort to cloak his argument in some sympathetic guise, Hoffman (and his joint parties) suggest that the interests of the creditors in the bankruptcy action should be considered (citing LaRose v. FCC, 494 F.2d 1145 (D.C. Cir. 1974)). Hoffman/TIBS/Ramirez Proposed Findings at 85. Hoffman, however, neglects to mention in this context that SBH has previously offered to pay the ACCLP estate a lump sum of \$3.1 million, on condition that Hoffman dismiss his above-captioned application and SBH's application for a construction permit for Channel 18 in Hartford is granted. Such a transaction would provide the creditors the same payment that would receive if Hoffman's application were ever to be granted. It would also obviate the need for resolution of the issues in the instant proceeding, since Hoffman would be dismissing his application, thus avoiding the substantial risk which Hoffman is currently running, i.e., that his application will be denied, leaving the creditors with nothing at all. Thus, if Hoffman truly had the interests of the creditors at heart, he would accept SBH's settlement offer. Having failed to do so, Hoffman cannot sincerely suggest that the interests of creditors should affect the outcome of this proceeding.

## V. Conclusion

74. From its inception ACCLP's bona fides were, at best, doubtful. Formed at the very last minute in order to permit the non-minority members of Astroline Company to take advantage of a deal which they had already negotiated with Faith Center, ACCLP had the earmarks of a sham at the outset.<sup>26/</sup> Still, ACCLP held itself out to the Commission and the Courts as being in compliance with the Commission's rules and policies, and the Commission and the Courts took ACCLP at its word.

75. What we have since learned, of course, is that ACCLP's claims of compliance were bogus. Within a year of its acquisition of the station, with its grant still on appeal (and its assignment application therefore still pending), ACCLP restructured itself substantially.<sup>27/</sup> Meanwhile, its day-to-

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<sup>26/</sup> Because they have chosen to focus on Ramirez, neither the Bureau nor Hoffman/TIBS/Ramirez bothers to mention that, by the time Ramirez actually came on the scene relative to Station WHCT(TV), Boling and Sostek had already negotiated the purchase agreement with Faith Center. But Boling and Sostek found themselves within a day or two of the recommencement of the Faith Center hearing and, therefore, the deadline for a submission of a distress sale application, and they (as non-minorities) did not qualify. Enter, at the last minute, Ramirez, willing to sign on with an investment of \$210 to help Astroline Company acquire the station. Such a last-minute marriage of convenience on its face raises questions concerning the legitimacy of Ramirez's claims of control -- far from being the driving force behind the formation of ACCLP and the acquisition of the station, he was at most the finishing touch on the process, the last minor detail which Astroline Company needed to tie down in order to implement their plan. See SBH Proposed Findings at 16-20.

<sup>27/</sup> At page 68 of the Proposed Findings, Hoffman/TIBS/Ramirez claim that ACCLP's structure did not change. The documentary record herein flatly disproves that: with the December 31, 1985 Amended Partnership Agreement, Ramirez's ownership in the partnership dwindled to virtually nothing.

day operating policies flew in the face of rigorous, clearly-stated standards announced by the Commission. The net result was that ACCLP was no longer able to satisfy either of the two conditions imposed by the Commission on minority distress sale applicants, i.e., that a minority hold more than 20% ownership of the entity, and that that minority hold complete control over the entity. Each of those two conditions was essential, and failure to meet either one or the other would be fatal; in this case, ACCLP failed to satisfy both conditions.

76. But ACCLP didn't bother to advise the Commission of these facts, even when (in early August, 1987) ACCLP was unquestionably required to disclose such matters. Instead, ACCLP dissembled, submitting a disingenuous letter "in lieu of" an Ownership Report, and justifying that course by reference to factors which were no justification at all.

77. SBH acknowledges that certain testimony adduced during this hearing seemed to favor ACCLP -- that is because it was coming from Hart and Ramirez, both of whom have no incentive at all to be forthcoming and candid here.<sup>28/</sup> But this case is different from many others because here there is, in addition to the incredible and self-serving oral testimony, a wealth of documentary evidence dating back to the actual historical events.

78. Those documents include multiple candid attorney-client communications specifically informing ACCLP that its structure

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<sup>28/</sup> As former Administrative Law Judge Walter Miller opined, "no applicant in his right mind is going to take the stand and openly admit" an intentional violation of Commission rules or policies. Guy S. Erway, 90 FCC2d 755, 775 (ALJ 1980).

was not in compliance with Commission standards. They include draft Ownership Reports and related materials which put the lie to the claim made by Hart to the Commission that ACCLP was somehow precluded from submitting a full Ownership Report in August, 1987. They include clear demonstrations that, from the earliest date, ACCLP was aware that any information it might put on file would thereby become available to SBH.

79. Confronted with this damning documentary record, Hoffman/TIBS/Ramirez continue in the sorry tradition established by ACCLP. They persist in the disingenuous effort to suggest (as B&H, in cooperation with P&B, did in November, 1988, see SBH Exhs. 58, 59, 60 and 61) that the Ownership Attribution Reconsideration standards did not become applicable to pending applications until late 1988, when that clearly was not the case.<sup>29/</sup> They suggest (at page 40 of their Proposed Findings) that Hart may not really have been a general partner in ACCLP, when the documentary record clearly establishes that Hart signed the partnership agreement and, ultimately resigned from the partnership, e.g., SBH Exh. 9 (p. 37), 56.

80. They claim that ACCLP was in "compliance with its representations to the Commission" (at page 62 of their Proposed Findings), even though Ramirez, the supposedly controlling partner, did not even have a checkbook in Hartford or control over the partnership's accounts. They attempt to ascribe

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<sup>29/</sup> And, as SBH demonstrated at footnote 53 to its Proposed Findings, Hart himself was well aware of the general applicability of the Ownership Attribution Reconsideration standards long before 1988.

inaccuracies in Commission filings to changes in personnel at B&H, ACCLP's communications law firm -- when Hart was both counsel to ACCLP at all relevant times and, from 1985-1987, a general partner in ACCLP.

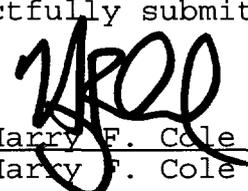
81. And then there is SBH Exh. 103, an application form for "Authority for Deposit and Borrowing" which was submitted to a bank by ACCLP. The form was completed by ACCLP and executed by Boling. That form identifies, as the general partners of ACCLP, Boling and Sostek and two others, but not Ramirez!

Hoffman/TIBS/Ramirez characterize this as a "minor error". And they also claim that there was no reason to believe that Ramirez owned less than 21% of ACCLP, when ACCLP's tax returns for three consecutive years had listed his "ownership of [ACCLP's] capital" at under 1%.

82. Notwithstanding the glib, self-serving, largely incredible testimony of Ramirez and Hart, ACCLP's sham has now been disclosed. The documentary record compiled herein reveals beyond doubt that ACCLP engaged in misrepresentation and lack of candor with respect to its claim to be a minority-owned and controlled limited partnership within the meaning of the Commission's rules and policies. The issues in this proceeding

must be resolved adversely to ACCLP and  
Hoffman/TIBS/Ramirez. <sup>30/</sup>

Respectfully submitted,

  
/s/ Harry F. Cole  
Harry F. Cole

Bechtel & Cole, Chartered  
1901 L Street, N.W.  
Suite 250  
Washington, D.C. 20036  
(202) 833-4190

Counsel for Alan Shurberg d/b/a  
Shurberg Broadcasting of Hartford

January 8, 1999

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<sup>30/</sup> The Commission's minority distress sale policy, pursuant to which ACCLP initially acquired the station's license, has already been found to be unconstitutional once, in Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 902 (D.C. Cir. 1989). While that decision was subsequently reversed by the Supreme Court, that reversal was in turn overruled in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). See SBH Proposed Findings at 9, n. 6. Any reaffirmation of the initial distress sale grant to ACCLP now, in 1999, would in any event be precluded by Adarand. However, since the record of this proceeding clearly compels denial of the above-captioned renewal application, that consideration may ultimately prove to be immaterial here.

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of January, 1999, I caused copies of the foregoing "Consolidated Reply of Shurberg Broadcasting of Hartford to Proposed Findings of Fact and Conclusions of Law" to be placed in the U.S. Postal Service, first class postage prepaid, or hand delivered (as indicated below), addressed to the following:

The Honorable John M. Frysiak  
Administrative Law Judge  
Federal Communications Commission  
445 12th St., S.W.  
Washington, DC 20554  
(BY HAND)

James Shook, Esquire  
Enforcement Division  
Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W. - Room 8202-F  
Washington, D.C. 20554  
(BY HAND)

Peter D. O'Connell, Esquire  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006  
Counsel for Martin W. Hoffman,  
Trustee-in-Bankruptcy for  
Astroline Communications Company  
Limited Partnership

Howard A. Topel, Esquire  
Fleischman and Walsh, L.L.P.  
1400 Sixteenth Street, N.W.  
Suite 600  
Washington, D.C. 20036  
Counsel for Two If By Sea  
Broadcasting Corporation

Kathryn R. Schmeltzer, Esquire  
Fisher, Wayland, Cooper, Leader  
& Zaragoza L.L.P.  
2001 Pennsylvania Avenue, N.W.  
Suite 400  
Washington, D.C. 20006-1851  
Counsel for Richard P. Ramirez

  
/s/ Harry L. Cole  
Harry L. Cole