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BEFORE THE
Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM Docket No. 97-128
)	
Martin W. Hoffman,)	
Trustee-in-Bankruptcy for Astroline)	FCC File No. BRCT-881201LG
Communications Company Limited)	
Partnership)	
)	
For Renewal of License of Station)	
WHCT-TV, Hartford, Connecticut)	
)	
Shurberg Broadcasting of Hartford)	FCC 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

**JOINT REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW OF
MARTIN W. HOFFMAN, TRUSTEE-IN-BANKRUPTCY, RICHARD P.
RAMIREZ AND TWO IF BY SEA BROADCASTING CORPORATION**

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006

MARTIN W. HOFFMAN, TRUSTEE-IN-
BANKRUPTCY FOR ASTROLINE
COMMUNICATIONS COMPANY LIMITED
PARTNERSHIP

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RICHARD P. RAMIREZ List A B C D E

By: Kathryn R. Schmeltzer
His Counsel

DATED: January 8, 1999

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Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Corporation Limited Partnership (hereinafter the "Trustee" or "Hoffman"), Richard P. Ramirez ("Ramirez") and Two If by Sea Broadcasting Corporation ("TIBS") (hereinafter the "Joint Respondents" when referred to jointly), by their respective counsel and pursuant to Sections 1.263 and 1.264 of the Commission's Rules and the Presiding Judge's Orders, FCC 98M-117, released October 2, 1998 and FCC 98M-126, released November 19, 1998, hereby submit their Joint Reply to the Proposed Findings of Fact and Conclusions of Law filed by Alan Shurberg d/b/a Shurberg

SUMMARY

The legal and factual flaws that permeate the Proposed Findings of Fact and Conclusions of Law tendered by Alan Shurberg d/b/a Shurberg Broadcasting of Hartford (“Shurberg”) reveal a pleading that is not only completely unreliable but also disingenuous. Shurberg has fabricated a fallacious argument premised on distorted facts and misplaced legal theories.

There are a series of fundamental errors in Shurberg’s legal analysis which cannot be considered mere mistakes. First, Shurberg’s argument assumes that ACCLP had to be converted at some stage to an “insulated” limited partnership. However, ACCLP was not an “insulated” limited partnership when it presented its application to the FCC in 1984, and ACCLP did not have a duty to become an “insulated” limited partnership in 1985 or at any other time. Although ACCLP’s limited partnership structure was reviewed and approved by the full Commission in 1984 and conformed to the minority ownership policies and attribution standards in effect at that time, Shurberg insists that the Commission’s 1985 reconsideration of its attribution standards mandated that ACCLP modify its structure. Shurberg is wrong.

As demonstrated in this Reply, both the Commission and the Review Board have stated that the changes in the attribution standards were to apply prospectively, and the changes were never applied by the Commission in the context of granted and consummated minority distress sales. It was only in the context of preparing for a comparative license renewal hearing in late 1988 that ACCLP began to consider the issue of insulation. As Richard Ramirez (“Ramirez”), ACCLP’s minority general partner, testified at the hearing, ACCLP never doubted that it complied with the minority distress sale policy, and the consideration of insulation in late 1988 in preparation for a comparative hearing had nothing to do with ACCLP’s status as a minority

controlled entity. At all times, ACCLP complied with the Revised Uniform Limited Partnership Act (“RULPA”) which was the applicable legal standard.

Second, in his zeal to buttress his flawed “insulation” argument, Shurberg erroneously relies on two Commission declaratory rulings on alien ownership. Not only are these rulings inapposite, but the Commission expressly distinguished them from its general attribution standards and from its minority distress sale policies.

Third, Shurberg’s Findings are premised on the arguments of Trustee Hoffman as one party to the Connecticut bankruptcy proceeding. Specifically, Shurberg proposes factual findings based on the arguments the Trustee advanced to the Bankruptcy Court in his fiduciary capacity at the behest of Shurberg and creditors seeking to expand the possible sources of funds. But Shurberg totally ignores the decisions of the Bankruptcy Court and the federal courts rejecting those very arguments.

Ironically, Shurberg’s allegations of misrepresentation are not only founded on false theories but also are premised on materials that Shurberg has known about for years but never raised in a timely fashion. Shurberg has known of the December 31, 1985 Restated and Amended ACCLP Limited Partnership Agreement and the August 3, 1987 ACCLP ownership filing with the FCC at least since the bankruptcy court proceeding, since both documents were exhibits in that proceeding, if not earlier, since both documents were public records. If Shurberg really believed that these documents contained evidence of misrepresentation, surely he would have brought them to the attention of the Commission previously. Shurberg has not hesitated to file every conceivable pleading to delay the ultimate resolution of the WHCT-TV license. Yet Shurberg did not mention these documents in his petition to deny and related pleadings and the

Hearing Designation Order in this proceeding made no mention of them. As ACCLP has shown in its Proposed Findings, the record evidence demonstrates that there was never any intent to deceive the Commission and no misrepresentation occurred.

In short, Shurberg's "insulation" argument is a "red herring" that is unsupported by either the law or the facts, and his reliance on the Commission's rulings on matters related to alien ownership is misplaced because those rulings have no relevance to the Commission's minority distress sale policies. Moreover, Shurberg's failure to acknowledge the decisions in the Connecticut bankruptcy court proceeding constitutes a substantial defect in his pleading. Shurberg's factual findings are replete with errors. For instance, Shurberg relies on an exhibit he withdrew (Shur. Ex. 35) and mistakenly argues that a pro forma transfer application filed by ACCLP in late 1988 was still pending in July 1989, although Commission records reflect the application was granted on December 22, 1988.

Shurberg has litigated the issue of ACCLP's compliance with the Commission's minority distress sale policy once - in a proceeding that went all the way through the Commission and the courts. Shurberg should not be permitted to engage in his own version of "Ground Hog Day" by litigating the issue over again using increasingly fanciful theories. The designated issues should be resolved in favor of the Trustee, thereby enabling him to vindicate the interests of the innocent creditors in the bankruptcy proceeding

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Broadcasting of Hartford (“Shurberg”) and the Proposed Findings of Fact and Conclusions of Law filed by the Mass Media Bureau (the “Bureau”).^{1/}

I. Overview

1. Shurberg's proposed findings distort the record and contain numerous legal and factual errors and inferential leaps. They are argumentative, conclusory and entirely too biased to be used by the trier-of-fact. Many of Shurberg's findings fail to cite any support from the record and other findings are not based on evidence in the record. It is well settled that “[d]ecisions in formal hearing proceedings must be based upon evidence in the record and matters outside the record which have not been tested through the process guaranteed by the Communications Act and the APA [Administrative Procedure Act], including the right of cross-examination, may not be considered.” Lincoln Operating Co., 6 R.R. 1388, 1388a (1951). The errors in Shurberg's findings are far too numerous to discuss in detail. The Joint Respondents therefore attempt below to point out the most obvious errors and distortions.

2. With respect to the two matters on which the designated misrepresentation issue was based, namely the question of Ramirez’s control of ACCLP and percentage of ownership in ACCLP, Shurberg has ignored the most significant and compelling evidence. Shurberg’s Findings neglect to mention or address (a) the decisions of the Connecticut Bankruptcy Court and the

^{1/} The Bureau’s Findings conclude that ACCLP did not misrepresent facts and that the public interest would be served by a grant of the WHCT-TV license renewal application. To the extent that the Joint Respondents have any comments relating to the Bureau’s Findings, they are included herein. This Joint Reply addresses the significant points raised by Shurberg. The failure to address each and every point raised in Shurberg’s Findings should not be considered an admission by any of the parties hereto. Rather, Hoffman, Ramirez and TIBS submit that the Joint Proposed Findings of Fact and Conclusions of Law that they filed on December 8, 1998 most accurately reflect the record in this proceeding.

federal courts holding on the basis of an extensive evidentiary record that Ramirez was the controlling general partner of ACCLP and rejecting the Trustee's arguments that Ramirez had less than a 21 percent ownership interest in ACCLP, and (b) the testimony of Kent Davenport, ACCLP's accountant, and the audited Financial Statements for ACCLP for the years 1984-1987 prepared by Arthur Andersen demonstrating that the special tax allocation Arthur Andersen had recommended did not affect Ramirez's 21 percent ownership interest in ACCLP.

3. Instead, Shurberg attempts to ignore the due process rights of the Trustee and the Intervenors by reaching far beyond the designated misrepresentation issue to allege new misrepresentations and even a lack of candor (inserted in Shurberg's conclusions) where none exist. These new allegations, based upon a total distortion of the record evidence, cannot properly be used as the basis for an adverse determination in this proceeding. Apart from the false nature of Shurberg's new allegations,^{2/} neither the Trustee, as the licensee, nor Ramirez, as the former controlling general partner of ACCLP, nor TIBS, as the proposed purchaser of the station, ever had requisite notice that these matters were at issue.

4. The purpose of a hearing designation order is to provide the party that is the subject of the order with the level of notice required by due process considerations of the issues that are to be tried and against which it must defend itself. See Faith Center, Inc., 82 F.C.C.2d 1, 9 (1980), recon. denied, 86 F.C.C.2d 891 (1981). This purpose would be vitiated if adverse determinations could be made on the basis of undesigned issues. The HDO in this proceeding,

^{2/} For instance, Shurberg suggests that ACCLP's FCC Form 316 pro forma transfer application filed November 22, 1988 was still pending in July 1989 (Shurberg Findings, p. 90). However, the Commission's FAIR report reflects that the application (File No. BTCCT-881122KH) was granted on December 22, 1988.

which was based on Shurberg's recitation of the allegations in the Connecticut bankruptcy proceeding,^{3/} revolved solely around the issues of whether ACCLP misrepresented facts concerning Ramirez's 21 percent ownership interest in ACCLP and his control of the company. Most of the misrepresentations that Shurberg would now find are based on matters which Shurberg never even raised until the hearing and as to which he failed to call any witnesses who would support his position.

5. Moreover, in the area of misrepresentation/lack of candor, the Commission's case precedent requires that "any conclusion of lack of candor arrived at without the designation of a specific issue be so blatant as to make any further evidentiary hearing on the matter of candor obviously superfluous." Silver Star Communications-Albany, Inc., 3 FCC Rcd 6342, 6350 (Rev. Bd. 1988), rev'd in part on other grounds, 6 FCC Rcd 6905 (1991). Shurberg's allegations of misrepresentation/lack of candor simply do not meet this standard. In the main, they derive from the erroneous inferences that Shurberg draws from innocent statements and facts.

II. Shurberg's Findings Are Premised On A Fallacious Argument

A. The FCC Approved ACCLP's Application Under the Minority Distress Sale Policy That Existed in 1984

6. Shurberg concedes that at the time that ACCLP was formed and its application was approved, the applicable Commission policies were embodied in Minority Ownership of Broadcast Facilities ("1978 Minority Policy Statement"), 68 F.C.C. 2d 979 (1978); the Policy Regarding Advancement of Minority Ownership in Broadcasting ("1982 Minority Policy

^{3/} Unfortunately, the Commission never considered the court decisions in the bankruptcy proceeding because Shurberg failed to inform the Commission that the allegations he was advancing had been rejected.

Statement”), 92 F.C.C. 2d 849 (1982); and Corporate Ownership Reporting and Disclosure by Broadcast Licensees (“Ownership Attribution”), 97 F.C.C. 2d 997 (1984). As Shurberg is also forced to concede, the applicable standard at that time in the case of a minority-controlled limited partnership was compliance with the Uniform Limited Partnership Act (“ULPA”) (or the Revised Uniform Limited Partnership Act (“RULPA”)). (See Shurberg Findings, pp. 11-13). The Connecticut Bankruptcy Court decision, which was affirmed on appeal, demonstrates that ACCLP complied with the RULPA at all times. (TRT Ex. 3).^{4/}

1. ACCLP's Application Was Approved By the FCC Even Though ACCLP Was Not an Insulated Limited Partnership

7. The Commission was well aware of ACCLP's structure in 1984. The application clearly set forth that there would be two general partners - Ramirez, who was a minority, and WHCT Management, Inc., whose officers, directors and shareholders were also partners in Astroline Company, ACCLP's limited partner. Fred Boling, the President of general partner WHCT Management, Inc., signed an Amendment to the application. (TRT Ex. 2, Appendix B, p. 118; Tr. 399). The issue of whether ACCLP complied with the Commission's minority ownership policies in 1984 was litigated by Shurberg all the way to the Supreme Court, where he lost. Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547, 110 S.Ct. 2997 (1990).

8. In view of ACCLP's plain disclosure from the very outset that its limited partners also held majority interests in a general partner, Shurberg's purported astonishment that the

^{4/} As in the December 8, 1998 Joint Proposed Findings, the exhibits of the Trustee, Ramirez and TIBS are herein referred to as TRT Ex. and Shurberg's exhibits are referred to as Shur. Ex.

limited partners were not insulated is entirely feigned.^{5/} The Commission knew in 1984, when it granted the application, and at all relevant times thereafter, that ACCLP did not propose or have an insulated structure. Shurberg's entire pleading is devoted to supposedly unmasking something that ACCLP itself revealed the first day it appeared before the Commission -- that ACCLP's limited partners were not insulated. Building his whole position on the manifestly false premise that ACCLP claimed to the contrary, Shurberg has spent 135 pages attacking a straw man. The ALJ's time should be spent addressing the real issues in the case, and Shurberg's misguided findings and conclusions and the bogus premise on which they are based should be entirely rejected.

2. Shurberg's Argument Erroneously Relies On the Commission's Rulings on Alien Ownership

9. Key to Shurberg's latest theory is the argument that "in June 1985, the Commission clarified precisely what it meant by 'ownership' of limited partnerships." Specifically, citing Citizenship Requirements of Section 310, 58 R.R.2d 531 (1985), recon. granted in part and denied in part, 1 F.C.C.2d 12, 61 R.R. 2d 298 (1986), Shurberg argues that the Commission rejected the suggestion that ownership could be measured by "sweat equity" and instead held that ownership of limited partnerships would be calculated based on the actual cash contributions to the partnership by the partners. (See Shurberg Findings, p. 94).

10. The two Commission rulings on Citizenship Requirements upon which Shurberg relies are declaratory rulings dealing with alien ownership restrictions under Section 310 of the Communications Act of 1934, as amended. These provisions have a narrow focus and have

^{5/} This purported astonishment is expressed throughout his pleading. See Shurberg Findings, ¶¶85, 103, 104, 105, 107, 109, 113, 238, 270.

nothing to do with the Commission's minority distress sale policies. Section 310(b)(3) prohibits aliens from owning or voting more than 20 percent of the "capital stock" of a licensee. Under Section 310(b)(4), aliens are permitted to hold 25 percent ownership or voting interests in a company which controls the licensee. In its 1985 ruling, the Commission concluded that the statutory benchmarks in Section 310(b) are applicable to partners who hold equity or voting interests in a limited partnership, but the Commission expressly distinguished as "inapposite" the 1982 Minority Policy Statement where it had extended its tax certificate and minority distress sale policies to limited partnerships in instances where the general partner was both a minority and possessed more than 20 percent in the broadcasting entity. See Citizenship Requirements, supra, 58 R.R.2d at 537, n.36. The Commission also expressly distinguished its attribution policies, stating: "We have recognized that the attribution standards and the alien ownership provisions differ in scope and effect." Id. at n. 56. In short, the very ruling on which Shurberg relies expressly rejects his contention that the Commission's treatment of alien ownership applies to the distress sale policy or the attribution standards.

11. In its declaratory rulings on alien ownership, the Commission determined for the purposes of its alien ownership rules to define ownership interests in a limited partnership in terms of the equity contributions of the limited partners and recognized that measuring ownership interests in a limited partnership in this way might not accurately cover situations where the general partner obtains "sweat equity" in exchange for active participation in business management. See Citizenship Requirements, supra, 61 R.R. 2d at 307, ¶17. However, it is clear from the Commission's discussion that it was defining ownership interests in terms of equity contributions solely for purposes of its alien ownership restrictions. The Commission stated:

In this situation, partnership share could seriously understate the actual equity interest of the aliens. Moreover, because partnership share may be a volatile term in a partnership agreement, it is more difficult to ascertain than equity contribution. For example, partnership share may be computed upon a fixed percentage or be tied to a complex formula that in turn depends upon some variable term such as the amount of gross receipts or profits of the business in a specific year. In addition, the partnership may change the method of computing the share at any time. Finally, in light of the potential for manipulation and the possible complexity in computing partnership share, its use in quantifying the equity interest of aliens in a partnership could place substantial administrative burdens upon the Commission. Given these considerations, we continue to believe that contribution offers the better approach to calculating alien limited partner ownership interests for purposes of Section 310(b) of the Act.

61 R.R. 2d at 307, ¶¶17-18 (emphasis added).

12. Shurberg's citations to the Commission's rulings on alien ownership are extremely misleading. The alien ownership limitations seek to prevent undue alien influence in broadcasting and to preclude aliens from exercising control over broadcast facilities. They have nothing to do with the Commission's goal of encouraging minority broadcast ownership by American citizens. At pages 40-49 of his Findings, Shurberg engages in a lengthy discourse about Ramirez's ownership in ACCLP which is predicated on the erroneous argument that the Commission "rejected the notion that, in calculating 'ownership' of a limited partnership, any non-capital contribution measure should be used." (Shurberg Findings, p. 97). Shurberg's Findings contend that the ownership percentage of each ACCLP partner must be proportionate to the level of the capital contribution that partner had made. This argument is based on a misapplication of the declaratory rulings on alien ownership. The Commission never imposed such a requirement in its Minority Distress Sale Policy Statements or in its decision approving the ACCLP partnership, and obviously such a requirement would completely frustrate rather than encourage minority ownership. The Commission has accepted minority ownership without pro-rata contributions of

equity to recognize the special contributions that experienced minority broadcasters such as Ramirez can bring to an enterprise and to encourage non-minorities to fund minority enterprises. The minority distress sale policies were adopted to promote minority ownership - not to impose heavy financial burdens upon minorities as Shurberg essentially advocates.

13. Moreover, in Citizenship Requirements, *supra*, the Commission adopted a more conservative approach for alien ownership situations because it feared that there would be “substantial business disruption” to communications entities if it first adopted a standard permitting consideration of sweat equity and then changed its policies. 61 R.R.2d at 307, n. 33. The rationale set forth by the Commission exemplifies the plain error of Shurberg’s argument that ACCLP had to modify its limited partnership structure based on statements made by the Commission in 1985 and 1986. If every minority controlled entity whose application was granted prior to 1985 and 1986 had been compelled to modify its structure to change to an equity contribution paradigm, there would have been massive business disruption because, as the Commission well knew, lack of capital in the hands of minority persons was a principal reason why minority ownership policies had been created.

14. Shurberg’s dissertation about the absence of the words “sweat equity” in ACCLP’s limited partnership agreements (Shur. Findings, ¶¶43, 96) is much ado about nothing. Both the original and amended ACCLP partnership agreements contained a specific schedule declaring that Ramirez’s partnership interest was 21% (TRT Ex. 2, Appendix E, pp. 29, 33, and Appendix F, p. 39). As shown above, the Commission fully recognizes the business reality that a “partnership share may be computed on a fixed percentage” without reciting the analysis of why that percentage was used. Citizenship Requirements, *supra*, 61 R.R.2d at 307, ¶17. Indeed, as

certified public accountant Kent Davenport testified, this is an extremely common practice, and one often will not see a specific reference to “sweat equity” in a limited partnership agreement that sets a fixed partnership interest based on a partner’s contribution of labor. (Tr. 436, 445-46). Since ACCLP’s partnership agreements at all times contained a schedule that fixed Ramirez’s partnership interest at 21%, Shurberg’s hunt for the words “sweat equity” in the agreements is meaningless.^{6/}

15. Equally meaningless is Shurberg’s pontification about hypothetical and offered values of the station after ACCLP was established. (Shur. Findings, pp. 40-46). Ramirez’s percentage was set in good faith at 21% at a time when the station enjoyed wide cable coverage prior to the “Quincy-Turner” court decision, and the Commission fully supported its minority ownership policies. ACCLP and Ramirez thus had good reason to expect, and did expect, outstanding growth in the station’s value and less need for limited partner contributions than eventually occurred. ACCLP could not possibly have anticipated that the must carry rules would be overturned and the station’s cable coverage slashed, that the Commission would second guess its own minority ownership policies before the court, that six years would be required to resolve Shurberg’s appeals, or indeed that Shurberg would still be prosecuting these same issues before the Commission today, 15 years later. Shurberg’s argument essentially is that ACCLP’s limited partners took advantage of Ramirez by spending over \$20 million at Ramirez’s request to try to bail out the Titanic. This is nonsense. The record plainly shows that ACCLP was a serious,

^{6/} Moreover, the Commission has held that “...the amount of the general partner’s investment relative to that of the limited partners is not, by itself, of decisional significance [citing other cases].” Doylan Forney, 5 FCC Rcd 5423, 5427, ¶26 (1990), aff’d by judgment sub nom. Maricopa Media, Inc. v. FCC, 951 F.2d 1324 (D.C. Cir. 1991); See also Harry S. McMurray, 72 R.R.2d 1267, 1271, ¶11 (Rev. Bd. 1993).

earnest, and commendable effort to use resources from limited partners to establish a successful and valuable station that would be controlled by a qualified minority operator, precisely as the Commission's policy envisioned. That unrelenting litigation mounted by Shurberg ultimately succeeded in killing ACCLP's operation is a sad reality, but one that does not detract from the valiant, good faith effort that Ramirez and the limited partners made to fulfill the Commission's policy.

16. In short, the Commission's alien ownership rulings and Shurberg's resulting animadversions about ACCLP's capital contributions under those rulings have nothing at all to do with the disposition of this proceeding.

3. ACCLP Complied With the Uniform Limited Partnership Act Which Was the Applicable Standard

17. As even Shurberg is forced to admit, the applicable standard for limited partnerships at the time ACCLP was formed and at the time its application was approved was compliance with the Uniform Limited Partnership Act or Revised Uniform Limited Partnership Act ("ULPA" or "RULPA") (See Shurberg Findings, p.13). The Connecticut Bankruptcy Court reviewed all aspects of ACCLP's operation under the Massachusetts Limited Partnership Act (the "MLPA") under which ACCLP was organized, found that the MLPA was based upon the RULPA, and held that Ramirez "as the managing general partner, exercised fully his powers as such, and that Astroline Company had no equal voice in his decisions." (TRT Ex. 3, pp.7-9). Subsequent policy changes by the Commission in other areas did not affect the validity of ACCLP's structure.

B. Subsequent Changes in the Commission's Attribution Policies Did Not Modify the Grant of ACCLP's Application

1. The Subsequent Changes Were Not Applied Retroactively

18. Shurberg's Findings rely heavily on the Commission's June 1985 decision on reconsideration in Corporate Ownership Reporting and Disclosure by Broadcast Licensees ("Ownership Attribution Reconsideration"), 58 R.R.2d 604 (1985), where the Commission first adopted certain insulation provisions for limited partnerships. It is a central tenet of Shurberg's argument that ACCLP was obliged to comply with the insulation provisions adopted in Ownership Attribution Reconsideration even though ACCLP had been approved as an uninsulated limited partnership under the minority distress sale policies in place at the time of its FCC grant.

19. There is simply no merit to Shurberg's theory, and in fact, there is evidence that Shurberg knows this argument is false. Ownership Attribution Reconsideration does not contain any suggestion whatsoever that the changes incorporated therein are to be applied retroactively to granted and consummated applications approved under the minority distress sale policies. There is no Commission case precedent applying the 1985 Ownership Attribution Reconsideration decision retroactively to previously granted minority distress sales. The Commission's rulings in Citizenship Requirements discussed above also support the grandfathering of ACCLP's status because it would manifestly be substantially disruptive to licensees to change the standards retroactively. Moreover, well established administrative principles dictate that there must be due notice if new policies are to be applied retroactively, Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), and there was no FCC notice to ACCLP in any form.

20. Shurberg avoids citing the cases that repudiate his argument. In Daytona Broadcasting, 103 F.C.C.2d 931, 934-935 at ¶. 7 and n. 6 (1986), the Commission held that the strengthened standards of its Ownership Attribution Reconsideration decision would apply in the future to general/limited partnerships proposed in the comparative licensing context. The Review Board referred to the Daytona ruling in Independent Masters, Ltd., 104 F.C.C.2d 178, 189 n. 25 (Rev. Bd. 1986), stating, “we notice that Augusta 54’s ‘limited’/‘general’ partnership agreement was formed considerably before the Commission strengthened its relevant removal standards; and Daytona Broadcasting expressly announces that the strengthened standards are to be applied prospectively.”^{7/} There can be no question that Shurberg was aware of the Daytona Broadcasting case. Ms. Harburg was shown a copy of the case during her deposition and asked questions about it. (Shur. Ex. 139, pp. 54-55). Shurberg's arguments are thus not only false but also overtly misleading.^{8/}

21. It is also noteworthy that while Shurberg has been litigating the Hartford proceeding for over fifteen years, it does not appear that he has ever previously argued to either the Commission or the courts that the 1985 Ownership Attribution Reconsideration or the 1985

^{7/} See also Chester Associates, 104 F.C.C. 2d 822, 825 (Rev. Bd. 1986).

^{8/} It was not until 1989 that the Commission applied its attribution standards to the integration criterion involving then pending comparative broadcast applications (see Cotton Broadcasting Co., 65 R.R.2d 1839, 1843 (1989)), and it has never applied those standards retroactively to those who became licensees pursuant to minority distress sales. As the Court of Appeals has held, an applicant must have the requisite notice before the standards set forth in Ownership Attribution Reconsideration are applied. Marin TV Services Partners, Ltd. v. FCC, 993 F.2d 261, 72 R.R.2d 1231, 1233 (D.C. Cir. 1993). ACCLP, whose application had been granted and consummated prior to adoption of the attribution standards, never received any notice that the new standards could be applicable.

and 1986 rulings on Citizenship Requirements had any bearing on ACCLP's structure. If Shurberg really believed that either the 1985 or 1986 decisions required corrective steps on the part of ACCLP, surely he would have pressed such arguments in a timely fashion. Thus, at a minimum, Shurberg's arguments are grossly untimely, and he has waived any right to raise them at this late date. A party with sufficient opportunity to raise a challenge in a timely manner, but who fails to do so, is deemed to have waived the challenge and is precluded from raising it in subsequent proceedings. See Jerome Thomas Lamprecht, 7 FCC Rcd 6794 (1992).

2. Comparative Broadcast Cases For New Facilities Decided Subsequent to 1984 Have No Bearing On the Grant of ACCLP's Application in 1984

22. Shurberg's reliance on a series of comparative broadcast cases for new facilities in which decisions were released between 1987 and 1993 is misplaced. Since the Commission expressly limited its Ownership Attribution Reconsideration to prospective application in licensing cases, these decisions are not applicable to ACCLP's situation. All of these decisions were released long after the ACCLP application had been approved and consummated, and none of these cases involved an application approved under the Commission's minority ownership policies. The cases are distinguishable in other respects as well. For instance, in Stanly Group Broadcasting, Inc., 3 FCC Rcd 5017 (Rev. Bd. 1988), the applicant (Amador Broadcasting Limited) was a limited partnership with one Hispanic general partner. The general partner had no broadcast experience whereas Amador's limited partners had extensive broadcast experience. The Board rejected Amador's claim of 100 percent fulltime integration credit, stating that at most it would award Amador 100 percent parttime credit. The situation is vastly different than that presented here because ACCLP's minority general partner has the extensive broadcast experience

and its limited partners had no broadcast experience. In any event, the Board did not disqualify Amador but rather limited its integration credit. Pacific Television, Ltd., 2 FCC Rcd 1101 (Rev. Bd. 1987), rev. denied, FCC 88-116, released March 24, 1988, another case cited by Shurberg, is also distinguishable. In Pacific, the general partner and the limited partner had only an oral agreement to form a partnership and no written agreement occurred until well after the B cut-off date. Under these circumstances, no integration credit was awarded. Shurberg also cites several cases from 1992 and 1993 such as Praise Broadcasting Network, Inc., 8 FCC Rcd 5457 (Rev. Bd. 1993),^{9/} Atlantic City Community Broadcasting, Inc., 8 FCC Rcd 4520 (1993), Gloria Bell Byrd, 7 FCC Rcd 7976 (Rev. Bd. 1992), aff'd, 8 FCC Rcd 7126 (1993), and SaltAire Communications, Inc., 8 FCC Rcd 6284 (1993). However, those cases were released nearly ten years after ACCLP's application was filed and granted, long after ACCLP went into bankruptcy and during the period that WHCT-TV was in the hands of the Trustee. Shurberg cannot sensibly argue that those comparative cases for new licenses gave any guidance at all to ACCLP in 1984 or at any time that it was the licensee of WHCT-TV.^{10/}

C. ACCLP Had No Motive to Misrepresent

23. Shurberg's attempt to allege misrepresentation by ACCLP is based on his argument that "ACCLP knew that it was not in compliance with the Commission's limited partnership criteria." (Shurberg Findings, p. 108). This argument has no basis in law or in the

^{9/} The facts in other cases cited by Shurberg such as Catherine Juanita Henry, 3 FCC Rcd 1492 (ALJ 1988) and Bogner Newton Corporation, 2 FCC Rcd 4792 (ALJ 1987) are very different and therefore these cases are not apposite.

^{10/} As in Stanly Group, supra, in Praise Broadcasting, the general partner of Wrightsville Beach Radio Limited Partnership lacked broadcast experience.

record. As demonstrated above, ACCLP's application clearly disclosed that the partners in Astroline Company had interests and official positions with general partner WHCT Management, Inc. In granting this application, the Commission never suggested to ACCLP that there was anything unacceptable about this structure or that it could be necessary to modify the structure. No subsequent order, decision or policy statement was released which placed ACCLP on notice that anything was wrong with its structure. As demonstrated above, the Commission's June 1985 decision in Ownership Attribution Reconsideration was not applied retroactively; hence, ACCLP was effectively grandfathered. As further demonstrated above, the Commission's 1985 and 1986 declaratory rulings on alien ownership in Citizenship Requirements were not apposite to ACCLP's situation and the Commission explicitly limited its rulings to alien ownership situations.

24. Shurberg claims that the failure to file ACCLP's December 31, 1985 amended partnership agreement constitutes "circumstantial evidence" that ACCLP knew its agreement fell short of the Commission's standards. (Shurberg Findings, pp. 115-116). And Shurberg also contends that the documents drafted in connection with the August 3, 1987 filing "demonstrate that ACCLP could not accurately claim that the limited partners of ACCLP were insulated from the media activities of ACCLP..." (Shurberg Findings, p. 109). Since the Commission had approved ACCLP's structure in 1984, neither the December 1985 Amended and Restated Limited Partnership Agreement nor the August 3, 1987 ownership filing were material in terms of partnership control, since they did not abrogate the 1984 structure. Both ACCLP and the Commission knew that the partners of Astroline Company had interests in WHCT Management, Inc. There was nothing to hide. The fact that the 1985 amendment to its partnership agreement did not contain insulation provisions is without significance. Shurberg's own Findings suggest

that any failure to file the amended agreement was more a matter of confusion among counsel than anything else. As Shurberg states at page 50 of his Findings, “it does not appear that B&H [Baker & Hostetler], ACCLP’s communications law firm ... even had a copy of the December 31, 1985 Amended Partnership Agreement in its files until late July, 1987, at the earliest, and possibly not even until September, 1988.” In any event, the amended partnership agreement was publicly filed with the State of Massachusetts, and it was referenced in ACCLP’s December 7, 1988 ownership report, which negates any attempt to hide it. (Shur. Ex. 9; Tr. 521-522; TRT Ex. 2, p. 25 and Appendix D, p. 123).

25. Similarly, it made no difference that ACCLP’s August 3, 1987 letter did not contain any certification with respect to insulation because ACCLP was not claiming that it was an “insulated” limited partnership. (TRT Ex. 2, Appendix D, p. 11; Shur. Ex. 21). Furthermore, the August 3 letter fully disclosed the various relationships of ACCLP’s partners which evidenced that the partners of Astroline were still involved in WHCT Management, Inc. Id. Shurberg’s arguments as to misrepresentation therefore ignore the facts and defy logic. While Shurberg points to a series of draft ownership reports as suggesting some kind of cover-up, in fact all that these drafts suggest was that there was confusion among counsel as to how to prepare the report and what format to adopt.

26. Shurberg’s arguments as to the August 3, 1987 filing rely heavily on his assertions that the B&H associates responsible for working on the ownership report were “experts” in the preparation of such reports. (Shurberg Findings, pp. 70,76,78). But the record does not support this characterization. Thomas Hart identified Dale Harburg as one of the B&H people who prepared ownership reports. (Tr. 554). Ms. Harburg’s deposition was entered into evidence in

this proceeding but Shurberg did not call her to testify. When asked about her involvement in the preparation of ownership reports at her deposition, Ms. Harburg stated: "I was involved for some of the firm's clients in either reviewing or filing issues programs lists and maybe ownership reports." (Shur. Ex. 139, p.13). She did not recall having any responsibility at B&H for maintaining ownership reports for any clients, and she had no recollection of preparing the drafts of the ACCLP ownership report. (Shur. Ex. 139, pp. 22, 31). Ms. Harburg worked in both the communications area and the trademark area at B&H. (Shur. Ex. 139, p.8). There is no indication that Ms. Harburg had much involvement of any kind in ACCLP matters. Ramirez only vaguely remembered her while he recalled other attorneys being much more involved with ACCLP. (Tr. 302-303).

27. Similarly, Shurberg entered into evidence the deposition of David Dudley, another B&H associate, but Shurberg did not call Mr. Dudley as a witness. While he was working at B&H during the period from 1986 until 1988 or 1989, Mr. Dudley did not specialize in any particular substantive area and was not assigned to any particular specialized practice group. (Shur. Ex. 141, pp.6-7). He did not recall ever being involved in the preparation of an ownership report for ACCLP to be filed with the FCC and did not recall discussing ownership reports with Ms. Harburg, Thomas Hart or anyone else. (Id. at pp. 13, 16-17). He had no idea what a Section 73.3613 contract was and did not recall reviewing B&H files to resolve the questions he had raised in a memo he had prepared. (Id. at p. 18; Shur. Ex. 83, p.2). Ramirez only vaguely remembered Mr. Dudley. (Tr. 303).

28. While Shurberg also introduced the deposition of former B&H associate Linda Bocchi as an exhibit, Ms. Bocchi did not begin working at B&H until June 1988 and therefore

had nothing to do with the preparation of ownership reports for ACCLP prior to 1988. (Shur. Ex. 140, p. 7).

29. The record reflects that ACCLP did not begin to consider “insulation” provisions until the latter part of 1988 when it was faced with the possibility of a comparative license renewal hearing. At that point, FCC counsel brought to ACCLP’s attention the case of Stanly Broadcast Group, supra, which involved a comparative situation. However, the activities in late 1988 had nothing to do with the December 31, 1985 amended partnership agreement or the August 3, 1987 ownership filing.

III. Shurberg’s Recitation of the Facts is Fundamentally Flawed

30. Shurberg’s findings of fact are misleading and cannot be relied upon. The instances of distortion are simply too substantial to discuss in detail but the following paragraphs illustrate the extent of the problem.

A. Ramirez Maintained Control of ACCLP At All Times

31. Shurberg claims that in Minority Ownership in Broadcasting, 92 F.C.C.2d 849, 855 n. 29 (1982) (the “1982 Minority Ownership Policy Statement”), the Commission emphasized that general partners must wield “complete control.” (Shurberg Findings, p. 12). However, the Commission actually emphasized that limited partnerships are creatures of statute with “one or more general partners who exercise complete managerial control over the business’ affairs and who are personally liable for the partnership debts.” Id. at 854. Furthermore the Commission stated: “We have generally found ‘control’ to be in those who have authority to determine the basic policies of a station’s operations, including programming, personnel and financial matters,” citing Southwest Texas Broadcasting Council, 85 F.C.C.2d 713, 715 (1981). The record

demonstrates that ACCLP operated in compliance with the statutory framework under which it was formed (the MLPA) and that Ramirez was at all times clearly in managerial and operational control of the matters the Commission deems of significance.

32. Furthermore, while Shurberg claims that the Petition for Special Relief filed by Faith Center's counsel on May 29, 1984 represented that Ramirez would have "full operational control" and Astroline Company would have "no operational control," Shurberg neglects to mention that the same petition also stated that WHCT Management, Inc. would have "limited operational control." (Shur. Ex. 66, p. 4). In addition, Shurberg neglects to mention that the assignment application fully set forth the relationships of the parties and contained an Affidavit of Fred Boling, Jr. in his capacity as President of WHCT Management, Inc. (TRT Ex. 2, Appendix B, pp. 49, 52-53). In fact, the record shows that Ramirez did exercise full operational control. See TRT Findings, pp. 28-39.

33. At pages 53-68 of his Findings, Shurberg tries to embellish his erroneous argument that Ramirez did not have "complete control." However, none of the matters that Shurberg raises go to the day-to-day operation of WHCT-TV over which Ramirez unquestionably exercised continuous managerial and operational control. For instance, Shurberg cannot dispute that Ramirez hired and fired the station personnel and had full authority to handle personnel matters on a day-to-day basis. The only matter that Shurberg raises that has anything to do with personnel is a letter from Schatz & Schatz, the Connecticut law firm hired by Mr. Ramirez, forwarding to Carter Bacon at Peabody & Brown draft "letters of intent" with three employees. Shurberg contends that the letter "belies Ramirez's claim that he alone was responsible for employment matters at the station." (Shurberg Findings, p. 65). The letter in question is dated March 29,

1985 -- shortly after the consummation of the assignment -- and was sent to Mr. Bacon at Mr. Ramirez's request because two of the draft letters dealt with partnership rights or appreciation rights, which was a perfectly natural thing for the corporate attorneys at Peabody & Brown to review. (TRT Ex. 6, p.3).

34. In an unavailing attempt to show that Ramirez did not have "complete control" over programming matters, Shurberg repeatedly misstates the hearing testimony. For instance, at page 60, Shurberg claims that Ramirez "kept Boling and Sostek apprised of Ramirez's discussions with various program suppliers concerning the possibility of restructuring payment plans." But Ramirez testified that he "communicated to them about extraordinary expenditures, large ticket liability assumption, a handful of times." (Tr. 298). Similarly, Shurberg claims that Ramirez "'advised' Boling and Sostek about programming matters," and "he made 'recommendations' and suggestions." (Shurberg Findings, p. 60). But Ramirez's testimony reflects that he advised Boling and Sostek about the programming decisions he had already made (Tr. 293). ^{11/}

35. With respect to finances, Shurberg relies upon the arguments made by the Trustee to the Bankruptcy Court and evidence introduced in the bankruptcy proceeding without acknowledging that the Court examined the arguments and the evidence and concluded that Ramirez had control. Specifically, Shurberg argues that "Ramirez regularly consulted with Boling and Sostek on virtually all aspects of the station's operation." (Shurberg Findings, p. 57).

^{11/} Shurberg contrives some incredible findings to the effect that Ramirez could not have been "managing general partner" of ACCLP because he signed some letters as General Manager. (Shurberg Findings, pp. 61-62). This argument is ridiculous. Ramirez was both Managing General Partner and General Manager and there was no requirement that he use one title as opposed to the other. It is hardly surprising or unusual that the General Manager of a television station would refer to himself as General Manager in correspondence related to the station or licensee company.

However, Shurberg cites no support for this conclusory statement other than Ramirez's testimony that he "would call them on significant expenditure issues from time to time." Shurberg's finding is misleading since his question to Ramirez did not ask about "consultations" but rather simply asked about "contacts" with Messrs. Boling and Sostek. The fact that there may have been "contacts" does not support the conclusion that Ramirez consulted with them or accepted any advice from them. Shurberg's Findings also appear to draw an adverse inference from the fact that Ramirez provided the Limited Partner with financial reports and budget and performance goals, but Shurberg cites no precedent which would indicate that there is anything wrong with this practice. Such financial reports are normal and customary. Indeed, even insulated limited partners can receive these types of reports. See Ownership Attribution Reconsideration, supra.

36. Shurberg further claims that "Ramirez did not, until sometime in 1988, shortly before the ACCLP bankruptcy...possess a checkbook for any ACCLP accounts;" that "Boling and Sostek exercised their check-signing authority on numerous occasions;" and that Boling annotated invoices with the notation "OK." (Shurberg Findings, p. 54-56). But all of these allegations were fully considered by the Bankruptcy Court. Chief Judge Krechevsky noted that "Boling testified that his notations of "O.K." on certain invoices were the recording of Ramirez's directions, not Boling's, as to priority of payment" and "the maintenance of the checkbook and the Debtor's bank account in Massachusetts was more the result of the neverending need to have Astroline Company fund the Debtor's continuous losses." (TRT Ex. 3, p. 104). After a nine day trial including far more exhibits than those introduced in the FCC hearing, the Bankruptcy Court held:

The court, however, cannot find as a fact that Astroline

Company ever did anything more than prepare the checks as directed by Ramirez or Rozanski and add to the Debtor's bank account those funds necessary to make good the issued checks. Funding in this manner reduced the borrowing costs of Astroline Company. While Astroline Company had the power to empty the Debtor's bank account, it never did so; neither did it refuse to prepare checks in order to override any decision of Ramirez. Ramirez testified that until the funding by Astroline Company ceased, every invoice was paid that he wanted paid. All of the relatively few checks which were signed by the Astroline Company partners, except for two, were adequately explained as either being payable to Ramirez himself, necessarily signed due to Ramirez's absence, or for other reasonable considerations.

(TRT Ex. 3, p. 106; emphasis added).^{12/}

37. Finally, Shurberg relies heavily on two isolated documents in his effort to suggest that there was too much involvement of Boling and Sostek with ACCLP's affairs. Shurberg points to a letter from Mr. Sostek to Mr. Hart complaining that a Special Temporary Authority ("STA") for WHCT-TV (Shur. Exs. 117 and 118) had been allowed to expire and to a memo prepared by David Dudley, a young associate at B&H (Shur. Exs. 134 and 135). Assuming that these documents supported Shurberg's argument, such isolated contacts would not establish that Sostek and Boling controlled ACCLP. In any event, however, the documents themselves do not support the findings proposed by Shurberg. It was Ramirez who brought to the attention of B&H and Mr. Sostek that the STA, which B&H apparently had been monitoring, had lapsed. (Shur. Ex. 117). Mr. Sostek's letter, which was copied to Ramirez, was that of an irate investor who was

^{12/} Although the Bureau initially raised a concern that the question of who controlled the station's finances was "troubling," (Bur. Findings, p. 30), the Bureau, like the Bankruptcy Court, found that all station expenditures were incurred at the direction of Ramirez or his staff. Id.

troubled that the licensed status of WHCT-TV might be in jeopardy. His letter shows his concern about FCC compliance. Id. Mr. Hart's letter in response was simply to calm Mr. Sostek and was also sent to Ramirez. (Shur. Ex. 118). Shurberg's Findings similarly distort the significance of the Dudley memo. (Shur. Ex. 135). The Dudley memo to Tom Hart, dated August 2, 1988, suggests that Hart had informed Dudley that Boling had requested that B&H perform no additional services unless he requested them. Id. Dudley did not recall writing the memo nor the circumstances that led to its preparation. (Shur. Ex. 141, pp. 30-31). Although Dudley knew that Ramirez was the manager of WHCT-TV, he did not know who Boling was and had no recollection as to whether Boling would have had the authority to make such a request. He did not think that Boling had the authority to prevent him from speaking to Ramirez. (Id. at pp. 31-32). Hart testified that Dudley had misunderstood him (Tr. 635-637). Faced with the testimony of Dudley and Hart, Shurberg claims that an August 8, 1988 letter from Hart to Boling (Shur. Ex. 134) "strongly supports a finding that Dudley did not misunderstand Hart at all." However, the August 8, 1988 letter concerns a request that B&H respond to an audit questionnaire from Arthur Andersen relating to a separate company, Astroline Corporation, a fact which Mr. Hart noted when he was asked about the document. (Tr. 634). Mr. Hart added that the firm continued to do work on behalf of ACCLP under the direction of Rich Ramirez and "we were doing some very significant work then, relating to the Supreme Court." Id. The August 8, 1988 letter does not suggest at all that Hart needed Boling's consent for work done for ACCLP. (Shur. Ex. 134).^{13/}

^{13/} Shurberg infers at p.28 n.19 that there were "early efforts to avoid personal liability" by Ramirez, but Shurberg cites no support for this statement. In fact, Ramirez never avoided
(continued...)

38. Shurberg's factual findings are thus fundamentally flawed by his reliance on arguments that were rejected by the Bankruptcy Court and unsupported by the evidence here. Moreover, it is noteworthy that although Shurberg had the benefit of full discovery and the opportunity to depose the principals of Astroline Company and WHCT Management, Inc., Shurberg did not even bother to depose Mr. Boling or Mr. Sostek.

B. Ramirez Maintained His 21% Ownership Interest in ACCLP

39. Shurberg's allegation to the Commission that Ramirez did not maintain his 21% ownership interest in ACCLP was based on an argument made in the Bankruptcy Court. At no time that his petition was pending did Shurberg ever inform the Commission that the Bankruptcy Court had rejected the proposed finding advancing this argument. In his Findings, Shurberg argues without any support that "the fact remains that even ACCLP was constrained to acknowledge in its IRS returns that Ramirez's ownership was dramatically lower than the "more than 20%' threshold level required under the Commission's minority ownership policies." (Shurberg Findings, p. 48, n.31). This finding is erroneous. Shurberg has failed to consider that the figures set forth in the IRS returns reflected the special tax reallocation which did not affect Mr. Ramirez's 21% ownership interest in ACCLP. The testimony of Arthur Andersen accountant, Kent Davenport, and the audited financial statements for ACCLP prepared by Arthur

^{13/}(...continued)

his responsibilities as managing general partner and incurred substantial expenses in reaching a settlement with the Trustee during the bankruptcy litigation. (TRT Ex. 2, p. 26; Tr. 306-309).

Andersen confirmed that Mr. Ramirez's 21% ownership interest did not change between 1984 and late 1988. (See TRT Findings, pp. 41-47).^{14/}

40. Indeed, to read Shurberg's Findings, one would barely know that Mr. Davenport testified at all, and would never know that he carefully explained why, contrary to Shurberg's claim, the tax returns had no bearing on Mr. Ramirez's consistent 21% ownership of ACCLP. Shurberg disingenuously takes the phrase "ownership of capital" contained in the K-1 tax form,^{15/} and arbitrarily transmogrifies it to read "percentage of ownership."^{16/} Yet, Mr. Davenport clearly showed precisely why the "ownership of capital" line on the K-1 form was not the same as "percentage of ownership," because the former assumed hypothetically that the business had been dissolved and was not ongoing, and excluded altogether the value of the station license, while the ownership percentage figures contained in the Arthur Andersen audited financial statements - which reflected Ramirez's 21% ownership - did not entail these fictions.^{17/} Shurberg's argument is based on how he wishes the record would read. But the ALJ must decide this case based on how the record actually reads.

^{14/} Shurberg claims that Kent Davenport "disagreed" with Ramirez's explanation of his entitlement to a 21% interest. That is not the case. Ramirez testified that the allocation of profits and losses had nothing to do with his ownership of 21% of the equity of the business (Tr. 383-384) which is precisely what the Arthur Andersen audited financial statements demonstrate and what Mr. Davenport confirmed. (TRT Exs. 7, 8, 9 and 10; Tr. 438).

^{15/} See Shur. Findings, p. 48; Shur. Ex. 26, p. 22; Shur. Ex. 27, p. 16; and Shur. Ex. 28, p.8

^{16/} See Shur. Findings, n. 33 and p. 96, ¶197.

^{17/} See TRT Findings, ¶¶75-86, 121.

C. Shurberg Repeatedly Distorts the Record Evidence

41. In the preceding sections, the Joint Respondents have shown numerous examples of errors in Shurberg's factual findings. While it is impossible to catalog all of Shurberg's distortions, this section deals with representative examples from the various portions of Shurberg's filing.

1. Shurberg's Version of the Origins of ACCLP is Unreliable

42. Shurberg's Findings completely ignore Ramirez's substantial broadcast experience and his longstanding interest in owning a broadcast facility, just as they likewise ignore the fact that the principals of Astroline Company had no broadcast experience and looked on the acquisition of a television station only as an investment. (See TRT Findings, pp. 14-21). In addition, Shurberg ignores the dialogue that had developed between Ramirez and Tom Hart after they were introduced by Ramirez's friend and boss, Bill Campbell. While Shurberg claims that Ramirez and Hart had a "few" discussions,^{18/} (Shur. Findings, p. 18), the record amply demonstrates that in addition to their initial meeting of a few hours, Ramirez and Hart had additional meetings in person as well as phone discussions that continued for a number of months. (TRT Ex. 2, pp. 5-6).

43. Shurberg notes that Ramirez was not certain when during the course of Memorial Day Weekend 1984 he first met Boling and Sostek, but Shurberg claims that the meeting took place on Monday May 28th. At page 17 of his Findings, Shurberg relies heavily on his Exhibit 35 and contends that the terms of an agreement were "a 'fait accompli' in Hart's view" as of May 28,

^{18/} Shurberg mistakenly cites TRT Ex. 1, the Testimony of Martin W. Hoffman, for this purported finding.

1994. (Shurberg Findings, p. 17). These findings must be rejected since Shurberg Exhibit 35 was a third hand hearsay document that Shurberg withdrew and which, in any case, does not support Shurberg's contention. It is a basic principle that findings cannot be predicated on documents that are not in evidence. See e.g. James E. Reese, 45 F.C.C.2d 329, 331 (ALJ 1973), aff'd 45 F.C.C.2d 315 (Rev. Bd. 1974).

44. At page 20 of his Findings, Shurberg contends that "Ramirez provided a copy of the draft [partnership agreement] to his personal counsel for review, but the record does not indicate that Ramirez requested any changes to the draft." However, the testimony cited by Shurberg does not support this finding. Instead, Ramirez testified that his counsel "made numerous suggestions to me and pointed out numerous issues. And, I have recollection of sending that over to Peabody & Brown ... Which of those, if any, I cannot tell you whether they were specifically incorporated." (Tr. 388-389).

45. At pages 20 and 25 of his Findings, Shurberg claims that Carter Bacon, the Peabody & Brown attorney, was "particularly sensitive to the interests of Astroline Company." However, the record reflects that Mr. Bacon was simply ensuring that ACCLP was in compliance with partnership law and FCC restrictions. Mr. Bacon testified: "...in addition to representing Astroline Communications Company in connection with these agreements, I was also counsel and always had been to Astroline Company, and the thought that these guys who had been... could be exposed to claims by creditors of Astroline Communications Company was something that I was charged with preventing... Anything that would suggest for a moment that Rich wasn't the controlling person would set off alarm bells in my mind because then we could be... end up in trouble with our license." (Tr. 503). The fact that ACCLP's corporate and FCC counsel were

doing their best to ensure ACCLP's compliance with partnership and FCC law is evidence not of misconduct but rather of ACCLP's good faith.

46. Shurberg states at page 25, n. 17 that "Hart viewed himself to be an expert in communications law." But Tom Hart candidly admitted that he was not an expert in ownership reports and that he relied on others to prepare those reports. (Tr. 554-556). In the same footnote, Shurberg states that "[f]or his part, Ramirez (although not an attorney) testified that he, too, had maintained on-going familiarity with the Commission's ownership policies." In fact, however, Ramirez was discussing the Commission's minority ownership policies and said that "[a]s a layperson, I tried to stay abreast of those issues up to 1984 and certainly thereafter..." (Tr. 231-232). There is no evidence that Ramirez was familiar with other FCC ownership policies or the alien ownership policies.

47. According to Shurberg's Findings (p. 31, n. 20), when ACCLP suggested to the FCC that it would provide ownership interests to minorities, that "did not include any suggestion that the ownership interests to be provided to [minority] employees would be conditional." This is nonsense. ACCLP had no duty to offer any additional interests to employees much less to report whether they would retain those interests if they left ACCLP's employ. In any case, ACCLP advised the FCC that WHCT Management, Inc. was to be a vehicle for ultimately transferring ownership interests to minority and non-minority employees who committed to work at the station (TRT Ex. 2, p.9; Tr. 241-242). Obviously, there would be no enhancement to minority ownership of the station if the employees left.

2. Shurberg's Findings Concerning the May 21, 1985 Lance Memo Are Speculative and Unreliable

48. As the Joint Respondents demonstrated in their Findings, in May of 1985 the accountants at Arthur Andersen recommended that ACCLP utilize a special tax allocation of the type that they had used in other limited partnership situations. (TRT Findings, pp. 43-46). On May 21, 1985, William Lance of Peabody & Brown prepared a memorandum summarizing discussions that were held the preceding day among Ramirez, Sostek, Boling, Hart, Lance and an Arthur Andersen representative to discuss the special tax allocation. (Shur. Ex. 39). At pages 32-33 of his Findings, Shurberg speculates that "it appears from the last portion of the Lance memo (Shur. Ex. 39)... that ACCLP intended in any event not to notify the Commission of any partnership changes until after SBH's reply brief was due in the Court of Appeals case..." But Shurberg has seriously misinterpreted the significance of the last portion of the memo. The memo, dated May 21, 1985, noted that in order to accomplish the recommended special tax allocation, Peabody & Brown would have to work with Arthur Andersen to prepare an amended partnership agreement; Mr. Hart would have to work with Peabody & Brown to prepare documents that needed to be filed with the FCC; and those filings would be made immediately following the filing of Shurberg's Reply which was estimated to be on or about June 20, 1985. June 20th was the 30th day following the May 21st memo and, under FCC rules, would have been the logical time for reporting any changes that originated on that date. Shurberg's attempt to draw some sinister inference from Lance's time calculations is totally unwarranted. In any case, there is no evidence that the parties could have accomplished the changes in the thirty day time frame originally contemplated. The December 31, 1985 amended partnership agreement was not

prepared until many months later. And Shurberg made no effort in discovery or at the hearing to examine Lance and establish any proof for Shurberg's own nefarious and unfounded speculation.

49. Indeed, Lance is not the only attorney who Shurberg defames without cause. Shurberg's entire pleading posits that a vast conspiracy of lawyers - attorneys Simowitz, Hayes, Bacon, Lance, Hart, Dudley, Harburg, and Bocchi - all engaged in some grand plan to mislead the Commission and the courts about a partnership amendment that was already a public record, and about a fact that ACCLP had already openly disclosed, namely, that its limited partners were not insulated. However, while shamelessly accusing Mr. Simowitz of authoring briefs to the federal courts that deliberately misrepresented ACCLP's structure, Shurberg canceled the deposition of Mr. Simowitz he had noticed, declined to call Mr. Simowitz for examination at the hearing, and now completely ignores the testimony Mr. Simowitz submitted (TRT Ex. 4).

50. Had Shurberg afforded Mr. Simowitz the decency of a chance to explain himself in person before dumping so serious a charge on him, or had Shurberg simply acknowledged the testimony that Mr. Simowitz gave, he would have to recognize that the record on which the court case was based ended in 1984, before even Shurberg claims that insulation of ACCLP's limited partners was supposedly required. There categorically was no misrepresentation.

51. Similarly, after first canceling his noticed deposition of Mr. Hayes, and then failing to call Mr. Hayes to testify at the hearing, Shurberg accuses Mr. Hayes in absentia of intentional deception. (See Shur. Findings, ¶¶174-178). Shurberg asks the ALJ to make this grave finding based on Shurberg's speculation about Mr. Hayes' state of mind regarding a letter he wrote. But speculation alone cannot support so serious a charge. If Shurberg really believed that this theory warranted pursuit, his proper course was to examine Mr. Hayes about the facts and

circumstances. Instead, Shurberg chose not to pursue that course, yet now relies on the complete absence of a record, which he allowed, and his failure to give Mr. Hayes any chance to be heard, to assassinate Mr. Hayes' character purely through speculation and surmise. The Presiding Judge should not endorse so unworthy a tactic.

52. To cite yet another example, Shurberg asks the Presiding Judge to make an assumption about Mr. Hart's state of mind regarding ACCLP's status under the distress sale policy based on the mention of Mr. Hart's name in the appearances of a case which did not involve that policy at all.^{19/} Of course, even had the case involved the policy that is the subject of this proceeding, counsel's name in the appearances alone does not reflect the nature or extent of counsel's involvement in the case, or the issues with which he was involved, or his state of mind about those issues. Mr. Hart was at the hearing in this proceeding. If Shurberg really believed that Mr. Hart's appearance in an unrelated case was relevant, he had only to ask and develop the record. But, again, Shurberg preferred to leave the record silent, and then to ambush Mr. Hart with a post-hearing character attack based entirely on conjecture and surmise that Mr. Hart has had no opportunity to address. To advance his wholly unsupported claim of a vast conspiracy of attorneys, Shurberg's desperation has regrettably led him to adopt unseemly tactics.^{20/}

^{19/} Shur. Findings, p. 111, n. 53, citing Religious Broadcasting Network 3 FCC Rcd 4085 (Rev. Bd. 1988).

^{20/} The Presiding Judge also will recall how Shurberg charged Mr. Hart in his absence with avoiding service of process to testify without disclosing, until Mr. Hart's appearance forced him to admit it, that Mr. Hart had telephoned to schedule his appearance voluntarily but Shurberg had not returned his call, choosing to respond instead by a fax which Mr. Hart did not receive because he was out of town. (Compare Tr. 14-15 with Tr. 194-196).

(continued...)

3. Shurberg's Findings Concerning the December 31, 1985 Amended Partnership Agreement and the August 3, 1987 Report of Ownership Are Speculative and Unreliable

53. Shurberg concedes that "ACCLP duly and timely reported the August-September 1985 changes in its ownership to the Commission..." (Shur. Findings, p. 36). But then Shurberg proceeds to draw unwarranted adverse inferences because no FCC file-stamped copy of the December 31, 1985 Amended and Restated ACCLP Limited Partnership Agreement could be located. In this regard, Shurberg neglects to mention that the FCC files are missing all of the ownership documents relating to Station WHCT-TV for the 1980s, so it is impossible to definitively determine what was filed and what was not filed. (TRT Ex. 5).

^{20/}(...continued)

Moreover, even in the rare instance when one of the targeted attorneys was able to address Shurberg's wild conspiracy theory, Shurberg obviously ignores the substance of the evidence. Although Shurberg relies heavily on his conjecture that a note which attorney Carter Bacon wrote in 1987 concerning a draft ownership report reflected a conspiracy to conceal that ACCLP's limited partners were not insulated (see Shur. Findings, ¶¶156-157, 265-266), the evidence proves precisely the opposite. In 1985 Mr. Bacon had written to Mr. Hart to express his concern that filing an ownership report for the non-insulated limited partners (i) might wrongly imply that they exercised control of ACCLP when they did not, and (ii) was not required by the instructions to the ownership report form. (Shur. Ex. 68). It is undisputed, however, that Mr. Hart nevertheless did file the ownership report for the limited partners, thereby going beyond the technical requirements of the instructions and openly re-notifying the Commission that the limited partners were not deemed insulated. (TRT Ex. 2, Appendix D, pp.50-53). Mr. Bacon testified that his 1987 notation reflected the same concern as his 1985 letter. (Tr. 495-496). It is further undisputed that the August 3, 1987, ownership letter that Mr. Hart filed with the Commisison again reported the ownership of the limited partners and their interest in a general partner. (TRT Ex. 2, Appendix D, pp. 111-112). Thus, Mr. Hart again proceeded in good faith as someone who was disclosing, not concealing, that the limited partners were not treated as insulated. Shurberg's speculation to the contrary is totally baseless.

54. Shurberg's recounting of the events that occurred in late 1985 and 1986 is inaccurate. For instance, Shurberg notes that there was a December 31, 1985 telex from Boling attempting to implement the special tax allocation of profits and losses that had been discussed in May 1985. Shurberg contends that "Ramirez testified that he himself was not involved in the preparation of this telex, nor could he recall when he first saw a copy of the telex." (Shur. Findings, p. 37). But Ramirez definitely recalled seeing the document previously (Tr. 318). Shurberg also claims that "Ramirez testified that he had run into difficulties in getting Webb and Planell to sign the December 31, 1985 Amended Partnership Agreement." Actually, Ramirez testified that the difficulties he encountered concerned the unwillingness of Webb and Planell to accept the exposure of being general partners which led to the offering of limited partnership interests to these individuals. (Tr. 329). According to Shurberg, since Webb and Planell joined ACCLP in September 1985, Ramirez's testimony is not reliable. Shurberg's argument is difficult to comprehend. The time period in the question posed to Ramirez was not clear and Ramirez's response covered a broad period. Ramirez certainly cannot be faulted for imprecise questioning on the part of Shurberg. See e.g. Swan Broadcasting Ltd., 5 FCC Rcd 3045, 3047, ¶ 14 (ALJ 1990). The testimony does not in any way affect Ramirez's credibility.

55. As discussed earlier, Shurberg appears to draw an adverse inference from the fact that no FCC stamped copy of the December 31, 1985 Amended Partnership Agreement could be located. But Shurberg's own findings admit that the December 31, 1985 amendment was "not executed until March, 1986 (at the earliest)" (Shur. Findings, p. 39) and that "it does not appear that B&H -- ACCLP's communications law firm which bore sole responsibility for assuring the filing of materials by ACCLP with the Commission -- even had a copy of the December 31, 1985

Amended Partnership Agreement in its files until late July, 1987, at the earliest, and possibly not even until September 1988.” (Shur. Findings, p. 50). Under these circumstances, it is evident that any failure to file the amended agreement was entirely inadvertent. The fact that ACCLP’s December 7, 1988 ownership report referenced the amended agreement (see TRT Ex. 2, Appendix D, p. 154) and the fact that the amendment was publicly filed in the State of Massachusetts (Tr. 521-22; Shur. Ex. 9) negates any inference that ACCLP was attempting to hide the amendment. While Shurberg claims, without citing any record support, that it was B&H’s “routine custom” to obtain a stamped “received” copy from the FCC (Shur. Findings, p. 51), this finding is not supported by the record. Mr. Dudley, a former associate at B&H, did not recall that it was B&H’s standard practice to retain a copy of an FCC filing stamped “received.” (Shur. Ex. 141, p. 17).

56. The speculation that Shurberg engages in with respect to ACCLP’s August 3, 1987 filing has no basis. The August 3, 1987 filing for ACCLP disclosed the ownership of ACCLP, of WHCT Management, Inc. and of Astroline Company. Shurberg’s suppositions concerning the drafts of the ownership reports that were circulated do not support any adverse findings. Rather, the drafts simply demonstrate that the associates at B&H, most of whom had not previously handled ACCLP matters, were trying to understand the nature of the entity and relate that information to the ownership report form.

57. Shurberg claims that “when [Ramirez] signed a document, that indicated that he was satisfied that the document was accurate” (Shurberg Findings, p. 71), and Shurberg attempts to relate this testimony to the preparation of the August 3, 1987 ownership filing, which followed two draft ownership reports that Ramirez had signed. But the testimony Shurberg relies upon at

Tr. 304 had nothing whatsoever to do with the preparation of ownership reports. Even Shurberg's Findings depict the confusion among counsel that surrounded the August 3, 1987 filing. First, B&H did not appear to have a copy of the December 31, 1985 amended partnership agreement. Second, Mr. Bacon was concerned, as he had earlier been in 1985, that if ownership reports were filed for WHCT Management, Inc. and Astroline Company, it might wrongly imply that those entities exercised control of ACCLP when they really did not. (See Shur. Exs. 68 and 89). Third, the Gibbs estate was still in the process of being settled. (Tr. 608-609). Fourth, ACCLP had just suffered a defeat in the Court of Appeals and discussions were proceeding with prospective investors. In contrast to Shurberg's speculation, there were a number of concrete reasons why ACCLP's attorneys had difficulty preparing an ownership report. (See TRT Findings, pp. 52-56). But in any event, the letter report that was filed was substantially complete and Shurberg has not identified any reason why the report filed by counsel should be considered evidence of misrepresentation by ACCLP.

4. Shurberg's Findings As to Events Occurring in 1988 Are Wrong

58. According to Shurberg, "in the late summer of 1988, ACCLP and its counsel contemplated changes of ACCLP's ownership structure in order to bring it into compliance with the Commission's rules and policies relative to the insulation of limited partners from the operations of the partnership's media activities." (Shur. Findings, p. 79). But Shurberg's Findings on this point ignore a critical fact - namely, that the memos Ramirez received in 1988 suggesting ownership changes in preparation for a comparative license renewal hearing had nothing at all to do with ACCLP's eligibility under the minority distress sale policy. (Tr. 418). Mr. Ramirez did not believe that ACCLP's status as a minority-controlled entity was in jeopardy. *Id.* He simply

wanted to present the best comparative case if ACCLP were to be part of a comparative hearing. There is no evidence that Ramirez or anyone else at ACCLP was concerned about ACCLP's status as a minority-controlled limited partnership.

59. At page 84, n.43 of his Findings, Shurberg insists that "B&H knew that ACCLP was not in compliance with the restrictions on limited partnerships and so advised ACCLP." Earlier, the Joint Respondents have discussed the fact that Shurberg's version of the FCC rules is mistaken. What B&H may or may not have known has nothing to do with the issue in this case. Certainly, the record is clear that ACCLP was not aware of any peril to its status as a minority controlled entity. Furthermore, the documents Shurberg refers to do not support his proposition. Shur. Ex. 83 are handwritten notes prepared by Dudley, and there is no evidence that Ramirez or anyone else at ACCLP saw them. There is no evidence that the draft ownership report included as Shur. Ex. 87 was ever sent to Ramirez or anyone else at ACCLP. Neither of these two documents would have advised ACCLP that they were not in compliance with FCC guidelines. Shur. Ex. 96, a September 8, 1988 letter from Tom Hart to Ramirez, also did not serve to place ACCLP on notice that it was not in compliance with any FCC restrictions. That letter simply referenced recent Commission case precedent which made it advisable to modify ACCLP's structure - an action which ACCLP took later that fall.

60. At page 89 of his Findings, Shurberg tries to argue that while the consent to the assignment of WHCT Management's shares to Ramirez was filed on November 22, 1988, the shares were actually transferred on November 15th, citing Shur. Ex. 63, p. 007874. It should be noted that the exhibit to which Shurberg refers is composed of pages that have no logical sequence or relationship. The preceding page to the one referred to by Shurberg is dated January

23, 1985 and the succeeding page is dated May 29, 1984. Without probative testimony concerning the preparation of this exhibit -- which Shurberg failed to present -- it is impossible to deduce what took place. In any case, the pro forma assignment was granted on December 22, 1988 according to the Commission's FAIR report. As discussed earlier, Shurberg's findings to the effect that the application was still pending in July 1989 are simply wrong.

IV. There Was No Misrepresentation

61. It is somewhat difficult to determine just what Shurberg's argument is with respect to the misrepresentation issue. As has been shown above, Shurberg's theory that the Commission's alien ownership policies applied to ACCLP is wrong, and his theory that the 1985 Ownership Attribution Reconsideration Order should have been applied retroactively to an application granted in 1984 and already consummated is likewise wrong. There was no evidence of misrepresentation in the December 31, 1985 amended partnership agreement. The only question is when that agreement was filed with the FCC, and even Shurberg concedes that B&H may not have had a copy of the agreement until late 1987 or even 1988. Nor does Shurberg make a case that ownership information contained in the August 3, 1987 letter filing constituted a "misrepresentation." He suggests that the information was "incomplete" and the letter "misrepresented the reasons why ACCLP supposedly could not file an ownership report." As demonstrated in ACCLP's Findings, however, the reasons set forth are supported by independent documentary evidence, so this allegation does not hold up. Moreover, Shurberg has been on notice of the ownership filing since 1987 and on notice of the amended partnership agreement since the bankruptcy proceeding a year later. He long ago waived any right he might have had to raise arguments based on these documents. And his failure to raise the arguments earlier speaks

volumes about the reality that there is nothing in the documents that raises any valid concerns. Shurberg has also failed to present any evidence that ACCLP made misrepresentations to the courts concerning its status as a minority-controlled entity. The bankruptcy court decisions as well as this record demonstrate that ACCLP was entirely truthful. (TRT Ex. 3).

62. Faced with the factual refutation of his charges of misrepresentation, Shurberg resorts to other baseless arguments, such as that the reorganization proposed in ACCLP's November 22, 1988 pro forma transfer application was accomplished a week before the filing of the application. (Shurberg Findings, p. 131). Not only is this argument unsupported by probative evidence, it is raised far too late and was not the subject of the HDO. Shurberg is simply left grasping at straws in his implacable efforts to disqualify ACCLP. The Commission should finally and decisively halt Shurberg's artifices.

V. The Public Interest Compels a Favorable Resolution of the Pending Issue and a Grant of the Trustee's Renewal Application

63. It is well established that administrative agencies, such as the FCC, are required to consider other federal policies, not unique to their particular area of administrative expertise, when fulfilling their mandate to assure that their regulatees operate in the public interest. LaRose v. F.C.C., 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974). The Commission has long recognized the public interest in protecting innocent creditors in a bankruptcy proceeding. See e.g., Second Thursday Corp., 22 F.C.C.2d 515 (1970), recon. granted, 25 F.C.C.2d 112 (1970). In this case, the Commission's jurisdiction over licensing matters must be reconciled with the federal bankruptcy court's jurisdiction and the decision of the Chief Bankruptcy Judge, affirmed by two higher federal courts, finding that Ramirez was the controlling general partner of ACCLP and that

ACCLP complied with the Revised Uniform Limited Partnership Act, the standard applied by the FCC in granting ACCLP's application. The decisions of those courts in conjunction with the evidence admitted in this case definitively demonstrate that the designated issue must be resolved in favor of ACCLP and the Trustee, and that the Trustee's license renewal application must be granted. Such a resolution will also achieve the accommodation that must be reached between the FCC's authority and the authority of the federal court system.

For the foregoing reasons, the Joint Respondents respectfully submit that Issues (1) and (2) must be favorably resolved.

Respectfully submitted,

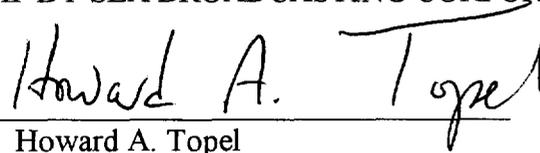
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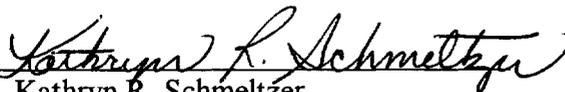
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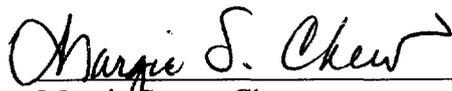
CERTIFICATE OF SERVICE

I, Margie Sutton Chew, a secretary in the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., do hereby certify that true copies of the foregoing **“JOINT PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF MARTIN R. HOFFMAN, TRUSTEE-IN-BANKRUPTCY, RICHARD P. RAMIREZ AND TWO IF BY SEA BROADCASTING CORPORATION”** was served this 8th day of January 1999, by first-class, postage prepaid mail to the following:

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