

FCC MAIL SECTION

Federal Communications Commission

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DISPATCHED BY
Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)	MM DOCKET NO. 97-128
)	
Martin Hoffman,)	File No. BRCT-881201LG
Trustee-in-Bankruptcy for Astroline)	
Communications Company Limited)	
Partnership)	
)	
SHURBERG BROADCASTING OF HARTFORD)	File No. BPCT-831202KF
)	
For Construction Permit for a New)	
Television Station to Operate on)	
Channel 18, Hartford, Connecticut)	

Appearances

Peter D. O'Connell, Esq. on behalf of Martin W. Hoffman, Trustee-in-Bankruptcy for Astroline Communications Company Limited Partnership; Harry F. Cole, Esq. on behalf of Shurberg Broadcasting of Hartford; Howard A. Topel, Esq. on behalf of Two If By Sea Broadcasting Corporation; Kathryn R. Schmeltzer, Esq. on behalf of Richard P. Ramirez and James Shook, Esq. and Catherine Withers, Esq. on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
JOHN M. FRYSIK

Issued: April 14, 1999 ; Released: April 16, 1999

Preliminary Statement

1. By Memorandum Opinion and Order & Hearing Designation Order, 12 FCC Rcd 5224 (1997) ("HDO"), the Commission designated for hearing the application of Martin W. Hoffman, Trustee-in-Bankruptcy ("Hoffman" or "Trustee") for Astroline Communications Company Limited Partnership ("ACCLP" or "Astroline"), for renewal of license of Station WHCT-TV, Channel 18, Hartford, Connecticut, upon the following issues:

- (1) To determine whether Astroline misrepresented facts to the Commission and the Federal Courts, in connection with statements it made concerning its status as a minority controlled entity;
- (2) To determine, in light of the evidence adduced under the preceding issue, whether the public interest, convenience and necessity would be served by a grant of the renewal application filed by the Trustee (File No. BRCT-881201LG).

2. The HDO made Shurberg Broadcasting of Hartford ("Shurberg"), a petitioner against the WHCT-TV renewal application, a party to the proceeding. 12 FCC Rcd at 5232. The initial burden of going forward with the introduction of evidence on issue (1) was placed on Shurberg, and the burden of proceeding with the introduction of evidence and the ultimate burden of proof for both issues (1) and (2) was placed on Astroline and the Trustee. Id.

3. Petitions for Leave to Intervene were filed by Richard P. Ramirez ("Ramirez") and Two If By Sea Broadcasting ("TIBS"). Ramirez was a general partner of Astroline and by Memorandum Opinion and Order, FCC 97M-109, released June 20, 1997, his petition was granted. An application is currently pending for assignment of Station WHCT-TV to TIBS (File No. BALCT-930922KE) and its petition for leave to intervene was granted by Memorandum Opinion and Order, FCC 97M-110, release June 20, 1997.

4. Pre-hearing conferences were held on June 2, 1997, and August 25, 1998. Hearing sessions were held in Washington, D.C., on September 23, 24, 28 and 29, 1998. The record was closed on September 29, 1998, by Order, FCC 98M-117, released October 2, 1998. The Proposed Findings and Conclusions of Law were filed on December 8, 1998 and Replies thereto on January 8, 1999.

Findings of Fact

Structure of Astroline Communications Company Limited Partnership

5. On December 10, 1984, the Mass Media Bureau, by delegated authority, granted the application for assignment of license of Station WHCT-TV from Faith Center, Inc., to ACCLP, pursuant to the Commission's minority distress sale policy.^{1/} Trustee/Ramirez/TIBS Ex. 2, Appendix D, pp. 1-2. At the time of grant, ACCLP was a limited partnership comprised of two general partners, Ramirez and WHCT Management, Inc., and one limited partner, Astroline Company. Ramirez, an Hispanic-American, held a twenty-one percent equity interest and a seventy percent voting interest in ACCLP. WHCT Management, Inc., held a nine percent equity interest and a thirty percent voting interest. WHCT Management, Inc., was wholly owned by Astroline Company, which was also a limited partner of ACCLP. Astroline Company's equity interest was seventy percent and it had no voting interest. Astroline Company had five limited

^{1/}The Commission's minority distress sale policy permits a broadcaster whose qualifications to hold a license have come into question, to assign that license without resolution of the outstanding issues, to an assignee which is a minority controlled entity. The assignee must meet the FCC's basic qualifications and must satisfy the FCC's definition of a minority controlled entity. In addition, the purchase price may not exceed 75% of the fair market value of the station. Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979 (1978) ("1978 Minority Ownership Policy Statement"); Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting, 92 FCC 2d 849, 855 (1982) ("1982 Minority ownership Policy Statement"). In order for a limited partnership to qualify as a minority entity under the distress sale policy, an ethnic minority general partner must hold more than a 20% interest in the partnership. 1982 Minority Ownership Policy Statement, 92 FCC 2d at 855. In addition, the minority general partner must have "Complete managerial control over the station's operations." Id.

partners, Fred Boling, Jr., Herbert Sostek, Joel Gibbs, Richard H. Gibbs, and Randall Gibbs, each of whom had a twenty percent ownership interest (the "Astroline Company Partners"). Four of these five individuals (all except Randall Gibbs) were also general partners of Astroline Company, and each had a twenty-five percent voting interest in that company. Boling, a general and limited partner of Astroline Company, was also President of WHCT Management, Inc. Trustee/Ramirez/TIBS Ex. 2, pp. 9 and 20-21, Appendix A, pp. 1-2, and Appendix B, pp. 4-6, 41 and 49; Shurberg Ex. 2, p. 29, Ex. 14, pp. 1-2, and Ex. 15, pp. 7-8, 45-46, and 53.

Formation of ACCLP and Acquisition of Station WHCT-TV

6. Ramirez first learned of an opportunity to become involved with Station WHCT-TV through a Washington communications attorney, Thomas Hart ("Hart"). Ramirez was introduced to Hart in the fall of 1983. At their initial meeting, Ramirez and Hart spent a few hours discussing minority broadcast ownership. Trustee/Ramirez/TIBS Ex. 2, p. 4. Ramirez had long been interested in obtaining an ownership interest in and controlling a broadcast station and had been following the FCC's minority ownership policies since 1977. Tr. 230-33.

7. Following their initial meeting, Hart and Ramirez spoke on numerous occasions about Ramirez' interest in ownership and Hart's desire to put together minority deals. Tr. 232. It was during one of those subsequent meetings that Hart brought up Station WHCT-TV. Hart informed Ramirez that the licensee of Station WHCT-TV, Faith Center, Inc., was involved in a revocation proceeding. He gave Ramirez a prospectus on the station. Ramirez reviewed the prospectus, researched the Hartford market, and prepared preliminary financial plans. Hart told Ramirez that he had clients who were men of very substantial means in the oil industry, who were engaged in efforts to diversify their interests and were interested in investing in the communications area. Trustee/Ramirez/TIBS Ex. 2, pp. 5-6.

8. In May 1984, over Memorial Day weekend, Hart arranged a meeting between Ramirez and Boling, Sostek, and their corporate attorney, William Lance from Peabody & Brown. Trustee/Ramirez/TIBS Ex. 2, pp. 6-7; Tr. 215. Prior to that meeting, Ramirez researched Astroline Company and its principals. Ramirez testified that Boling and Sostek later told him that they had done some research into his background. Trustee/Ramirez/TIBS Ex. 2, p. 6. At the meeting, Ramirez discussed his personal, educational and professional background and his interests and ambitions. He then spent a good part of the morning discussing the television industry in general and the Hartford market and Station WHCT-TV in particular. Trustee/Ramirez/TIBS Ex. 2, p. 6; and Tr. 216-219. During the meeting, Ramirez presented financial projections and estimates of the amounts that needed to be invested. He also discussed engineering issues and the need to evaluate WHCT's facilities. Trustee/Ramirez/TIBS Ex. 2, p. 7. Ramirez believed that Sostek's and Boling's prior experiences with the television industry were essentially those of consumers or viewers. Tr. 218. According to Ramirez, he led the discussion regarding the industry, market, and station, with Sostek and Boling asking questions based on Ramirez' presentation. Tr. 219.

9. Ramirez was then asked to leave the room for about forty or fifty minutes. Tr. 220. When he returned, Sostek and Boling proposed a business structure to him, offering him a partnership interest. Ramirez and Hart had spoken on several occasions about what a prospective structure could be and the requirements of the FCC's minority ownership policies. Tr. 387-88, 571. The structure proposed by Sostek and Boling was consistent with what Hart and Ramirez had discussed. Tr. 220-21. The meeting lasted late into the afternoon and the parties discussed the structure, the rapid timetable, issues of FCC compliance, day-to-day operations, the need for engineering and programming consultants, and Ramirez' desire for an employment agreement. Tr. 220-221.

10. Based on that meeting, it was Ramirez' understanding that a limited partnership would be formed for the purpose of acquiring Station WHCT-TV. He would be the managing general partner and would have no less than twenty-one percent of the equity. The participants also decided at the Memorial Day weekend meeting that there would be a corporate general partner, WHCT Management, Inc., and that Astroline Company would be the limited partner. Trustee/Ramirez/TIBS Ex. 2, p. 7.

11. Ramirez recalled that a corporate general partner was created for two reasons. First, Ramirez explained that WHCT Management, Inc., would serve as a backup general partner if he were not available. In addition, he stated that WHCT Management, Inc., was created as a vehicle for ultimately transferring ownership interests to minority and non-minority employees without affecting his control as managing general partner. Trustee/Ramirez/TIBS Ex. 2, p. 9; Tr. 241-42. Ramirez believed that ACCLP chose this option on the advice of Hart. Tr. 241-42, 244-48.

12. Hart could not recall why the partnership was structured with WHCT Management, Inc., as a general partner. He testified that it was an approach that all the partners felt comfortable with and one that could be used as a vehicle to enhance minority ownership in the partnership without diluting Ramirez' ownership and control. Tr. 569-71. Carter Bacon, ACCLP's corporate counsel at Peabody & Brown, also could not remember why the partnership was created with two general partners, although he recalled Ramirez was involved in the decision. Tr. 469-70.

13. The parties contemplated that the limited partners would invest a total of \$500,000 in the partnership and that the partnership would need a bank loan of approximately \$15,000,000 to get the station up and operating. Trustee/Ramirez/TIBS Ex. 2, p. 8; Tr. 226, 319. They agreed that Ramirez would contribute approximately \$200 to the partnership and that the rest of his contribution would be "sweat equity." Ramirez was familiar with the term "sweat equity" based on his experience in the broadcast industry and he believed sweat equity deals were a common business practice. Tr. 223-24, 237-39. He thought such a deal was consistent with the FCC's minority distress sale policy, allowing members of minority groups like himself, to control station affairs despite a lack of financial resources. Trustee/Ramirez/TIBS Ex. 2, pp. 8-9. Moreover, Ramirez believed that his experience in the industry was an asset to the company. Specifically, he stated that "[t]he fact that I had experience in the industry facilitated the entire

process, both in the anticipated financing that we were going to seek and, in our opinion, in our presentation as a qualified company to run the business." Tr. 228.

14. It was Ramirez' understanding that he would serve as general manager of the station. Ramirez recalls specifically discussing how important it was for him, as the ethnic minority general partner, to have independence and authority. It was critical to Ramirez that the station comply with FCC rules and policies because he was concerned with his reputation in the industry and ultimately wanted to own additional stations. Ramirez received assurances from Boling, Sostek and Lance that he would be in control of station affairs. Trustee/Ramirez/TIBS Ex. 2, p. 8.

15. Ramirez received a draft partnership agreement on the Tuesday following the Memorial Day weekend. He asked his attorney to review the agreement and discussed it with him. Ramirez' attorney suggested edits and a marked-up draft was sent back to Peabody & Brown, Sostek and Boling's corporate counsel. Trustee/Ramirez/TIBS Ex. 2, p. 9; Tr. 223, 241, 388-89. The partnership agreement was executed as of May 29, 1984. Shurberg Ex. 2.

16. On May 29, 1984, Hart filed a letter with the presiding judge in the Faith Center, Inc. proceeding, informing him of the possibility of a minority distress sale of Station WHCT-TV to ACCLP. Trustee/Ramirez/TIBS Ex. 2, p. 10 and Appendix A; Shurberg Ex. 14; Tr. 537. In its letter, ACCLP represented that Ramirez had a twenty-one percent equity interest in the partnership and that he would have operational control of the station. Specifically, ACCLP stated that Ramirez "will have the authority to determine the basic policies of the station's operations, including programming, personnel and financial matters." Trustee/Ramirez/TIBS Ex. 2, Appendix A; Shurberg Ex. 14.

17. Hart, Ramirez, Boling, Sostek, and possibly Lance all attended a pre-hearing conference in the Faith Center proceeding on May 30, 1984. On June 28, 1984, Hart filed an application for assignment of license of Station WHCT-TV from Faith Center, Inc., to ACCLP, along with a Motion for Continuance, a Motion for Expedited Processing, and a Petition for Special Relief. Trustee/Ramirez/TIBS Ex. 2, p. 10 and Appendix B; Shurberg Ex. 15; Tr. 535-37. In its application and related pleadings, ACCLP asserted that it was a "qualified minority purchaser." Specifically, it represented to the Commission that Ramirez held a twenty-one percent partnership interest and would be the General Manager of Station WHCT-TV. ACCLP also fully disclosed its ownership structure, including the fact that its corporate general partner, WHCT Management, Inc., was wholly owned by ACCLP's limited partner, Astroline Company. It stated that Ramirez would have full operational control of the partnership, that WHCT Management, Inc., would have limited operational control, and that Astroline Company would have no operational control. Trustee/Ramirez/TIBS Ex. 2, Appendix B; Shurberg Ex. 15.

18. A petition to deny the assignment was filed by Shurberg Broadcasting of Hartford ("Shurberg"), which had filed a competing application (File No. BPCT-831202KF) against the then pending renewal application of Faith Center, Inc., for Station WHCT-TV. Shurberg's petition challenged the bonafides of ACCLP's minority status under the distress sale

policy. Trustee/Ramirez/TIBS Ex. 2, p. 10.

19. On December 7, 1984, the Commission found ACCLP's ownership structure to be in compliance with the minority distress sale policy and denied Shurberg's petition. Faith Center, Inc., 99 FCC 2d 1164, 1172-74 (1984).^{2/} On December 10, 1984, the application for assignment of Station WHCT-TV to ACCLP was granted by the Mass Media Bureau pursuant to delegated authority. Trustee/Ramirez/TIBS Ex. 2, p. 10 and Appendix D.^{3/}

20. ACCLP closed on the transaction in January 1985. The purchase price for the station was \$3,100,000 which was paid by a wire transfer of \$500,000 from Astroline Company and a promissory note from ACCLP to Faith Center for the remainder. Trustee/Ramirez/TIBS Ex. 2, p. 11. The promissory note was signed by both Ramirez and Boling, as president of WHCT Management, Inc. Trustee/Ramirez/TIBS Ex., p. 11; Tr. 263-64. Ramirez recalled that he directed the due diligence in preparation of closing and that he worked with counsel to effectuate closing. Tr. 399-400.

21. Following consummation of the assignment, ACCLP filed an ownership report with the Commission on February 22, 1985, which again detailed what had previously been reported regarding ACCLP's ownership structure. Trustee/Ramirez/TIBS Ex. 2, Appendix D, p. 3; Shurberg Ex. 16; Tr. 540-41. On May 16, 1985, an amended ownership report was filed in order to explain more clearly the structure of ACCLP. Trustee/Ramirez/TIBS Ex. 2, Appendix D, p. 41; Shurberg Exs. 17 and 68; Tr. 549-51, 488-89. The record contains copies of another ownership report prepared by Hart's law firm, Baker & Hostetler, during this time which inaccurately characterizes Astroline Company as a general partner of ACCLP, but the record does

² In that order, the Commission acknowledged that Shurberg had filed a competing application for Channel WHCT-TV, but neither accepted for filing nor dismissed Shurberg's competing application. Rather, the Commission simply stated that competing applications would be considered if ACCLP failed to effectuate the assignment of Station WHCT-TV. 99 FCC 2d at 1175.

³ Shurberg filed an appeal of those decisions in early December with the U.S. Court of Appeals for the District of Columbia Circuit (Shurberg Broadcasting of Hartford v. FCC, Case No. 94-1600). Trustee/Ramirez/TIBS Ex. 2, pp. 12-13; Tr. 557. ACCLP was an intervenor in that case. ACCLP represented to the court that it was a fully qualified minority purchaser under the Commission's minority distress sale policy and that Ramirez would be in operational control of the station. Shurberg Ex. 18, pp. 26-28. Ramirez was actively involved in the preparation of ACCLP's intervenor brief. Tr. 265-66, 558-59; Shurberg Ex. 69. Moreover, both Ramirez and Hart testified that they were confident that ACCLP would prevail at the court of appeals. Tr. 261, 320, 649; Trustee/Ramirez/TIBS Ex. 2, pp. 13-14. Resolution of this case was delayed as a result of a Commission inquiry into its minority ownership policies. In light of this inquiry, on June 25, 1987, the court of appeals remanded the case to the Commission which eventually reaffirmed its earlier ruling. Faith Center, Inc., 3 FCC Rcd 868 (1988); Shurberg Ex. 90. Ultimately, in 1989, a divided court of appeals invalidated the Commission's minority distress sale policy. Shurberg Broadcasting of Hartford, Inc. v. FCC, 876 F.2d 902 (D.C. Cir. 1989). Petitions for rehearing and suggestions for rehearing en banc were denied, and the Supreme Court granted certiorari. 493 U.S. 1018 (1990). In Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), the Supreme Court reversed the court of appeals and upheld the Commission's minority distress sale policy.

not reflect that the report was actually filed. Trustee/Ramirez/TIBS Ex. 2, Appendix D, p. 57, and Ex. 5; Shurberg Ex. 19; Tr. 550-54.

Operation of Station WHCT-TV

22. Preliminary matters involving acquisition and upgrading of station. Between May and December 1984, prior to grant of the assignment application, Ramirez worked with Hart on FCC filings, and interviewed engineering consulting firms, local lawyers, equipment companies, programming consultants and program suppliers. Trustee/Ramirez/TIBS Ex. 2, p. 10. In October or November 1984, Ramirez leased and began to work at an office in Hartford. He hired an assistant and outside consultants, retained an engineer to prepare a preliminary analysis of the technical facility, evaluated the transmitter site, began looking for studio space, and negotiated with program suppliers in New York and Los Angeles. He also began a search for station personnel and hired an executive search firm specifically to look for minority management employees. Trustee/Ramirez/TIBS Ex. 2, p. 11, and Ex. 2, p. 11, and Ex. 6, pp. 62-65. In addition, Ramirez negotiated a citizen's agreement, with Hart's assistance, with the Capital Region Conference of Churches. According to Ramirez, the Astroline Company Partners were not involved in these negotiations. Trustee/Ramirez/TIBS Ex. 2, p. 12, and Ex. 6, pp. 270-85; Tr. 401-03. In December 1984, just prior to closing, Ramirez decided that the station should go dark for a period of time while new programming was selected and repairs were made. Trustee/Ramirez/TIBS Ex. 2, pp. 11-12. Immediately after closing on the sale, Ramirez took the station off-the-air. Tr. 400

23. Ramirez selected the location for the new studios and offices of WHCT-TV and he supervised the renovation of that facility. He hired and worked with architects, an engineering consultant, a construction management company, and an expert to design studio transmitter links and transmitter studio links. Trustee/Ramirez/TIBS Ex. 6, pp. 25 and 347. According to Ramirez, the Astroline Company partners did not participate in the selection of these experts. Tr. 412. Ramirez also determined that a taller tower was necessary, negotiated the acquisition of land to allow for construction of such a tower, and worked with city officials to resolve zoning issues. Trustee/Ramirez/TIBS Ex. 2, pp. 14-15, and Ex. 6, pp. 344-46.

Day-to-Day Management

24. Ramirez testified repeatedly that he was fully responsible for the day-to-day management and operation of the station and that he supervised and directed every aspect of station operations. Trustee/Ramirez/TIBS Ex. 2, p. 14. In addition, Ramirez consistently stated that none of the principals of Astroline Company had any role in the day-to-day management of the station. Trustee/Ramirez/TIBS Ex. 2, p. 14.

25. Ramirez conferred with both Boling and Sostek every month, and possibly weekly. Tr. 299. In particular, he would consult with them about significant expenditures, including the purchasing and renovation of the new studio and office building Tr. 269-70, 298. It is Ramirez' belief that he did not seek or need the "approval" of Boling or Sostek for such

projects or expenditures, although it was his "practice to get their advice or two cents. . . on anything [he] wanted to do." Tr. 270. In general, he stated that he was very "deferential" to the Astroline Company Partners and was very conscious of the fact that they were putting up a lot of money. Tr. 270. However, although he was deferential to them, Ramirez made the decision as to what projects or expenditures were necessary. Moreover, he stated that if money were not advanced for a particular project, it was his decision whether or not to pursue it anyway. For example, if he felt that money was needed for new windows and a new roof, and money was not advanced to cover both, he would decide which to pursue. Tr. 271-72; Shurberg Exs. 119 and 120. In addition, Ramirez explained that if the Astroline Company Partners were unwilling to fund a bid for a particular program, or could not guarantee him adequate funding, it was his decision whether and how to make the bid anyway. Tr. 296-97. Moreover, Ramirez stated that all contracts, liabilities and obligations incurred by the station were entered into by him or his staff and that at no time did any partner or employee of Astroline Company enter into or create a contractual obligation on behalf of the station. Trustee/Ramirez/TIBS Ex. 2, pp. 19-20.

26. Hart corroborated Ramirez' testimony in this regard. According to Hart, Ramirez "was a hands on manager, hands on general partner. He took a very active role in oversight of all aspects of the station's operations. . ." Tr. 559. Hart characterized Ramirez as "the boss," the person "in charge." Tr. 637-38. He considered Ramirez to be his client, his point of contact at the partnership. Tr. 634-635. Legal bills incurred by Hart's firm were sent to Ramirez at the station's Hartford address. Tr. 545-46; Shurberg Exs. 93, 94, and 95. It was not Hart's standard practice to send documents to both Ramirez and Sostek. While the record contains a copy of a letter about routine station matters that was sent to both Ramirez and Sostek, Hart recalled that as a general practice he would only send documents to Sostek when they were important, dealing with a major decision or a major filing. In those cases, Hart would send Sostek a courtesy copy. Tr. 561, 656-58; Shurberg Exs. 70 and 73. Hart could only recall one instance where Sostek had ever brought a station matter to his attention. That instance involved a failure to file an STA request which had been pointed out to Sostek by Ramirez. Tr. 656-57; Shurberg Exs. 117 and 118. Boling would occasionally call Hart about financial matters, primarily to discuss the amount of money being spent by Ramirez, or the possibility of finding investors. But, according to Hart, such contacts were rare. Tr. 657-58.

27. Kent W. Davenport, a tax accountant at Arthur Andersen & Co., also corroborated Ramirez' testimony that he was in control of Station WHCT-TV. Arthur Andersen & Co. was ACCLP's accountant. According to Davenport, Ramirez and Al Rozanski, the station's business manager, were his primary contacts. Tr. 427-29; Trustee/Ramirez/TIBS Ex. 12, p. 2, and Ex. 14. Davenport described Ramirez as "the individual who actually was running the station in Hartford." Tr. 428-29. He recalled meetings and conference calls with Boling and Sostek, but such contacts primarily involved structuring of the partnership and occurred in and around May of 1985. Tr. 429, 458; Shurberg Ex. 40. After May 1985, Davenport did not have much contact with either Boling or Sostek in regard to ACCLP matters. Tr. 458.

Station Programming

28. WHCT-TV was an independent television station, unaffiliated with a network. Ramirez negotiated and acquired syndicated off-network programs and first-run syndicated programs. In addition, he insured that WHCT-TV originated local programming. Trustee/Ramirez/TIBS Ex. 2, pp. 15-16. When the financial situation of Station WHCT-TV declined, Ramirez negotiated with the program suppliers. Trustee/Ramirez/TIBS Ex. 2, pp. 16-17. The record contains numerous documents from and to Ramirez regarding acquisition of programming for Station WHCT-TV and renegotiation of payment schedules. Trustee/Ramirez/TIBS Ex. 6, pp. 88-213; 216-55; Shurberg Exs. 122, 124, 125, 126, and 129. According to Ramirez, he advised the Astroline Company Partners about programming decisions and asked about their willingness to fund certain programs, but never consulted with them about his programming choices. Tr. 293-94. For example, he would discuss the cost of a bid for a program with Sostek and Boling, but not whether or not to air that program rather than another, nor what time that program should be aired. Tr. 294-98; Shurberg Ex. 133.

29. In order to better market the station, particularly in light of the fact that there was no mandatory cable carriage requirement, Ramirez engaged an advertising agency to promote WHCT-TV, Channel 18, to viewers and put pressure on the cable companies to carry Channel 18. Trustee/Ramirez/TIBS Ex. 2, pp. 17-18, and Ex. 6, pp. 51-60; Tr. 274-75. Ramirez informed Sostek of his decision to do so, although he could not recall whether or not he did so before or after the agency was engaged. Shurberg Ex. 114. He recalled that upwards of \$700,000 was spent for logos and advertising and that it was a big expense line in the budget. Tr. 275. The record also contains correspondence to and from Ramirez regarding his negotiation of representation sales agreements. Trustee/Ramirez/TIBS Ex. 6, pp. 41-50.

Station Personnel

30. None of the Astroline Company Partners had any involvement in the hiring, firing, or supervising of any employees of Station WHCT-TV, with the exception of the hiring of Ramirez himself. Ramirez hired all of the department heads and, although his department heads had authority to hire their own staffs, Ramirez' policy was to meet every employee who was hired. Trustee/Ramirez/TIBS Ex. 2, p. 17; Tr. 273. The record contains numerous letters offering employment, all executed by Ramirez as a general partner of ACCLP. Trustee/Ramirez/TIBS Ex. 6, pp. 1-24, 61. In addition, the Astroline Company Partners had no involvement in the setting of staff salaries. Ramirez did inform Sostek and Boling when an employee who had been given an interest in WHCT Management, Inc., left the station, but only because it involved retrieving a partnership interest. Tr. 274.

Station Finances

31. It was originally anticipated that after the original capital contributions of the partners, funding would be obtained by a bank loan. However, because of the ongoing litigation, neither a bank loan nor any other outside funding was ever obtained. Trustee/Ramirez/TIBS Ex.

2, pp. 13-14. Further complicating matters, there were no station revenues until late 1985. Thus, at the outset, ACCLP was totally dependent upon Astroline Company for funding. Moreover, from late 1985 until the partnership went into bankruptcy in 1988, expenses continued to exceed revenue. Consequently, ACCLP continued to depend upon Astroline Company to make up for the shortfalls. Trustee/Ramirez/TIBS Ex. 2, p. 18; Tr. 320-21. Furthermore, in May 1986, one of the Astroline Company Partners, Joel Gibbs, died, which created further financial difficulties for the partnership. Trustee/Ramirez/TIBS Ex. 2, p. 24; Tr. 283, 350, 356.

32. From August 1984 until approximately March 1985, ACCLP's expenses were nominal. During that time period, Ramirez approved invoices and sent them to Astroline Company. Astroline Company then prepared the checks and sent them to Ramirez for signature. Around March 1985, the station began using a general ledger system in Hartford, where invoices were accumulated and sent with transmittal letters to Astroline Company's offices in Boston for checks. Payroll was done through a separate payroll accounting company and funding for payroll came directly from Astroline Company's accounts. Trustee/Ramirez/TIBS Ex. 2, p. 18; Tr. 414.

33. In May or June 1985, the station moved into its new building and a new Columbine computer system was installed. Columbine is an "integrated traffic continuity and accounting system" that Ramirez had previously used and which he installed as part of his overall upgrading of the station. Tr. 276-77; Trustee/Ramirez/TIBS Ex. 2, pp. 18-20. Ramirez originally anticipated that once the Columbine system was installed, everything, including accounts payable, would be integrated in-house at Hartford. Tr. 278. In addition, ACCLP's accountants, Arthur Andersen & Co., recommended that the billing and payment process be located in Hartford. However, Ramirez explained that as an "accommodation" to the Astroline Company Partners no checkbooks were kept in Hartford. Rather, until 1988, all the checks were written in Astroline Company's offices in Boston. Tr. 278.

34. By the summer of 1985, all billings and invoices were tracked by the Columbine system. Under this system, each department head would review and approve the department's bills, the invoices would be recorded, processed and then grouped into hundreds of thousands of dollars and sent to Boston, along with a transmittal letter summarizing the invoices attached. Tr. 279-281, 286-88; Shurberg Ex. 104. The normal course of business was for the station's accounting department to send the transmittals to Astroline Company's accounting department. According to Ramirez, for "most of the existence of the business prior to the bankruptcy, they just came back with checks attached to them, and I never spoke to anybody about them." Tr. 281. Ramirez would then sign the checks and the station would pay the invoices. Trustee/Ramirez/TIBS Ex. 2, pp. 18-20; Tr. 286-88.

35. Ramirez recalled that in 1988, and possibly the last quarter of 1987, "when things got very crunched, we began to then have the transmittals stack up and then I would work with Fred [Boling] to determine the priority of that month's allocation." Tr. 282. Ramirez explained that during this time, the partners were only allocating a certain amount of money per month. Ramirez would determine which bills were critical and then discuss his prioritization of the bills with Boling. Boling would then initial or sign the bill, giving approval to his accounting

department to release the funding. Tr. 282-85; Shurberg Exs. 106 and 110. Ramirez explained that throughout this time, he continued to manage the station's payables and that Boling simply provided the money. Tr. 282.

36. The record contains two bank documents designating authority for deposit and borrowing on ACCLP accounts. The first document, for the State Street Bank Trust Company in Boston was executed by Boling in 1985 and lists Sostek, Boling, Joel Gibbs, and Richard Gibbs as General Partners of ACCLP. Shurberg Ex. 103. Ramirez' understanding of this account was that it was opened in order to provide overdraft protection to the ACCLP account on which station checks were issued. Tr. 291-92. The second document, for the Bank of Boston, is dated January 16, 1987. It is signed by Ramirez but lists only Boling and Sostek as signatories on the account. Shurberg Ex. 105. Ramirez had no specific recollection of the document, but pointed out that the company was misnamed and that the signature block was confusing, but could not otherwise explain the document. Tr. 288-91.

37. Ramirez did not recall any instance where his payment requests were challenged. He asserted that up until the time that money ran out, everything was paid that he wanted paid in accordance with his decisions. Ramirez explained that "Astroline Company's role was to physically prepare checks for payments that [he] had approved and to add funds to bank accounts to make good checks that ACCLP issued." Trustee/Ramirez/TIBS Ex. 2, p. 18. Ramirez signed the majority of the checks, although he acknowledged that both Boling and Sostek had check signing authority as well. Tr. 288, 413; Trustee/Ramirez/TIBS Ex. 2, pp. 18-20. According to Ramirez, every liability of the station was incurred at his direction. Tr. 415. He explained that he, together with his staff, would develop an annual budget, detailing the annual goals or plans of the station, and the expenditures associated with meeting such goals. Tr. 410-11; Shurberg Exs. 108 and 109. Ramirez "never changed an operating budget to accommodate a suggestion of one of those [Astroline Company] partners." Tr. 411.

Negotiations regarding sale of the station

38. In early 1987, Ramirez negotiated an agreement with the Home Shopping Network for the sale of Station WHCT-TV. That agreement was never pursued because of the ongoing litigation involving Shurberg. Trustee/Ramirez/TIBS Ex. 2, p. 14; Tr. 268-69. Hart recalled that Ramirez was involved in the partnership's search for additional investors. He characterized Ramirez as "the principal spokesperson for the station," and stated that Ramirez was involved in preparing the documentation that would go to prospective investors. Tr. 658-59. The record contains correspondence between Ramirez and a brokerage company regarding Ramirez' efforts to find outside investors for ACCLP. Trustee/Ramirez/TIBS Ex. 6, pp. 27-39.

Changes to the Partnership/Addition of Partners

39. On September 10, 1985, a First Certificate of Amendment was executed which reflected the transfer by WHCT Management, Inc., of certain partnership interests to some station employees, including two minorities. In addition, that Amendment documented the transfer by

Astroline Company of a six percent limited partnership interest in ACCLP to Martha and Robert Rose, as joint tenants, and Thelma N. Gibbs. Further, the Amendment reflected the admission of Hart as a one percent general partner. The Amendment did not alter Ramirez' twenty-one percent ownership interest in or his control over ACCLP. Trustee/Ramirez/TIBS Ex. 2, p. 23 and Appendix E, pp. 29 and 32; Shurberg Exs. 3, 4, 6 and 7; Tr. 489-90; 562-63. Ramirez and Hart discussed the benefits of admitting Hart to the partnership and Ramirez recommended Hart's admission to the partners. Tr. 407-08.

40. Ramirez recalled that some station employees were unwilling to accept the exposure of being a general partner and, accordingly, they were offered limited partnership interests. However, at that time, if limited partners were given interests in a business, they would have been subject to tax liabilities. Tr. 329-30. In order to avoid such tax liabilities, a vehicle was created which allowed certain employees to purchase an interest in ACCLP from WHCT Management, Inc. Payment of the purchase price was by promissory note held by WHCT Management, Inc. Upon termination of employment, WHCT Management, Inc., had the right to repurchase the partnership interest. Tr. 248-52, 330; Shurberg Exs. 4, 10, 11, 40 and 71.

41. According to Hart, the decision to offer the station employees limited partnership interest, rather than general partnership interests, was to make it clear that "the line of authority within station operations always rested with Richard Ramirez. He was the man in charge from the beginning, and they didn't want to create any confusion about that with some of his subordinates at the station that also had an ownership interest." Tr. 567.

42. Ramirez testified that he never knew when and what type of partnership changes needed to be reported to the FCC and, more specifically, whether or not the ownership changes described above needed to be reported. Tr. 304. Rather, he relied on counsel's advice. On September 13, 1985, an ownership report was filed with the Commission reporting these changes to the partnership. Tr. 566; Shurberg Ex. 19; Trustee/Ramirez/TIBS Ex. 2, Appendix D, p. 54. A supplement to that report was filed on October 31, 1985, transmitting to the FCC additional agreements that had not been submitted with the September 13, 1985, ownership report. Tr. 313, 571-75; Shurberg Exs. 20 and 72; Trustee/Ramirez/TIBS Ex 2, Appendix D, p. 68.

Reallocation of Profits and Losses.

43. In the Spring of 1985, when it became evident that ACCLP would be relying heavily on the financial resources of the limited partners, Arthur Andersen & Co. recommended some accounting changes for tax purposes. Specifically, Davenport recommended that there could be a reallocation of profits and losses among the partners for tax purposes until capital contributions were recovered, so that the limited partners would be able to deduct the substantial losses they were incurring. Trustee/Ramirez/TIBS Ex. 2, pp. 22-23 and Ex. 13; Shurberg Exs. 38, 39 and 40; Tr. 321-24, 435-36, 441-41, 454-56, 459-60. According to Davenport, such special allocations were fairly common at that time. Tr. 436-37.

44. Effective December 31, 1985, the partners entered into an Amended and Restated Limited Partnership Agreement. Shurberg Ex. 9; Trustee/Ramirez/TIBS Ex. F. The purpose of this amendment was to reconcile the agreement with the reallocation of profits and losses for tax purposes. According to Ramirez, such a reallocation was "not an uncommon practice" and it did "not constitute a change in control in any way, shape or form." Tr. 317. The December 31, 1985, amendment further provided that if there were a sale of the station, after each general and limited partner had recovered his capital contributions, Hart and Ramirez, as ACCLP general partners, would split \$1,000,000. Any remaining balance would be allocated among the partners in accordance with their respective ownership interests. Trustee/Ramirez/TIBS Ex. 2, pp. 23-24 and Appendix F, p. 39; Tr. 322-25, 435-46, 441-42.

45. Ramirez testified that he always had twenty-one percent of the equity and seventy percent of the voting interest in ACCLP and denied that the reallocation in any way changed his equity or voting interests. Tr. 324-25; 373-74. He categorically rejected the suggestion that the reallocation was done as a vehicle to shift control of ACCLP to the Astroline Company Partners. Tr. 325-26. Moreover, he explained that it was at his insistence that the amended and restated agreement contained a special allocation for the general partners. Tr. 392-93.

46. The 1985, 1986, 1987, and 1988 financial statements prepared by Arthur Andersen & Co. for ACCLP all reflected this special allocation. Moreover, each of the statements indicated that, notwithstanding this special allocation, the limited partners had a seventy-two percent ownership interest in the partnership, with the remaining twenty-eight percent ownership allocated to the general partners. Trustee/Ramirez/TIBS Ex. 7, p. 7, Ex. 8, pp. 7-8, Ex. 9, p. 7 and Ex. 10, p. 13; Tr. 437-38. Davenport and Ramirez both testified that the tax returns prepared by Arthur Andersen & Co. for ACCLP for 1985, 1986 and 1987, also reflected this special tax reallocation. Shurberg Exs. 26, 27 and 28. Both explained at hearing that the ownership of capital line entry on Schedule K-1 to the partnership's tax returns does not refer to equity or voting interest in the partnership. Rather, it refers to how the assets would be distributed upon liquidation of the partnership. Thus, according to Ramirez and Davenport, the less than one percent interest reported on those forms does not mean that Ramirez had a less than one percent interest in the partnership -- it simply relates to profit and loss allocations if the partnership were dissolved at that moment. Tr. 381-85; 439-44.

47. Ramirez' understanding of the special tax reallocation has been the same since it was first proposed in 1985. He stated that while he may now be more sophisticated about tax matters, his basic understanding about the partnership's profit and loss reallocations has been the same. Tr. 386-387.

48. It does not appear that a copy of the restated agreement was ever filed with the FCC. Tr. 330, 346; Shurberg Ex. 22. When asked about this omission, Ramirez responded that he had "zero recollection of any discussion, plan, plot, inference or anything to not submit anything that was required." Tr. 331. Documents of this nature were sent routinely to Hart for filing with the FCC, and Ramirez was not aware of any failure to file the agreement. Tr. 331-36;

Trustee/Ramirez/TIBS Ex. 2, pp. 24-25. Hart could recall no discussion about whether or not to file a copy of the restated partnership agreement. Tr. 654-55.

Removal of Partners

49. On May 18, 1986, Joel Gibbs died and his interests in WHCT Management, Inc., and Astroline Company passed to his estate. Trustee/Ramirez/TIBS Ex. 2, p. 24, Tr. 356. On April 7, 1987, Hart retired as a general partner, transferring his equity and voting interests back to WHCT Management, Inc., in exchange for cancellation of his outstanding obligation to pay the purchase amount. Tr. 474-76, 584-85; Shurberg Ex. 56. At varying times from 1985 to 1988, the WHCT-TV employees who had acquired ownership interests in ACCLP left the station or otherwise decided to retire their ownership interest. Tr. 249-250, 253-55; Shurberg Exs. 8, 10 and 11, p. 19.

Reporting of Changes to the Partnership.

50. Between 1985 and August 3, 1987, the Commission suspended the filing of annual ownership reports while a new ownership report form was being prepared. Trustee/Ramirez/TIBS Ex. 2, p. 24 and Appendix H; Shurberg Ex. 74; Tr. 337-38, 586-87. The record contains various drafts of ownership reports which were prepared in anticipation of meeting the August 3, 1987, filing deadline. Shurberg Exs. 82, 84, 86, 87, 88, 89 and 91; Tr. 339-49. In addition, the record reflects various conversations and correspondence by and between Hart, other attorneys and paralegals at Baker & Hostetler, attorneys at Peabody & Brown, and Ramirez regarding preparation of this ownership report. Shurberg Exs. 75, 76, 77, 78, 79, 80, 81, 83, 87, 88, 89, 92, 93, 94 and 95; Tr. 343-45, 588-607.

51. However, on the advice of counsel, instead of filing a new ownership report, ACCLP filed a letter on August 3, 1987, reporting the ownership structure of ACCLP, WHCT Management, Inc., and Astroline Company. That letter stated that Astroline was in the process of resolving a number of matters which arose as a result of (1) the June 25, 1987, Order by the court of appeals remanding the Shurberg v. FCC proceeding to the Commission; (2) the death of Joel Gibbs; and (3) internal reorganization. Trustee/Ramirez/TIBS Ex. 2, p. 24, and Appendix D, p. 111; Shurberg Ex. 21; Tr. 349-55.

52. Ramirez did not recall anything unusual surrounding the filing of the August 3, 1987, letter. In addition, he had "a clear recollection" that no conversations took place about a need to hide or cover up anything in connection with that filing. Tr. 349-55. Hart testified that there were a lot of things going on in the partnership at that time and that it was a difficult time for ACCLP. Accordingly, the "group of experts" at Baker & Hostetler who prepared ownership reports recommended that a letter should be filed, followed by a supplemental ownership report once additional information had been gathered. Tr. 616-18, 626. Like Ramirez, Hart stated that the decision to file a letter was not an attempt to hide anything. Tr. 618.

Transfer of control of WHCT Management Co.

53. On November 22, 1988, ACCLP filed an FCC Form 316, seeking permission to transfer control of WHCT Management, Inc., to Ramirez. Trustee/Ramirez/TIBS Ex. 2, Appendix D, p. 113; Shurberg Ex. 23. That application was filed upon the recommendation of Baker & Hostetler. Tr. 409-10; Shurberg Ex. 142.

54. Baker & Hostetler's recommendation was set forth in a November 16, 1988, letter to Ramirez, many versions of which are in the record. Shurberg Exs. 58, 59, 60, 61 and 142; Trustee/Ramirez/TIBS Ex. 2, p. 25; Tr. 357-60, 363-65, 371-73. The letter raised concerns about the upcoming December 1, 1988, deadline for filing ACCLP's renewal application. Specifically, the letter reminded Ramirez that as a result of the June 25, 1987, Order by the court of appeals to remand the proceeding to the Commission, Astroline "faces the possibility" that it will not be entitled to a renewal expectancy and, therefore, that it might become involved in a comparative proceeding based on the Commission's standard comparative criteria. Moreover, the letter cited a 1988 case which raised questions about whether or not ACCLP's current structure would allow it to receive full integration credit in a comparative proceeding. Shurberg Ex. 61.

55. Ramirez recalled that the decision to change the ownership of WHCT Management, Inc. arose because of the possibility of a comparative renewal hearing, not because of a concern that ACCLP's status as an entity that acquired a station pursuant to the Commission's minority distress sale policy was in jeopardy. Tr. 418. His understanding was that the Commission's position on insulation of limited partners had changed over time and that as Station WHCT-TV approached its renewal deadline, modifications to its partnership structure were needed in order to put ACCLP in a better comparative position. Tr. 356-73; Trustee/Ramirez/TIBS Ex. 2, p. 25.

ACCLP Bankruptcy

56. On October 31, 1988, an involuntary Chapter 7 Petition was filed against ACCLP. On December 1, 1988, the ACCLP bankruptcy case was converted to a voluntary Chapter 11 proceeding. Trustee/Ramirez/TIBS Ex. 1, p. 1, and Ex. 2, Appendix D, pp. 128-38 and 144. On April 9, 1991, the case was converted to a voluntary Chapter 7 proceeding and Hoffman was appointed as Trustee of the Chapter 7 estate. Trustee/Ramirez/TIBS Ex. 1, p. 1. Hoffman testified that "[b]ased upon the advice of counsel, the strong insistence of Shurberg [who was one of the creditors against the estate], and my own investigations, I concluded that I had a fiduciary duty to maximize the potential distribution to creditors by filing a lawsuit against the Limited Partner and its general partners in the Bankruptcy Court." Trustee/Ramirez/TIBS Ex. 1, pp. 3-4. Among other things, Hoffman alleged that the Astroline Company Partners "were de facto general partners" of ACCLP and should be liable to the estate for the debts of the partnership. Trustee/Ramirez/TIBS Ex. 1, p. 2.

57. After a nine-day trial, the bankruptcy court ruled that it would have to "engage in conjecture and surmise" to find any control of ACCLP's operation of Station WHCT-TV by the Astroline Company Partners. Trustee/Ramirez/TIBS Ex. 1, p. 4, and Ex. 3, p. 8. The court further held that it "cannot find as a fact that Astroline Company ever did anything more than prepare the checks as directed by Ramirez or Rozanski [the station's business manager] and add to the Debtor's bank account those funds necessary to make good the issued checks." Trustee/Ramirez/TIBS Ex. 1, p. 4, and Ex. 3, p. 9. Hoffman appealed the bankruptcy court's decision to the U.S. District Court and to the United States Court of Appeals for the Second Circuit. Both appellate courts essentially affirmed the bankruptcy court's decision. Trustee/Ramirez/TIBS Ex. 1, p. 4, and Ex. 3, pp. 10-23.

CONCLUSIONS OF LAW

58. The designated issues require the determination as to whether ACCLP misrepresented its status as a minority-controlled entity to the Commission and to the Federal Courts and specifically: Whether ACCLP's limited partners were involved in station operations and financial matters; whether Ramirez original 21% interest was reduced to one-percent; and what is the significance of the Trustee's arguments in the bankruptcy proceeding that ACCLP's limited partners and not Ramirez were in control of the partnership and station.

A. Misrepresentation as to ownership and control.

59. Misrepresentation involves false statements of fact made with an intent to deceive the Commission. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). Intent to deceive may be found from the false statement of fact coupled with proof that the party making it had knowledge of its falsity. See David Ortiz Radio Corp. vs. FCC, 941 F2d 1253, 1260 (D.C. Cir. 1991).

60. ACCLP acquired Station WHCT-TV pursuant to the Commission's minority distress sale policy, which, inter alia, permits distress sales to limited partnership if an ethnic minority general partner owns more than twenty percent of the broadcasting entity. 1982 Minority Ownership Policy Statement, 92 FCC 2d at 855. In addition, under the minority distress sale policy, the minority general partner must have "complete managerial control over the station's operations." Id. The Commission has generally "found 'control' to be in those who have authority to determine the basic operating policies of a station's operations, including programming, personnel and financial matters." Id. at n. 29, citing Southwest Texas Broadcasting Council, 85 FCC 2d 713, 715 (1981).

61. ACCLP repeatedly represented to the Commission and to federal courts that it was a "qualified minority purchaser" under the FCC's minority distress sale policy. Specifically, ACCLP represented that Ramirez, an Hispanic-American, held a twenty-one percent ownership interest and a seventy percent voting interest in the partnership. Moreover, ACCLP repeatedly stated that Ramirez had operational control of Station WHCT-TV, including its programming, personnel, and financial matters.

62. Shurberg claims that Ramirez' equity interest in ACCLP should be calculated on the basis of his capital contribution to the partnership because according to Commission precedent sweat equity is not to be considered as a measure of ownership.

63. Shurberg's reliance on Citizenship Requirements of Section 310, 58 RR 2d 531 (1985) recon. granted in part and denied in part 1 FCC 2d, 61 RR 2d 298, (1986) is misplaced. That ruling defined limited partnership interests only for the purpose of alien ownership restrictions set out in Section 310 (b) of the Communications Act of 1934, as amended. The Commission has not intended the definition of ownership contained therein to apply in minority distress sale context. The alien ownership limitations have nothing to do with the Commission's goal of encouraging minority broadcast ownership by American citizens. In applying its Minority Distress Sale Policy the Commission has never imposed the requirement that the ownership percentage of each partner of a distress sale applicant be proportionate to the level of the capital contribution that partner has made. The Commission has accepted minority ownership without pro-rata contributions of equity to recognize the special contributions that experienced minority broadcasters can bring to an enterprise and to encourage non-minorities to fund minority enterprises. Furthermore, the Commission, even in the alien ownership analysis, has specifically recognized that there may be other ways to measure limited partnership ownership interests, including consideration of sweat equity. Citizen Requirements Reconsideration, 1 FCC Rcd. at 14. See Fox Television Stations, Inc., 10 FCC Rcd 8452, 8474 (1995), aff'd 11 FCC Rcd 7773 (1996) (equity capital contributions may not fairly measure the true extent of an ownership interest, including sweat equity.)

64. The record establishes that, prior to ACCLP's acquisition of the license of Station WHCT-TV, Ramirez was an experienced broadcaster. Moreover, it is clear from the record that, from the day the partnership was created, Ramirez took an active role in the acquisition of Station WHCT-TV and directed the upgrade and, upon Commission approval, the operation of station. None of the other ACCLP partners had any knowledge about the broadcast industry, and they deferred greatly to Ramirez' expertise in this area.

65. During his testimony, Ramirez repeatedly reaffirmed ACCLP's representations that he was in operational control of Station WHCT-TV. He stated that he was fully responsible for the day-to-day management and operation of the station and that he supervised and directed every aspect of station operations. In addition, Ramirez stated that none of the Astroline Company Partners had any role in the day-to-day management of the station.

66. As the minority general partner of ACCLP and the general manager of WHCT-TV. Ramirez organized the search for employees and determined the number and types of employees to hire. Ramirez personally hired all of the station's department heads and senior level personnel and was solely responsible for setting staff salaries. He managed the staff and station operations on a day-to-day basis. None of the limited partners were in any way involved in the personnel decisions for the station.

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

68. Ramirez also exercised control over ACCLP's finances. He created annual budgets, decided what purchases would be made, set staff salaries, directed the station's financial decisions, and determined the monthly payables. Ramirez directed the payment of WHCT's expenses and implemented the use of the Columbine computer system to handle and track the stations finances. Ramirez tracked and managed the station's expenditures, revenue and fiscal planning. Ramirez acknowledged that he was deferential to the Astroline Company Partners and was very conscious of the fact that they were putting up a lot of money. Accordingly, he would advise them prior to incurring major expenditures. However, it was Ramirez who decided what projects should be undertaken and what expenditures should be incurred and, according to Ramirez, he did not need the approval of the Astroline Company Partners prior to incurring an expense. Although he accommodated the Astroline Company Partners by sending all invoices to Boston, Ramirez decided when and if invoices should be paid. Ramirez could not recall any instance where his payment requests were challenged. With a few exceptions, Ramirez signed all the station's checks.

69. De facto control is "the ability to dominate the management of corporate affairs." Fox Television Stations, Inc., 10 FCC Rcd 8452, 8514 (1995) recon. denied, 10 FCC Rcd 7773 (1996). Ramirez's activities in the areas of personnel, programming and finances reflect his total dominion over the affairs of ACCLP and WHCT. As the record reflects, Ramirez was the partner with the broadcast experience and expertise who was in charge of the daily operations of the station. The partners of Astroline Company had no working knowledge of the broadcast industry and no interest in running a television station.

70. Shurberg claims that ACCLP was not an insulated limited partnership and, thus, Ramirez could not be credited with control of Station WHCT-TV. Citing Corporate Ownership Reporting and Disclosure by Broadcast Licensees, 58 RR 2d 604 (1985) ("Ownership Attribution Reconsideration"), Shurberg argues that in order to have "complete control" sufficient to satisfy the minority distress sale requirements, limited partners must be prohibited from having any material involvement in the partnership's day-to-day media activities and such prohibitions must be included in the partnership agreement. Shurberg PFCs at 103. Although Shurberg recognizes that the partnership was originally formed and the request for minority distress sale filed before the Commission's ruling in Ownership Attribution Reconsideration, it argues that ACCLP lost any claims of "grandfathering" when it amended its partnership agreement. There is simply no merit to Shurberg's theory. 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.

71. 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 standard; and Daytona Broadcasting expressly announces that the strengthened standards are to be applied prospectively."

72. ACCLP eventually amended its structure to comply with the limited partnership insulation requirements. However, Ramirez specifically testified at hearing that while he was concerned about the insulation requirements, his concern arose because of the possibility of a comparative renewal hearing wherein integration credit would be considered, not because of a concern that ACCLP's status as an entity that acquired a station pursuant to the Commission's minority distress sale policy was in jeopardy. MMB PFCs at 26; Tr. 418. In light of Ramirez' clear testimony, Shurberg's speculation that ACCLP was in fact concerned with its representations in the minority distress sale context is without merit. Moreover, while ACCLP's letter of August 3, 1987, clearly did not answer all the questions contained in an ownership report, it did not misrepresent the information contained therein.

73. It is concluded that Ramirez controlled ACCLP and that there is no evidence of misrepresentation in this regard.

B. Ramirez 21% interest.

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

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

75. Although there is no record that the reallocation and subsequent partnership amendment were reported to the Commission, there is no evidence that the ACCLP's failure to report was in any way an effort on its part to conceal information. Rafter, Ramirez and Hart both recalled that there was no conscious decision not to report the special tax reallocation. Additionally, the record contains no evidence of any motive to conceal this information since, as explained during the hearing, the changes to the partnership agreement did not change or in any way alter Ramirez' ownership interest in or control of the station.

76. Moreover, although ACCLP's structure was ultimately changed to better insulate the Astroline Company Partners, that change was not made because of a concern regarding ACCLP's representations to the Commission in connection with the minority distress sale. Rather, in response to a 1988 Commission case concerning insulation of limited partners, ACCLP was restructured to put itself in a better comparative position, in anticipation of a comparative renewal hearing in which it would have no renewal expectancy.

77. Accordingly, the record reveals that at all times Ramirez had at least twenty-one percent of the equity and seventy percent of the voting interest in ACCLP. Thus, the record lacks evidence of any misrepresentations to the Commission in this regard.

C. Trustee's arguments in pleadings filed with bankruptcy and appellate courts.

78. The concerns set forth in the HDO regarding the bankruptcy court documents were sufficiently explained at hearing by the Trustee. Specifically, the Trustee explained that he felt obligated to try to maximize the potential distribution to creditors by filing a lawsuit against the limited partners. The record in this case does not support the Trustee's arguments to the bankruptcy court that the Astroline Company Partners controlled the partnership. Additionally, although the issues in this case differ from those litigated by the Bankruptcy Court, the Bankruptcy Court after a nine day trial, ruled that it would have to engage in conjecture and surmise to find that the Astroline Company Partners had any control over station operations.

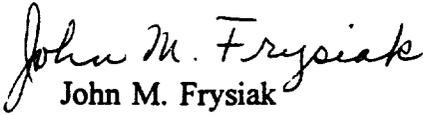
Although the Trustee challenged this finding, he was unsuccessful in doing so. ⁴/

Ultimate Conclusions

79. In view of all the foregoing, it is concluded that ACCLP did not misrepresent facts to the Commission and the federal courts in connection with statements it made concerning its status as a minority controlled entity. It is also ultimately concluded that the public interest, convenience and necessity would be served by grant of the renewal application filed by Trustee-in-Bankruptcy for ACCLP for (File No. BRCT-881201LG).

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Martin W. Hoffman, Trustee-in-Bank for Astroline Communications Company Limited Partnership IS GRANTED. ⁵/

FEDERAL COMMUNICATIONS COMMISSION


John M. Frysiak
Administrative Law Judge

⁴ Shurberg by filing made January 19, 1999, requests that the Presiding Judge take official notice of the "Ruling on Defendant's Motion to Dismiss Complaint" ("Ruling") which was issued on October 14, 1998 by Bankruptcy Judge Krechevsky in connection with an adversary proceeding initiated by Martin W. Hoffman ("Hoffman") in the on-going bankruptcy proceeding relative to Astroline Communications Company Limited Partnership ("ACCLP"). The Request is opposed on the grounds that the pleading is an untimely attempt to reopen the record of this proceeding to insert an exhibit and secondly, that the proffered exhibit is not appropriate for judicial notice. Rule 201 (b) of the Federal Rules of Evidence provides that a judicially noticed fact must be one that is not subject to reasonable dispute in that it is either generally known within the jurisdiction of the court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Judge Krechevsky's ruling is an interlocutory ruling that involves a matter that has no bearing on the issue designated by the Commission in this proceeding. Accordingly, Shurberg's request IS DENIED.

⁵ In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1.27(d).