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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)	MM DOCKET NO. <u>97-128</u>
)	
MARTIN W. HOFFMAN,)	
Trustee-in-Bankruptcy for Astroline)	File No. BRCT-881201LG
Communications Company Limited)	
Partnership)	
)	
For Renewal of License of)	
Station WHCT-TV, Hartford, Connecticut)	
)	
SHURBERG BROADCASTING OF HARTFORD)	File No. BPCT-831202KF
)	
For Construction Permit for a New)	
Television Station to Operate on)	
Channel 18, Hartford, Connecticut)	

TO: Magalie Roman Salas, Secretary
for direction to
The Commission

**CONSOLIDATED EXCEPTIONS AND BRIEF
OF SHURBERG BROADCASTING OF HARTFORD**

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Summary

In his Initial Decision below, the Administrative Law Judge failed to apply the applicable, well-established standards developed by the Commission with respect to determining the bona fides of limited partnerships. Further, he ignored overwhelming evidence that the structure and operation of ACCLP were dramatically inconsistent with those well-established standards. And he also ignored substantial, documentary evidence demonstrating that (a) ACCLP was aware of its non-compliance, and (b) ACCLP was aware that it was required to notify the Commission of that non-compliance, but that (c) ACCLP elected not to so notify the Commission and instead (d) advised the Commission that demonstrably irrelevant factors somehow prevented ACCLP from providing the required information.

This case raises the most serious constitutional questions concerning the Commission's race-based "minority ownership" policies. If the Commission wishes to utilize such policies, it must do so in an exceedingly careful, narrowly-tailored manner designed to comply with the colorblind strictures of the Constitution. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The Commission cannot conceivably affirm the Initial Decision below consistently with its constitutional obligation to strictly review entities claiming "minority" status. From 1984 (when ACCLP first appeared before the Commission as a "minority" entity seeking the benefits of the minority distress sale policy) through 1990 (when the Supreme Court affirmed the Commission's grant of ACCLP's initial assignment application), the Commission undertook no detailed review whatsoever of the structure and/or operation of ACCLP, despite the Commission's contrary representations to the Courts (including the

Supreme Court). The Commission's ability to engage in such a review was substantially limited by the fact that, throughout that time, ACCLP declined to provide the Commission with the information which would have permitted such review.

The Commission has now, at long last, permitted the compilation of record evidence which unquestionably establishes that ACCLP could not legitimately claim to be a "minority-owned/controlled" entity within the meaning of the Commission's policies. If the Commission fails to acknowledge this, the Commission will be demonstrating its unwillingness to recognize and abide by its constitutional obligation to engage in colorblind decisionmaking.

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Pursuant to Sections 1.276 and 1.277 of the Commission's Rules, Shurberg Broadcasting of Hartford ("SBH") submits its Exceptions to the *Initial Decision* ("I.D."), ___ FCC Rcd ___ (ALJ 1999), of Administrative Law Judge John M. Frysiak ("ALJ"). As set forth below, the ALJ's decision completely ignores substantial, undisputed evidence and plainly valid and relevant precedent, all of which contradicts and/or undermines the conclusions reached by the ALJ with respect to each of the designated issues. Accordingly, the *I.D.* must be reversed.

CONCISE STATEMENT OF THE CASE

This case arises from representations made to the Commission, to the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") and to the U.S. Supreme Court by Astroline Communications Company Limited Partnership ("ACCLP") concerning its supposed status as a "minority-controlled" entity within the meaning of the Commission's minority ownership policies (including particularly the minority distress sale policy). Those policies have long raised, and continue to raise, serious constitutional concerns. Indeed, in an appeal of the Commission's decision granting ACCLP's application to acquire the license of Station WHCT(TV) in 1984, the D.C. Circuit held that the minority distress sale policy was *UN*constitutional. *Shurberg Broadcasting of Hartford, Inc. v. FCC* ("Shurberg"), 876 F.2d 902 (D.C. Cir. 1989) ^{1/}. See also, e.g., *Lutheran Church - Missouri Synod v. FCC* ("Lutheran

^{1/} While the D.C. Circuit's decision was ultimately reversed in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the decision in *Metro* was in turn expressly overruled in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). According to *Adarand*, the standard of review applied in *Metro* was incorrect; instead, *Metro* held, the proper standard for judging the constitutionality *vel non* of race-based governmental programs is the "strict scrutiny" standard. The ALJ failed to acknowledge *Adarand*, and appears to have labored under the erroneous belief that the minority distress sale policy is constitutional. See *I.D.* at 2, n. 1. Since the D.C. Circuit's decision in *Shurberg* was based on that proper "strict scrutiny" analysis, it may be safely concluded that the minority distress sale policy was, and remains, unconstitutional. *But see* Letter to Nathaniel F. Emmons, Esquire, *et al.*, from Roy J. Stewart, Chief (January 19, 1996), which states, *inter alia*, that that policy "remains viable". The validity of that asserted viability is, however, questionable, since -- like the *I.D.* -- the Bureau Chief's letter did not refer to *Shurberg*, *Metro* or, more importantly, *Adarand*.

Church"), 141 F.3d 344 (D.C. Cir. 1998).

The Commission has defended its minority ownership policies with the claim that the Commission has supposedly exercised extreme care to assure that entities benefiting from those policies -- such as ACCLP -- are in fact minority-owned/controlled. *See, e.g.*, FCC Brief in *Astroline Communications Company Limited Partnership v. Shurberg Broadcasting of Hartford, Inc.*, No. 89-700 (U.S.S.C., filed February, 1990) at 43, n. 41. Thus, even in the Commission's eyes, the constitutionality of minority ownership policies -- if they are ever to be found to be constitutional -- must hinge in significant measure on exceedingly careful scrutiny of any claim of minority ownership or control.

From 1984-1990, ACCLP held itself out at all times as a minority-owned/controlled entity consistent with the Commission's policies. Contrary to the impression which it presented to, *inter alia*, the Supreme Court, the Commission undertook no independent examination of ACCLP's organization or operation during that period. Indeed, the Commission did not take any action even when, in 1987, ACCLP unilaterally declined to comply with the Commission's minimal reporting requirements relative to ACCLP's organization, operation and compliance with Commission criteria (*see* ¶¶33-48, below).

The evidence developed in this proceeding demonstrates that the Commission's claims of careful scrutiny of so-called minority applicants were, at least in this case, completely baseless: in fact, ACCLP declined to inform the Commission about how ACCLP was organized and/or operated from its earliest days, and the Commission was unaware of multiple facts and circumstances which contradicted ACCLP's claims of compliance with Commission policies relative to limited partnerships.

The instant proceeding, initiated after years of delay (and only after SBH brought this

matter to the attention of the D.C. Circuit), affords the Commission an opportunity at long last to make good on its representations to, *inter alia*, the Supreme Court that the Commission carefully scrutinizes so-called minority applicants. If the Commission has any hope of preserving minority ownership policies in any form -- and in light of, *e.g.*, *Adarand* and *Lutheran Church*, such policies are in any event unconstitutional as matters now stand -- the Commission must avail itself of this opportunity and undertake a detailed, critical analysis of ACCLP's organization and operation during the period 1984-1990.

As set forth both below and in SBH's Proposed Findings of Fact and Conclusions of Law ("PFC"), the evidence establishes conclusively that ACCLP's organization and operation fell far short of Commission standards by 1985 and remained that way at least into late 1988 -- *i.e.*, the period of time during which ACCLP's initial assignment application remained pending while on appeal in *Shurberg*. Moreover, the evidence establishes ACCLP was aware of its shortcomings and nevertheless failed to advise the Commission of them, even though it was required to do so.

The ALJ's Initial Decision, which resolved the issues ^{2/} herein favorably to ACCLP, ignores the relevant precedent and evidence and, instead, continues the Commission's historical approach to ACCLP, *i.e.*, simply to rubberstamp ACCLP as "minority" because ACCLP self-servingly claims that title, without regard to whether ACCLP was organized, owned and/or

^{2/} The issues designated in the Hearing Designation Order, 12 FCC Rcd 5224 (1997), were as follows:

- (1) To determine whether [ACCLP] misrepresented facts to the Commission and the Federal Courts, in connection with statements it made concerning its status as a minority controlled entity; and
- (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 [Martin W. Hoffman ("Hoffman"), Trustee in Bankruptcy for ACCLP].

operated consistently with the Commission's well-established policies. In reviewing the ALJ's decision, the Commission should be mindful that its resolution of the issues herein will demonstrate the extent to which a federal agency recognizes the constitutional boundaries imposed by, *e.g.*, *Adarand* and *Lutheran Church* on any and all race-based agency policies.

STATEMENT OF THE QUESTIONS OF LAW PRESENTED

Since the record evidence establishes that ACCLP did not comport in multiple substantial respects with the Commission's standards for minority-owned/controlled limited partnerships, and since ACCLP was aware of that fact, and since ACCLP nevertheless failed to disclose that to the Commission and, instead, affirmatively withheld information which would have disclosed it, and since ACCLP nevertheless continued to hold itself out as a minority-owned/controlled limited partnership, was it not error to resolve the issues herein favorably to ACCLP?

Since Hoffman has repeatedly asserted before Federal Courts that Ramirez owned less than 1% of ACCLP and that a non-minority principal of ACCLP was in fact "in control of" ACCLP, is he not precluded from advancing absolutely contrary positions before the Commission?

Does not the ALJ's refusal to apply to ACCLP well-established standards concerning the bona fides of limited partnerships demonstrate that the Commission's minority-ownership policies violate the U.S. Constitution, *see, e.g.*, *Adarand* and *Lutheran Church*?

ARGUMENT

I. The ALJ failed to apply the Commission's governing standards relative to limited partnerships.

1. Since 1982 (when the Commission held that certain limited partnerships might qualify for relief under the minority distress sale policy, *Minority Ownership in Broadcasting* ("1982 Policy Statement"), 92 FCC2d 849, 52 RR2d 1301 (1982)), the Commission has developed standards governing the regulatory treatment of such partnerships. In his *I.D.*, the ALJ ignored virtually all of those standards.

2. According to the *1982 Policy Statement*, limited partnerships are entities in which limited partners "lack a voice in the operation of the enterprise" and general partners wield

"complete control". 52 RR2d at 1306. Two years later, the Commission reinforced this view, stating that limited partnership interests "confer[] no influence or control over the licensee."

Corporate Ownership Reporting and Disclosure by Broadcast Licensees ("Ownership Attribution"), 97 FCC2d 997, 55 RR2d 1465 (1984).^{3/}

3. In June, 1985, the Commission concluded that reliance on the ULPA would *not* advance the Commission's regulatory objectives because the ULPA (and the Revised ULPA) allow the possibility of influence by the limited partner over partnership activities -- which would be inconsistent with the Commission's insistence that the limited partner have "no material involvement" whatsoever in partnership activities. *Corporate Ownership Reporting and Disclosure by Broadcast Licensees ("Ownership Attribution Reconsideration")*, 58 RR2d 604 (1985). The Commission emphasized this "no material involvement" standard through its own, ultra-stringent, criteria to be used in evaluating limited partnerships.^{4/}

4. Immediately after that announcement, the Commission released *Citizenship Requirements of Section 310*, 58 RR2d 531 (1985), in which it defined ownership interests in limited partnerships "in terms of the equity contributions" of the partners. 58 RR2d at 538. On reconsideration of that decision, the Commission expressly rejected the notion that it should consider such concepts as "partnership shares" or "sweat equity" as an adequate measure of

^{3/} In *Ownership Attribution*, the Commission expressed concern about assuring "appropriate insulation of the general partner from any possibility of control or influence by the limited partners", 55 RR2d at 1485, and announced that it would rely on compliance with the Uniform Limited Partnership Act ("ULPA") as the appropriate standard.

^{4/} Those criteria included, *inter alia*, that a limited partnership agreement would have to expressly provide that limited partners would (a) have no active involvement in the operation of the station; and (b) be prohibited from even communicating with the general partner "on matters pertaining to the day-to-day operations of its business." 58 RR2d at 620.

ownership of a partnership.^{5/}

5. Meanwhile, the stringent criteria for limited partnerships (particularly those seeking credit as minority- or female-controlled entities) were being further developed in the context of comparative broadcast proceedings. There the standards set out in *Ownership Attribution Reconsideration* were applied to applicants whose applications had been on file prior to the June, 1985 adoption of those standards. See, e.g., *Family Media, Inc.*, 102 FCC2d 752, 59 RR2d 165 (Rev. Bd. 1985); *Pacific Television, Inc.*, 62 RR2d 653 (Rev. Bd. 1987); *Religious Broadcasting Network*, 3 FCC Rcd 4085 (Rev. Bd. 1988).

6. Through the comparative process a number of factors were identified as necessary to the legitimacy of a limited partnership seeking benefits under the Commission's minority/female ownership policies. For example, supposed "limited partnerships" were deemed to be *NOT* bona fide:

- when it was shown that the "general partner" who supposedly owned 20% of the overall equity of the partnership in fact had contributed only 1-5% of the entity's capital and would not receive anything more than a 1-5% of the partnership's income, expenses or distributions until the "limited partner" had received 100% of his contributed capital. *Pacific Television, supra; Praise Broadcasting Network*, 8 FCC Rcd 5457, 5459, n.4 (Rev. Bd. 1993); see also *Saltaire Communications, Inc.*, 8 FCC Rcd 6284 (1993) (essentially same rationale applied to supposedly passive corporate stockholders).
- when the supposed "limited partner" had the authority to sign the partnership's checks, *whether or not that authority was ever exercised*. *Gloria Bell Byrd*, 7 FCC Rcd 7976 (Rev. Bd. 1992), *aff'd*, 8 FCC Rcd 7126 (1993).
- when the supposed "general partner" could not, without the consent of the "limited partners", sell his/her own interest, borrow money against that interest,

^{5/} See 61 RR2d at ¶17 ("We recognize that [capital] contribution may not accurately measure the ownership interests in a limited partnership, particularly in situations in which a general partner obtains 'sweat equity' in exchange for active participation in business management. However, based on our experience at this time, we are not convinced that reliance upon partnership share as the measure of ownership interest would provide a more appropriate measure.")

or sell or borrow money against the station. *Atlantic City Community Broadcasting, Inc.*, 8 FCC Rcd 4520 (1993).

See also, e.g., Royce International Broadcasting, 5 FCC Rcd 7063, 7065, n. 10 (1990); *Evergreen Broadcasting Company*, 6 FCC Rcd 5599, 5602, ¶20 (1991); *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 6314, 6318, ¶13 (Rev. Bd. 1990).

7. The *I.D.* fails even to mention, much less apply, the vast majority of this precedent. That alone is reversible error (particularly because, as set forth below, ACCLP's structure and operation featured virtually all of the traits of a "sham" limited partnership described above). And to the very limited extent that the ALJ did consider some of the precedent cited above, his "analysis" is plainly wrong.

8. With respect to the concept of "control" within a limited partnership, the ALJ ignored virtually all of the Commission's pronouncements from 1984 on, and instead referred only to the *1982 Policy Statement*, a 1981 decision (*Southwest Texas Broadcasting Council*, 85 RR2d 713 (1981)) cited therein, and one other case (*Fox Television Stations, Inc.*, 10 FCC2d 8452 (1995)). *See I.D.* at ¶¶63-70. Both *Southwest Texas* and *Fox* are inapposite here, since both deal with the question of whether some entity other than a licensee had assumed control of the licensee's station. Neither of those cases concerned the distinct question of whether a particular limited partnership structure was bona fide and, therefore, entitled to favorable treatment under the Commission's minority/female ownership policies.

9. Further, the ALJ claimed that *Citizenship Requirements of Section 310, supra*, has "nothing to do" with this case because the Commission "has not intended the definition of ownership contained therein to apply in minority distress sale context", *I.D.* at ¶63. However, the ALJ did not cite any authority for that novel, ipse dixit claim, nor did the ALJ explain why the Commission might have adopted a very clear and bright line for calculating "ownership" of

a limited partnership for one regulatory purpose but would nevertheless have completely rejected that same bright line in a clearly related context. Normally (and logically), an agency would be expected to apply its policies -- particularly definitional policies -- across the board unless it specifically announces one or more exceptions. Here, no such exceptions have been announced, as far as SBH is aware (or as far as the *I.D.* indicates). Accordingly, the ALJ's failure to apply the standards of *Citizenship Requirements of Section 310* was erroneous.

10. The ALJ also rejected the notion that the Commission's stringent criteria (*i.e.*, the "complete control" standards developed in *Ownership Attribution Reconsideration* and other subsequent decisions) relative to limited partnerships should be applied at all to ACCLP. *I.D.* at ¶¶70-71. That, too, was erroneous for both factual and legal reasons.

11. First, the ALJ seemed to think that, just because the ACCLP assignment application had been granted in 1984 and consummated in 1985, no later authority could be applied to it. *I.D.* at ¶70. The ALJ seemed to think that the 1984 grant of the ACCLP assignment application (and the consummation of the sale) put ACCLP somehow beyond the reach of the Commission for on-going regulatory purposes. But the ALJ failed to recognize that the grant of ACCLP's assignment application did not become "final" until September, 1990 because SBH's appeal of the grant of the assignment was pending throughout that period. Under the Commission's own rules, ACCLP's application was thus in "pending" status, *see* Section 1.65(a), and was therefore, at all times relevant here, subject to the Commission's on-going regulation. ^{6/}

12. The ALJ also asserts that the decision in *Daytona Broadcasting*, 103 FCC2d 931

^{6/} In opposing SBH's motion for stay of the grant (filed with the D.C. Circuit in December, 1984), both ACCLP and the Commission expressly acknowledged that the grant was not final and that any actions which ACCLP might take in reliance on the grant would be taken at ACCLP's risk.

(1986) somehow limited application of the Commission's stringent limited partnership standards to only partnerships formed after the June, 1985 announcement of those standards. *I.D.* at ¶71. This, too, was wrong. First, it is clear from such decisions as *Pacific Television* and *Religious Broadcasters* -- both of which post-date *Daytona Broadcasting* -- that the stringent standards were to be applied to *all* limited partnerships, not just those formed after June, 1985. The dictum relied on by the ALJ from *Daytona Broadcasting* (and the similar dictum from *Independent Masters, Ltd.*, 104 FCC2d 178 (Rev. Bd. 1986) are on their face limited in application and, in any event, were subsequently ignored by the Review Board in, *e.g.*, *Pacific Television* and *Religious Broadcasters* -- thus indicating that the ALJ's reading of the effect of *Daytona Broadcasting* is wrong.

13. And even if that reading were not wrong legally, it is wrong factually. The ALJ would not apply any post-1984 standards to ACCLP. But the ALJ ignores the fact that, in early 1986 -- more than six months *after Ownership Attribution Reconsideration* -- ACCLP substantially overhauled its partnership agreement (with the changes effective as of December 31, 1985, *see* SBH PFC at 36-53, discussing, *inter alia*, SBH Exh. 9). Any claim that ACCLP's partnership agreement should not be held to post-1984 standards evaporated when ACCLP chose to re-form itself in 1986, well *after* the Commission had put everyone on notice that it really did mean what it had said in 1982, *i.e.*, that the supposed "general partner" would really be expected to be in "complete control", *see, e.g.*, *1982 Policy Statement*.^{2/}

^{2/} The ALJ also cites *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), for the proposition that "new policies" cannot be applied retroactively without due notice. *I.D.* at ¶70. But the ALJ is incorrect to suggest that any "new policies" are in issue here. To the contrary, since the *1982 Policy Statement*, the Commission has held that general partners must wield "complete control" of supposedly "limited" partnerships. Faced with continuing efforts by private parties seeking to evade the obvious meaning of that standard, the Commission had occasion to announce, in various decisions thereafter, exactly what "complete control" means. Such case-by-case efforts to clarify the
(continued...)

14. The ALJ's failure to apply any of the foregoing legal standards to the facts of this case was error which must be reversed.

II. The ALJ ignored overwhelming evidence establishing that ACCLP's structure and operation were inconsistent with the Commission's governing standards relative to limited partnerships.

15. The *I.D.*'s version of how ACCLP was organized, modified and operated is akin to a revised version of *Gone With The Wind* which doesn't mention Rhett Butler or the Civil War. The ALJ focussed myopically on the self-serving testimony of Ramirez and Hart, neither of whom provided any evidence to contradict the substantial, damning, *documentary* record compiled below, a record which the ALJ fails to address in most respects.

16. The history of ACCLP as demonstrated by the record below is set forth in detail in SBH's PFC (particularly at 16-91), all of which are incorporated herein by reference. The following are noteworthy points of that history.

17. ***Initial formation of ACCLP.*** Contrary to the impression which the *I.D.* may create, the moving force behind the formation of ACCLP was *not* Ramirez, but ACCLP's non-minority "limited" partners who had already completely negotiated the asset purchase agreement for the station before they even met Ramirez. *E.g.*, SBH Exhs. 32-35. ^{8/}

^{7/}(...continued)

meaning of an existing standard does not amount to the sort of "retroactive" rule making which was at issue in *Bowen*. To the contrary, such efforts are routine in the administrative process; were the ALJ's position to be adopted, the Commission would be powerless to engage in effective adjudication and/or policy-making.

^{8/} The non-minority "limited" partners had previously negotiated with a minority individual who already had an agreement to acquire the station; however, they were unable to come to terms with that individual, as a result of which they broke off their discussions with him and advised the licensee that they would negotiate directly for the acquisition of the station. It was only after those negotiations had been concluded and an agreement drafted, and virtually the night before a distress sale proposal had to be filed, that the "limited" partners -- needing a minority participant in order to

(continued...)

18. In return for his supposedly controlling interest in ACCLP, Ramirez paid only \$200. *I.D.* at ¶13. The ALJ notes Ramirez's testimony that Ramirez was also supposed to be contributing "sweat equity". *Id.* What the ALJ fails to mention is that the ACCLP partnership agreement -- both as originally executed in 1984 and as revised effective December 31, 1985 -- included *no reference whatsoever to any* non-cash contribution by Ramirez (whether or not characterized as "sweat equity"). SBH Exh. 2, p.3; Tr. 240; SBH Exh. 9. Whether or not Ramirez may have thought he could increase his capital contribution to ACCLP through "sweat equity", the fact is that the agreements he signed did *not* provide that option.^{2/} The ALJ's failure to acknowledge this undisputed fact, or to consider its effect on the bona fides of ACCLP's supposed structure, is reversible error, particularly in light of, *inter alia*, *Citizenship Requirements of Section 310*.

19. ***Revision of ACCLP partnership agreement.*** As early as May, 1985, ACCLP contemplated revising its structure. ACCLP recognized that any such revision would have to be reported to the Commission. *E.g.*, SBH Exhs. 37 (p. 4) and 39 (p. 5).^{10/}

20. On December 31, 1985, Boling (a supposedly passive non-minority ACCLP principals) sent instructions effecting substantial changes in the ACCLP partnership agreement.

^{8/}(...continued)

avail themselves of the minority distress sale policy -- met Ramirez and, within a couple of hours, agreed to let him be the supposedly "controlling" general partner of a partnership which they formed the next day. *See, e.g.*, SBH PFC at 16-24 and record citations therein.

^{2/} The total initial capitalization of ACCLP was \$1,000, with Ramirez's \$200 (or, possibly, \$210) amounting to 21% of that total. SBH Exh. 2 at 29. Originally, as the ALJ acknowledges, ACCLP planned to rely on bank financing of approximately \$15,000,000. *I.D.* at ¶13. However, such bank financing proved unavailable, and the "limited" partners ultimately made approximately \$22 million in additional capital contributions. Ramirez made no capital contributions beyond his initial \$200.

^{10/} ACCLP planned to undertake such revisions only after the pleading cycle in the *Shurberg* appeal had closed. SBH Exh. 39 (p. 5).

SBH Exh. 44, 45. Despite the fact that he claims to have been the absolute, controlling general partner, Ramirez was not involved in the preparation of that document. Tr. 316-18.

21. By mid-March, 1986, a revised partnership agreement had been executed which conformed to the terms specified by Boling on December 31, 1985. The revised agreement provided that, upon sale of all or substantially all of ACCLP's assets, the proceeds would be distributed in such a way as to effectively assure that Ramirez would never receive any of those proceeds. ^{11/} The revised agreement also reallocated 99% of all profits, losses and credits to the non-minority limited partners until a "Participation Change Point" ("PCP") was reached. The PCP would be reached only when the Unrecovered Adjusted Capital of all limited partners had been reduced to zero -- a point which was never reached and which could not, as a practical matter, ever be reached, *see* Footnote 11, above.

22. The revised agreement prohibited Ramirez from selling or otherwise encumbering his partnership interest without the consent of all other general partners and a majority of the limited partners. SBH Exh. 9, p. 16. He also could not sell, mortgage or pledge ACCLP's

^{11/} According to the revised agreement, Ramirez would not receive dime one until all partnership debts had been paid *and* all "Unrecovered Adjusted Capital" had been re-paid. The term "Unrecovered Adjusted Capital" encompassed (a) any partner's additional capital contributions (beyond the initial contributions which, as noted above, totalled only \$1,000), less (b) any distributions made to the partner, plus a return on (a) minus (b). SBH Exh. 9, p. 39. The only parties who could claim "Unrecovered Adjusted Capital" were the non-minority partners, since Ramirez made no contributions beyond his initial \$200 payment. By the end of 1985, the total "Unrecovered Adjusted Capital" was approximately \$11 million, SBH Exh. 9, pp. 31-32; by the end of 1986, it had increased to approximately \$18.3 million; it remained at that level (or slightly above) through 1987, Hoffman/TIBS/Ramirez Exh. 3, 188 BR at 101. *See also* SBH PFC at 42-46. The station's appraised value at the end of 1984 was approximately \$7 million, SBH Exh. 137; in 1986, "between \$10 and \$12 million", SBH Exh. 138. In other words, at all times the "Unrecovered Adjusted Capital" to be re-paid to the non-minority partners substantially exceeded the value of the station, leaving Ramirez with no real hope of receiving any portion of the proceeds. The ALJ failed to mention these facts, although he did specifically acknowledge that Ramirez's claimed 21% partnership interest would not enter into the calculation of distribution of proceeds until after the "limited" partners had recouped all of their capital contributions. *I.D.* at ¶44. That acknowledgement was unavoidable in light of the clear language of the amended ACCLP partnership agreement.

assets without consent of a majority of the limited partners. SBH Exh. 9, p. 12. The revised agreement did not prohibit limited partners from communicating with general partners about ACCLP's business; to the contrary, it specifically contemplated that limited partners might participate in or even control ACCLP's business. SBH Exh. 9, p. 14.

23. In each of the foregoing regards, the revised ACCLP partnership agreement was dramatically inconsistent with the Commission's own standards for bona fide limited partnerships. *See, e.g.*, ¶¶2-6, above, and the cases cited therein. The ALJ, however, ignored the relevant standards and also ignored the undisputed evidence. Those failures constitute reversible error.

24. *The ACCLP Tax Returns.* To comply with the *1982 Policy Statement*, Ramirez claimed that he owned 21% of ACCLP. His initial claim in that regard was based on the original ACCLP arrangement, pursuant to which he paid in \$200 (or \$210) of the partnership's total \$1,000 capital -- giving him 21% of the capital and, therefore, 21% of the equity. Under that original agreement, Ramirez was entitled to 21% of ACCLP's profits, losses and credits, as well as 21% of the proceeds of a sale of ACCLP's assets. *See* SBH Exh. 2. In its 1984 Federal tax return, ACCLP reported that Ramirez's "percentage of ownership" in the partnership was 21%. SBH Exh. 25, p. 8.

25. Following adoption of the revised ACCLP partnership agreement, ACCLP reported in its 1985 Federal tax return that Ramirez's ownership interest had dropped to approximately 0.7%, where it remained through the 1986 and 1987 returns as well. SBH Exh. 27, p. 16; SBH Exh. 28, p. 8. The change was the result of the revisions effected in the ACCLP partnership agreement. *E.g., I.D.* at ¶46; ¶¶19-23, above.

26. The ALJ claimed that the information reported to the IRS did "not refer to equity

. . . interest in the partnership"; in his view the information in the tax returns "refer[red] to how the assets would be distributed upon liquidation of the partnership." *I.D.* at ¶46. But Ramirez himself testified that his own belief that he owned 21% of ACCLP at all times was based on the notion that he would be entitled to a 21% share of the proceeds of a sale of ACCLP's assets, Tr. 383-84 -- so the allocation of proceeds was the relevant measure of what Ramirez's "equity" interest was, even in his mind. The information in the tax returns was calculated on that very basis, according to ACCLP's accountant, Kent Davenport. ^{12/}

27. But if allocation of proceeds was the relevant measure, and if the tax return information was calculated (by Davenport) based on that measure, then the tax return information accurately reflected that Ramirez's equity interest had, as a result of the revised partnership agreement, decreased to approximately 0.7%, well below the level required by Commission policy. The ALJ's contrary conclusion is inconsistent with the evidence, and with common sense, and is reversible error.

28. *ACCLP's Operating Practices.* The *I.D.* confirms that, throughout ACCLP's history, Ramirez conferred regularly -- at least monthly, sometimes even weekly, daily, or more often -- with Boling and Sostek, two of ACCLP's non-minority partners. *I.D.* at ¶25; Tr. 298-99. While Ramirez claimed that Boling and Sostek had no role in day-to-day management of the station, the documentary record flatly disproved that claim. Ramirez did not himself even possess a checkbook for any ACCLP accounts -- rather, all checkbooks were maintained in the Boston offices of Boling and Sostek, and all station revenues were automatically "swept" into that account from Hartford at least weekly. *E.g.*, SBH Exh. 99; Hoffman/TIBS/Ramirez Exh.

^{12/} According to Davenport, "the Ownership of Capital number [in the tax returns] . . . is how the assets would be distributed if the partnership were liquidated." Tr. 440. Also, it is clear that, whatever future effect the reported figures might have, those figures were being reported to the IRS for present-day, real world use in calculating the then-current tax liabilities of the ACCLP principals.

3. Ramirez acknowledged that this unusual arrangement was not his own personal preference, but rather was an "accommodation" to the non-minority ACCLP principals. Tr. 278, 390, 416. Boling and Sostek were both signatories on the ACCLP checking account, and they both in fact signed ACCLP checks. SBH Exh. 30, p. 21. ^{13/}

29. Moreover, in order to get a check made out for his own signature, Ramirez had to send a check request to the Boling/Sostek offices, along with appropriate supporting documentation. *See, e.g.*, SBH PFC at 54-57; Hoffman/TIBS/Ramirez Exh. 3; SBH Exhs. 30, 106. While Ramirez claimed that all of his check requests were routinely granted, *e.g.*, Tr. 281, in fact that was *not* the case, as even the ALJ indicated: in 1987-1988, according to Ramirez, the requests began to "stack up" in Boston -- *i.e.*, the checks were *not* being prepared routinely at his request, *I.D.* at ¶35. At that time, Ramirez would "work with Fred [Boling] to determine the priority of that month's allocation". Tr. 282. In other words, for a year or more, Ramirez had to "work with" Boling just to get checks prepared. ^{14/}

30. Boling and Sostek were deeply involved in other station activities. Ramirez made "recommendations" and suggestions to them, and "advised" them about virtually all aspects of

^{13/} The record includes reference to at least two checks signed by Boling or Sostek in which Ramirez was not involved and about which Ramirez had no explanation. Hoffman/TIBS/Ramirez Exh. 3, 188 BR 102. Further, the record includes at least one document signed by Boling and filed with a bank in which the general partners of ACCLP were supposedly identified -- but that list included non-minority, supposedly passive principals of ACCLP and it did *not* include Ramirez at all. *I.D.* at ¶36. Ramirez -- again, the supposedly absolute, controlling general partner -- could offer no explanation for how passive investors might have told a bank that they were ACCLP's general partners while he was not even included as any kind of principal. Tr. 291-92.

^{14/} Ramirez confirmed that Boling had to approve the release of funds to cover the checks which Ramirez was requesting. *See, e.g.*, SBH Exh. 106; Tr. 283. According to Ramirez, the non-minority ACCLP principals maintained a tight hold on the partnership's financial pursestrings, declining to "put big blocks of cash at our access at any one time. . . . [T]hey were gentlemen who came from, you know, a cash and carry . . . business. They're a peculiar nature. They wanted to see where the investments were going." Tr. 415.

the station's operation, including programming (*see, e.g.*, SBH Exh. 116, 124, 125, 126, 129; Tr. 298; 130, 133; Tr. 294-98 ^{15/}); physical plant (SBH Exh. 119; Tr. 271-72); advertising (SBH Exh. 122, 132); and a wide variety of other matters (*see generally* SBH PFC at 657-66). ^{16/}

31. The extent of day-to-day communications between Ramirez and the non-minority, supposedly passive investors, and the substantial routine involvement of those supposedly passive investors in the operation of the station, establishes that ACCLP was not a bona fide minority-controlled limited partnership as defined by the Commission. The ALJ's contrary conclusion was reversible error.

III. The ALJ ignored overwhelming evidence that ACCLP intentionally withheld from the Commission information which would have established ACCLP's non-compliance with the Commission's governing standards.

32. The ALJ concluded that there was "no evidence" that ACCLP sought to conceal from the Commission evidence that ACCLP was not in compliance with the Commission's standards. That conclusions is flat out wrong.

33. The record establishes that, as early as February-May, 1985, when ACCLP first contemplated changing its structure, its principals and counsel expressly acknowledged the fact that such changes would have to be reported to the Commission. SBH Exhs. 37 (p. 4), 39

^{15/} While Ramirez claimed that he alone made all programming decisions, the circumstances surrounding "The Cosby Show", *inter alia*, belie that claim. Ramirez wanted to bid for that program; Boling and Sostek did not, and advised him of their unwillingness to finance a bid. While Ramirez went ahead and submitted a bid, he acknowledged that his bid was structured to accommodate the limitations imposed on him by Boling and Sostek. Tr. 297. As a result, the bid was unsuccessful. Had Ramirez really enjoyed free reign over programming decisions, as he claimed, the views of Boling and Sostek would not have entered into the matter at all.

^{16/} The record even includes one document which indicates that Boling believed that he had the authority to instruct ACCLP's communications law firm not even to respond to calls from Ramirez. SBH Exh. 135.

(p. 7). ^{17/} And the record also demonstrates that, with respect to *all non*-controversial changes in ownership, ACCLP was johnny-on-the-spot in getting the changes filed with the Commission. SBH PFC at 33-36 (and record evidence cited therein).

34. But that was *NOT* the case with respect to the December 31, 1985 Amended Partnership Agreement. As even the ALJ concedes, ACCLP did not file that agreement with the Commission, or notify the Commission of the changes encompassed in that agreement. *I.D.* at ¶48. The evidence establishes conclusively that that was *NOT* an inadvertent oversight on ACCLP's part.

35. Section 73.3613 of the Commission's rules required that amendments to partnership agreements be filed within 30 days of their execution. ^{18/} ACCLP failed to do so.

36. In March, 1987, the Commission announced that licensees would be required to file full Ownership Reports on August 3, 1987. SBH Exh. 74. The public notice and the Ownership Report form itself, including detailed instructions -- copies of which were received and read by Ramirez and ACCLP's communications counsel -- made clear that the report would have to include copies of the licensee's organizational agreements *AND*, for limited partnerships,

^{17/} Those acknowledgements were accompanied by indications of concern that, once filed, the information would be available to, *e.g.*, SBH. One memorandum from ACCLP's counsel reveals that ACCLP and its advisors had concluded that any changes which might be made would be withheld until after the close of the pleading cycle in SBH's then-pending appeal in the D.C. Circuit -- the reasonable implication being that ACCLP did not want the information to be made available to SBH at a time when it could easily bring that information to the Court's attention.

^{18/} The ALJ mentions that, from 1985-August 3, 1987, the Commission suspended the filing of annual ownership reports. *I.D.* at ¶50. But the filing of annual ownership reports was required by §73.3615, which imposes obligations which are completely separate and distinct from those imposed by §73.3613. Whatever may have been the status of §73.3615 from 1985-1987, §73.3163 was in full force and effect, and ACCLP was required to submit its amended partnership agreement. It did not do so. Moreover, since ACCLP's assignment application was "pending" from mid-1984 through September, 1990, it was separately required, by §1.65, to submit its amended partnership agreement irrespective of §73.3613.

an express certification that the partnership was in compliance with the Commission's insulation requirements, which were themselves set forth in detail in the instructions to the form. SBH Exh. 74 (p. 3).

37. The documentary record clearly establishes that: ACCLP's counsel, with Ramirez's cooperation, worked on several drafts of the Ownership Report, *e.g.*, SBH Exh. 82; during that process, counsel recognized that ACCLP would be completely unable to certify that it was properly insulated, *e.g.*, SBH Exhs. 82, 83, 87; draft Ownership Reports which counsel prepared -- and which Ramirez himself signed -- plainly reflect that ACCLP was *NOT* insulated. SBH Exhs. 83, 91. There is no doubt that ACCLP was aware of this fact.

38. The documentary record also indicates that, in the course of preparing the Report, counsel determined that no copy of the amended partnership agreement was available. Accordingly, on July 28, 1987 a copy was sent by Federal Express from ACCLP's business counsel in Boston to ACCLP's communications counsel in Washington. SBH Exh. 85. Thus, the availability of that agreement, in Washington, for inclusion with the Report, prior to the August 3, 1987 deadline for the Report, is established.

39. According to Hart, the Report was prepared by a "group of experts" within Baker & Hostetler, ACCLP's communications law firm. Tr. 616-620. The Report was due to be filed on Monday, August 3, 1987. On Friday, July 31, 1987 -- the last business day before the deadline -- one of the "experts" faxed an apparently final draft of the report to ACCLP's Boston counsel for review. That draft specifically certified that ACCLP was *NOT* properly insulated. SBH Exhs. 87-89.

40. ACCLP was therefore in a position to file a full Ownership Report, including a copy of the amended partnership agreement, by the deadline. However, ACCLP did not file

such a report. According to handwritten notations on two documents, ACCLP's counsel determined, on the afternoon of July 31, 1987, not to file a full Report because of the "implications". Concern about the "implications" was expressed not by the "group of experts" - who had prepared a full Report and who appeared ready to file such a Report -- but rather by ACCLP's Boston counsel. SBH Exhs. 88, 89.

41. Instead of a full Report, on August 3, 1987 Hart filed a letter "in lieu of" an Ownership Report.^{19/} That letter contained information about the principals of ACCLP, but it did not include either a copy of the amended partnership agreement or a certification concerning insulation. SBH Exh. 21. In his letter, Hart attributed ACCLP's failure to file a full Report to three factors:

a recent Court of Appeals Order [in the *Shurberg* appeal]; the death of Joel A. Gibbs, one of the Limited Partners of Astroline Company [an ACCLP limited partner]; and an internal reorganization.

But the Court of Appeals Order (SBH Exh. 90) in question did not relate in any way to ACCLP's ownership or insulation. Neither did Mr. Gibbs's death, which had occurred in May, 1986, some 15 months previously, Tr. 615. And Hart testified that no "internal reorganization" in fact took place. Tr. 627-29. So the three supposed justifications for ACCLP's failure to file a full Ownership Report were, on their face, plainly bogus.

42. Hart was given an opportunity to explain how any of the three supposed justifications in fact prevented him from filing a full Ownership Report. He was unable to provide such an explanation. Tr. 608-09, 617-29.

^{19/} The decision to file the August 3, 1987 letter was made by Ramirez, Hart and ACCLP's Boston counsel. Tr. 349-53; 620. While the ALJ asserts that the "group of experts" in ACCLP's communications law firm recommended the filing of a letter, the documentary record demonstrates that that "group of experts" had prepared a full Ownership Report and was apparently prepared to file it. *E.g.*, SBH Exh. 87. That plan was aborted only after ACCLP's Boston counsel "voted" not to file because of the "implications". SBH Exh. 88.

43. Importantly, Hart's August 3, 1987 letter provided much of the information which would have been included in an Ownership Report -- which further confirms that the three justifications offered by Hart in his letter were, in fact, completely illegitimate: had those factors really interfered with Hart's ability to compile responsive information, then Hart would not have been able to file the information set out in his letter.

44. More importantly, the primary information sought by the Ownership Report but which Hart *omitted* from his letter consisted of the copy of the amended partnership agreement, and the certification concerning insulation. Again, the documents establish that Hart had, in his possession in Washington, a copy of the amended partnership agreement as of July 29, 1987. It is clear that he could have filed it with his letter. He did not, and no explanation for that failure has been offered.

45. Similarly, the documents establish that Ramirez and ACCLP's counsel all recognized that ACCLP could *NOT* validly certify that ACCLP was an insulated limited partnership. *E.g.*, SBH Exhs. 83, 91. None of the factors cited by Hart in his August 3, 1987 letter prevented (or affected in any way) ACCLP's ability to provide that information to the Commission, whether in Hart's letter or in a full Ownership Report. And yet, Hart did not provide that information, and no explanation for that failure has been offered.

46. The record evidence therefore plainly establishes that ACCLP withheld information which was required to be filed, and which ACCLP knew was required to be filed. As set forth above, that information would have led unavoidably to the conclusion that, as of August 3, 1987, ACCLP could not claim to be a bona fide limited partnership as defined by the Commission. Moreover, the record evidence plainly establishes that ACCLP was aware as early as 1986 (in the preparation of its 1985 tax returns) that Ramirez's ownership interest had

dropped from 21% to less than 1%, and thus was far below the Commission-required level.

47. Despite this, ACCLP failed to inform the Commission or the Courts of the fact that it was not a bona fide limited partnership with the requisite minority ownership. Instead, it filed Hart's bogus letter on August 3, 1987, and otherwise kept mum, allowing the Commission and the Courts to assume, incorrectly, that ACCLP was in compliance with the Commission's policies (as ACCLP had previously represented).

48. Nor did ACCLP make good on Hart's claim, in his August 3, 1987 letter, that a full Ownership Report would be submitted as soon as possible. And though ACCLP's counsel urged, a year later (in September, 1988) that it was "imperative" to amend the partnership agreement to bring ACCLP into compliance with the Commission's insulation policies, SBH Exh. 96, no such effort was made until approximately three months later.^{20/}

49. ACCLP's conduct here fell far short of the standards expected of Commission licensees. *E.g.*, *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994). ACCLP clearly knew that it was not in compliance, as the documents plainly demonstrate.^{21/}

^{20/} The record contains multiple documents demonstrating that ACCLP was advised, by counsel, that its structure was not in compliance with the Commission's policies and that amendment of the agreement was "imperative". *E.g.*, SBH Exh. 96. ACCLP did not report this to the Commission at any time; it also took no steps to attempt to bring itself into compliance until after it was placed in bankruptcy. SBH Exh. 23. And even then ACCLP could not bring itself to tell the Commission the truth. While ACCLP claimed, in a November, 1988 application, that it was requesting Commission approval for certain transactions, *id.*, the record shows that ACCLP had, a week before the filing of its application, effectuated precisely those changes without Commission approval, SBH Exhs. 63 (p. RC007874) and 63 (p. RC007862-65); Tr. 242.

^{21/} The ALJ chose to ignore the documentary evidence, and instead relied on the latterday testimony of Hart and Ramirez. Of course, neither of those two witnesses was likely to admit to misrepresentation. *See, e.g.*, *Guy S. Erway*, 90 FCC2d 755, 775 (ALJ 1980) ("no applicant in his right mind is going to take the stand and openly admit" to an intentional violation of the rules). But neither of them was able to provide any explanation for ACCLP's failure to file the required information. Under the circumstances presented, an intent on ACCLP's part to mislead the Commission and the Courts may easily, and justifiably, be inferred. *See, e.g.*, *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991).

But ACCLP chose not to so advise the Commission or the Courts, even though ACCLP's application was still pending at the time, and even though the question of the bona fides of ACCLP's partnership structure was squarely at issue in the then on-going appeal relating to that application. The unavoidable conclusion is that ACCLP engaged in misrepresentation (or at least a gross lack of candor) before the Commission and the Courts. The ALJ's contrary conclusion can and must be reversed.

IV. The ALJ failed to apply the doctrine of judicial estoppel to prevent Hoffman from taking factual positions before the Commission which were flatly inconsistent with positions he had taken before the Courts.

50. It is undisputed that Hoffman has repeatedly argued to the U.S. Bankruptcy Court in Hartford and the U.S. Court of Appeals for the Second Circuit that, as a result of the December 31, 1985 Amended Partnership Agreement, Ramirez owned less than 1% of ACCLP; Hoffman has also argued to the Bankruptcy Court that the non-minority principals of ACCLP were, in fact, persons "in control of" ACCLP. SBH Exh. 30, pp. 12-31; SBH Request for Official Notice (filed January 19, 1999), Attachment A, at 2. While the Bankruptcy Court rejected, in 1995, Hoffman's claim that the non-minority principals should be treated as de facto general partners for liability purposes within the meaning of Massachusetts limited partnership law, the Court did not address or resolve the question of the quantum of Ramirez's ownership. Hoffman/TIBS/Ramirez Exh. 3.

51. The Bankruptcy Court's 1995 decision was very narrow. Indeed, it was so narrow that when, in 1998, Hoffman returned with a separate claim (concerning subordination of a claim presented by a non-minority principal of ACCLP) based on the notion that that non-minority principal was really an "insider" and a "person in control of" ACCLP, the Bankruptcy Court agreed with Hoffman; in so doing, the Court denied a motion to dismiss Hoffman's

complaint, which motion was based in large measure on the argument that questions concerning the locus of control of ACCLP were res adjudicata and therefore not subject to further litigation. ^{22/}

52. SBH argued below that Hoffman should not be permitted to advance, *simultaneously*, inconsistent factual arguments in different fora. Such conduct is generally barred by the doctrine of judicial estoppel. *E.g.*, *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 361 (3d Cir. 1996); *Patriot Cinemas, Inc. v. General Cinema Corp.*, 834 F.2d 208, 212 (1st Cir. 1987); *Guinness PLC v. Ward*, 955 F.2d 875, 899 (4th Cir. 1992). The ALJ declined to address this argument. SBH renews its argument that Hoffman has conceded core elements of his case (*e.g.*, that Ramirez in fact owned less than 1% of ACCLP from 1985 on), and any contrary arguments which he may now try to assert can and should be summarily rejected.

V. Conclusion

53. The Constitution is colorblind, and governmental actions and policies must conform to that exacting standard. *E.g.*, *Adarand*. The Commission has a constitutional obligation to scrutinize as carefully as possible any claims on the basis of which an entity seeks

^{22/} The most recent Bankruptcy Court action, issued October 14, 1998, post-dated the hearing herein. Moreover, since SBH was not a party to that particular Bankruptcy Court proceeding, the action did not come to SBH's attention until January, 1999, at which point SBH submitted a copy to the ALJ with a request that official notice be taken of the Bankruptcy Court's decision. In a truly bizarre footnote in the *I.D.*, the ALJ denied SBH's request because the Court's ruling supposedly "has no bearing on the issue" herein. *I.D.* at n. 4. Since the Court's decision involves allegations by Hoffman concerning the locus of control of ACCLP, and since the Court's ruling also demonstrates that claims advanced by the other parties herein concerning the supposedly conclusive (and preclusive) effect of the Court's 1995 decision are meritless, the ALJ's action is odd. In any event, SBH excepts to the denial of its request.

preferential race-based treatment. *Id.* ^{23/} The Commission itself has already advised no less a forum than the Supreme Court that the Commission has in fact undertaken such scrutiny relative to ACCLP. That claim appears to have been less than accurate, since at the time the Commission was apparently unaware of multiple important aspects of ACCLP's structure and operation. ^{24/}

54. The Commission now has a chance to set matters straight, based on an extensive documentary record which discloses substantial misrepresentation (or at least gross lack of candor) by ACCLP over an extensive period of time. The ALJ's decision ignored both the vast majority of the record evidence and virtually all of the relevant legal standards. In so doing, the ALJ seems to have been saying that the legal standards governing limited partnerships, standards which have been clearly articulated and applied by the Commission for years, somehow don't apply to entities seeking race-based preferential treatment. *I.D.* at 19.

55. Of course, as the Commission is well aware, race-based policies demand *the most stringent* review, not the lenient (verging on non-existent) review accorded by the ALJ. For that reason alone the *I.D.* must be reversed.

56. The record evidence conclusively establishes that ACCLP was not a bona fide minority-owned/controlled limited partnership within the meaning of the Commission's policies. The record evidence also conclusively establishes that ACCLP was well aware of that fact, and

^{23/} SBH notes for the record that the Commission's historical treatment of minority-ownership issues already raises significant questions about the constitutionality of the agency's policies. The Commission's various "definitions" of qualifying racial categories fall far short of the narrow tailoring which is constitutionally required, as does the Commission's practice of according racial characteristics to corporations, partnerships and other business organizations.

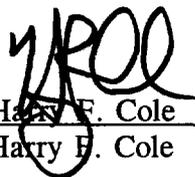
^{24/} Those included the facts that: ACCLP had been telling the IRS that Ramirez owned less than 1% of ACCLP (while telling the Commission and the Courts that he really owned 21%); Ramirez did not even have the ACCLP checkbook; even ACCLP recognized that it was not an insulated limited partnership.

that it knew that it had multiple opportunities to so advise the Commission (including at least one instance, in August, 1987, in which such disclosure was flatly mandated by the Commission) and the Courts. And the record evident conclusively establishes that ACCLP persisted in not so advising the Commission or the Courts; instead, ACCLP continued to maintain that it was a bona fide minority-owned/controlled limited partnership.

57. ACCLP's conduct before the Commission and the Courts from 1984-1990 makes a mockery of the Commission and its own arguments to the Courts, arguments which were based on the presumed validity of ACCLP's (now disproven) factual claims. The Commission must now set things right, at long last. If the Commission fails to do so, it will be signalling that it is content to blindly accept the self-serving claims of parties seeking racial preferences, even where those claims can be shown, as here, to be blatantly misrepresentative. If the Commission fails to set things right, it will be signalling that it is committed to a course of unconstitutional decision-making directly contrary to, *e.g.*, *Adarand* and *Lutheran Church*.

WHEREFORE, for the reasons stated, the Initial Decision in the above-captioned proceeding should be reversed.

Respectfully submitted,


/s/ ~~Harry F. Cole~~
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May 17, 1999

CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of May, 1999, I caused copies of the foregoing "Consolidated Exceptions and Brief of Shurberg Broadcasting of Hartford" to be placed in the U.S. Postal Service, first class postage prepaid, or hand delivered (as indicated below), addressed to the following:

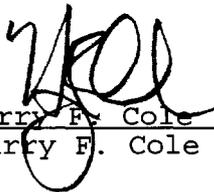
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