

tenure as program director for both stations, Britain remained a Pathfinder employee. MMB Ex. 72, pp. 1-4.

75. In November 1995, Kline promoted Joseph Goldbach (air name, Joe Turner, hereafter referred to as "Turner" or "Joe Turner") to the position of assistant program director of "WBYT/WRBR." MMB Ex. 96, p. 6; Tr. 338. Previously, Turner had been an announcer, first for WBYT(FM) and, later, for WRBR(FM). *Id.*, pp. 1-5; MMB Exs. 119, p. 3; 120, p. 5; Tr. 1386-90. Although Turner's title reflected responsibilities at both stations, his activity was directed primarily toward WRBR(FM) inasmuch as he continued to do that station's morning show and he served as that station's "main link" with the station's program consultant. MMB Ex. 96, p. 6; Pathfinder Ex. 5. Turner continued as assistant program director until Britain's departure in February 1996, at which time Turner became interim program director of both stations. Tr. 339; MMB Ex. 96, p. 8. In March 1996, Turner became program director solely of WRBR(FM). *Id.*, p. 9. Notwithstanding his job titles, Turner's salary has been allocated 100% to WRBR(FM) since February 1995. ¹³ *Id.*, p. 1. MMB Ex. 1, p. 64.

76. Generally, Kline has decided how to allocate responsibilities and salary of nonsales personnel between WBYT(FM) and WRBR(FM). Tr. 303, 305. Thus, in addition to the personnel already noted, Kline divided the salary of the continuity director and the event coordinator equally between WBYT(FM) and WRBR(FM). MMB Exs. 88, pp. 1-2; 95, pp. 1-6. The salary allocation of the operations manager has varied, apparently, according to the amount of time spent by that individual at each station. MMB Exs. 1, p. 64; 91, pp. 1-4.

77. Since Hicks/Indiana's acquisition of WRBR(FM), sales personnel have always been Pathfinder employees and their compensation has been divided between WBYT(FM) and WRBR(FM) in accordance with the JSA. MMB Exs. 1, p. 65; 94, pp. 1-26; 119, p. 3; 120, p. 5; 121, p. 4; 122, p. 4; Pathfinder Ex. 50; Tr. 653-4. As was the case when Booth American was licensee of WRBR(FM), account executives continued to sell the stations jointly following Hicks/Indiana's acquisition of WRBR(FM). However, beginning on July 1, 1995, account executives primarily sold only one station or the other (WBYT(FM) or WRBR(FM)); they no longer sold both unless the client wanted to buy time on both stations. Tr. 293, 327, 333, 2303. Notwithstanding this change in procedures, the compensation of all sales personnel continued to be divided between WRBR(FM) and WBYT(FM) pursuant to the formula prescribed in the JSA. Tr. 653-4. Effective January 1, 1997, the JSA was amended. From that time on, the compensation

¹³ For EEO reporting purposes, Turner was viewed as a Pathfinder employee in 1994, but a Hicks/Indiana employee subsequently. MMB Exs. 1, p. 64; 119, p. 3; 120, p. 5; 121, p. 5; 122, p. 6

of sales personnel has been allocated either to WBYT(FM) or to WRBR(FM) exclusively, depending on which station's air time the individual sold. MMB Exs. 1, pp. 64-5; 94; 100, p. 5; Pathfinder Ex. 50. The compensation of the general sales manager has always been divided equally between the stations, except for a brief period in the latter part of 1996, in accordance with the JSA. MMB Exs. I, pp. 64-5; 93, pp. 1-5; 100, p. 5 - Hicks/Indiana Ex. II.

78. When Hicks/Indiana acquired the license for WRBR(FM), Hicks was employed by Crystal at its stations in the Kalamazoo, Michigan area. He held the titles of Chairman, Executive Vice President and Director of Sales. MMB Ex. 23, p. 15. His compensation was more than \$100,000 per year, and, operationally, he was in charge of the stations' sales. *Id.*, p.14; Tr. 93-4, 1856, 1941.

79. Pursuant to a recommendation from communications counsel retained separately by Crystal, the Crystal board, on July 15, 1994, removed Hicks as Chairman and Treasurer due, in part, to questions concerning the propriety of the acquisition and operation of WRBR(FM) by Hicks/Indiana. In addition, Crystal's board voted to place Hicks on unpaid administrative leave pending further investigation of his relationship with WRBR(FM) and other allegations.¹⁴ Tr. 129-32, 236. He no longer received a salary but continued to receive insurance coverage until Crystal terminated that in December 1994. MMB Ex. 90, p. 3; Tr. 1857. Hicks never again worked for Crystal. Tr. 1858-9.

80. On September 1, 1994, Dille hired Hicks to oversee the opening of stores which would make and sell vinyl signs. MMB Ex. 1, pp. 66, 96; Tr. 790, 2274. Eventually, stores, operating under the name "Sign Pro," were opened in Elkhart (autumn 1994), Grand Rapids, Michigan (late 1994/early 1995), and Fort Wayne, Indiana (1995). MMB Ex. 3, p. 180; Tr. 795-6. 2139-41. In this regard, Hicks met Flint Dille for the first time sometime in August 1994, in connection with an interview for the position of general manager for the Elkhart Sign Pro store. MMB Ex. 3, p. 181. Dille paid Hicks \$20,000 (based on a \$60,000 annual salary) for Hicks' services with regard to Sign Pro for the four months covering September through December, 1994. MMB Exs. 4, p. 13; 90, p. 4. During this period, Hicks visited WRBR(FM) and spoke with Kline and/or Henning during the visits or by telephone. He also received weekly sales reports, monthly financial statements and miscellaneous invoices. MMB Ex. 110, Tr. 354, 359-

¹⁴ In December 1994, Hicks filed a civil suit against Crystal (Case No. B94-3603-NZ, Circuit Court for the County of Kalamazoo, Michigan). On August 5, 1996, summary judgment was entered in favor of Hicks "on the core issue of the unlawful removal of a forced sale clause by Crystal from a shareholder agreement to which Hicks was a party." Pathfinder Ex. 48. On August 8, 1997, Hicks and Crystal settled their litigation. Pathfinder Ex. 53; Tr. 133.

60, 2123), 2138. None of the salary Hicks received from Pathfinder was allocated to WRBR(FM). Tr. 794-5.

81. On January 1, 1995, Dille assigned Hicks the additional responsibility of increasing national sales for some, but not all, of the radio stations operated by Pathfinder and Truth. Tr. 2275. From January 1, 1995, to July 1, 1995, Hicks' salary, now \$70,000 per year, was allocated among Sign Pro and eight radio stations, one of which was WRBR(FM). MMB Exs. 4, p. 13; 90, p. 5; Tr. 795-7. On July 1, 1995, Hicks, at no change in salary, became the general manager of Pathfinder stations, WCUZ(AM/FM), Grand Rapids and WAKX(FM), Holland, Michigan. Tr. 818-9. Hicks continued as general manager of WAKX(FM), following the sale of WCUZ(AM/FM) in 1996, until March 1, 1997. MMB Ex. 1, p. 66. While he was general manager of Pathfinder's Grand Rapids area stations, Hicks continued to visit WRBR(FM) periodically, maintain telephone contact with Kline, Henning, and, later, Turner, and review station reports and invoices. Tr. 354-5, 360-1, 1394, 1413-4, 2123-5, 2140-3, 2147-8.

82. Bv memo dated November 14, 1995, Watson informed Pathfinder's payroll clerk that, effective November 1, 1995, \$3,000 of Hicks' salary was to be charged to WRBR(FM). The remaining compensation was to be charged to WCUZ-FM. In addition, Watson informed the clerk that he had reclassified \$30,000 of Hicks' 1995 salary to the WRBR(FM) account. MMB 90, p. 11. Watson did not recall why he made such an allocation but he believed it followed a conversation with Hicks. Tr. 802-6. Likewise, Hicks testified that the allocation had been discussed with Watson although Hicks acknowledged that he spent far more time at Grand Rapids than at South Bend. Tr. 2145-9. By memo dated May 1, 1996, Watson directed Pathfinder's payroll clerk to charge 50% of Hicks' salary to WAKX(FM) and 50% to WCUZ-FM; however, Pathfinder would continue to make a standard journal entry transferring \$3,000 per month from the WAKX(FM) account to the WRBR(FM) account. MMB Ex. 90, p. 13; Tr. 817-8. By memo dated August 30, 1996, Watson informed Pathfinder's payroll clerk that, effective July 1, 1996, Hicks's compensation should be allocated solely to WAKX(FM), except for the \$3,000 per month which should continue to be charged to WRBR(FM). MMB Ex. 90, p. 15; Tr. 820-1. Consequently, between January 1, 1995 and March 1, 1997, slightly more than 51% of Hicks' salary was allocated to WRBR(FM). MMB Ex. 1, p. 66. Since March 1, 1997, all of Hicks' compensation has been charged to WRBR(FM). Hicks' salary has remained at \$70,000 per year. MMB Ex. 90, p. 17.

83. As of April 1, 1997, when Hicks/Indiana and Pathfinder responded to a letter

of inquiry ("LOI") from the FCC's staff,¹⁵ the compensation of nine persons was allocated exclusively to WRBR(FM). Those individuals included Hicks, Joe Turner, five announcers, a board operator, and a person involved in promotions. MMB Exs. 1, p. 64; 90; 96. The compensation of the general manager (Kline), WRBR's Operations Manager (Hull), the employee in charge of Production/Continuity (Poeppe), the Event Coordinator (Tiedemann), the General Sales Manager (Williams), and the Office Manager/Traffic Director were split evenly between WBYT(FM) and WRBR(FM). MMB Exs. 1, p. 64; 88; 91, p. 1, 93, pp. 2-5, 95, pp. 1-3. The compensation of the Chief Engineer (Henning) and the Sports Director (Vince Turner) were split among WTRC(AM), WBYT(FM) and WRBR(FM). MMB Exs. 1, p. 64; 89, pp. 3, 8. The record is not clear as to whether and, if so, to what extent, there was a split in the allocation of the compensation of the News Director. MMB Ex. 73, pp. 4-9. Finally, the compensation of the five persons who sold air time for only WRBR(FM) was allocated to Hicks/Indiana pursuant to the amended JSA. MMB Exs. 1, p. 64; 94, pp. 5-7, 17-19.

ii. Programming

84. Under Booth American, WRBR(FM)'s entertainment programming was "oldies." Tr. 1974. Following the acquisition of the station by Hicks/Indiana, the oldies format was continued. Tr. 351, 1975. Hicks signed the music license agreements following their transmission to him by Watson and forwarded them to the appropriate parties with cover letters prepared by Watson. MMB Ex. 86; Pathfinder Exs. 37; 40; Tr. 769-70, 2015-6. WRBR(FM) continued to use an oldies format until March 1996, when the format was changed to "active rock."¹⁶ Tr. 287-8. Hicks made the decision to change the format after receiving input from Kline, Turner and Tim Moore ("Moore") of the Audience Development Group. Tr. 1395-6; 1402-3, 1977.

85. By letter dated January 24, 1994, Kline, in his capacity as general manager of Radio One Marketing of Michiana, advised Booth of his intention to use Moore as a consultant for the programming of both WLTA(FM) and WRBR(FM). Pathfinder Ex.

¹⁵ The LOI had followed Niles' October 29, 1996, informal objection which contended, *inter alia*, that Pathfinder controlled Hicks/Indiana. Niles' informal objection was supported in large measure by December 1995 and January 1996 deposition testimony of Hicks, Dille, Kline, Watson and Flint Dille, which focused on their roles in Hicks/Indiana's acquisition and operation of WRBR(FM). *E.g.*, MMB Exs. 1, p. II; 2, p. 20; 3, p. 9; 4, pp. 15-16.

¹⁶ Kline, with Dille's approval, had changed the format of WLTA(FM) to country and changed the station's call sign to WBYT(FM) in June 1994. Tr. 285.

1; Tr. 379-80. Two days later, Booth informed Kline that he concurred with the use of Moore and asked Kline to have Moore contact Ford (then WRBR(FM)'s general manager) to coordinate plans for Moore's visit. Pathfinder Ex. 2; Tr. 380-2. The advice received was to continue with oldies. Tr. 351. Following Hicks/Indiana's acquisition of WRBR(FM), Kline continued to use Moore as a programming consultant for WRBR(FM). MMB Ex. 118, pp. 1-2, 4-5, 7. According to Moore, he persuaded Hicks to continue the oldies format, notwithstanding Hicks' misgivings about the wisdom of doing so. Tr. 1463-4. Prior to the format change in 1996, Moore visited WRBR(FM) approximately four or five times a year. Moore testified that Hicks was there "most of the time." Tr. 1470-1.

86. In mid-January 1996, Moore sent a memo to "Steve Kline, Dave Hicks -- Federated Media." In this regard, Moore testified that, contrary to the inference one could draw from the way the memo was addressed, he did not view Hicks/Indiana as a part of Federated Media. As to why he sent a copy of the memo to "Federated Media," Moore explained that he sent the document to Dille "as a passive sales tool." Tr. 1489-90. The memo focused on WRBR(FM)'s (then known as KOOL 104) performance in the fall of 1995 and possible approaches to attain audience growth. Essentially, Moore recommended increased marketing and promotion, a change in the morning show, and, possibly, a change in format. Pathfinder Ex. 3; Tr. 390-1, 1491-3. According to Moore, Dille called immediately and said: "'Don't waste your memos on me. I don't have anything to do with the station, and I really shouldn't be receiving them.'" Tr. 1489.

87. Shortly thereafter, Moore sent a second memo, this one directed to Kline, Joe Turner and Hicks. This memo observed that:

"WRBR has been a sub-optimized product. We've assumed that while the station's Oldies position is viable as a compliment [sic] to B-100, it cannot be expected to achieve the total persons tonnage to challenge for the market's top 3 ranking. Market cluster composition, SUNNY 101's prominence and the slowly aging narrow target of Oldies are factors in the projection of KOOL 104's future limitations."

Moore recommended that WRBR(FM) change its format to "active rock," attack two of its competitors, WAOR (licensed to Niles) and WZOW, and change its image from KOOL 104 to the "BEAR." Pathfinder Ex. 5; Tr. 394-5, 1494-7. In conjunction with this recommended change, Hicks negotiated for and ultimately acquired the rights to the "The Bob and Tom Show," a syndicated program originating in Indianapolis, which

became WRBR(FM)'s new morning show. ¹⁷ Hicks Ex. 8; Tr. 1978-84. On March 17, 1996, the format of WRBR(FM) was changed from oldies to active rock. Tr. 287. Prior to the format change, Turner acknowledged that he had little or no interaction with Hicks; subsequent to the change, Turner testified that he has contact with Hicks at least weekly. Tr. 1413-4.

88. From the time of the acquisition of the station by Hicks/Indiana to the present, WRBR(FM) has obtained news and public affairs programming from Pathfinder. In this regard, since May 11, 1994, the news director has been a Pathfinder employee and the news broadcasts are edited and delivered by Pathfinder employees. Tr. 279-81, 2131. See also, *paragraph 71, supra*. Likewise, the public affairs programs are moderated by Pathfinder employees, and the programs themselves are usually broadcast both on WRBR(FM) and WBYT(FM). MMB Ex. 4, pp. 15-16; Tr. 281-3, 2131-2. With respect to news programming, the principal difference between Pathfinder's WBYT(FM) and Hicks/Indiana's WRBR(FM) is that the latter features national news discussions and presentations during its morning show, "The Bob and Tom Show," and thus its news breaks during the morning show are focused more on local news. Tr. 1406-9.

iii. Finances

89. Hicks/Indiana's financial certification was based on Hicks' ability to sustain the operations of WRBR(FM) for three months from his personal assets. Tr. 1918, 2101-2. Hicks further believed that Hicks/Indiana could meet its obligations to Booth American from funds derived through the operations of WRBR(FM). Tr. 1904. In this regard, Hicks understood that WRBR(FM) would derive revenues primarily through the JSA, which Hicks/Indiana was to assume from Booth American upon becoming licensee. MMB Ex. 3, p. 83, Tr. 2094-7. As events unfolded, however, Hicks was not called upon (and did not volunteer) to cover initial operations, and station revenues were insufficient to pay the amounts due on the note to Booth American.

90. As discussed above (see paragraph 7, *supra*), the JSA charged Pathfinder with the tasks of accounting for the Venture's revenue and expenses and paying sales expenses. However, if expenses exceeded revenues by more than \$5,000 in any month, the JSA called for Booth American, and, once it became licensee, Hicks/Indiana, to reimburse

¹⁷ The Dille children covered the \$75,000 fee paid to acquire the rights to "The Bob and Tom Show." MMB Exs. 1, p. 59, n. 6; 104, pp. 6-8; 105, pp. 4-5; Tr. 878-9, 2328. Each had recently received a check from Hicks/Indiana for more than \$42,000, which represented a return of money loaned to Hicks/Indiana in order to, *inter alia*, make the \$105,000 payment to Booth American. MMB Exs. 102, pp. 35-38; 104, pp. 2-3; 105, p. 3; Tr. 874-5, 2328.

Pathfinder for the excess. Conversely, if revenues exceeded expenses for any given month, the JSA prescribed that Pathfinder disburse the excess to Booth American, later, Hicks/Indiana, by the 55th and 70th days following the month in question. MMB Ex. 1, p. 18. The JSA did not provide for payments of interest by either party. Tr. 1061. While Booth American was licensee of WRBR(FM), Pathfinder disbursed funds to Booth American in accordance with the JSA. Tr. 489-92, 1062-3.

91. As a consequence of the Hicks/Indiana - Pathfinder accounting agreement, Pathfinder undertook to perform all accounting functions for Hicks/Indiana, not just those arising through the JSA. MMB Ex. 1, p. 81; Pathfinder Ex. 78; Tr. 1013, 1143-4, 1163, 2159-60. Although not specified in either the JSA or the accounting agreement, Hicks and Watson, with Campbell's blessing, understood that all of Hicks/Indiana's bills would be paid from an account maintained and controlled by Pathfinder. Tr. 1140-2, 1166, 1545-6, 2014. In this regard, for bills relating solely to WRBR(FM) operations, the Pathfinder check was to and did in most instances reflect that it was a payment from Hicks/Indiana. MMB Exs. 48, p. 2; 63, p. 4; 106; Tr. 903-4. In addition, all invoices related solely to WRBR(FM) were supposed to be sent to Hicks for his approval. Tr. 1139. But see, *e.g.*, MMB Exs. 118, 126 and Tr. 982-9. 1996. In any event, regardless of whether a Pathfinder check correctly identified, or mistakenly failed to reflect, that it was a payment from Hicks/Indiana, the books of both Pathfinder and Hicks/Indiana properly attributed the expense to Hicks/Indiana. Tr. 658-9, 698-9. Since May 1994, Hicks has received a copy of the monthly general ledger and financial statement for WRBR(FM). Tr. 1159-60, 1993-4.

92. For the period April 1, 1994 to September 1, 1996, sales expenses and revenues were evenly divided between Pathfinder and Hicks/Indiana in accordance with the JSA. For the period September 1, 1996 to January 1, 1997, revenues and expenses were divided 60% to Pathfinder and 40% to Hicks/Indiana because of WBYT(FM)'s higher ratings during the applicable rating period in accordance with the JSA. Pathfinder Ex. 49; Hicks Ex. 11; Tr. 1200-3). 1211-2. Since January 1, 1997, in accordance with the amendment to the JSA, revenues and expenses have been divided in accordance with the actual sales of time for each station, Pathfinder's WBYT(FM) and Hicks/Indiana's WRBR(FM). Pathfinder Ex. 50; MMB Exs. 1, p. 65; 100, p. 5. Hicks receives a weekly sales report. Tr. 354, 1993-4.

93. Prior to the establishment of a separate bank account for Hicks/Indiana in April 1997 (MMB Ex. 4, p. 10), all funds belonging to Hicks/Indiana resided in a Pathfinder checking account. Tr. 1171-3. Indeed, during this period, Hicks/Indiana did not have a bank account. Tr. 1164. From April 1, 1994 to April 1997, when those funds (other than those designated to pay Booth American, discussed at paragraph 99, *infra*, or used to pay the rights to the "Bob and Tom Show," discussed at n. 13, *supra*)

were insufficient to cover WRBR(FM)'s expenses, Pathfinder simply paid the bill and treated the amount advanced as a receivable from Hicks/Indiana. Tr. 681, 1163-70. As with other receivables, Pathfinder did not charge interest for any funds advanced to Hicks/Indiana. Tr. 761, 1235-6. Thus, for the periods June 1994 through March 1995, and January through May 1996. Pathfinder (and/or Truth) funded Hicks/Indiana's negative cash flows. MMB Exs. 112, pp. 7-27; 113, pp. 1-9; 114, pp. 1-15; Tr. 758-61, 835-6, 841-7. The largest amount Hicks/Indiana ever owed to Pathfinder and Truth was approximately \$80,000. Tr. 1177. Accordingly, irrespective of whether expenses exceeded revenues by more than \$5,000 in any month, Pathfinder never sought and Hicks/Indiana never tendered reimbursement in accordance with the JSA. Tr. 679-84. However, beginning April 1997, if Hicks were to owe Pathfinder money, it would have to be paid within 30 days. Tr. 1177; MMB Ex. 1, p. 60, n. 11

94. Conversely, during the period April 1, 1994 to April 1997, any funds belonging to Hicks/Indiana remained in Pathfinder's account. Tr. 683. Money from that account was swept regularly into an interest-bearing account of Pathfinder; however, Pathfinder has never paid any interest earned from money to Hicks/Indiana. Tr. 761, 1224. In this regard, the handling of funds jointly generated by WBYT(FM) and WRBR(FM) was similar to the treatment accorded other Pathfinder stations which operate jointly. Tr. 761-3. The largest amount Pathfinder and Truth owed to Hicks/Indiana was approximately \$175,000. Tr. 1177. All funds payable to Hicks/Indiana were handled by Pathfinder personnel and deposited into the Pathfinder checking account. MMB Exs. 76; 102, pp. 4, 10, 15, 17, 19, 21, 24, 28-30, 38; 103, p. 6, 104, pp. 6, 12; 109; Tr. 723-5, 853-6. Watson acknowledged that, prior to January 1, 1997, disbursements of the Venture's revenue were not made in accordance with the JSA. Tr. 679-84. However, pursuant to an amendment to the JSA effective January, 1, 1997, revenue has been disbursed twice in a 30 day period, with the first payment occurring in March 1997. Tr. 683, 1172; Pathfinder Ex. 50. The amendment has been strictly followed thereafter. Tr. 1177.

95. Dille has received Hicks/Indiana financial statements. Tr. 2281. In December 1994, Dille knew about and discussed with Watson the amounts owed by Hicks/Indiana to Pathfinder and Truth. Dille acknowledged the amount was "becoming significant." Tr. 2282-3. Rather than try to collect money from Hicks/Indiana, Dille chose to wait, and, eventually, WRBR(IFM) was "in the clear." Tr. 2284. Dille recognized that Hicks/Indiana was not like an advertiser since he knew Pathfinder would get what it was owed. Tr. 2323-4. In any event, Dille never thought of the Hicks/Indiana receivable as a form of financing the WRBR(FM) acquisition or as inconsistent with his February 1994 representation to the Commission. Tr. 2284-5.

96. When Hicks/Indiana became licensee of WRBR(FM), the members' capital contributions totalled \$1,000 -- \$510 from Hicks and \$490 from the Dille children -- in accordance with the Side Letter. MMB Ex. 61. Hicks' contribution was the cost of his letter of credit from the Michigan National Bank. MMB Ex. 3, p. 77; Hicks Ex. 6, p. 2; Tr. 1194-5. The Dille children's capital contribution was derived from the cash portion of the escrow, all of which was sent directly by Booth American's counsel to Watson. Watson treated the remainder of the funds initially provided by Dille children, approximately \$24,000, as loans to Hicks/Indiana. MMB Exs. 76; 105, pp. 1, 3; 112, p. 1; Tr. 723-5. Eventually, Watson prepared and Hicks signed promissory notes to repay to each of the Dille children \$8,000, which represented the difference between the escrow funds returned to Hicks/Indiana and the amounts of their respective capital contributions. MMB Ex. 104, p. 1; Tr. 871-3. Subsequent loans from the members to Hicks/Indiana have been evidenced by promissory notes contemporaneously prepared by Watson and signed by Hicks. MMB Exs. 103, pp. 1, 4, 7, 9-10, 13; 104, pp. 4-5, 8, 10-11, 13, 15-6; Tr. 875-7, 895-7.

97. Sometime during the months of April, May and June, 1994, Kline, Watson, and, eventually, Hicks discussed a budget for WRBR(FM) for the 1994 calendar year. Tr. 773-6. The budget was finalized on June 15, 1994 and transmitted to Hicks by letter dated June 22, 1994. Hicks Exs. 13; 14; MMB Ex. 108; Tr. 770-2, 1204. Kline, Watson and Hicks testified that subsequent annual budgets for WRBR(FM) have been prepared during the autumn preceding the year at issue. Tr. 401-3, 1213-5, 1985-7. Hicks testified that Kline and Watson are involved in assembling the information for the budget, but that he has made the final decision regarding the amounts to be spent and that he reviews each line of the budget. Tr. 1985-7. With respect to WRBR(FM), Dille has never participated in the budget process, suggested an expenditure, or vetoed a capital expenditure. Tr. 408.

98. The 1994 budget for WRBR(FM) anticipated that the station would have a positive cash flow for all months except May. Hicks Ex. 13, p. 1. However, as reflected in the station's financial statements, WRBR(FM)'s operating cash flow dropped from a positive \$3,585 in April 1994 to a negative \$52,570 by the end of the year. MMB Ex. 112. Indeed, the only positive cash flow months for 1994 were April, August and December. *Id.*, pp. 15, 27. Hicks/Indiana did not fund the losses via contributions or loans from its members; rather, Pathfinder simply continued to pay Hicks/Indiana's bills and the amounts contributed were reflected on Hicks/Indiana's balance statement as a payable to Pathfinder and/or to Truth. *E.g., id.* p. 20. By the end of 1994, Hicks/Indiana's net operating loss was over \$160,1000. *Id.*, p. 27. The same financial statement shows that Hicks/Indiana owed Truth \$11,370 and Pathfinder \$52,219. *Id.*, p. 26; Tr. 844-5.

99. The financial difficulties in 1994 also affected how the note to Booth American was paid. By memos sent during the period September 1994 through March 1995, Watson informed the Dille children that Dille was making a gift (or a loan) to each of them in the form of the enclosed check. The Dille children were directed to deposit their father's check in their individual checking accounts and then send a personal check to Watson. Watson thereupon deposited the checks of the Dille children for the benefit of Hicks/Indiana in Pathfinder's account and paid the amount due to Booth American. MMB Ex. 102, pp. 1-5, 7-10, 12-15, 18-22, 25-30, 32-38; Tr. 830-2, 838-45. Between September 1994 and April 1995, Dille was the source for all funds, which totalled nearly \$120,000, contributed by the Dille children. MMB Ex. 1, pp. 52-3; Tr. 838-9, 901. Dille was also the source of funds contributed by the Dille children for the Hicks/Indiana payments made to Booth American that were due on May 1 and June 1, 1996. MMB Exs. 1, p. 89; 102, pp. 39-41; Tr. 851-2, 901. Hicks did not receive copies of Watson's memos to the Dille children, and he did not know about any of the transactions involving Dille and his children. Tr. 2006-7.

100. Between September 1994 and February 1995, Watson also sent reminder memos to Hicks. Hicks, in turn, would send a personal check to Watson, who deposited the check for the benefit of Hicks/Indiana in Pathfinder's account. MMB Ex. 102, pp. 4-6, 10-11, 16-17, 23-24, 31; Tr. 836-7, 840-2. For several of the \$5,000 payments due Booth American, however, Hicks did not have sufficient funds to pay the amount of his share. To allow Hicks to make the payment, Pathfinder in early 1995 sent Hicks "extra compensation," which he then used to pay his portion of the money due Booth American.¹⁸ MMB Ex. 90, pp. 6, 9-10; Tr. 809-11. Moreover, Hicks made no contributions toward the \$105,000 payment made to Booth American on March 22, 1995 or the \$10,000 payment made to Booth American on April 24, 1996. However, Hicks did contribute the entire \$10,000 amount paid to Booth American on March 27, 1996 as well as his pro rata share toward the \$10,000 payment made on May 22, 1996. MMB Ex. 1, p. 89. Between June 1996 and December 1997, funds for note payments were derived from station operations. MMB Ex. 1, p. 58. Finally, Hicks secured from Old Kent Bank a line of credit which enabled Hicks/Indiana to make the final balloon payment due Booth American on January 1, 1998. MMB Ex. 100, pp. 10-17; Tr. 962-3, 2010-4.

¹⁸ According to Hicks, Dille and Watson, the April 3, 1997, LOI response contained an inadvertent error. Specifically, the response should have noted that Pathfinder was the source of some of the money paid by Hicks to cover his share of the payments made to Booth American. In this regard, the three forgot that Pathfinder had paid Hicks "extra compensation" to allow him to contribute his pro rata share of the payment due Booth American. Tr. 812-5, 1963-5, 2276-7.

101. Initially, Pathfinder's accounting department treated the money provided by the Dille children and Hicks to pay Booth American as contributions to capital. MMB Exs. 102, pp. 1-3; 112, pp. 20, 23, 26. However, Watson ultimately suggested and Hicks agreed that the amounts should be treated as loans to Hicks/Indiana. Tr. 830-4. These loans were usually memorialized in the form of promissory notes prepared by Watson and signed by Hicks. Initially, the loans were repaid at the instigation of Watson by Hicks/Indiana when it had the cash balance to do so. MMB Exs. 103, p. 1; 104, pp. 2-5; Tr. 901-2. However, at the first meeting of the members of Hicks/Indiana on December 23, 1996, the members agreed that there should be no repayment of loans in order to have sufficient cash to meet the company's obligations. MMB Ex. 100, p. 4.

102. On April 22, 1997, Hicks/Indiana opened a bank account. MMB Ex. 4, p. 10. Funds from that account are used to repay Hicks/Indiana's line of credit and attorneys fees. Most of Hicks/Indiana's payables, however, are still made from Pathfinder's account. Tr. 904-5. WRBR(FM)'s revenue for 1997 was \$1,542,000. As of May 29, 1998, the station's bookings for 1998 exceeded \$1.1 million. MMB Ex. 100, p. 22. Pathfinder's annual gross revenue is approximately \$12 million. Tr. 1046.

iv. Miscellaneous Matters

Legal bills/services

103. Brown's April 29, 1994 invoice regarding Hicks/Indiana was sent directly to Hicks. MMB Ex. 18. Copies were sent to both Watson and Dille. MMB Exs. 80; 81; 82; Tr. 509-10. The invoice, which totalled \$22,804.58, covered services Brown provided between September 6, 1991 and April 26, 1994. Virtually all of the services noted were provided by Brown and the members of his firm to Hicks in his capacity as agent for Hicks/Indiana or to Hicks/Indiana. MMB Ex. 18. By letter dated May 2, 1994, to Dille, copies to Watson and Hicks, Brown advised that he was reducing the firm's normal charges by 10%. MMB Ex. 82. By letter dated November 7, 1994, to Dille, copy to Hicks, Brown confirmed that, pursuant to their conversation, the firm's invoice to Hicks/Indiana would be reduced to \$15,759.08 provided that payment was made in full on or before December 15, 1994. MMB Ex. 107, p. 1; Tr. 1745-6. Dille negotiated the reduction in the fee because Hicks was uncomfortable doing so in light of his relationship with Brown. Tr. 2078-80. Watson made the payment on behalf of Hicks/Indiana. MMB Ex. 107, p. 2; Tr. 510.

104. Campbell's invoices to Hicks/Indiana have been sent directly to Hicks. Hicks, in turn, has forwarded the invoices to Watson, who would authorize payment. Tr. 560-1. In this regard, none of the invoices from attorneys would be paid unless Watson approved. Tr. 499, 530, 560-1, 565, 572, 574-5, 586-7, 626. Some of the

invoices reflect that Hicks reviewed the invoice and determined that payment should be made. MMB Ex. 126, pp. 3-5, 11-31. Others do not indicate whether Hicks reviewed the bill. MMB Exs. 39-, 42; 44; 126, pp. 1-2, 6-10; Pathfinder Exs. 41; 42. However, even with respect to invoices that Hicks approved, Pathfinder did not always pay the entire amount authorized by Hicks. MMB Ex. 126, pp. 17, 21, 23, 25.

105. The Barnes & Thornburg invoices pertain to services rendered between February 24 and March 31, 1994. MMB Exs. 45; 46. As discussed (see paragraphs 56-9, *supra*), those services resulted in the preparation of the organizational documents for Hicks/Indiana, including the Articles of Organization and the Operating Agreement. The invoices were sent to Watson who determined when they should be paid. MMB Exs. 45; 46; Tr. 591-2.

Insurance

106. By letter dated March 31, 1994, Watson informed Pathfinder's insurance agent that WRBR(FM) radio "should have similar coverages as do our other radio stations and companies." MMB Ex. 67; Tr. 690. Ultimately, WRBR(FM) was included on Pathfinder insurance policies covering motor vehicles, real property and equipment, workers compensation and communications liability. MMB Ex. 101, pp. 1-10, I8-32; Tr. 922-34, 945-7. Hicks/Indiana has been charged for its share of insurance premiums paid by Pathfinder, and the charges are reflected in Hicks/Indiana's budgets. Hicks Ex. 13.

Accountant

107. Hicks/Indiana used the same outside accounting service, McGladrey & Pullen, LLP ("McGladrey"), as did Pathfinder. Hicks/Indiana employed McGladrey only for the purpose of preparing tax returns; Pathfinder also uses McGladrey to audit its books. Tr. 750-1, 907-8 The invoices from McGladrey were sent to Hicks/Indiana at Pathfinder's post office box in Elkhart. Tr. 909. Prior to January 1997, the invoices indicate that the only persons who saw them were Pathfinder personnel. Beginning in January 1997, some of the invoices reflect Hicks' acquiescence or approval. MMB Ex. 117; Tr. 915.

Hicks/Indiana files/records

108. Hicks/Indiana files and records have been in the custody of a variety of persons. Initially, pertinent records such as the APA and all its schedules were sent to Hicks, Brown, Dille, Watson and Campbell. MMB Ex. 35-, Tr. 533. Following the closing, the entire set of documents was sent by Brown to Watson. MMB Ex. 81; Tr. 739. Watson later set up and maintained the minute book for Hicks/Indiana. MMB Ex.

85; Tr. 764. Watson has also forwarded music licensing agreements to Hicks and prepared appropriate letters for Hicks' signature. MMB Ex. 86; Tr. 769-70. As previously noted, Watson sent reminder memos to Hicks and the Dille children and prepared promissory notes as well as the checks used to pay off the notes (see paragraphs 99-101, supra) while Pathfinder employees have prepared and occasionally executed forms for WRBR(FM) which were filed at the Commission. MMB Exs. 99, pp. 1-6; 125. Finally, Watson has served as the scribe and keeper of the minutes of Hicks/Indiana's members' meetings. MMB Ex. 100; Tr. 959-60.

Monitoring Station Affairs

109. As noted, Kline, Watson and Hicks testified that weekly sales reports and monthly financial statements for WRBR(FM) are sent to and reviewed by Hicks. In this regard, by letter dated July 25, 1995, Hicks congratulated Kline "on a money making June for WRBR." In addition, Hicks had questions about line items for the Associated Press ("AP"), the rent, and the telephone. With respect to the AP item, Hicks commented that he hoped the station was nearing the end of the expense, while for the rent, he inquired how the figure was arrived at and that the station had received a sizeable increase over the previous year. MMB Ex. 110. The June 1995 financial statement showed that the station had a positive operating cash flow for the month of \$25,995. MMB Ex. 113, p. 17 (column heading: "This Mo. Actual"). In addition, the statement showed that the station's rent was only \$57 over budget and some \$500 less than the amount budgeted in 1994. Compare MMB Ex. 113, p. 17, with Hicks Ex. 13, p. 1. Hicks believed he was questioning why the rent was not consistent. Tr. 2120. Moreover, even though he understood that the rent was based on an even split with Pathfinder, he was questioning whether Hicks/Indiana was on the "short side" of the deal. Tr. 2121. With respect to the AP expense, the 1994 budget reflects a monthly budget expense for the AP news wire of \$675 to \$845. Hicks Ex. 13, p. 13. Hicks explained his concern was based on the premise that he was nearing the end of the contract, and he was hoping to reduce or eliminate the expense soon. Tr. 2117.

110. Generally, any questions regarding station operations are now discussed by Hicks and Kline during Hicks' visits to the station or during telephone conversations. Hicks also discusses programming with Joe Turner. Tr. 1988-93, 2007-9. Hicks also now keeps track of station affairs via email. E.g., MMB Ex. 111. Kline reviews monthly financial statements with Hicks. Tr. 359-60. The frequency of Hicks' visits to WRBR(FM) varied depending on his responsibilities to Sign Pro, Pathfinder's national sales and Pathfinder's Grand Rapids properties. Tr. 2138-43.

111. Beginning in late 1996, Hicks has convened meetings of the members of Hicks/Indiana to review and discuss formally the affairs of WRBR(FM). Tr. 960-1. At

least three such meetings have occurred on: December 23, 1996; August 20, 1997; and May 28, 1998. MMB Ex. 100, pp. 3-7, 10-17, 20-24. At such meetings, the members of Hicks/Indiana (Hicks and the Dille children) have reviewed station operations with Watson, Kline and Williams (the WBYT(FM)/WRBR(FM) sales manager) and approved or vetoed capital expenditures. As late as their most recent meeting, the members discussed *inter alia* whether WRBR(FM) is receiving the same amount of "hype" as WBYT(FM), whether WRBR(FM) is still "looked at as a "stepchild" in the building [shared with WBYT(FM)]," and whether their sales people were as good as those of WBYT(FM). MMB Ex. 100, p. 21. However, it was also noted that Hicks/Indiana had two new rental agreements for use of space on WRBR(FM)'s tower and that a load study was being performed to determine whether additional space could be rented. *Id.*, p. 22.

Character Testimony

112. Edward K. Christian ("Christian") testified as a character witness on behalf of Hicks. At present, Christian is president and chief executive officer of Saga Communications ("Saga"). Tr. 2168. Saga operates in twelve broadcast markets with 37 radio stations and one television station. Tr. 2169. Christian started working in radio as a teenager and has known Hicks for approximately 35 years. Tr. 2172.

113. Christian recommended Hicks to the owner of two radio stations in Battle Creek, Michigan; the owner ultimately hired Hicks as the general manager of the stations. Tr. 2174-6. When the owner of the stations offered to sell them to Hicks, Christian assisted Hicks in obtaining the necessary financing by introducing him to executives at a bank and to another investor. Tr. 2176-7. Christian indicated that his assistance was a measure of his confidence in Hicks. Christian assisted Hicks because he believed Hicks had the character and ability to own the stations, and that Christian would not have done so for just anybody because it could reflect badly on him. Tr. 2177-8.

114. Christian and Hicks have had contact throughout the years through various business and social relationships. Tr. 2172-80. Christian testified that Hicks was well respected in the broadcast community in Michigan and was viewed as a responsible broadcaster who was not out to "beat the system or cheat the system." Tr. 2181. Based on his experience with Hicks, Christian believes him to be trustworthy and a man of integrity who would not be predisposed to mislead the Commission. Tr. 2182.

115. Richard H. Harris ("Harris") also testified as a character witness on behalf of Hicks. Harris is the former president and chairman of Group W, Westinghouse Broadcasting's radio station group. Tr. 2195. Harris joined Westinghouse in 1964 and

worked there until his retirement in 1991. Tr. 2198. At the time of his retirement, Group W owned 21 radio stations. Tr. 2199.

116. Harris has known Hicks for between 12 and 15 years, primarily through industry organizations to which they both belonged, such as the National Association of Broadcasters ("NAB"). Tr. 2204-6. In approximately 1990, Harris and Hicks served on a committee that worked with a group of European broadcasters to develop a trade conference in Switzerland. Tr. 2204-5. Harris also invited Hicks to serve on the Radio Music Licensing Committee, on which they served together from the late 1980s through 1997, and he appointed Hicks to be the vice chair of the Committee in the early 1990s. Tr. 2206, 2209-11. Harris testified that, throughout the period he has known Hicks, he found Hicks to be "very honest," "candid and forthcoming." and not the type of person who would mislead the Commission. Tr. 2212-3.

117. Henry L. ("Jeff") Baumann ("Baumann") testified as a character witness on behalf of Dille. At present, Baumann is the Executive Vice President for Law and Regulatory Policy at the NAB. Tr. 2356. Previously, Baumann held various jobs at the Commission, ultimately rising to the position of Deputy Chief of the Broadcast (later, Mass Media) Bureau before joining the NAB in 1984. Tr. 2352-6.

118. Baumann first met Dille in 1982, when Dille attended an NAB board meeting after having been elected to serve as a board member. Tr. 2360. Subsequently, Baumann had contact with Dille through the NAB, when Baumann served as Senior Vice President and General Counsel and Dille served as first a board member and later as chairman (1985-6) of the NAB radio board. Additional contacts have occurred through Dille's work on an NAB committee and return to the NAB board in 1997. Tr. 2362. Baumann developed his high regard for Dille largely as a consequence of Dille's role in the 1986 merger between the NAB and the National Radio Broadcasters Association ("NRBA"). In Baumann's view, Dille was instrumental in convincing broadcasters and the leadership of both groups that a merger was the best way to advance the mutual agendas of the two organizations. According to Baumann, the merger occurred in large part because the broadcasters in both the NAB and the NRBA respected Dille's integrity. Tr. 2365-8.

119. Baumann testified that despite numerous requests for him to testify on people's behalf throughout his years at the Commission and at the NAB, he has never vouched for anyone's character other than Dille in an FCC proceeding. Indeed, Baumann felt so strongly about Dille's integrity that he made an exception to a rule he instituted at the NAB that no NAB personnel may testify voluntarily in any court or administrative proceeding. Tr. 2371. As a consequence of his contacts with Dille, Baumann has the highest regard for Dille's integrity. Tr. 2369-70.

III. Conclusions of Law

120. The OSC calls for resolution of interrelated issues involving representations made to the Commission by Hicks/Indiana and by Dille in connection with the acquisition of the license for WRBR(FM), South Bend, Indiana, and the control of that station. The OSC specified the issues because the record then before the Commission raised substantial and material questions of fact with respect to the truthfulness of those representations. Specifically, it appeared that Hicks/Indiana sought to conceal from the Commission the existence of an understanding regarding the future ownership of WRBR(FM). It also appeared that Hicks/Indiana and Dille sought to conceal from the Commission the role Dille was going to play in the financing of the purchase of WRBR(FM) by Hicks/Indiana and that station's operation by Pathfinder once Hicks/Indiana became licensee. The ascribed motive for the questionable representations was Dille's apparent desire to purchase and control WRBR(FM) notwithstanding the existence of the newspaper-radio cross-ownership rule which served to bar his ownership and control absent a waiver. However, after considering all the evidence, including the demeanor of the various witnesses, it is concluded that while a material omission occurred in the statement which was signed by Dille and which was submitted as an amendment to the Booth American - Hicks/Indiana assignment application, that omission did not happen because of deceit. Rather, the omission occurred because Dille mistakenly concluded, based on an earlier conversation with counsel, that the information he did not provide was not decisionally significant to the Commission. Accordingly, revocation of the license for WRBR(FM) or WBYT(FM) is not warranted; rather, a forfeiture will be imposed against Pathfinder. Moreover, it is concluded that Pathfinder has exercised and continues to have the ability to exercise de facto control over WRBR(FM). Thus, Pathfinder and Hicks/Indiana have violated Section 310 of the Act, and Pathfinder has violated Section 73.3555(d)(2) of the Commission's Rules. Accordingly, appropriate forfeitures will be imposed upon both licensees and the licensees will be required to demonstrate compliance with applicable Commission rules.

A. Misrepresentation/Lack of Candor

121. Issue 1 seeks to determine whether Hicks/Indiana misrepresented facts and/or lacked candor in its application to acquire the license for Station WRBR(FM) in violation of Sections 73.1015 and/or 73.3514 of the Commission's Rules. Specifically, the issue concerns representations made to the Commission with regard to the station's present or future ownership or control. Issue 4 seeks to determine whether John Dille III misrepresented facts and/or lacked candor in the application of Hicks/Indiana to acquire WRBR(FM).

122. Misrepresentation is a false statement of fact made with an intent to deceive. Fox River Broadcasting, Inc., 93 FCC 2d at 129. Lack of candor involves concealment, evasion or some other failure to be fully informative, also with an intent to deceive. *Id.* Intent to deceive is a "necessary and essential element" of misrepresentation. See Swan Creek Communications, Inc. v. FCC, 39 F.3d 1217 (D.C. Cir. 1994). Such intent 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 v. FCC, 941 F.2d 1253, 1260 (D.C. Cir. 1991).. Intent may also be inferred from motive. See Joseph Bahr, 10 FCC Rcd 32, 33 (Rev. Bd. 1994). The duty of candor requires an applicant before the FCC to be "fully forthcoming as to all facts and information relevant" to its application. Swan Creek, 39 F.3d at 1222. Relevant information is defined as information that may be of "decisional significance." RKO General Inc. v. FCC, 670 F.2d 215, 229 (D.C. Cir. 1981), cert denied, 456 U.S. 927 and 457 U.S. 1119 (1982). Even when an intent to deceive does not exist, however, the Commission can impose a forfeiture for the willful omission of material facts pursuant to Section 73.1015 of the Commission's Rules. See Abacus Broadcasting Corp., 8 FCC Rcd 5110 (Rev. Bd. 1993).

i. Hicks/Indiana

123. The findings establish and it is therefore concluded that Hicks/Indiana accurately set forth its ownership structure which existed throughout the pendency of the application to acquire WRBR(FM). In this regard, the representations in the application were fully in accord with the documents which ultimately gave birth to Hicks/Indiana. Specifically, David Hicks was and remains the single majority owner of Hicks/Indiana, while the three Dille children were and remain the minority owners of that entity. (Findings, ¶¶ 39, 61-3, 66).

124. Although the findings future ownership of Hicks/Indiana are not as clear cut, it is concluded that Hicks/Indiana did not misrepresent facts or lack candor. Question 15 of the Booth American - Hicks/Indiana assignment application inquired whether there were "any documents, instruments, contracts or understandings relating to ownership or future ownership rights...." The findings show that there were no documents, instruments or contracts then in existence. In this regard, the findings further show that the Operating Agreement, which gave the Dille children the right to "call" Hicks' interest at any time, and the Side Letter, which gave Hicks the right to "put" all of his interest to the Dille children were not finalized until the end of March 1994, several weeks after the assignment application had been granted. (Findings ¶¶ 59-60).

125. The findings regarding further indicate that, throughout the pendency of the application, only discussions had occurred between Hicks and Brown on the one hand and Dille and Robert Watson on behalf of the Dille children as to whether Hicks would sell

his interest in Hicks/Indiana to the Dille children. In this regard, from his first meeting with Hicks in July 1993 through his joint meeting with Hicks and Eric Brown, Hicks' counsel, Dille repeatedly expressed not only his desire that his children hold minority interests but that they have the right to acquire Hicks' interest when and if such became possible. (Findings, ¶¶ 16, 21, 29, 31) Neither Hicks nor Brown ever rejected such overtures or suggested that they were unacceptable. Indeed, in considering Hicks' exit possibilities, the only option ever discussed was acquisition of Hicks' interest by the Dille children. (Findings ¶ 31).

126. However, until the mechanics of transmitting Hicks' interest in Hicks/Indiana to the Dille children were resolved - which did not occur until after the application had been granted - only discussions concerning the matter had actually occurred. Thus, even though Dille asserted to Booth as early as August 15, 1993, that his children "would have an arrangement-option-agreement to purchase from Hicks his shares when and if that became possible," Hicks had not yet assented to such an arrangement. Indeed, it appears that Dille's assertion, which was made without Hicks' knowledge, was gratuitous and designed primarily to persuade Booth that Hicks was ready to step into Pathfinder's shoes and buy WRBR(FM). (Findings, ¶¶ 18-9) That such ultimately happened does not prove the existence of an understanding, especially when one considers that Brown had an independent role on behalf of Hicks during subsequent negotiations with Booth American. (Findings, ¶¶ 33).

127. Admittedly, a more troublesome question is raised by Sackley's testimony. In this regard, Sackley, then Hicks' business partner, understood by late September 1993 that Hicks' possible acquisition of WRBR(FM) involved a "planned subsequent transfer to a third party." (Findings, ¶ 26) Obviously, Sackley could not have obtained this understanding absent statement regarding this topic from Hicks and/or Dille. However, Sackley's testimony does not inevitably lead to the conclusion that an understanding between Hicks and Dille regarding future ownership actually existed. Moreover, even if one credited only Sackley's recollection of the discussion that occurred during the January 1994 Crystal board meeting, it shows only that Hicks and Brown viewed matters as unsettled because there was no written agreement concerning future ownership rights. (Findings, ¶ 46).

128. Consistent with the view attributed to Hicks and Brown by Sackley, the record reflects that, while the application was pending, there was no agreement as to how and at what price such a planned transfer was to occur. Indeed, Dille's first concrete proposal regarding his children's future ownership rights - a proposal which Hicks did not accept - was not made to Hicks until one week after the application was granted. (Findings, ¶¶ 58-9) While Hicks' counteroffer involved only a change in price, that change was not so insignificant as to be meaningless. Moreover, the ultimate terms

agreed to by Hicks and Dille (on behalf of his children) cannot be viewed as unreasonable considering the circumstances then existing in the broadcast industry. (Findings, ¶¶ 58-9) Finally, by virtue of the put provision in the Side Letter, Hicks tacitly promised to be available for at least three years before he might choose to exit as an owner of WRBR(FM). (Findings, ¶¶ 60) In sum, while the issue of future ownership by the Dille children was never a point of contention between Hicks and Dille, it also never rose to the level of an actual understanding. Thus, Hicks was not obligated to report his discussions with Dille concerning future ownership, and his decision not to report them cannot be viewed as arising from deceit.

129. With respect to the issue of providing information relative to the control of WRBR(FM), however, Hicks/Indiana did not disclose during the pendency of the application the extent to which Pathfinder would be involved in the affairs of WRBR(FM). Nevertheless, in light of the sequence of events, it is concluded that Hicks/Indiana did not violate Sections 73.1015 or 73.3514 of the Commission's Rules; rather, it appears that Hicks/Indiana may have violated Section 1.65 of the Commission's Rules. In this regard, Hicks/Indiana accurately responded to the staff's query regarding the proposed roles of Dille and his father and answered each application question accurately. However, following the Watson/Campbell discussion, Hicks/Indiana did not inform the Commission that Pathfinder's role with respect to WRBR(FM) was going to be more than that set forth in the JSA. Thus, although it appears that Hicks/Indiana may have violated Section 1.65 of the rules, no sanction is warranted. First the findings reflect that any such violation was not caused by deceit. Second, this proceeding does not include an issue as to whether a violation of Section 1.65 of the rules occurred.

130. In its application, Hicks/Indiana reported that Booth American and Pathfinder were parties to a JSA and that Booth American's interests therein would be assigned to Hicks/Indiana. (Findings, ¶ 39) Nothing else appears relative to Pathfinder's proposed role in the operation of WRBR(FM). Thus, the only impression given in the application regarding Pathfinder's role was that it would be limited to that specified in the JSA, a type of agreement that the Commission explicitly permitted. (Findings, ¶ 5) That impression was further bolstered by the submission of the Dille statement, which clearly and unequivocally stated that Dille and his father, Pathfinder's and Truth's principal shareholders, respectively, would not be involved in either the financing or the day-to-day operations of WRBR(FM). (Findings, ¶¶ 50-5)

131. However, shortly thereafter, in early March 1994, Hicks, Watson, Dille and Campbell had discussed and/or assented to a seven point plan which gave Pathfinder significant additional influence with respect to the day-to-day operation of WRBR(FM) to that already accorded by the JSA in the areas of personnel and finances. With regard to personnel, Pathfinder employee Kline, who was already general manager of

WLTA(FM), would also become general manager of WRBR(FM). Second, all employees of Hicks/Indiana would be on Pathfinder's payroll and subject to Pathfinder's personnel policies. With regard to finances, Pathfinder would do all of Hicks/Indiana's accounting, and Pathfinder's checking account would serve as the repository for all Hicks/Indiana funds and the source of all Hicks/Indiana checks. (Findings, ¶¶ 62-3) All such checks would be prepared and signed by Pathfinder personnel. (Findings, ¶¶ 64, 91, 93-4) While the arrangement also had several built-in safeguards that were designed to keep Hicks in charge of WRBR(FM), the totality of the provisions gave Pathfinder an opportunity to control WRBR(FM) -- an opportunity of which it took advantage, as more fully discussed, *infra*. Notwithstanding Hicks' and Campbell's knowledge of the arrangement, the Hicks/Indiana application was not updated to report Pathfinder's additional proposed role in the operation of WRBR(FM). (Findings, ¶¶ 50-5, 62).

132. Section 1.65(a) of the Commission's Rules provides in pertinent part that

"whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate...."

As noted, the application initially only reported the existence of the JSA, and the amendment to the application declared that Dille and his father would not be involved in the day-to-day operation of the station. Thus, once Hicks/Indiana and Pathfinder agreed to arrangements which expanded Pathfinder's role beyond those specifically set forth in the JSA, Hicks/Indiana arguably should have reported those arrangements to the Commission. However, in light of Campbell's advice and the resultant understanding of Hicks, Watson and Dille that their arrangements would not result in an abdication of control by Hicks (Findings, ¶¶ 62-3), it must be concluded that Hicks/Indiana's failure to report the information was, at most, inadvertent and not the result of deceit. Moreover, considering that the OSC does not specify a Section 1.65 issue and the proceedings were not enlarged to include such an issue, it would not be appropriate to reach a conclusion on that issue.

ii. Dille

133. The findings establish and it is therefore concluded that Dille did not misrepresent facts or lack candor in the application of Hicks/Indiana to acquire the license for WRBR(FM). Specifically, no misrepresentations occurred because the only representations Dille made relative to the application were literally true. Moreover, although Dille mistakenly failed to disclose material information in connection with his

February 22, 1994, statement to the Commission, the omission was the result of an erroneous belief rather than deceit. Thus, while the ultimate sanction of revocation is inappropriate, a forfeiture is warranted pursuant to Section 73.1015 of the Commission's Rules. See ¶ 66 of the OSC.

134. The only information in Hicks/Indiana's application in which Dille had any personal role was the statement he signed in response to a request by the staff for additional information. (Findings, ¶¶ 40, 50-5) In that statement, Dille affirmed first that he would not finance or guarantee the purchase of WRBR(FM) by Hicks/Indiana. Dille also promised that he would not be involved in the day-to-day operations of WRBR(FM). (Findings, ¶¶ 53).

135. At the outset, the parties note that the statement Dille signed was prepared by Alan Campbell, a former president of the Federal Communications Bar Association and an attorney with extensive experience before the Commission in connection with the processing of applications, including applications to assign licenses. Campbell had directly communicated with the staff person regarding the matter to be submitted.¹⁹ That communication was brief and never reduced to writing by the staff. From his conversation with the staff, Campbell understood that the staff was concerned about the personal involvement of Dille and his father in the financing and operations of WRBR(FM). Campbell's records and the recollections of Campbell, Watson and Dille reflect that Campbell's conversation with Dille and Watson about the statement's subject matter was brief and made no particular impression upon any of the parties to the conversation. (Findings, ¶¶ 50-5).

136. At the time the statement was signed, Dille had not provided any money to Hicks either to fund Hicks' portion of the escrow or to pay Campbell's fee. (Findings, ¶¶ 36, 43) Moreover, Dille's testimony that he had no present intention to pay any portion of the money due Booth American or to guarantee such payment is credible in light of the seller financing that Booth American was contracted to provide. (Findings, ¶ 54) Indeed, at that time, the only guarantee which was to be provided was from Hicks and each of the Dille children for \$250,000 total, which represented less than one-half of the contract price for the station. (Findings, ¶ 35). At most, Dille intended to lend his children their proportionate shares should such loans be necessary to provide Hicks/Indiana with funds to pay Booth American. As Dille understood the situation from prior discussions with Peter Tannenwald, another lawyer well-versed in FCC matters, he

¹⁹ In this regard, although the statement prepared by Campbell differed slightly from the information contained in the cover letter sent to Hicks, which indicated a copy to Watson -- in that the letter advised that the Commission's staff had asked Dille to sign a statement that he would not finance the purchase of the station for his children -- there is no evidence that Campbell's letter or its contents were ever communicated to Dille.

could make such loans to his children consistent with the Commission's multiple ownership rules, and the statement he was signing did not preclude him from making any such loans. Consequently, Dille never even informed Campbell about the money he already contributed or his (Dille's) intentions in the event his children needed additional money to meet their commitments. (Findings, ¶ 54).

137. The evidence further indicates that Dille never made any commitment to, or had any agreement with, Hicks/Indiana to provide money. At the time of the statement and throughout the pendency of the application, Hicks and the Dille children were the only parties personally responsible for the escrow provided. (Findings, ¶ 36) Hicks was the person who paid Campbell's retainer and was the only person who signed the retainer agreement with Campbell's firm on behalf of Hicks/Indiana. (Findings, ¶ 43) Hicks, on behalf of Hicks/Indiana, was the only party responsible (and the ultimate signatory of) the promissory note to Booth American, while Hicks and the Dille children ultimately were the only parties responsible for the guaranty to Booth American. Dille never made any personal commitments to Booth American, nor did he ever make, or cause to be made, any such commitments on behalf of Pathfinder or Truth. (Findings, ¶ 66).

138. Moreover, the weight of the evidence is that Dille also did not make any personal commitment to Hicks. Brown's December 1993 note to the file that Dille would hold Hicks harmless on the letter of credit and guaranty was not based on a communication from Dille. Rather, it resulted from telephone conversation with Hicks who simply told Brown not to worry about the letter of credit and guaranty. Dille, on the other hand, flatly denied having made any such commitment to Hicks. (Findings, ¶ 38) Further, although Hicks ultimately obtained indemnification protection via the Side Letter, the protection obtained differed materially from that suggested by Brown's note to the file. Specifically, in the Side Letter, the Dille children, as opposed to Dille himself, promised only to indemnify Hicks on the letter of credit. Thus, any failure to do so would have given Hicks a cause of action only against the Dille children, not against their father. More importantly, the Dille children's promise relative to the guaranty was only to pay their respective commitments to Booth American before Hicks paid his. Such a promise did not appreciably change the burden of the Dille children and, at most, reduced Hicks' commitment by only \$10,000 (out of possible exposure of \$127,500). (Findings, ¶¶ 35, 60).

139. The conflicts in testimony relative to the January 1994 Crystal board meeting do not alter the basic conclusion about the non-existence of Dille's commitment to Hicks and, thus, the truthfulness of Dille's statement to the Commission. Analysis of the three versions of the meeting - Sackley's, Hicks' and Brown's - indicates that the issue of Hicks/Indiana's future funding was discussed. Moreover, Dille's role as a possible source of funds was also mentioned. (Findings, ¶¶ 46-8) However, the minutes of the

meeting are absolutely silent about Dille or the financing of WRBR(FM). (Findings, ¶ 49) It thus appears that Hicks comments regarding Dille's commitment to fund the operations of the station were ultimately perceived as Hicks had testified; namely, a sarcastic reaction by Hicks to a caustic comment and not a concession to the accuracy of the premise that a commitment from Dille actually existed. (Findings, ¶ 47).

140. When payments to Booth American were due, Watson specifically sought and obtained funds from Hicks and the Dille children. Generally, Hicks and the Dille children made pro rata contributions to Hicks/Indiana. Further, beginning June 1996, funding for note payments came either from station operations or from a line of credit obtained by Hicks. No Pathfinder funds were ever used directly to pay Booth American. (Findings, ¶¶ 99-100).

141. Notwithstanding the foregoing, it could be argued that Pathfinder's and Truth's provision of interest-free funding to the operations of Hicks/Indiana is contrary to the representation Dille made to the Commission that he would not finance the purchase of WRBR(FM). However, the weight of the evidence suggests otherwise. At the outset, Hicks expected that station revenues would be sufficient to fund station operations. (Findings, ¶¶ 89). This expectation was not unreasonable on its face given the station's modest personnel costs and the savings likely to occur from joint operations with WLTA(FM). (Findings, ¶¶ 67) Consistent with this expectation, the 1994 budget prepared by Hicks and Kline for WRBR(FM) projected a positive cash flow for all but the month of May. (Findings, ¶¶ 97-8) Moreover, Watson's March 4 memo and the related accounting agreement did not commit Dille, Pathfinder or Truth to fund Hicks/Indiana in any way, and Dille never thought of the Hicks/Indiana receivable as a form of financing the WRBR(FM) acquisition or as inconsistent with his February 1994 statement to the Commission. (Findings, ¶¶ 62, 64, 91, 93, 95) Thus, it does not appear that the funding which Pathfinder provided occurred as a result of any plan which arose during the pendency of the Hicks/Indiana application or resulted from a conscious effort by Dille or Hicks to evade the effect of Dille's promise to the Commission that he would not finance the acquisition of WRBR(FM) by Hicks/Indiana.

142. Even though the evidence establishes the literal truth of Dille's statement to the extent that he did not directly finance or guarantee the purchase of the station, the evidence also shows that Dille provided, and had intended to provide, all the funds which his children had been and might be obligated to provide Hicks/Indiana. In this regard, Dille and Watson knew that Dille had supplied the entirety of the escrow provided by the Dille children to Booth American, and Dille knew that, as of the date of his statement, he would further furnish his children with whatever funds they needed to meet their commitments. (Findings, ¶¶ 36, 54) As events unfolded, Dille did, in fact, provide nearly \$120,000 toward the payment of the Booth American note. (Findings, ¶ 99) Dille

neither disclosed his actions nor his intentions to the Commission. Instead, he left unmodified a statement prepared by Campbell, who was unaware of Dille's financial actions and plans. Consequently, the statement, which clearly implied that Dille would have no role in financing the purchase of the station, gave a false impression about Dille's actions and imparted no hint about his intentions. (Findings, ¶¶ 52-3) However, considering the advice Dille received from Tannenwald that provision of funds from a parent to a child was permissible, Dille's belief that his statement did not preclude him from loaning or giving money to his children was not unreasonable on its face. (Findings, ¶¶ 36, 54) In sum, the evidence supports a conclusion that although Dille's statement omitted material information that would have ensured that the Commission understood Dille's precise role in providing funds used to purchase WRBR(FM), the omission, though willful, was a mistake and not occasioned by an intent to deceive. Accordingly, a forfeiture, not revocation, is warranted. See Abacus Broadcasting Corp., 8 FCC Rcd at 5114-5.

143. With respect to Dille's promise that he would not be involved in the day-to-day operations of WRBR(FM), the evidence again establishes that the promise was literally true. Other than sales matters which fell under Pathfinder's purview pursuant to the JSA, there is no evidence that Dille himself had or took any role in the operations of the station. At Campbell's suggestion, Dille specifically informed Kline that he (Dille) did not want to be involved in WRBR(FM)'s operations, and Dille subsequently honored that commitment by avoiding any involvement in decisions concerning the station's personnel, programming and finances. (Findings, ¶¶ 65, 86, 97).

144. Moreover, it cannot be concluded that Dille willfully or deceitfully omitted material information from his statement regarding his and his father's non-involvement. In this regard, the proposals concerning Kline and Pathfinder's expanded role at WRBR(FM) were not settled until sometime after the date of Dille's statement. Moreover, Campbell basically informed Watson that Watson's proposals regarding Pathfinder's role would not run afoul of the Commission's dictates concerning control of the station. (Findings, ¶ 62) Thus, it cannot be concluded that Dille lacked candor by failing to describe Pathfinder's ultimate role.

B. Real Party-in-Interest/De Facto Control

145. Section 310(d) of the Act states, in pertinent part:

No construction permit or station license, or any rights thereunder shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and

upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

47 U.S.C. § 310(d); see also 47 C.F.R. § 73.3504(a) (implementing the statutory provisions of Section 310(d) and prohibiting the voluntary assignment or transfer of control of a broadcast permit or license without prior Commission consent).

146. Although there is no formula for evaluating whether a party is in de facto, or actual, control, see, e.g., Stereo Broadcasters, 55 FCC 2d 819, 821 (1975), modified, 59 FCC 2d 1002 (1976), the Commission traditionally looks to whether a new entity has obtained the right to determine the basic operating policies of the station, that is, to affect decisions concerning the personnel, programming or finances of the station. See, WHDH, Inc., 17 FCC 2d 856 (1969), aff'd sub nom. Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). A licensee may delegate certain functions on a day-to-day basis to an agent or employee, e.g., Southwest Texas Public Broadcasting Council, 85 FCC 2d 713, 715 (1981), but such delegation cannot be wholesale. That is, those persons assigned a task must be guided by policies set by the permittee or licensee. See David A. Davila, 6 FCC Rcd 2897, 2899 (1991). Further, while joint sales agreements between licensees in the same market are permissible, each licensee must retain control of its own station and comply with the Communications Act and the Commission's rules and policies. Radio Revision, 7 FCC Rcd at 2787. The Commission evaluates real party in interest questions as it does questions concerning de facto control of a permittee or licensee. Univision Holdings, 7 FCC Rcd 6672, 6675 (1991), recon. denied, 8 FCC Rcd 3931 (1993)

147. The evidence indicates that neither Pathfinder nor any of its agents were real parties-in-interest in the Hicks/Indiana application when it was filed. Although Pathfinder, through Dille and Watson, had negotiated the basis terms of the APA with Booth American and remained involved on behalf of the Dille children throughout the negotiations with Booth American, Hicks' attorney, Brown, clearly had a significant and active role in the final negotiations leading up to the execution of the APA. (Findings ¶¶ 12, 20, 23, 28, 32-4) Moreover, Hicks, on behalf of Hicks/Indiana, executed the APA and obtained the letter of credit to fund his share of the escrow. The letter of credit and the personal guaranty required of Hicks exposed him to a substantial financial loss in proportion to his interest in the applicant. (Findings, ¶¶ 34-6) Hicks completed the principal parts of the assignment application. He retained Campbell as special communications counsel and paid his retainer. He executed the various certifications in the application. Dille had no role in the preparation of the application, and Watson's role was limited to providing information about the interests of the Dille children in Pathfinder and Truth. (Findings, ¶¶ 39-40). It thus appears that Hicks had adequate control of the applicant at least until March 1994.

148. However, the evidence further reflects that, beginning in March 1994, Hicks and Pathfinder began to put into place a series of joint operational elements that had the unintended effect of ceding control of WRBR(FM) to Pathfinder. Shortly after or concurrent with the submission of Dille's statement of no involvement with WRBR(FM), Hicks, Dille, Watson and Campbell discussed and ultimately agreed to arrangements which expanded Pathfinder's role well beyond that established in the JSA. (Findings, ¶¶ 7-8, 62-5, 90). As a consequence of the March 1994 arrangements, operational control of WRBR(FM) would rest with Kline, who was to serve as the station's general manager as well as the general manager of WLTA(FM). In addition, by virtue of the accounting agreement and the fact that Hicks/Indiana did not maintain its own bank account, Pathfinder had the opportunity to exercise inappropriate control over Hicks/Indiana's funds. Finally, all employees providing services to WRBR(FM) were going to be paid from Pathfinder's payroll whether or not the employees devoted all or merely part of their work day to that station. (Findings, ¶¶ 62, 64, 68, 70, 91) The only restrictions imposed on Pathfinder were personal to Dille. As Dille understood the restrictions, he was not precluded from lending money to his children. Also, Dille did not consider whether Pathfinder was affected by those restrictions inasmuch as it had already been reported to the Commission that Pathfinder was involved in WRBR(FM)'s sales pursuant to the JSA. (Findings, ¶¶ 53-4, 65).

149. Shortly after the application's grant, shareholder agreements further reduced the influence Hicks might otherwise hold as majority shareholder of Hicks/Indiana. Specifically, Hicks gave the Dille children the right to buy his stock at any time without obtaining a reciprocal right to buy theirs. Hicks' choice in this regard must be contrasted with the rights he held vis-a-vis Sackley, the primary shareholder in Crystal. For example, in the Crystal situation, if Sackley offered to buy out Hicks, Hicks, in turn, had the right to buy out all the other Crystal shareholders, including Sackley, at Sackley's offering price. (Findings, ¶¶ 58-9) In addition, Hicks, at Brown's initiative, continued to focus on how to leave the investment and reduce his financial exposure. As a consequence of the Side Letter, Hicks obtained a right to "put" all of his shares to the Dille children at any time after three years, a promise that the Dille children would hold him harmless from any costs arising from the letter of credit, and a promise from the Dille children that they would pay their part of the guaranty before he would have to pay anything. (Findings, ¶¶ 60-1) Taken in combination, the March memo, the accounting agreement, the Operating Agreement and the Side Letter left Hicks with virtually no employees and minimal investment in, or incentive to stay involved with, WRBR(FM).

150. The passive role envisioned for Hicks at the outset of Hicks/Indiana's acquisition of the WRBR(FM) license dovetails perfectly with his then existing responsibilities relative to Crystal. Hicks was a director and officer of Crystal, employed full time as director of sales for Crystal's three stations in Kalamazoo, Michigan, and was

personally responsible (along with Sackley) for several million dollars of bank debt. (Findings, ¶¶ 15, 24, 26, 78) Clearly when Hicks/Indiana became licensee, Hicks' focus was going to be directed toward Kalamazoo, not South Bend. Moreover, even after his termination from Crystal, Hicks did not become involved on a full-time basis with WRBR(FM). Rather, he became an employee of Dille/Pathfinder, first in the fledgling Sign Pro business, then in national sales for all of Pathfinder's radio stations (as well as for WRBR(FM)) and finally as general manager of three Pathfinder stations in Grand Rapids. (Findings, ¶¶ 79-82) Only after the sale of all of Pathfinder's Grand Rapids properties, was Hicks in a position to devote his full time and attention to WRBR(FM). In any event, as the following demonstrates, Pathfinder has had and will continue to have a role which is at odds with Hicks/Indiana being licensee of WRBR(FM).

151. Personnel. Kline, WRBR(FM)'s only general manager under Hicks/Indiana, also was and remains a Pathfinder employee.²⁰ (Findings, ¶¶ 68-9) WRBR(FM)'s news directors, sports director and program directors also have been or become Pathfinder employees and have nearly always had dual roles at both WBYT(FM) and WRBR(FM). (Findings, ¶¶ 71-5) Likewise, the operations manager, continuity director, events coordinator and general sales manager for WRBR(FM) have always been Pathfinder employees. (Findings, ¶¶ 76-7) Moreover, the only person that Hicks claims to have hired (other than Kline) - Henning as program director - apparently also worked as a contract engineer for Pathfinder. (Findings, ¶ 73) Further, the fact that Hicks receives a salary from Hicks/Indiana for his contributions to WRBR(FM) and communicates with the station's program director, Joe Turner, on a regular basis, is not dispositive given Kline's continued presence. (Findings, ¶¶ 75, 82-3, 87) Finally, every employee working for WRBR(FM), either partially or exclusively, is on Pathfinder's payroll and subject to Pathfinder's personnel policies. (Findings, ¶ 70).

152. Programming. From April 1, 1994 until late 1995, the evidence is inconclusive as to what part Hicks actually played in determining WRBR(FM)'s entertainment programming. In this regard, although Moore testified that he and Hicks had discussed whether to continue the oldies format and had periodically met, the documentary evidence reflects no involvement by Hicks until early 1996, except as a signatory of documents forwarded to him by Watson. (Findings, ¶¶ 84-5) Even then, Moore chose to address his January 1996 memo about WRBR(FM) to Hicks and

²⁰ In this regard, even though Hicks/Indiana has paid one half of Kline's salary, it is by no means clear that it has had half of Kline's attention, time and effort. Two examples will suffice. First, Kline made Britain program director of both WBYT(FM) and WRBR(FM) (and charged Hicks/Indiana accordingly) and kept him in that position for more than a year even though Hicks testified he viewed Henning as his program contact during that period. (Findings, ¶¶ 73-5) Second, Hicks apparently made so little an impression on Kline that, during a 1995 deposition, Kline connected his first meeting with Hicks to Sign Pro, not WRBR(FM). (Findings, ¶ 68).

Federated Media. (Findings, ¶ 86) Had Hicks/Indiana been truly independent, there would have been no reason for Moore to have addressed his memo to Federated Media. Moreover, Moore's next memo, addressed only to Kline, Joe Turner and Hicks, candidly appraised WRBR(FM)'s oldies format as a viable complement to Pathfinder's WBYT(FM). However, the evidence also clearly shows that Hicks played a significant role in the acquisition of the Bob and Tom Show and the concurrent format change. In addition, Hicks has played and continues to play a significant role in the entertainment programming of WRBR(FM). (Findings, ¶ 87) Thus, Hicks now has apparent control over the entertainment programming of the station.

153. With respect to non-entertainment programming, however, Hicks has been virtually invisible. From the beginning, WRBR(FM)'s news and public affairs programming has been edited and delivered by Pathfinder employees. Hicks/Indiana's only role in their activities is to pay a portion of their salaries. (Findings, ¶¶ 71, 88).

154. Finances. As a consequence of the JSA, the Watson memo and the accounting agreement, Pathfinder has served as Hicks/Indiana's principal accountant. (Findings, ¶¶ 62, 64, 91) In this role, Pathfinder has faithfully prepared and sent to Hicks weekly sales reports, monthly financial reports and general ledgers. Hicks has reviewed and, to varying degrees, commented on these materials. (Findings, ¶¶ 80, 91-2, 110) Hicks has also received on a regular basis most attorneys bills (except those of Barnes & Thornburg) and a variety of invoices. (Findings ¶¶ 80, 103-5, 107, 109) Further, Hicks has reviewed every budget prepared for WRBR(FM). (Findings, ¶ 97) Beginning in late 1996, Hicks has clearly directed the station's capital budget. (Findings, ¶ 111) The foregoing shows that Hicks is and has been fully informed about WRBR(FM)'s finances.

155. However, the evidence demonstrates that, prior to April 1997, Hicks was not in control of Hicks/Indiana's financial affairs. Until April 1997, Hicks/Indiana had no bank account of its own. Consequently, until that time, it was not in a position to receive interest on its funds (which totalled more than \$100,000 in 1996) which were regularly swept into a Pathfinder interest bearing account. As of now, most, but not all, of Hicks/Indiana's funds immediately find their way into the Hicks/Indiana account. The remainder stay in the Pathfinder account until paid to Hicks/Indiana pursuant to the amendment to the JSA. (Findings, ¶¶ 91, 93-4).

156. Prior to 1997, whenever Hicks/Indiana was struggling financially, Hicks did not seek bank financing or contributions from his fellow shareholders. Indeed, Hicks did nothing. Rather, Pathfinder simply paid Hicks/Indiana's bills and treated the resulting debt as a receivable, notwithstanding that Hicks/Indiana was not in any way like a Pathfinder advertiser. In this regard, Pathfinder treated WRBR(FM)'s bills just as it

would have treated any other station controlled by Dille.²¹ (Findings, ¶¶ 93, 95, 98) This situation has been ameliorated somewhat since, beginning in 1997, Hicks/Indiana has its own line of credit from which it paid off the Booth American note and which it pays down from its own account. (Findings, ¶¶ 100, 102).

157. The decisions to obtain money from shareholders in 1994 and 1995 and how to treat the money sent - whether as loans or capital contributions - were made in the first instance by Pathfinder. In this regard, Watson initiated the memos to Hicks and the Dille children, which requested funds necessary to pay Booth American, and Watson suggested whether monies contributed should be classified as capital contributions or loans. Hicks' role in this process was passive, at best. Likewise, Watson was the person who initiated the preparation of promissory notes, who proposed the interest rate for the repayment of funds advanced, and who initiated repayment. Again, Hicks' role appears to have been passive. (Findings, ¶¶ 96, 99-101).

158. Although Hicks has reviewed WRBR(FM)'s basic expenses in the course of establishing station budgets, Pathfinder personnel have made the day-to-day allocations of costs for WRBR(FM). Kline, together with Richard Rhodes, his counterpart at Pathfinder's WTRC(AM), Elkhart, have allocated salaries and costs among and between WTRC, WBYT(FM) and WRBR(FM) with no visible input from Hicks. (Findings ¶¶ 71-6) Occasionally, those allocations - such as the ones for Britain and Joe Turner - favored Pathfinder over Hicks/Indiana in that the latter paid for more than its share of those employees' compensation given the time they spent on WRBR(FM) affairs. (Findings, ¶¶ 74-5) Additional disparities include Kline's compensation (shared evenly between Pathfinder and Hicks/Indiana) and the rent (where Pathfinder has charged Hicks/Indiana 50% of the cost of its shared premises) because WRBR(FM) has always had a smaller number of employees.²² (Findings, ¶¶ 67, 69) Finally, Pathfinder allocated 50% of Hicks' compensation to Hicks/Indiana during periods when Hicks spent far more than half his time on Pathfinder business. While Hicks apparently agreed with the allocation, the evidence reflects that Pathfinder took the initiative in effecting the allocation. (Findings, ¶¶ 81-2) The point is not that Pathfinder took advantage of its position vis-a-vis Hicks/Indiana but that it had the ability to do so.

²¹ Such treatment includes the payments of attorney bills. With respect to Brown's bill, Dille negotiated the final amount due at Hicks' request. With respect to other bills, Watson had the final say as to when and how much of a bill is paid. (Findings ¶¶ 103-5).

²² In this regard, Pathfinder has always been the employer of all WBYT(FM) and WRBR(FM) sales personnel and support staff pursuant to the JSA. (Findings, ¶ 77).

159. In sum, with respect to finances, Pathfinder's role was and still is pervasive. It is not and never has been a mere accountant. Pathfinder has controlled the sole account which served and still serves Hicks/Indiana's main repository of funds and primary source of funds for the payment of WRBR(FM)'s bills. Pathfinder personnel, principally Watson and his subordinates, have initiated all significant financial actions taken by Hicks/Indiana. While Hicks has taken a more active role since late 1996, WRBR(FM)'s finances are still affected by the decisions of Pathfinder.

160. Considering the totality of the evidence, it is concluded that Pathfinder and its agents acquired the ability to control WRBR(FM) immediately before Hicks/Indiana became licensee of the station. Moreover, because Pathfinder has continued to have impermissible control over the operations of WRBR(FM), it is also concluded that Hicks abdicated control of Hicks/Indiana and that Pathfinder acquired control contrary to Section 310 of the Act. See Roy M. Speer, 11 FCC Rcd 18393, 18415 (1996).

C. Multiple Ownership

161. Section 73.3555(d)(2) of the Commission's Rules provides:

(d) Daily newspaper cross-ownership rule. No license for an ...FM... broadcast station shall be granted to any party (including all parties under common control) if such party directly owns, operates or controls a daily newspaper and the grant of such license will result in:

...

(2) The predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published.

The findings show that Truth publishes the Elkhart Truth, a daily newspaper in Elkhart, and that WRBR(FM) encompasses the entire community of Elkhart, Indiana. (Findings, ¶ 13) The evidence further shows that Truth and Pathfinder are controlled by common parties, including Dille and Watson. (Findings, ¶¶ 6, 11, 13) Finally, as explained above, the evidence shows that Pathfinder, not Hicks/Indiana, has controlled WRBR(FM). Inasmuch as Pathfinder has never obtained a waiver to operate or control WRBR(FM), it is concluded that from April 1, 1994, to the present, Pathfinder has operated and/or controlled WRBR(FM) in violation of Section 73.3555(d)(2) of the Commission's Rules.

D. Ultimate Conclusions

162. As reflected above, neither Hicks/Indiana nor Pathfinder misrepresented facts or lacked candor. However, Pathfinder, through its agent, Dille, omitted material information from a statement submitted to the Commission in connection with Hicks/Indiana's application to acquire WRBR(FM), in violation of Section 73.1015 of the Commission's Rules. Further, Hicks/Indiana and Pathfinder each violated Section 310 of the Act by abdicating and acquiring control, respectively, of WRBR(FM) without approval of the Commission. Finally, Pathfinder's control of WRBR(FM) was in violation of Section 73.3555(d)(2) of the Commission's Rules. Inasmuch as the foregoing violations resulted from mistake rather than deceit, the ultimate sanction of revocation is not appropriate. See Roy M. Speer, 11 FCC Rcd at 18428. Further, it is concluded, notwithstanding the statutory and rule violations described above, that Hicks/Indiana and Pathfinder are qualified to remain Commission licensees. However, as discussed below, forfeitures are warranted.

163. Section 503(b) of the Communications Act provides for the imposition of forfeitures for willful and/or repeated violations of the Communications Act and/or the Commission's rules. As discussed above, the violations were willful. The parties knew what they were doing even though they did not intend to violate the law. See Abacus Broadcasting Corp., 8 FCC Rcd at 5115. In this regard, the fact that the parties consulted with their attorneys and formed a good faith belief that they were not trespassing Commission rules does not absolve them of these violations. Further, with respect to the violations related to Pathfinder's illegal control of WRBR(FM), the violations were continuous and, therefore, repeated. After considering the violations in light of case precedent,²³ the forfeiture guidelines,²⁴ and the factors enumerated in Section 503(d) of the Act, it is appropriate to assess Hicks/Indiana a forfeiture of \$20,000 for the Section 310(d) violation. Also, it is appropriate to assess Pathfinder a total forfeiture of \$30,000 (\$10,000 for the Section 73.1015 violation and \$20,000 for the Section 310(d) violation and the Section 73.3555(d)(2) violation). In this regard, the parties concur in their joint conclusions that the forfeiture liability for Dille's violation of Section 73.1015 of the rules appropriately falls upon Pathfinder in light of Dille's and Watson's knowledge concerning the source of the escrow funds provided by the Dille

²³ The Presiding Judge agrees with the Bureau that Abacus Broadcasting Corp., 8 FCC Rcd 5110 (Rev. Bd. 1993), is the appropriate precedent for the forfeiture amount specified for the violation of Section 73.1015 of the Commission's Rules. For the violations of Section 310(d) of the Act and Section 73.3555(d)(2) of the Commission's Rules, Roy M. Speer, 11 FCC Rcd 18393 (1996), American Radio Systems Corporation, 13 FCC Rcd 9588 (MMB 1998) and Palm Beach Radio Broadcasting, 13 FCC Rcd 9593 (MMB 1998), cited by the Bureau, are appropriate precedent.

²⁴ Forfeiture Guidelines, 12 FCC Rcd 17087 (1997).

children and their involvement in the events leading up to Dille's execution of the February statement that was submitted to the Commission. (Findings, ¶¶ 36, 52).

164. Further, Hicks/Indiana and Pathfinder shall be ordered to take such steps as deemed appropriate to avoid future violations of Section 310(d) of the Act and Section 73.3555(d)(2) of the Commission's Rules. Such steps shall include some or all of the following: 1) the employment of Hicks/Indiana of a WRBR(FM) general manager who is not subject in any way to the authority of Pathfinder; 2) the disbursement of all revenues generated by the JSA to Hicks/Indiana in accordance with the JSA; and 3) the payment of all non-JSA bills, invoices, obligations, etc. from an account maintained solely by Hicks/Indiana. See Roy M. Speer, 11 FCC Rcd at 18430-4; Fox Television Stations, Inc., 10 FCC Rcd 8452, 8523 (1995) (subsequent history omitted). Lastly in light of the conclusion that Hicks/Indiana and Pathfinder are qualified to remain Commission licensees, the prohibition on Pathfinder's right to assign, transfer and acquire additional licenses may be lifted upon finality of the Initial Decision in this proceeding. See OSC, ¶ 53.

Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,²⁵ the license of Hicks Broadcasting of Indiana, LLC., FM Radio Station WRBR(FM), South Bend, Indiana, and the license of Pathfinder Communications Corp., FM Radio Station WBYT(FM), Elkhart, Indiana ARE NOT REVOKED.

IT IS FURTHER ORDERED, that Hicks Broadcasting of Indiana, LLC and Pathfinder Communications Corp. SHALL no later than sixty (60) days after this Initial Decision becomes final submit a report to the Commission setting forth the steps taken to avoid future violations of Section 310(d) of the Act and Section 73.3555(d)(2) of the Rules.

IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, this Initial Decision SHALL CONSTITUTE an Order of Forfeiture in the amount of \$20,000 against Hicks Broadcasting of Indiana, LLC.

IT IS FURTHER ORDERED, pursuant to Section 503(d) of the Communications Act of 1934, as amended, this Initial Decision SHALL CONSTITUTE an Order of Forfeiture in the amount of \$30,000 against Pathfinder Communications Corp.

²⁵ 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 Section 1.276(d) of the Rules.

IT IS FURTHER ORDERED, that, within 30 days after the date of this Initial Decision becomes final, Hicks Broadcasting of Indiana, LLC and Pathfinder Communications Corp. SHALL PAY the full amount of the forfeiture by check or money order made payable to "Federal Communications Commission." The remittance should identify the payor, be marked "NAL Control No. FCC 98-88; NOF Control No. FCC 99D-2," and be sent to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION



Joseph Chachkin
Chief Administrative Law Judge