

Loginow also testified that the way Turro described the use of WMG-499 was "very close to being [technically] impossible." (Tr. 560.) However, Loginow admitted that each element of the fail-safe arrangement described by Turro was, in fact, technically possible. Specifically, Loginow testified that an individual microwave path could be subdivided into more than one channel, an audio and a data channel (Tr. 560-61, 562); that the receiver and the remote control unit at the Fort Lee translator could be programmable (Tr. 561-62); and that those units could be programmed to home in on the microwave audio path in the event that the data path was interrupted (although, according to Loginow, this would have been illogical and "terribly poor practice") (Tr. 562-63).

175. Hurst's July 6, 1995, Observation. On June 21, 1995, the Chief of the Bureau's Complaints and Investigations Branch sent a letter of inquiry to Turro. (Bur. Ex. 7.) Turro was asked, *inter alia*, whether programming originating from the Dumont studio had been transmitted by WMG-499 to the Fort Lee translator, and whether Turro had implemented the use of telephone lines to deliver programming to the Fort Lee translator. (*Id.* at 111.) Turro responded by letter dated July 27, 1995 (filed on July 30, 1995), and signed by Turro. (Bur. Ex. 8.) Appended to Turro's letter was a July 25, 1995, engineering statement signed by Hurst. (*Id.* at 126.) As part of his preparation of this statement, Hurst went to New Jersey and New York on July 6, 1995, and viewed all of the facilities in question. (Tr. 1869, 1884-85.)

176. In his statement, Hurst asserted that WJUX provided a reliable, high fidelity, over-the-air signal to both the Fort Lee and Pomona translator locations (Bur. Ex. 8, p. 129), that such signal was adequate to supply the good quality signal rebroadcast over the Fort Lee translator (*id.* at 128), and that the Fort Lee translator had the ability to receive "directly through space" either the WJUX or Pomona translator broadcast signal, depending on signal quality (*id.*, emphasis omitted). In this regard, Hurst reported that, on July 6, 1995, he listened to the over-the-air reception of the WJUX signal at both the Fort Lee and Pomona translator locations, and could "attest to the good quality of the WJUX(FM) signal" at both locations. (*Id.* at 128.) Hurst noted that WJUX was a monophonic broadcast facility, and remarked that "[i]t is well documented that a monophonic broadcast system will serve a much wider area than a conventional stereo broadcast facility because receiver characteristics allow for much better reception of low level mono signals." (*Id.* at 129-30, footnote omitted.) Hurst also related that, at the time of his visit, WMG-499 was silent, and that it was his "understanding that no alternate means of program delivery [was] used." (*Id.* at 128.)

177. In his testimony in this proceeding, Hurst stated that on July 6, 1995, while he, Turro, and another individual were driving from the Pomona translator to Monticello, the WJUX programming to which they were listening on the car radio ceased. The carrier was still on the air, however, and could be detected on the car radio. They went to the WJUX transmitter site and found that no audio was being received at that location. Turro spoke with someone, and it was determined that the telephone line carrying programming from the Dumont studio had been cut or was no longer able to provide programming to the WJUX transmitter. For the remainder of the day, at least until Hurst arrived at Newark Airport at about 6:30 p.m., there was no audio on WJUX or the Pomona or Fort Lee translators. (Tr. 1869-70; *see also* Tr. 1587-94.)

178. The July 31, 1995, Observation. By letter dated June 6, 1995, the Chief of the Commission's Microwave Branch directed Turro to show cause why his license for WMG-499 should not be revoked or cancelled (Bur. Ex. 8, pp. 120-21; Turro Ex. 1, p. 24), and Turro deactivated that facility

in early July 1995 (Tr. 1616). On July 31, 1995, at the request of the Wireless Telecommunications Bureau, Loginow returned to Dumont with a multi-band communications receiver, monitored 951 MHz (the frequency of WMG-499), and determined that it was not in operation. (Bur. Ex. 16, p. 259; Bur. Ex. 18, p. 334; Tr. 380-81.) Loginow then returned to his office and reduced his observations to an e-mail, dated August 1, 1995, which was directed to both Wireless Telecommunications Bureau and Mass Media Bureau personnel. (Bur. Ex. 18, p. 334; Bur. Ex. 16, p. 259.)

179. In his e-mail, Loginow stated that the audio quality of the Fort Lee translator indicated that the input signal was not being received off the air from the Pomona translator but from some other "alternate means, presumably via telephone lines." (Bur. Ex. 16, p. 259.) Loginow's presumption was based upon the high audio quality he heard that day in comparison to the lesser audio quality he remembered hearing in April 1995. (Tr. 381-83.) However, Loginow performed no testing on July 31, 1995 (Tr. 384), did not inspect or observe the Fort Lee or Pomona translators on that date (Tr. 381), and did not look for some other mechanism of program delivery (Tr. 382). Loginow also thought that the high audio quality he observed on July 31, 1995, was consistent with the audio quality he observed on May 15, 1995. (Tr. 383.)

180. Loginow admitted that in April 1995 he observed that the power of the WJUX transmitter had been reduced as a result of a lightning strike. (Tr. 385-86; Bur. Ex. 4, p. 84; Bur. Ex. 16, p. 255 *see also* Turro Ex. 1, p. 28.) He also admitted that a signal being received by the Fort Lee translator would be stronger, and the audio quality would be better, if it was being transmitted at full power by the WJUX transmitter than it would be if that transmitter was operating at reduced power. (Tr. 386; *see also* Tr. 555-57.) Loginow further admitted that the fact that he heard a better signal on May 15 and July 31, 1995, might have been attributable to the fact that something had been fixed and the WJUX transmitter was operating at full power. (Tr. 386-87.) Hurst, too, testified that a reduction in the power of the Monticello transmitter could have caused some degradation of the audio quality heard from the Fort Lee translator. (Tr. 1861.)

181. The August 2, 1995, Testing and Inspection. On August 2, 1995, Loginow called Turro and informed him that he wanted to inspect the Fort Lee and Pomona translators. (Bur. Ex. 18, p. 334.) Loginow had given no advance notice to Turro of this inspection. Loginow met Turro at the Fort Lee translator shortly after calling him. (Tr. 387.) Turro cooperated fully during this inspection and Loginow inspected as he saw fit. (Tr. 387.)

182. Loginow's inspection included a visit to the roof of the Mediterranean Towers, where he observed many antennas. (Tr. 390; Turro Ex. 1, p. 25.) Turro testified that he explained to Loginow that the roof-mounted antennas had been vandalized repeatedly and that he "had used other receive antennas located elsewhere in the building." Turro stated that he offered to show Loginow those antennas but Loginow told him that he was only interested in seeing the antennas in use that day. (Turro Ex. 1, p. 25; Tr. 1972-73, 1974-75, 1976-77.) Turro did not specifically refer to any receive equipment for the Pomona translator which was located in the basement. (Tr. 503, 1972.)

183. Turro had a spare Sony car radio with a battery and headphones, and he took Loginow to the hot spot on the roof. Turro held the car antenna and, according to Turro, Loginow heard WJUX "loud and clear without any type of filtering devices at all." (Tr. 1760-61, 1976-77; *see also* Tr. 390-91.) Turro

told Loginow: "This is how I picked it [WJUX] up from October till [sic] January . . . I can't explain it, but here it is." (Tr. 1761, internal quotation marks omitted; Tr. 1976-77.)

184. The receivers and electronics for the Fort Lee transmitter were located two floors below the roof. (Tr. 391.) Loginow inspected the Fort Lee translator equipment and observed a high quality Sony car radio tuned to the Pomona translator's frequency. The audio of this car radio was being fed into the transmitter. (Bur. Ex. 18, pp. 334-35.) He also observed that filters were in place but did not know when they were installed. (Bur. Ex. 16, p. 260; Tr. 400.) This was the first and only time that Loginow got a good look at the Fort Lee translator transmitter, receivers, electronics, and power source. (Tr. 389, 399-400.)

185. While in the equipment room, Turro demonstrated that the Fort Lee translator was receiving the signal of the Pomona translator off the air. (Bur. Ex. 16, p. 260.) Turro did this by turning the volume control down on the receiver that was receiving the Pomona translator. Loginow was listening to the Fort Lee translator through headphones connected to a Sony Walkman. As Turro reduced the volume, Loginow observed that the programming to which he was listening simultaneously dropped out, or became totally silent. (Tr. 392-94.) During this inspection, Loginow observed no means of program delivery to the Fort Lee translator other than reception off the air. (Tr. 389, 390.) Loginow stated that the Fort Lee translator passed the test on August 2, 1995. (Tr. 389-90, 392.)

186. After concluding his inspection of the Fort Lee translator, Loginow and Turro drove to the Pomona translator in Turro's car. (Bur. Ex. 18, p. 335; Bur. Ex. 16, p. 260; Tr. 394-95.) Loginow inspected the Pomona translator to the extent that he saw fit, and Turro cooperated fully with Loginow's inspection. (Tr. 395.) This was the only time that Loginow had a chance to go over the electronics and facilities of the Pomona translator. (Tr. 399-400.)

187. Loginow saw a Sony car radio tuned to the frequency of WJUX at the Pomona translator. (Bur. Ex. 18, p. 335; Tr. 1761-62.) Loginow also observed the use of high quality filters at that translator but did not know when they were installed. (Bur. Ex. 18, p. 335; Bur. Ex. 16, p. 260; Tr. 400.) Loginow tested the Pomona translator in a manner similar to his testing of the Fort Lee translator. Specifically, he had Turro turn down the volume of the receiver that was receiving WJUX. Loginow was listening to the Pomona translator through headphones connected to his Walkman. As Turro reduced the volume, Loginow heard the volume of the programming to which he was listening go down. As Turro raised the volume, Loginow heard the volume on his Walkman go back up. (Tr. 395-96.)¹⁰ During this inspection, Loginow observed no means of program delivery to the Pomona translator other than off-the-air reception. (Tr. 395.) Loginow stated that the Pomona translator passed the test on August 2, 1995. (Tr. 397.)

188. Loginow reported the results of his August 2, 1995, inspection to personnel of the Wireless Telecommunications Bureau and Mass Media Bureau in an e-mail dated August 4, 1995. (Bur. Ex. 18, p. 335; Bur. Ex. 16, p. 260.) Loginow characterized the audio quality of the Fort Lee translator as "very high [and] particularly free of sideband splatter from adjacent FM stations." (Bur. Ex. 16, p. 260; Tr.

¹⁰ Turro's recollection of the testing of the Pomona translator was slightly different (Tr. 1762), but the differences are without decisional significance.

388.) Loginow further stated that, while at the Fort Lee translator, Turro demonstrated the ability to receive "moderately good audio" directly from WJUX. (Bur. Ex. 16, p. 260; Tr. 390-91.) Loginow remarked that "[i]t appears that Turro is now able to provide a consistent high quality audio signal off air from the Pomona NY translator at the Fort Lee NJ location." (Bur. Ex. 16, p. 260.)

189. The June 4, 1997, Testing. On June 4, 1997, subsequent to the designation of this case for hearing, Loginow monitored and tested the Fort Lee and Pomona translators at the request of Mass Media Bureau personnel. (Bur. Ex. 18, p. 335; Tr. 397-98.) On this occasion, unlike the tests conducted on May 15, 1995, Loginow actually went out on the roof of the Mediterranean Towers while monitoring and testing the Fort Lee translator. The monitoring and testing of the Pomona translator was done from the street adjacent to the property where the equipment was located. Loginow did not physically inspect either translator facility at this time. (Bur. Ex. 18, p. 335; Tr. 398-99.)

190. Using a signal generator set to the frequency of the translator being tested, and monitoring the output, Loginow determined that the Pomona translator was receiving the signal of WJUX, and the Fort Lee translator was receiving the signal of the Pomona translator. (Bur. Ex. 18, p. 335; Tr. 399.) The signal generator and antenna used by Loginow on June 4, 1997, were similar to the ones he had used for the May 15, 1995, testing. (Tr. 398.) The Fort Lee translator passed the test on June 4, 1997. (Tr. 399.) Loginow telephonically reported the results of this testing to Mass Media Bureau personnel on either June 4 or 5, 1997. (Bur. Ex. 18, pp. 335-36; Tr. 399.)

(3) Rejected Testimony

191. The Testimony of Luna and Gaghan. Relying on the testimony of Vincent D. Luna and William Gaghan, former Jukebox Radio employees who were working for Universal at the time of their appearance (Bur. Ex. 14, p. 229; Bur. Ex. 15, p. 240), the Bureau and Universal request that findings of fact be made to the effect that the Fort Lee translator rebroadcast Jukebox Radio programming received directly from WMG-499 "most of the time" or "routinely." (Bur. PFCs at para. 34; Universal PFCs at para. 49; *see also* Bur. PFCs at para. 122.) Also based upon the testimony of these two witnesses, the Bureau further requests that findings of fact be made regarding an incident which allegedly occurred during the course of Loginow's April 1995 inspection. (Bur. PFCs at paras. 105-06.) The requested findings will not be made. Put simply, the testimony of Luna and Gaghan was not credible. Cross-examination of Luna and Gaghan established major contradictions, inconsistencies, inaccuracies, and misunderstandings throughout their testimony. In addition, the testimony of Luna and Gaghan was squarely contradicted on all significant points by the credible testimony of other witnesses. Further, neither Luna nor Gaghan had engineering training or experience, personal knowledge of the precise configuration of the equipment at the Dumont studio, WJUX, or the Fort Lee translator, or detailed personal knowledge of the intricacies of the operation of the TC-8 Remote Control Systems located at those sites.

192. Luna and Gaghan claimed that the Fort Lee translator "routinely" or "usually" rebroadcast the programming received directly from WMG-499. (Bur. Ex. 14, pp. 229-30, 232, 238; Bur. Ex. 15, pp. 240, 248.) They also alleged that the Fort Lee translator received programming for rebroadcast through telephone lines. (Bur. Ex. 14, pp. 230-32, 238; Bur. Ex. 15, pp. 240-41, 244, 248.) Their assertions will not be credited inasmuch as they were grounded on erroneous assumptions. First, Luna and Gaghan relied

upon their observations of the status lights on a TC-8 unit and/or the strobe light at the Dumont studio. (Bur. Ex. 14, pp. 230-32, 239; Bur. Ex. 15, pp. 240-41, 248.) However, the record establishes that neither Luna nor Gaghan had any personal knowledge of, and largely misunderstood, the way in which the TC-8 Remote Control System, the status lights, and the strobe light were configured and actually operated. Second, the variation in audio quality to which they referred (Bur. Ex. 14, pp. 230-32; Bur. Ex. 15, p. 241) provides no definitive support for their claims. Suffice it to say, there was a plausible and rational alternative explanation for the variations. (Turro Ex. 1, p. 9; Tr. 1739-40.) Third, their belief that WJUX was completely off the air because some listeners in Sullivan County reported they could not hear the station (Bur. Ex. 14, p. 232; Bur. Ex. 15, pp. 242-43, 248-49), was incorrect. As explained by Turro (Turro Ex. 1, pp. 21, 28-29), and confirmed by Hurst (Turro Ex. 2, pp. 4-5), the Pomona translator could receive and rebroadcast a signal from WJUX with the WJUX transmitter operating at greatly reduced power. Consequently, it was possible for the Pomona translator to receive WJUX, and for the Fort Lee translator to receive and rebroadcast the Pomona translator, even though the WJUX off-air signal was too weak to have been received at some locations in Sullivan County. (Turro Ex. 1, pp. 21, 28-29.)

193. Turning to the incident in question, Luna and Gaghan contended that Turro ordered that they take certain actions in order to deceive Loginow into thinking that the WJUX transmitter could be shut down by remote control from the Dumont studio. (Bur. Ex. 14, p. 238; Bur. Ex. 15, pp. 243, 249.) The record reflects that no such deception could have occurred as they described it, even assuming, *arguendo*, that the incident occurred. Contrary to the claims of Luna and Gaghan (Bur. Ex. 14, p. 234; Bur. Ex. 15, p. 244), the actions allegedly taken at Turro's direction, i.e., turning down (or off) the WJUX audio at the Dumont studio (Bur. Ex. 14, pp. 234, 238-39; Bur. Ex. 15, pp. 244, 249), would not have made it appear that the WJUX transmitter had been shut down. Specifically, had the audio been turned down (or off), Loginow would have heard "dead carrier." (Turro Ex. 1, pp. 15, 17; Tr. 1745-47.) Loginow testified, however, that he heard "white noise," and that this was consistent with the WJUX transmitter actually being turned off. (Bur. Ex. 18, p. 332; Tr. 344.) Given his experience, it is reasonable to believe that Loginow would have seen through such a deception. Similarly, having been the chief engineer or operator of radio stations for more than 20 years, Turro would have known that Loginow could not have been fooled by these alleged actions. (Turro Ex. 1, p. 15.) Moreover, Loginow testified that he did not even inspect or test the remote control equipment for WJUX which was located in the Dumont studio. (Bur. Ex. 18, p. 333; Tr. 347-48.) Therefore, whatever it was that Luna and Gaghan may have thought they were doing, they were not participating in a deception of Loginow at Turro's direction.

194. The Testimony of La Follette. Based upon the testimony of Wilson A. La Follette, one of the CDE engineers who prepared the February 10, 1995, engineering report attached to Universal's complaint (Bur. Ex. 2, p. 51), Universal requests that findings of fact be made that the signal of WMG-499 was being directly input to the Fort Lee translator, and that the measured off-air signal of WJUX was unsuitable for rebroadcast due to low signal level and severe first adjacent channel interference. (Universal PFCs at para. 19.) The requested findings will not be made. First, La Follette's opinion concerning the use being made of WMG-499 was based on nothing more than groundless assumptions. Specifically, La Follette testified that he assumed that the Fort Lee translator must have been broadcasting the programming being delivered by WMG-499 because WMG-499 had programming on it and he "could not ascertain any other purpose for carrying that programming other than to directly feed that translator station." (Tr. 698, 706-07.) However, La Follette did not test to determine whether his assumption was

correct, and he acknowledged that the audio feed from WMG-499 could have been going into a dummy load. (Tr. 698-99.)

195. Next, no reliance may be placed on La Follette's measurements of, and opinion relating to, the off-air signal of WJUX. Such measurements were not taken from the roof of the Mediterranean Towers, the actual point of reception of WJUX by the Fort Lee translator. The record establishes that the location of any such measurements was absolutely critical. For example, Hurst testified that "good quality" reception of WJUX existed without the use of filtering devices from the area of the hot spot whereas, from any other location on the roof of the Mediterranean Towers, filtering devices would have been necessary. (Turro Ex. 2, p. 2; Tr. 1877, 1887-89.) La Follette's measurements were taken approximately 0.6 kilometers (or 0.37 miles¹¹) southeast of the Mediterranean Towers. (Bur. Ex. 6, p. 103.) It was not shown that measurements taken from that point would have been comparable to those taken on the roof of the Mediterranean Towers, particularly given the existence of the hot spot. In addition, La Follette did not take into consideration or test the adjacent channel rejection characteristics of the Sony Model XR2500 receiver used by Turro to receive the WJUX off-air signal, or the Phase Canceller utilized by Turro at the relevant time. (Tr. 660-61, 665-66.) Such tests were performed by Hidle, and the results thereof completely rebutted La Follette's conclusions. (Turro Ex. 7, pp. 6-7; Turro Ex. 36.)

196. The Testimony of Cohen. Relying on the testimony of Jules Cohen, P.E., a consulting electrical engineer retained by Universal (Bur. Ex. 5), Universal requests that findings of fact be made that the WJUX signal received off the air at the Fort Lee translator was of marginal quality; that it was not suitable for rebroadcast; that it was subject to diurnal and seasonal variability, adjacent channel interference, and fading; that no combination of sophisticated filtering and antenna discrimination could completely eliminate the first adjacent channel interference; that it was not credible that the WJUX signal at the Fort Lee translator consistently could be of sufficient strength to permit reception of a signal suitable for rebroadcast; that the probability of finding a hot spot such as that described in this case was extremely low and highly unlikely absent some special conditions not present here; and that if such a hot spot was found it would be temporary and highly variable. (Universal PFCs at paras. 20-21, 24.) The requested findings will not be made. Cohen's testimony was based almost entirely on a "theoretical study" of the strength of the WJUX signal at the Fort Lee translator. (Tr. 590.) In addition, significant assumptions upon which his study was based were shown on cross-examination to have been invalid. Further, Cohen never visited WJUX or the Fort Lee translator, and never examined any of the equipment in use at those locations. (Tr. 594, 604.) Therefore, Cohen had no personal knowledge of the phenomena about which he was testifying. On the other hand, the testimony of Turro, Hurst, and Hidle was based upon personal observations made over time, as well as actual testing and measurements. Under these circumstances, the testimony of Turro, Hurst, and Hidle has been credited over that of Cohen.

¹¹ One mile is equivalent to 1.609 kilometers. (Official notice taken.)

E. Issues 3 and 7: Misrepresentation/Lack of Candor Issues

197. Many of the facts which appear to have formed the basis for the specification of the misrepresentation/lack of candor issues have been presented above and need not be repeated at this juncture. The following are additional findings of fact.

198. Letter of Inquiry to Turro. On June 21, 1995, the Chief of the Bureau's Complaints and Investigations Branch sent a letter of inquiry to Turro ("LOI to Turro"). (Bur. Ex. 7.) Turro was asked, *inter alia*: whether he had "provided any programming" for the Fort Lee and/or Pomona translators from the Dumont studio (Question 3); whether programming "originated" at the Dumont studio had been transmitted to the Fort Lee and/or Pomona translators by WMG-499 (Question 4); whether Turro "implemented the use of telephone lines . . . to deliver programming" to the Fort Lee translator, the Pomona translator, or WJUX (Question 5); and whether Turro had entered into "a management agreement, a time brokerage agreement, or any other agreement concerning ownership, programming, staffing, sales, or operation" of WJUX (Question 6). Turro was also asked to "describe in detail any involvement" he or his employees had "in the following aspects of the construction or operation" of WJUX: "paid the cost of constructing or outfitting the studio or transmitting facilities" of WJUX (Question 7a); "guaranteed repayment of funds borrowed by [MMBI] for the purchase of equipment or construction of the Station" (Question 7b); "paid WJUX's operating expenses" (Question 7e); "paid rent for WJUX's studio(s)" (Question 7g); "paid rent for WJUX's antenna tower site or usage" (Question 7h); and "controlled what is or is not broadcast on WJUX" (Question 7j). (*Id.* at 111-12.)

199. Turro responded by letter dated July 27, 1995 (filed on July 30, 1995), and signed by Turro. (Bur. Ex. 8.) Therein, he stated that programming which he produced at the Dumont studio was provided to and broadcast by WJUX, and rebroadcast by the Pomona and Fort Lee translators. (*Id.* at 114.) Specifically, Turro explained that the programming "consisted of music, news, weather, sports, public affairs programming, commercials, public service announcements, etc.," and that it was delivered "twenty-four hours per day, seven days per week," by means of telephone line to WJUX (*id.* at 116); that it was broadcast by WJUX "pursuant to a network affiliation agreement" (a copy of which was attached to the response) (*id.* at 114, 137-41); that the Network Affiliation Agreement met the requirements set forth in the Bureau Letter (*id.* at 118); that the WJUX broadcasts were currently received off the air by an antenna located at the Pomona translator facility (*id.* at 114); that the Pomona translator rebroadcast that programming (*id.*); that the Pomona translator rebroadcasts were, in turn, received off the air by an antenna located at the Fort Lee translator facility (*id.*); and that the Fort Lee translator rebroadcast that programming (*id.*). He also stated that none of the programming created at the Dumont studio was delivered by telephone line to either the Fort Lee or Pomona translator. (*Id.* at 116.) Turro further stated that prior to approximately January 10, 1995, the WJUX signal was received directly off the air at the Fort Lee translator rather than through the Pomona translator. (*Id.* at 115 n.1.)

200. In addition, Turro stated that he was aware of the complaint lodged against him by Universal, and he disputed the allegation of Universal's engineers that the signal of WJUX as received at a location near the Fort Lee translator was inadequate to provide the high quality signal which he rebroadcast. In this connection, Turro stated that "an acceptable signal generally [sic] can be received off-air at the Ft. Lee translator site. However, since a better signal can generally be received off-air at the

Pomona translator, that is where the WJUX(FM) signal is received for rebroadcast.” Turro attached the engineering statement of Hurst in support of his assertions. (Bur. Ex. 8, pp. 115, 126-31.)

201. Turro stated that WMG-499 “was used to provide telemetry to [the Fort Lee translator] until recently,” and that he took WMG-499 off the air pursuant to a letter from the Commission. (Bur. Ex. 8, pp. 114-15.) Turro admitted that WJUX programming had been transmitted by WMG-499, and explained that he “was using the WJUX(FM) signal to modulate the WMG-499 carrier[] only [and that he] was not retransmitting the WMG-499 signal.” (*Id.* at 115, 116.) He further stated that:

The WMG-499 signal was not being used as a source of WJUX(FM) programming. It was used to insert 30-second messages pursuant to Section 74.1231(g) of the Rules and for remote control purposes to switch from the Ft. Lee main transmit antenna to its authorized auxiliary antenna. It was also available to relay emergency warnings to the translator for broadcast to the . . . residents of Bergen County who currently have no local FM service. Removing WMG-499 from service had no impact on the ability of the translators [to] continue to rebroadcast the signal of WJUX(FM), picked up off-air, as before.

(*Id.* at 115-16.) Turro stated that the 30-second messages and emergency announcements were prepared for broadcast at the Dumont studio. (*Id.* at 116.)

202. Turro also attached to his response, and quoted from, a June 13, 1995, letter to the Commission from William J. Getz, one of his consulting engineers. In Getz's letter, which was written when WMG-499 was still on the air, it was noted that WMG-499 was “in use 24 hours per day . . . [but] only the 30-second messages and any emergency transmissions are broadcast over” the Fort Lee translator. (Bur. Ex. 8, pp. 115, 123.) Getz explained that WMG-499 functioned in this manner because the microwave equipment was not manufactured to operate on an intermittent basis, switching the equipment on and off would lead to equipment failure, and “the link must be operational 24 hours a day” in an effort to make the 951 MHz transmission “readily identifiable.” (*Id.*) Getz further stated that WMG-499 was also used for remote control purposes, and that this was “critical” to the operation of the Fort Lee translator “because of frequent operational problems with the main transmit facility.” (*Id.* at 123 n.1.)

203. Turro denied having any present or future ownership interest in MMBI (Bur. Ex. 8, p. 116), denied paying for the cost of constructing or outfitting the studio or transmitting facilities of WJUX, denied guaranteeing repayment of funds borrowed by MMBI for the purchase of equipment or construction of the station, denied paying WJUX's operating expenses “with the exception of its telephone bills,” denied paying rent for WJUX's studios, antenna tower site “or usage,” and denied controlling what was or was not broadcast on WJUX (*id.* at 117). Turro stated, however, that he did assist Weis, without charge, in installing some of his equipment at WJUX, including the transmitter; that he provided \$40,000 to Weis as an “inducement” to enter into the Network Affiliation Agreement; and that he acted, without charge, as the Chief Operator for WJUX until May 1, 1995. (*Id.*) Turro attached to his response a copy of the Guaranty of Payment. (*Id.* at 139.) Turro did not recall the circumstances under which WJUX's telephone bills came to him, but stated that “[s]teps are now being made to have the telephone bills sent to [MMBI] for payment.” In connection with WJUX's programming, Turro stated that MMBI “has complete discretion in the exercise of its licensee responsibilities, including the right in its sole discretion to delete

or preempt network programming and to broadcast other programming which it deems appropriate.” (*Id.* at 117.)

204. Letter of Inquiry to MMBI. On June 21, 1995, the Chief of the Bureau's Complaints and Investigations Branch sent a letter of inquiry to MMBI (“LOI to MMBI”). MMBI was asked, *inter alia*: whether there had been “a change in ownership or control” of WJUX since MMBI became the “licensee” of the station (Question 1); whether Turro had “ever been the licensee” of WJUX “or otherwise held an ownership interest” in MMBI (Question 2); who provided “any funds used to purchase equipment for and/or construct” WJUX (Question 3); whether anyone “not previously . . . reported to the Commission as having an ownership interest” in MMBI loaned funds to MMBI, or guaranteed the repayment of funds used by MMBI, to purchase equipment or construct WJUX (Question 4); who controlled, had access to, prepared, and kept WJUX's financial records (Questions 5a and b); who paid WJUX's operating expenses (Question 5c); who “interviewed, hired, or fired” WJUX personnel (Question 5g); whether WJUX had a main studio, the address(es) thereof, when it “was established in each location,” and whether it had ever been relocated (Questions 7a, b, d, and 8); what functions were performed at the main studio (Question 9a); whether the main studio had “program origination capability (including any linkage from the studio to the transmitter)” (Question 9b); the identity and responsibilities of “personnel assigned to the main studio” (Question 9c); which of those personnel were “present at the main studio during regular business hours” (Question 9d); whether, and during what dates and hours, the main studio had “been open to the public” (Question 10); whether WJUX maintained an “auxiliary studio” (Question 12); whether the station maintained a local or toll-free telephone number for the residents of Monticello (Question 14); whether MMBI had “entered into a management agreement, a time brokerage agreement, or any other agreement concerning ownership, staffing, programming, sales, or operation” of WJUX (Question 15); the “nature” of WJUX's programming (Question 16a); and the identification of the individual(s) who “established and changed” WJUX's programming policies (Question 16b). (Bur. Ex. 10.)

205. MMBI responded by letter dated July 27, 1995 (filed on July 28, 1995), and signed by Weis. (Bur. Ex. 11.) Therein, Weis stated that he had been the sole stockholder of MMBI since the CP for WJUX was acquired, that Turro had never been the licensee or permittee of WJUX, or otherwise held an ownership interest in that station, and that Turro had no right to acquire such interest. Weis stated that he provided all of the funds used to purchase equipment and to construct WJUX, and that he already had on hand much of the necessary equipment. Weis stated that the only money he borrowed to purchase equipment and to construct the station was \$15,000, that he borrowed this money from his mother, and that no one guaranteed the repayment of those funds. Weis stated that Turro paid him \$40,000 as an “inducement” to enter into the Network Affiliation Agreement, that this was not a loan, that he (Weis) did not have to repay those funds, and that he “applied” those funds toward his obligations to Fishman. (*Id.* at 161-62.)

206. Weis stated that, apart from his accountant, he was the sole individual who controlled, had access to, prepared, and kept the financial records of WJUX. Weis noted, however, that Blabey and Montana had “access to certain financial materials [i.e., bills from various vendors] which they receive at the station and forward” to him. Weis stated that he paid WJUX's operating expenses with the exception of telephone bills which were sent to and paid by Turro. Weis added: “This was due to an oversight, which is now being corrected.” Weis stated that he interviewed, hired, and fired station

personnel, and that Blabey had "from time to time interviewed potential employees and made recommendations" to him as to their hiring. (Bur. Ex. 11, p. 162.)

207. Weis stated that, "at all times since WJUX(FM) went on the air," the station had a main studio located within the station's principal community contour. He stated that it was open to the public during normal business hours. He gave its address, noted that it was located at the WVOS main studio, and stated that it had never been relocated. Weis stated that the WJUX public inspection file was maintained at the main studio, that mail was received there and forwarded to him, that the program "Sullivan County People Who Make a Difference" was recorded there, and that a remote control point for the WJUX transmitter was located there. Weis stated that Blabey and Montana had their offices at the main studio and were present there during normal business hours. He described their duties, responsibilities, and "other employment." Weis stated that the WJUX main studio had program origination capability, and referred to an attached engineering statement of Hurst which contained a description of the facilities. Weis noted that "[l]inkage between the main studio and transmitter is via phone line, [and stated that t]he transmitter can be activated and deactivated from the remote control point at the main studio." Weis stated that WJUX had no auxiliary studio. (Bur. Ex. 11, pp. 163-64.)

208. Weis stated that he entered into a Network Affiliation Agreement with BCCBF which was subsequently amended. Copies of the Agreement and Amendment were attached to the response. Weis described the "jukebox radio" format and stated that he was "solely responsible for WJUX(FM)'s programming policies, and for the decision to enter into the Network Affiliation Agreement pursuant to which programming is delivered to WJUX(FM)." (Bur. Ex. 11, pp. 165, 216-20.)

209. Weis stated that: "The WJUX(FM) main studio telephone number is (914) 292[-]0751, which is a toll free number for residents of Monticello. The telephone number was established on or about November 2, 1994." (Bur. Ex. 11, p. 165.) He also stated that "[t]he WJUX(FM) telephone is answered" at the main studio. (*Id.* at 163.) Attached to the response were copies of the WJUX telephone bills for the period from November 2, 1994, through June 12, 1995. (*Id.* at 189-213.)

210. In his direct written case, Weis admitted that the above response contained information about WJUX's local telephone service which might have created an "erroneous" understanding. Specifically, Weis stated that, although the local telephone number he provided was in fact the number listed by NYNEX, and the statement that it was a toll free number for local residents was accurate, he failed to disclose that calls to that number had been uniformly forwarded to the Dumont studio. (MMBI Ex. 1, pp. 8-9.)

211. Weis explained that he did not recall that he knew of the call-forwarding arrangement at the time he answered the LOI to MMBI. (MMBI Ex. 1, p. 9.) Weis stated that he never tried to call the WJUX telephone number, so his calls were never forwarded to Dumont. (Tr. 1441.) In addition, all of the telephone bills had been sent by NYNEX to Jukebox Radio, and Weis did not recall how much detailed review he gave those bills before sending copies to the Commission. Weis did not believe, at the time of his response, that his answer was inaccurate. (MMBI Ex. 1, p. 9.)

212. In preparing responses to the Bureau's prehearing discovery requests, Weis concluded that the response in question was inaccurate. He stated that he set out to provide more accurate information.

(MMBI Ex. 1, pp. 9-10.) On June 20, 1997, MMBI filed its response to the Mass Media Bureau's First Request for Admissions of Fact and Genuineness of Documents. (Bur. Ex. 24, p. 551.) Bureau requests 28 and 64, and MMBI's responses thereto, were as follows:

[Request] 28. [Admit that w]hen WXTM(FM) began broadcast operations, the station maintained a toll-free telephone line at the main studio for residents of Monticello.

[Response] 28. Beginning November 2, 1994, WXTM maintained a toll-free telephone number for residents of Monticello. However, MMBI now believes that number was not answered, or answered exclusively, at the WXTM main studio.

* * *

[Request] 64. [Admit that a]fter the FCC inspection, a dedicated phone line for WJUX(FM) was installed at the station's main studio in Liberty [sic], N.Y.

[Response] 64. Deny. Subsequent to the FCC inspection a call forwarding feature was deleted from the WJUX phone line.

(Bur. Ex. 23, pp. 470, 474 and Bur. Ex. 24, pp. 555, 557, underlining added.)

213. On June 30, 1997, in a declaration signed by Weis, MMBI amended its responses to Bureau requests 28 and 64 as follows:

First, the response to Bureau Request No. 28 stated that MMBI now believes that number [a toll-free telephone number] was not answered, or answered exclusively, at the WXTM [now WJUX] main studio. I have now concluded that it is very likely that the telephone number was not, until July, 1995, answered there, and therefore I delete the phrase "or answered exclusively" from MMBI's response to Bureau Request No. 28.

Second, the response to Bureau Request No. 64 needs to be expanded. The expanded response is as follows:

Deny. Subsequent to the FCC inspection, it appears that a phone jack for this number was relocated within the building housing the WJUX main studio, a telephone (either a replacement for an existing instrument or a first telephone instrument for the number) was acquired and the practice of forwarding calls placed to the number was ended.

(Bur. Ex. 25, p. 562, brackets in original.)

III. CONCLUSIONS OF LAW

214. This proceeding was designated for hearing to determine whether Gerard A. Turro's operation of FM translator stations in Fort Lee, New Jersey, and Pomona, New York, violated Sections 74.1231(b) and 74.531(c) of the Commission's Rules relating to FM translator and auxiliary stations (Issue 1); to determine whether there was an unauthorized transfer, abdication, or assumption of control of radio station WJUX(FM), Monticello, New York (Issues 2 and 6); to determine whether Monticello Mountaintop Broadcasting, Inc., the permittee of WJUX, violated the Commission's main studio rule (Issue 5); to determine whether Turro and/or MMBI made misrepresentations to, or lacked candor with, the Commission (Issues 3 and 7); and, ultimately, to determine whether the public interest will be served by a grant of Turro's applications for renewal of the licenses of his translator stations (Issue 4), and whether MMBI possesses the requisite qualifications to be or remain a Commission permittee (Issue 8). The findings of fact establish, and it is concluded, that Turro's operation of the Fort Lee and Pomona translators was in full compliance with Section 74.1231(b) of the Rules; that Turro's operation of WMG-499, beginning in late October 1994, was in violation of Section 74.531(c) of the Rules; that there was no unauthorized transfer, abdication, or assumption of control of WJUX; that MMBI violated one aspect of the main studio rule for a short period of time; that in all other respects MMBI was in full compliance with the main studio rule; and that neither Turro nor MMBI intentionally misrepresented facts to, or lacked candor with, the Commission. Accordingly, it is ultimately concluded that the public interest will be served by a grant of Turro's renewal applications, and that MMBI has the requisite qualifications to be and remain a Commission permittee.

A. Issues 2 and 6: Unauthorized Transfer of Control Issues

215. Issue 2 was designated to determine whether Turro engaged in an unauthorized transfer of control or otherwise exercised control over WJUX in violation of Section 310(d) of the Act and Section 73.3540(a) of the Commission's Rules. Issue 6 was designated to determine whether MMBI engaged in an unauthorized transfer of control or otherwise abdicated control over WJUX in violation of the same provisions of the Act and the rules. These issues were specified because the Commission "ha[d] information suggesting that MMBI . . . abdicated control of its station to Turro." (*HDO* at para. 16.) Specifically, the Commission stated that it appeared that Turro exercised *de facto* control of WJUX because he directed WJUX programming and advertising time, controlled its technical facilities, and provided the funds used to operate the station. The Commission also stated that it appeared that MMBI was unable to control its programming and equipment. (*Id.*) For the reasons which follow, Issues 2 and 6 are resolved in favor of Turro and MMBI.

216. Section 310(d) of the Act prohibits the transfer of control of a station permit or license, or any rights thereunder, without prior Commission consent. While there is no exact formula by which control of a broadcast station can be determined, in ascertaining whether or not an unauthorized transfer of control has occurred, the Commission has traditionally looked beyond the legal title to whether a "new" entity or individual has obtained the right to determine the basic operating policies 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). The Commission's inquiry into the locus of control of a station's operation focuses on three factors: finances, programming, and personnel. *Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981), *recon. denied*, 50 R.R. 2d 1346 (1982).

217. The Commission has consistently held that a licensee's participation in a time brokerage, network affiliation, or local marketing agreement ("LMA") does not, in and of itself, constitute an unauthorized transfer of control or a violation of the Act or of any Commission rule or policy. *See, e.g., Siete Grande Television, Inc.*, 11 FCC Rcd 21154, 21156 (MMB 1996) ("Broadcast Agreement"); *WGPR, Inc.*, 10 FCC Rcd 8140, 8141 (1995) (LMA); *Roy R. Russo, Esquire*, 5 FCC Rcd 7586 (MMB 1990) (reciprocal time brokerage agreements); *Joseph A. Belisle, Esquire*, 5 FCC Rcd 7585 (MMB 1990) ("network affiliation agreement"). However, as with any allegation of unauthorized transfer of control, without regard to whether a time brokerage agreement, network affiliation agreement, or LMA existed, the Commission has looked to whether a licensee continued to have ultimate control over the station, including its financing, programming, and personnel. *See, e.g., Siete Grande*, 11 FCC Rcd at 21156. In this connection, licensees are permitted under Section 310(d) of the Act to delegate day-to-day operations relating to those three areas, so long as they have the right to revoke such delegation and to exercise full responsibility over the operations of the station. *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715-16 (1981); *The Alabama Educational Television Commission*, 33 FCC 2d 495, 508 (1972). In making a determination, the Commission has also examined not only who executed the finance, programming, and personnel responsibilities, but who established the policies governing those areas. *WGPR*, 10 FCC Rcd at 8142. Each of these matters will be considered below.

218. Finances. The findings of fact establish, and it is concluded, that Weis, not Turro or any entity owned by Turro, was in sole control of the finances of MMBI and WJUX. Thus, Weis negotiated with Fishman for the sale of the CP for what later became WJUX, and Weis negotiated the terms of the payments to Fishman. Weis, on behalf of MMBI, was the sole obligated party on the Secured Note given to Fishman for the purchase of the CP. Although Turro was present at some of the meetings between Weis and Fishman, there was no evidence that Turro was involved in any substantive way in the negotiations relating to the sale of the CP or the terms of payment, and Turro was not financially obligated to Fishman in any manner whatsoever.

219. Weis, on behalf of MMBI, reached an agreement with Turro and entered into the Network Affiliation Agreement. Weis determined the amount of the monthly payments the Network was to make to MMBI on the basis of a business plan he had prepared. The monthly payments were designed by Weis to cover capital costs and operating expenses and produce a profit. In addition, at Weis's behest, Turro signed a Guaranty of Payment wherein he personally guaranteed Network payments to MMBI up to a limit of \$400,000. The Network also paid MMBI \$40,000 as an inducement for entering into the Network Affiliation Agreement. This, too, was done at the insistence of Weis.

220. Weis, on behalf of MMBI, negotiated with Blabey and entered into an assumption of Fishman's tower lease with MBC and a lease of studio and office space for WJUX. Weis personally guaranteed the tower lease as well as the lease for studio and office space. Weis, on behalf of MMBI, negotiated with Blabey and entered into a consulting agreement whereby Blabey would be the General Manager of WJUX in return for compensation from MMBI. Similarly, Weis entered into an agreement with Montana whereby she would be the Public Affairs Director of the station in return for compensation from MMBI. Weis also negotiated with Blabey and reached an agreement with respect to compensation for sales by Blabey of advertising time on WJUX. Turro was not financially or contractually obligated to Blabey, MBC, or Montana in any manner whatsoever for these leases and agreements. Nor did Turro guarantee any lease payments or the payment of compensation to MMBI personnel.

221. Weis provided all of the equipment (except for Jukebox Radio Network equipment) which was used to build WJUX, and a crew from one of Weis's companies, under Weis's direction, constructed the station's facilities. Weis also paid all of the costs of such construction (except for the Network equipment). While Turro installed the Network audio equipment, performed tests, and may have assisted Weis's crew in some manner, he was not paid by Weis or MMBI for his services. Moreover, even assuming that Turro had been paid, that fact would not manifest a transfer of control of the finances of MMBI to Turro. *Choctaw Broadcasting Corporation*, 12 FCC Rcd 8534, 8540 (1997) (where an employee of the new entity, who was also the Chief Operator of the licensee, was involved in and paid by the licensee for his services in connection with the construction of the station, no transfer of financial control was found). In addition, the provision and installation of Network equipment by Turro, and his testing of MMBI's equipment, was not indicative of an assumption of financial control by Turro. *Id.* at 8542 (where the new entity purchased all of the station's equipment and constructed the station, but did not make financial policy or conduct financial operations, no transfer of control occurred); *cf. WGPR*, 10 FCC Rcd at 8144-45 (equipment and improvements expenditures by the time broker were not indicative of an assumption of financial control).

222. Weis alone was responsible for the financial obligations of MMBI and WJUX. Consequently, Weis, on behalf of MMBI, made all of the payments to Fishman under the Secured Note; made all of the payments to MBC for the tower lease and the studio and office lease; paid the compensation of all MMBI personnel; paid all of the bills for services, products, and utilities, with the exception of telephone bills from October 1994 to mid-1995 which were sent to Jukebox Radio by NYNEX; paid all of the subsequent telephone bills; paid all of the legal expenses relating to the acquisition of WJUX, the response to the LOI to MMBI, and the instant hearing proceeding; and raised Montana's salary on the recommendation of Blabey. Weis, on behalf of MMBI, wrote the checks relating to the construction of the station, the payment of MMBI personnel, and the payment of the operating expenses of WJUX. Neither Blabey nor Montana was authorized to sign MMBI checks, and Montana only had the authority over petty cash in amounts up to about \$50. Both Blabey and Montana referred financial matters to Weis. None of these payments was made by Turro, except for the telephone bills for the period noted above, and there was no evidence that Turro had check-writing authority on any MMBI account. With respect to Jukebox Radio's payment of MMBI's telephone bills, the record reflects that this was caused by an oversight or mix-up which was corrected when it was discovered, and does not constitute grounds for finding an unauthorized transfer of financial control to Turro. *Cf. Siete Grande*, 11 FCC Rcd at 21160 (where there was "some confusion" regarding the payment of the licensee's telephone bills and the licensee reimbursed the time broker for calls on its line, no transfer of financial control was found).

223. The Bureau and Universal contend that since Turro provided MMBI with all of its operating funds through Jukebox Radio's monthly payments, and since MMBI was "totally dependent" on these payments to operate WJUX, Turro controlled the finances of MMBI and WJUX. This argument is without merit. The Commission (as well as the Bureau itself) has repeatedly held that such financial terms are "characteristic of time brokerage arrangements" and do not raise questions as to whether an undue amount of control had been exercised by the time broker or abdicated by the licensee. *Russo*, 5 FCC Rcd at 7587; *Choctaw*, 12 FCC Rcd at 8541; *WGPR*, 10 FCC Rcd at 8145. This was true even where the time brokerage payments constituted "the sole source of funding" of the licensee's broadcast operations for the term of the brokerage arrangement, and where the contractual payments were "calculated to incorporate

the station's fixed and operating costs plus a built-in profit." *WGPR*, 10 FCC Rcd at 8145; *Choctaw*, 12 FCC Rcd at 8541.

224. Moreover, as demonstrated above, Weis had the sole responsibility for MMBI's finances and MMBI maintained its own bank accounts. If Jukebox Radio failed to make a monthly payment, MMBI and Weis would remain obligated to pay the station's bills, and creditors would have no right to obtain such payments from Turro. Although MMBI could sue Turro in an effort to recover the monthly payments, MMBI would still have to continue to pay WJUX's operating expenses. Similarly, if MMBI expended more each month in operating WJUX than it received under the Network Affiliation Agreement, Weis, not Turro, would be responsible for making up the deficit.

225. The Bureau also claims that the Network's payment of \$40,000 to MMBI as an inducement for Weis to enter into the Network Affiliation Agreement and Turro's personal guarantee of Network payments up to a limit of \$400,000, provide further evidence of MMBI's financial reliance on Turro and show that Turro was in financial control of WJUX. This assertion must be rejected. Rather than showing control by Turro, these facts further demonstrate that Weis controlled MMBI's finances. The record establishes that the ideas for an inducement payment and a personal guarantee came from Weis and were designed to protect MMBI's interests, not Turro's. Indeed, had Turro been in control of the situation, as alleged, it is unlikely that he would have elected to pay MMBI an additional \$40,000 over and above the monthly payments, or agreed to a \$400,000 personal guarantee which could have put his personal assets in jeopardy. In a similar vein, Weis requested, and Turro agreed to, an increase in the monthly payments of about \$100 per month in order to cover additional capital expenditures by MMBI. Once again, Turro would hardly have chosen to pay this increased amount had he been in control of the finances of the station. Moreover, the Commission has held that no transfer of control of a station's finances occurred where a time broker expended millions of dollars for improvements to the station's facilities. *WGPR*, 10 FCC Rcd at 8145-46. To paraphrase the Commission's rationale in that case, such expenditures, rather than evidencing an intent to control the financial aspects of the station, demonstrated the licensee's ability "to exercise its authority . . . and to protect its interests." *Id.* at 8146. The same may be said of the Network's \$40,000 payment and Turro's personal guarantee.

226. The Bureau relies on *Salem Broadcasting, Inc.*, 6 FCC Rcd 4172 (MMB 1991), to support its conclusion that financial control was transferred to Turro. The instant case, however, is easily distinguishable from *Salem*. In *Salem*, the licensee was indebted to the time broker, leased station equipment from the time broker, and used the time broker's transmitter rather than its own. In addition, the time broker negotiated a tower lease and had an option to purchase the station. 6 FCC Rcd at 4172-73. Here, MMBI was not indebted to Turro, did not lease equipment from Turro, and used its own transmitter and auxiliary transmitter for WJUX. Further, Weis, on behalf of MMBI, negotiated the tower lease, and Turro did not have an option to buy WJUX.

227. Programming. The findings of fact establish, and it is concluded, that Weis, not Turro or any entity owned by Turro, was in ultimate supervisory control of the programming of WJUX. The Network Affiliation Agreement provided that Jukebox Radio would supply programming to MMBI on a 24-hour per day, 7-day per week, 365-day per year basis. The Network was also obligated to provide all local station identifications, public affairs programming, and Emergency Broadcast System tests. An Amendment to Network Affiliation Agreement specified that MMBI retained the responsibility to ascertain

the needs of its community and service area, that MMBI had the right to broadcast programming other than Network programming, that MMBI had the right to delete or preempt Network programming in order to broadcast MMBI programming responsive to the issues of concern to its community of license, and that MMBI maintained the right to delete or preempt any Network programming it believed to be unsatisfactory or unsuitable or contrary to the public interest, or to substitute programming which, in its opinion, was of greater local or national importance. The Amendment further provided that MMBI's acceptance and broadcast of Network programming was subject to MMBI's responsibility to comply with all FCC regulations including, among others, compliance with political programming and sponsorship identification rules, maintenance of the station's public and political files, and the compilation of quarterly issues/programs lists. Inasmuch as these provisions gave MMBI the right to substitute for, and to delete or preempt Network programming, they complied in all significant respects with the Commission's time brokerage and LMA programming policies. In this regard, the Commission (as well as the Bureau itself) has repeatedly approved agreements containing substantially similar language, and has held that licensees operating their stations in accordance with such agreements have retained ultimate programming control. *WGPR*, 10 FCC Rcd at 8142-43; *Choctaw*, 12 FCC Rcd at 8539; *Gisela Huberman, Esquire*, 6 FCC Rcd 5397 (MMB 1991); *Russo*, 5 FCC Rcd at 7586-87; *Belisle*, 5 FCC Rcd at 7585.

228. In addition, contrary to the arguments of both the Bureau and Universal, the record demonstrates that Weis actually exercised his ultimate authority over the programming of WJUX. At the time Weis acquired the CP and agreed to enter into the Network Affiliation Agreement, he was familiar with the programming and format of Jukebox Radio Network and he believed that such programming would appeal to a large segment of the Sullivan County population. At the commencement of WJUX operations, Weis directed that the station carry public affairs programming and PSAs serving Monticello and Sullivan County. To accomplish this, Weis had discussions with Blabey which resulted in the public affairs programs produced by Blabey and broadcast on WVOS, being rebroadcast over WJUX on different days and at different times than they were broadcast over WVOS. Weis explained that, in this manner, these programs would be heard by a separate listening audience in Sullivan County than originally heard them.

229. Weis also had discussions with Blabey which resulted in the broadcast over WJUX of PSAs which Weis believed were of interest to Monticello and Sullivan County. Montana was in charge of gathering material for the PSAs, compiling a bulletin board of prospective PSAs, and forwarding it to Jukebox Radio for broadcast over WJUX. Although Jukebox Radio made the determination as to which PSAs to produce and broadcast, Montana designated on the bulletin board, or called the Network regarding, PSAs that she considered particularly important which she believed should be aired. The Network followed her suggestions on almost every occasion.

230. According to Turro, Jukebox Radio Network had complete discretion to reject public affairs programming or PSAs forwarded for broadcast by Blabey and Montana. However, Turro recognized that if the Network was to exercise this discretion, MMBI would have the right to delete Network programming and put the PSAs and public affairs programming on the air directly from WJUX.

231. Blabey made decisions on putting emergency announcements regarding Sullivan County on WJUX. For example, during a snow storm in Sullivan County, Blabey received a call from the Sullivan County Manager concerning road closings. Blabey called Jukebox Radio, told them he had an emergency

message to be broadcast over WJUX, prepared the message, and faxed it to the Dumont studio to be originated. In addition, in September 1995, Weis made the decision that WJUX would not accept further political advertisements. Weis communicated this decision to Blabey, who issued a statement to that effect. Weis subsequently changed this policy.

232. As noted above, the Network Affiliation Agreement required Jukebox Radio Network to provide MMBI with all of its public affairs programming. Weis's decision to procure and broadcast non-Network public affairs programming establishes that he did, in fact, substitute other programming in place of Network programming, as he was permitted to do under the Amendment to Network Affiliation Agreement. In addition, the record shows that MMBI broadcast its own programming (from the WJUX main studio) in the early summer of 1995 when the Network's program feed went out, and that MMBI preempted Network programming during the 1997 elections in order to broadcast political commercials. Under these circumstances, no transfer of ultimate programming control can be found. *Cf. Choctaw*, 12 FCC Rcd at 8539 (where licensee "prepar[ed]" programming material responsive to the needs of its community of license, no transfer of control over programming occurred).

233. Although the Bureau and Universal attempt to make much of the fact that WJUX's public service programs had also been broadcast on WVOS, they have failed to demonstrate how the rebroadcast of these programs on WJUX reduced the public interest value of such programming. Indeed, there was no evidence that WJUX's public affairs programming did not serve the needs and interests of Monticello and Sullivan County. Moreover, because the record reflects that stations WJUX and WVOS targeted different audiences in Sullivan County, the fact that certain public affairs programs were rebroadcast on WJUX served to ensure that a separate listening audience in that county had an opportunity to hear such programming.

234. The Bureau notes that Turro and Jukebox Radio sold virtually all of the commercial advertisements that were broadcast over WJUX, and argues that Turro controlled this aspect of the station's programming. While the facts relied on are correct, they do not give rise to a conclusion that programming control was transferred. Once again, the Commission (as well as the Bureau itself) has consistently observed that the sale of commercial time by a time broker is one of the typical characteristics of all time brokerage arrangements and that it is permissible so long as ultimate programming control resides, as it does in this case, in the licensee. *WGPR*, 10 FCC Rcd at 8140, 8145; *Russo*, 5 FCC Rcd at 7587; *Peter D. O'Connell, Esquire*, 6 FCC Rcd 1869 (MMB 1991) (agreement approved where the licensee "would sell all of its commercial advertising time to [the time broker] which would, in turn, resell and provide all advertising programming" on the station).

235. The Bureau and Universal rely on *Salem* to support their conclusions that control over programming was transferred to Turro. However, as discussed above, that case is distinguishable. In *Salem*, the licensee had not exercised its right to preempt the broker's programming, and a "Lease and Option Agreement" did not indicate that the licensee would originate programming or be responsive to the needs of its community of license. 6 FCC Rcd at 4173. Here, in contrast, Weis directed that WJUX carry public affairs programming and PSAs which would serve its community of license, Weis took steps to procure some of this public affairs programming, MMBI's employee gathered the material for the PSAs, and the public affairs programming and PSAs were, in fact, broadcast over WJUX. In addition, Turro

acknowledged the ultimate right of MMBI to delete Network programming to broadcast PSAs and public affairs programming, and MMBI did, indeed, substitute its own programming for that of the Network.

236. Personnel. The findings establish, and it is concluded, that Weis, not Turro or any entity owned by Turro, exercised supervisory control over MMBI's and WJUX's personnel. Thus, Weis was solely responsible for hiring Blabey and, at Blabey's recommendation, Montana and Spicka. Weis was also directly responsible for hiring Kirschner, who replaced Turro as WJUX's Chief Operator. With Weis's approval, Blabey hired Silverstein to sell time locally for WJUX. There was no evidence indicating that Turro played any role in Weis's decisions to hire Blabey, Montana, Spicka, or Kirschner, or in Weis's decision to approve the hiring of Silverstein. Similarly, there was no evidence that an employer-employee relationship existed between Turro and any of these individuals, that Turro held termination authority over any of them, or that Turro was contractually or otherwise responsible for their compensation.¹²

237. Weis had several meetings with Blabey before he was hired to become General Manager. Montana learned of the employment opportunity at WJUX from Blabey. Blabey introduced Montana to Weis before WJUX went on the air and she discussed a position at the station with Weis at that time. When Blabey and Montana were hired, they each entered into letter agreements with Weis, on behalf of MMBI, concerning their positions and compensation. Montana considered herself to be an employee of WJUX. Blabey was retained by MMBI as an "independent consultant," not as an employee, for tax reasons. There was no evidence that Turro discussed with Blabey, Montana, or anyone else, potential employment with MMBI or WJUX, or that any type of employment agreement relating to MMBI or WJUX existed between Turro and Blabey, Montana, or anyone else.

238. Blabey supervised Montana's work at WJUX and she consulted with him on WJUX matters. However, Montana ultimately reported to Weis, and met with him on an as-needed basis. Montana understood that Weis was Blabey's immediate supervisor and could give him directions. There was no evidence that Turro had the authority to supervise or direct the activities of Blabey, Montana, or any other MMBI employee, or that Turro did, in fact, supervise or direct any of their activities.

239. Although Turro held the (unpaid) position of Chief Operator of WJUX from October 1994 until mid-1995, that fact would not establish any transfer to Turro of any ultimate decision-making functions. Indeed, the Commission (as well as the Bureau itself) has recognized the necessity for a time broker's staff to become involved with the licensee's facilities, and the sharing of staff between a licensee and a time broker has been permitted. *WGPR*, 10 FCC Rcd at 8143; *Michael R. Birdsill*, 7 FCC Rcd 7891 (MMB 1992).

240. Given all of the above, it is clear that MMBI has retained complete responsibility for, and control over, all aspects of WJUX's personnel operations, that MMBI's personnel activities were consistent with the Commission's rules and policies, and that a transfer of control of those functions did not occur. *WGPR*, 10 FCC Rcd at 8143.

¹² The record establishes that WJUX had another employee, Charles Martin, but does not reflect the circumstances surrounding his hiring. It was clear, however, that Blabey supervised Martin's activities in connection with WJUX.

B. Issue 5: Main Studio Issue

241. This issue was designated to determine whether MMBI violated Sections 73.1120 and 73.1125(a) and (c) of the Commission's Rules with respect to the maintenance of a main studio for WJUX in Monticello, New York. The Commission specified this issue on the basis of those portions of Loginow's May 23, 1995, Radio Station Inspection Report which alleged that WJUX's presence at the WVOS main studio was limited to its lease of a former production room for its studio, that studio had no apparent program production and transmission capabilities, there was no apparent remote control equipment installed at the station to control the transmitter or to read its operating parameters, and it appeared that the WJUX transmitter was being controlled full-time, through telephone lines, by personnel at the Dumont studio. (*HDO* at para 15.) In addition, the Commission queried whether MMBI maintained a local toll-free telephone number for residents within its community of license. (*Id.*) The Commission also stated that "there was no indication to [Loginow]" that Blabey and Montana were operating under the direction of Weis "for matters attendant to the operation of WJUX." (*Id.*) Further, the Commission questioned whether the employment of Blabey and Montana "represent[ed] that type of 'meaningful management presence' contemplated by [the] main studio rule." (*Id.* at note 15, citations omitted.) For the reasons which follow, it is concluded that MMBI was in violation of Section 73.1125(c) of the Rules for a 12-day period. In all other respects MMBI was in full compliance with the applicable Commission rules.

242. Section 73.1120. This section of the rules states that each FM broadcast station will be licensed to the principal community "which it primarily serves." The Bureau and Universal maintain that MMBI has violated this rule because WJUX "primarily serves" Bergen County, New Jersey, rather than Monticello, New York, its community of license. Universal also suggests that the disparity between Jukebox Radio's commercial advertising rates and the local advertising rates of WJUX shows that the station is primarily serving the needs and interests of Bergen County and is being marketed in that county.

243. These arguments must be rejected. Put simply, neither the Bureau nor Universal offered evidence of any community need or interest in Monticello that was not addressed by WJUX's overall programming, including its public affairs programs and PSAs. *See Deregulation of Radio*, 84 FCC 2d 968, 982-83 (1981) (issue-responsive programming may consist of, but is not limited to, public affairs, PSAs, and community bulletin boards; the amount of such programming to be offered is within the licensee's sole discretion). In addition, neither the Commission nor WJUX received any complaints from listeners within the WJUX service area that the station's overall programming was not serving the needs and interests of its community of license. In this regard, Montana received only two complaints about WJUX, one concerning a listener's inability to receive the station on his cable system, and one complaining about the station not playing enough Perry Como music.

244. Further, there is no precedent for examining a station's local advertising rates or marketing strategy in connection with its service of the needs and interests of its community of license. Indeed, the Commission's station identification rule would have permitted WJUX to "include in its official station identification" the names of communities in Bergen County, New Jersey, so long as Monticello, New York, the station's community of license, was "named first." *See* Section 73.1201(b)(2) of the Rules. Consequently, there is no basis for concluding that MMBI has violated the provisions of Section 73.1120 of the Rules. *See Broadcast Communications, Inc.*, 97 FCC 2d 61, 63 (1984) ("renewal expectancy")

awarded where there was no evidence that the licensee omitted any "local public issues," and where there was an allegation that the licensee's programming was directed to audiences residing mostly outside its community of license); *WHYY, Inc.*, 93 FCC 2d 1086, 1094 (1983) (no material and substantial question of fact was raised where the complainant failed to describe any significant problem, need or interest which had not been addressed by the licensee).

245. Section 73.1125(a). Section 73.1125(a) of the Rules, in conjunction with Section 73.315(a) of the Rules, requires an FM broadcast station to maintain a main studio within the 70 dBu (3.16 mV/m) contour of the station ("principal community contour"). The findings establish, and it is concluded, that the WJUX main studio in Ferndale, New York, was located within the principal community contour, and that MMBI has, at all times relevant to this proceeding, been in complete compliance with Section 73.1125(a).

246. Section 73.1125(c). This section of the rules requires an FM broadcast station to "maintain a local telephone number in its community of license or a toll-free number." The findings establish that although WJUX began broadcasting on October 21, 1994, the station did not establish a local telephone number until November 2, 1994. It must be concluded, therefore, that MMBI violated Section 73.1125(c) for a period of 12 days.

247. The findings further establish, and it is concluded, that beginning on November 2, 1994, MMBI was in full compliance with Section 73.1125(c) of the Rules. On that date MMBI established and maintained a separate telephone number for WJUX. In addition, the number was listed by the local telephone company and was readily available from directory assistance. The record reflects that, from November 2, 1994, to July 1995, calls to the WJUX telephone number were forwarded to Dumont, New Jersey, and that call forwarding and long distance charges were incurred. However, since such charges were not billed to the callers, calls to the WJUX number during that period were, in fact, toll free for residents of Monticello, the station's community of license. Beginning in July 1995, the call-forwarding arrangement was discontinued and all calls to the WJUX number were answered at the Ferndale main studio building.

248. No sanction is warranted for MMBI's violation of Section 73.1125(c). First, the violation was *de minimis*. Second, the duration of the violation was only 12 days, a relatively short period of time. Third, MMBI voluntarily disclosed in its response to the LOI to MMBI that WJUX's local telephone number was not established until "on or about November 2, 1994." Similarly, in its response to the Bureau's First Request for Admissions of Fact and Genuineness of Documents, MMBI admitted that it maintained a local toll-free telephone number "[b]eginning November 2, 1994." Finally, neither the Bureau nor Universal has contended that MMBI's lack of a local telephone number for this 12-day period warrants an adverse finding or conclusion against MMBI, or the imposition of any sanction.

249. The Bureau does argue, however, that MMBI was in violation of this section of the rules from October 1994 to July 1995 because there was no WJUX telephone instrument in its main studio and all calls to the WJUX number were forwarded to the Dumont studio and answered there. This argument is without merit. Section 73.1125(c) requires a broadcast station to maintain a local or toll-free "telephone number" in its community of license. The rule does not specify where telephone instruments must be located, or where telephone calls must be answered. The record in this proceeding reflects that MMBI

did maintain a local toll-free "telephone number," and that calls to that number were answered. The requirements of the rule have, therefore, been met.

250. Program Origination Capability. The Commission requires broadcast licensees to maintain a main studio which is equipped with production and transmission facilities, and to maintain continuous program transmission capability. *Main Studio and Program Origination Rules*, 3 FCC Rcd 5024, 5026 (1988) ("*Main Studio Clarification*"). The findings establish, and it is concluded, that, from the time WJUX went on the air on October 21, 1994, the station's main studio was in complete compliance with these requirements.

251. The record establishes that, at all times relevant to this proceeding, the WJUX main studio contained all of the equipment necessary for the production of programming, and that the equipment was capable of being used in that manner. These facts were testified to by Weis, Turro, Hurst, and/or Blabey. Even Loginow testified that, although he was in the WJUX main studio "very briefly," he observed a control board of the type typically found in a broadcast studio from which programming could be originated, as well as a microphone and tape machines. He also testified that he had no reason to think the microphone and tape machines were not connected to the control board. Further, there was no evidence adduced indicating that the WJUX main studio lacked any critical piece of production equipment or that the equipment which was located in the main studio was not in working order.

252. The findings also establish, and it is concluded, that, at all times relevant to this proceeding, the WJUX main studio had continuous program transmission capability. Specifically, the WJUX main studio could be put on the air by throwing a switch, or making a connection at a switch patch, in the WVOS(AM) transmitter room. This room was located about 10 to 15 feet down the hall from the WJUX main studio. Although Loginow apparently believed, and reported in his May 23, 1995, Radio Station Inspection Report, that a visit to the WJUX transmitter site (about a 15-minute drive from the main studio) was necessary in order to put the main studio on the air, the record reveals that he was mistaken. A trip to the WJUX transmitter site was never required in order to originate programming from the WJUX main studio, and Loginow's belief to the contrary was based upon a misunderstanding.

253. Remote Control Capability. Although the Commission's station location and main studio rules, Sections 73.1120 and 73.1125, respectively, were specifically and exclusively referred to in the text of Issue 5, those rules are completely silent on the subject of remote control. Nevertheless, since the *HDO* in this proceeding discussed questions relating to WJUX's remote control capabilities under Issue 5, and the parties litigated this matter under that issue, those questions will be addressed here.

254. The Commission's remote control rules in effect during the period from October 1994 through November 1995 provided, *inter alia*, that it was permissible for an FM broadcast station to be operated by remote control, that no authorization by the Commission was required to do so, and that "a remote control point [could be established] at a location other than at the main studio or transmitter." 47 C.F.R. § 73.1400 (1994, 1995). In addition, broadcast stations being operated by remote control were required to "provide at remote control points sufficient control and operating parameter monitoring

capability to allow technical operation in compliance with the Rules applicable to that station and the terms of the station authorization.” 47 C.F.R. § 73.1410(a) (1994, 1995).¹³

255. The findings establish, and it is concluded, that, at all times relevant to this issue, the WJUX transmitter was capable of being controlled by remote control from either the WJUX main studio or the Dumont studio, and that such operation was totally consistent with then Sections 73.1400 and 73.1410 of the Rules. The record reveals that, from the commencement of operation of the station, the WJUX transmitter was equipped with a dial-up remote control system which could be accessed from a telephone instrument, located anywhere, by merely dialing a telephone number and entering a code. After accessing the system, the telephone instrument could be used to turn the transmitter off and on, to take transmitter readings, and to perform other functions required by the Commission's regulations. In addition, both Blabey and Montana knew how to use the dial-up remote control system. Further, the evidence establishes that there was a telephone instrument (belonging to WVOS) located in the WJUX main studio, and that this instrument could have been used to dial up and control the WJUX transmitter, if necessary.

256. The record also reveals that the WJUX transmitter could be remotely controlled from the Dumont studio by utilizing one of the TC-8 remote control units located there. In this regard, Turro leased a 56 Kbps land line from the telephone company and used its narrow data channel to carry remote control commands to the TC-8 unit connected to the WJUX transmitter.

257. Universal argues that, at the time of Loginow's inspection, there was no operator on duty in control of the WJUX transmitter either at the WJUX main studio or at the Dumont studio, and that this was a violation of then Section 73.1860 of the Rules. Universal's contention must be rejected; it is based on speculation. Although Turro was out of town on the dates of the inspection, there was no evidence of record that another licensed operator was not on duty at the Dumont studio at that time. Indeed, neither Universal nor the Bureau sought to establish such facts at the hearing, and Loginow himself did not make such an allegation. Moreover, Section 73.1860 was not the subject of a designated issue, nor was it even referred to in the *HDO*. This matter is, therefore, beyond the scope of Issue 5.

258. Staffing. In *Main Studio Clarification*, 3 FCC Rcd at 5026, the Commission stated that licensees must maintain at their main studios “[a] meaningful management and staff presence [in order to] help expose stations to community activities, help them identify community needs and interests and thereby meet their community service requirements.” The Commission elaborated on the meaning of this statement in *Jones Eastern of the Outer Banks, Inc.*, 6 FCC Rcd 3615 (1991) (“*Jones I*”), *recon. granted in part and clarified* 7 FCC Rcd 6800 (1992) (“*Jones II*”). There, the Commission stated that, to be considered “meaningful,” there must be management and staff “presence” at a station's main studio on a full-time basis during regular business hours. *Jones I*, 6 FCC Rcd at 3616 n.2. In addition, management presence on a full-time basis may consist of more than two people working on part-time bases. *Jones II*, 7 FCC Rcd at 6800 n.4. The managerial personnel must also be authorized to make “typical managerial decisions.” *Id.* at 6801. The Commission further stated:

¹³ It is noted that the remote control rules were completely revised effective December 1, 1995. *Unattended Operation of Broadcast Stations*, 10 FCC Rcd 11479, 78 R.R. 2d 1737 (1995).

Because some [management] positions may require the person occupying them to conduct significant business outside the office, we would not, of course, require management personnel to remain "chained to their desks" during normal business hours. Rather, we require that management personnel report to work at the main studio on a daily basis, spend a substantial amount of time there and . . . use the studio as a "home base." Ultimately, that management presence must remain responsible for whatever station operations occur from that studio. To the extent that the staff person may fully perform its [sic] station functions with time to spare, and coverage of the main studio permits, that person may also take on responsibilities for another business, as long as the main studio remains attended during normal business hours.

Id. at 6802, footnote omitted.

259. The findings establish, and it is concluded, that the presence of Blabey and Montana at the Ferndale main studio building constituted a meaningful management and staff presence which was fully consistent with the Commission's guidelines. Thus, the record establishes that both Blabey and Montana reported to work at that building on a daily basis, that they used that building as a home base, that they were present at the building during normal business hours, and that they spent substantial amounts of time there. Consequently, the WJUX main studio "remain[ed] attended during normal business hours" within the parameters set forth in *Jones I* and *Jones II*. Moreover, there was no evidence whatsoever that the WJUX main studio was not properly staffed or attended at any particular time, including the date of Loginow's inspection, or that WJUX's studio hours were not regular or normal. Compare *KLDT-TV 55, Inc.*, 8 FCC Rcd 6316 (1993), *forfeiture reduced* 10 FCC Rcd 3198 (1995), with the instant case.

260. The record further establishes that Blabey was authorized to perform, and did in fact perform, duties and functions for WJUX which were typically managerial in nature. Specifically, Blabey recommended prospective employees for Weis to hire, and they were hired. Blabey supervised Montana's work for WJUX and she reported to him. Blabey consulted with Montana on WJUX matters and directed her to prepare the PSA bulletin boards and forward them to the Network. Blabey recommended to Weis that Montana's salary be raised, and it was raised. Blabey had discussions with Weis which resulted in the broadcast of public affairs and public service programming over WJUX and arranged for such programming to be broadcast over the station. Blabey made decisions to put emergency announcements concerning Sullivan County on the air over WJUX and prepared those announcements. Blabey was responsible for initiating steps to put WJUX back on the air on those occasions when it went off the air. Blabey "hosted" Loginow during his inspection of WJUX. Blabey retained Spicka to assist Loginow during the course of the inspection of WJUX and, subsequently, to originate programming from the WJUX main studio at the time the Network's program feed was cut. Blabey made the decision to hire Silverstein to sell time for WJUX, and Weis approved the hiring. Blabey arranged for Martin to cover the office functions of WJUX on the days he (Blabey) and Montana were testifying in this proceeding. Blabey represented WJUX in the community through his memberships in local civic organizations and his attendance at local civic functions. Moreover, there was no evidence of record that Blabey was not completely responsible for whatever station operations and activities were carried out at the WJUX main studio.

261. The record also reflects that Montana performed various staff functions for WJUX on a daily basis. She picked up the mail at the post office and distributed it when she returned to the studio building. She made sure Blabey and Weis saw mail that needed their attention. She brought bills to the attention of Blabey and Weis for payment. She handled petty cash, dealt with walk-ins, answered the telephone, and took care of the callers' requests, including their complaints about WJUX. In addition, Montana gathered material for and prepared a bulletin board of prospective PSAs. She was the one who decided what was and was not to be included on the bulletin board and she forwarded it to the Network for production and broadcast. She specified on the bulletin board or called the Network regarding PSAs which she considered particularly important and warranted broadcast, and the Network followed her suggestions on nearly every occasion.

262. The Bureau and/or Universal argue that Blabey and Montana did not constitute a meaningful management and staff presence at WJUX because they were not full-time employees and Blabey was a "consultant," their salaries were not commensurate with management-level positions, the functions they performed were ministerial not managerial, and they devoted much of their time to matters involving WVOS. These contentions must be rejected. *Jones I* and *Jones II* require a full-time presence at a main studio, not the employment of individuals on a full-time basis. The record clearly reflects that the WJUX main studio remained attended on a full-time basis during normal business hours by Blabey and Montana. The fact that Blabey and Montana also devoted time to WVOS matters did not render their presence at the main studio building less than full-time or meaningful. Indeed, *Jones II* specifically permits staff persons, such as Montana, to undertake responsibilities for another business in their spare time, and there appears to be no reason why individuals in managerial positions, such as Blabey, should not be able to do the same provided that the main studio remains attended, as it was in this case. Further, there is no precedent holding that such other business cannot under any circumstances be another broadcast station. *Cf. KQQK, Inc.*, 10 FCC Rcd 132 (MMB 1995) (the Bureau did not hold that the President of Station A could not be appointed to the position of Assistant General Manager of Station B, to which Station A leased main studio space; rather, the Bureau ruled that his presence at Station B's main studio was not managerial because Station B could give no description of his duties).

263. The fact that Blabey was retained as a "consultant" is neither determinative nor controlling, and to rule otherwise would place form over substance. The record establishes that Blabey chose that title for tax purposes only, that Weis treated and addressed Blabey as his General Manager not as his consultant, that Blabey followed all of Weis's directions and policies, that Blabey functioned more like an employee than a consultant, and that Blabey's duties were more similar to an employee's than to a consultant's. In addition, in arguing that Blabey and Montana were paid less than what the salary would be for comparable positions at other radio stations, the Bureau has completely ignored the fact that WJUX operated under the Network Affiliation Agreement. As a result, substantially less time was required of Blabey and Montana to perform their duties than would have been required had WJUX been operated differently, and their pay reflected that reality. Moreover, as demonstrated above, Blabey's duties and responsibilities for WJUX were, in fact, managerial in nature, and appeared typical of those carried out by general managers of stations operating under time brokerage arrangements where the broker was providing the programming and selling the advertising time within such programming.

264. Universal contends that MMBI's engagement of Blabey and Montana violated the Commission's cross-interest policy and is disqualifying. This matter is beyond the scope of Issue 5. At

the time this case was designated for hearing, the Commission was fully aware of both the cross-interest policy and of the role of Blabey and Montana at WJUX. See *HDO* at notes 8 and 15. However, the Commission failed to specify an issue to determine whether there was a violation of that policy. Indeed, after noting the cross-interest policy, the Commission's only statement was that a question remained as to whether the presence of Blabey and Montana at WJUX "represent[ed] that type of 'meaningful management presence' contemplated by [the] main studio rule." *Id.* at note 15, citations omitted. Under these circumstances, no consideration of the cross-interest policy is warranted.

C. Issue 1: Translator and Auxiliary Station Rules Issue

265. Issue 1 was designated to determine whether Turro's operation of the Fort Lee and Pomona translators violated Section 74.1231(b) of the Rules relating to FM broadcast translator stations, and Section 74.531(c) of the Commission's Rules relating to aural broadcast auxiliary stations. This issue was specified because the Commission had information that all the programming airing on WJUX and the Pomona and Fort Lee translators was originating from Jukebox Radio's Dumont studio, that intercity relay station WMG-499 was being used to deliver the programming from the Dumont studio directly to the Fort Lee translator, that the programming being delivered by WMG-499 was being broadcast by the Fort Lee translator, that the Fort Lee translator was not retransmitting the off-air signal of WJUX, and that the Pomona and Fort Lee translators had also been programmed through telephone lines from the Dumont studio. (*HDO* at paras. 7 and 13.) For the reasons which follow, it is concluded that Turro's operation of the Fort Lee and Pomona translators was in full compliance with Section 74.1231(b) of the Rules, but that his operation of WMG-499 beginning in late October 1994 was in violation of Section 74.531(c).

266. Section 74.1231(b). This section of the Commission's rules provides, in pertinent part, that "[a]n FM translator may be used for the purpose of retransmitting the signals of a primary FM radio broadcast station . . . which have been received directly through space, converted, and suitably amplified." In this regard, the Commission has stated that the signal of the FM radio station being rebroadcast must be received "directly over-the-air at the translator site." *FM Translator II*, 8 FCC Rcd at 5093. The findings establish, and it is concluded, that at all times pertinent to this issue, including the period between October 21, 1994, and July 1995, Turro's operation of the Fort Lee and Pomona translators was in complete compliance with this rule.

267. First, there was no competent or reliable proof substantiating the charge in the *HDO* that telephone lines were used to deliver programming from the Dumont studio to the Fort Lee translator for the purpose of retransmission. The only "evidence" from a credible witness suggesting such use was contained in an August 1, 1995, e-mail from Loginow to Mass Media Bureau and Wireless Telecommunications Bureau personnel. In this e-mail, which reported on his July 31, 1995, observations, Loginow stated that the audio quality of the Fort Lee translator indicated that the input signal was not being received off the air from the Pomona translator but from some other "alternate means, presumably via telephone lines." The record establishes, however, that Loginow's statement was nothing more than sheer, unsupported speculation.

268. Loginow based his statement solely on the high quality audio he heard on July 31, 1995, in comparison to the lesser audio quality he remembered hearing during his April 1995 inspection. He also thought that the high quality audio he observed on July 31, 1995, was consistent with the audio

quality he observed on May 15, 1995. However, Loginow performed no testing on July 31, 1995, did not inspect or observe the Fort Lee or Pomona translators on that date, and did not look for some alternate mechanism of program delivery. In addition, Loginow admitted that in April 1995 he observed that the power of the WJUX transmitter was reduced. He also admitted that a signal being received by the Fort Lee translator would be stronger, and the audio quality would be better, if it was being transmitted at full power by the WJUX transmitter than it would be if that transmitter was operating at reduced power. (Hurst, too, testified that a reduction in the power of the Monticello transmitter could have caused some degradation of the audio quality heard from the Fort Lee translator.) Loginow further admitted that the fact that he heard a better signal on May 15 and July 31, 1995, might have been attributable to the fact that something had been fixed and the WJUX transmitter was operating at full power. Moreover, on August 2, 1995, only two days after his July 31, 1995, observations, Loginow inspected both the Fort Lee and Pomona translators to the extent that he saw fit and found no means of program delivery other than reception off the air.

269. Next, the evidence establishes that the Fort Lee translator was capable of receiving, and did in fact receive, the off-air signal of WJUX "directly through space." Prior to the time that WJUX went on the air on October 21, 1994, Turro performed tests on the roof of the Mediterranean Towers and determined that WJUX could be received directly off-the-air at the Fort Lee translator site. Turro located a "hot spot" on the roof, installed a receive antenna at that location for reception of WJUX, installed a second antenna a few feet away to receive the signal of first adjacent channel WBAI, and connected the two antennas to a filtering device which was adjusted to eliminate interference from WBAI. This arrangement was in use from late October 1994 to mid-January 1995. Based upon his monitoring of the Fort Lee translator on a daily basis during this period, Turro testified that this arrangement at all times provided an adequate signal from WJUX for rebroadcast. Although there were two subsequent changes in filtering devices, the reception quality of the Fort Lee translator remained essentially the same. After the Pomona translator started to rebroadcast WJUX, the Fort Lee translator began to retransmit the signal of the Pomona translator on a regular basis. However, that did not affect the capability of the Fort Lee translator to receive and rebroadcast the signal of WJUX.

270. The ability of the Fort Lee translator to receive the off-air signal of WJUX "directly through space" was observed by Hurst, Hidle, and Loginow. Those three individuals also observed the off-air reception of WJUX at the hot spot. In this connection, Hurst testified that "good quality" reception of WJUX was possible in the hot spot without the use of filtering devices, and that a good quality signal from WJUX could be received from any other location on the roof provided that filtering devices were used. In addition, Hurst confirmed Turro's testimony concerning the stability and longevity of the hot spot, and there was no evidence adduced demonstrating that the hot spot was artificially created, such as by locally generating a signal into a "dummy load."

271. The evidence additionally establishes that the Pomona translator was capable of receiving, and did in fact receive, the off-air signal of WJUX "directly through space." Such reception was never in serious question and was observed by Loginow on several occasions. Indeed, testing by Hurst, Hidle, and Kirschner demonstrated that the Pomona translator remained able to receive the off-air signal of WJUX with the WJUX transmitter operating at levels below 100 watts. WJUX was authorized to operate with an ERP of 6.0 kW.

272. The record further reveals that the Fort Lee translator was capable of receiving, and did in fact receive, the off-air signal of the Pomona translator "directly through space" with the receive antenna for the Pomona translator located on the roof of the Mediterranean Towers. This fact was testified to by Turro and confirmed by Hurst, Hidle, and Loginow, each of whom had observed such off-air reception. Hurst characterized the off-air signal received on the roof of the Mediterranean Towers from the Pomona translator as a "good quality" signal, and Loginow characterized it as "a consistent high quality audio signal." In addition, the evidence establishes that the signal of the Pomona translator could be received "directly through space" in the basement of the Mediterranean Towers. This fact was testified to by Turro, Hurst, and Hidle. Hurst characterized such reception as "unusual [and] possibly phenomenal," and Hidle stated that it was "acceptable audio." Loginow never observed, or sought to observe, such reception in the basement, and performed no tests at that location.

273. The record establishes that audio programming which had originated in the Dumont studio was continuously delivered to the Fort Lee translator by WMG-499. Telemetry (i.e., data) was also transmitted continuously from the Dumont studio to the Fort Lee translator by WMG-499. Turro never denied those facts. Turro explained that the continuous telemetry path enabled him to switch remotely among the several different receiving antennas, transmitting antennas, and transmitters which were located at the Fort Lee transmitter site. Turro further testified that the continuous audio path made WMG-499 easily identifiable in the event that it caused interference, and permitted him to place emergency messages on the air. The evidence indicates, however, that, from October 21, 1994, until the time WMG-499 was deactivated, the audio programming received by the Fort Lee translator from WMG-499 was not retransmitted unless there was an emergency, and that it was possible that no emergency messages at all were broadcast during that period. Rather, the evidence shows that the audio feed from WMG-499 terminated into a dummy load, and that the Fort Lee translator retransmitted the off-air signals it received "directly through space" from either WJUX or the Pomona translator.

274. The most significant evidence contradicting these conclusions resulted from Loginow's May 15, 1995, tests. On that date, Loginow used a portable signal generator to generate "dead carrier" (i.e., silence) on each of the frequencies of WJUX, the Pomona translator, and WMG-499 while listening to the output of the Fort Lee translator over the air. Loginow was attempting to determine whether the Fort Lee translator would pick up the signal he was generating and retransmit it on its own frequency. If the dead carrier had gotten into the receiver of the Fort Lee translator, it would have overridden any other signal on that frequency and Loginow would have heard the output of the Fort Lee translator gradually become silent.

275. The signals Loginow generated on each of the frequencies of WJUX and the Pomona translator did not overwhelm the signal he was monitoring, and Loginow concluded that neither of those signals was being rebroadcast by the Fort Lee translator. The signal Loginow generated on the frequency of WMG-499 did overwhelm the signal Loginow was monitoring. That is, Loginow heard the output of the Fort Lee translator gradually become silent. Loginow concluded from this that the Fort Lee translator had been receiving and rebroadcasting the audio path from WMG-499. However, the weight of the evidence establishes that Loginow's results were not probative.

276. The record reveals that on May 15, 1995, the Fort Lee translator was retransmitting the off-air signal of the Pomona translator, and that the receive antenna being used to pick up that signal was

situated in the basement of the Mediterranean Towers, at least 25 stories below the roof. Loginow performed his tests from the inside of a stairwell enclosed by cinder block walls located at the roof level of the Mediterranean Towers. The signal he was generating was a "low level signal" of less than half a watt. This low level signal was not of sufficient strength to have passed through the building and been picked up by the Pomona receive antenna located in the basement. Therefore, Loginow's generated signal could not have gotten into the receiver of the Fort Lee translator and overwhelmed the signal being received from the Pomona translator. Consequently, Loginow's conclusion that the Fort Lee translator had not been rebroadcasting the off-air signal of the Pomona translator was erroneous.

277. Loginow's own testimony undermined the legitimacy of his test results. Loginow testified that he understood that the receive antennas for WJUX, the Pomona translator, and WMG-499 were all located on the roof, that he performed his testing from the roof level because he wanted to be near those antennas, and that the closer he could get to the antennas being tested the more accurate his tests would be. Loginow also stated that the distance between the signal generator and the antenna he was trying to affect was important to the testing process, that at some distance the signal would be unable to affect a receiver, that obstructions between the signal generator and the system being tested could affect the validity of the tests, and that his surroundings on May 15, 1995, would have attenuated toward the receiving end the signal he was generating. Loginow never performed a complete inspection of the Mediterranean Towers and had no personal knowledge as to what materials, equipment, or other things may have been in the building that theoretically could have shielded from an antenna located in the basement the low level signals being transmitted by the signal generator.

278. Further, and more importantly, tests performed by Hurst and Hidle actually demonstrated that Loginow's less than half-watt signal generated from the roof level of the Mediterranean Towers could not have affected a receive antenna located in the basement. Specifically, from the basement of the Mediterranean Towers at the location where the Pomona receive antenna had been situated, Hurst and Hidle used a signal generator to generate a 5 watt signal on the frequency of the Pomona translator. This signal, which was about 10 times the strength of the signal generated by Loginow, was unable to pass through the building and cause interference to the roof-mounted receive antenna for the Pomona translator. Based upon these tests, Hurst testified that someone located on or near the roof of the Mediterranean Towers would not have been able to cause interference with the reception of the Pomona translator with a 0.5 watt signal when the Pomona receive antenna was located in the basement. In view of the above, and the absence of comparable testing by Loginow or anyone else, Hurst's testimony must be considered dispositive. Loginow's contradictory testimony, that "ducting" would have enabled his low level signal to have overwhelmed a receive antenna located in the basement, is entitled to no weight. Unlike the testimony of Hurst, it was unsupported and untested.

279. Loginow's conclusion that the Fort Lee translator had been rebroadcasting the audio path from WMG-499 was also flawed. As discussed earlier, WMG-499 was subdivided into an audio path and a telemetry path. As a "fail-safe," to enable him to get emergency messages on the air, Turro programmed the receiver and the remote control unit at the Fort Lee translator to immediately home onto the audio path on WMG-499 and rebroadcast that signal if the telemetry path was interrupted. In this connection, Turro testified that the telemetry path was the weakest component of his system. It was narrow and on the outside edge of the microwave, and was the first thing that would have been "strip[ped] away" by someone seeking to "jam" WMG-499.

280. When Loginow generated dead carrier on 951 MHz, the frequency of WMG-499, he gradually substituted silence for the signals that WMG-499 had been carrying. At some point, the dead carrier, which contained no telemetry, interrupted or blanketed the telemetry path on WMG-499. When that occurred, the fail-safe was activated and the Fort Lee translator immediately homed onto the audio path on WMG-499 and rebroadcast that signal. Thereafter, as the dead carrier overwhelmed the audio path, Loginow heard the output of the Fort Lee translator become silent. However, had the telemetry path not been interrupted or blanketed by Loginow, the fail-safe would not have been triggered and the audio path on WMG-499 would not have been put on the air. It is clear, therefore, that given this configuration of the Fort Lee translator, Loginow caused the results he obtained.

281. Loginow testified that Turro's fail-safe was inconsistent with good engineering practice, highly problematic, not logical, and close to being technically impossible. But Loginow admitted on cross-examination that each element of the fail-safe arrangement was, in fact, technically possible. Specifically, Loginow testified that an individual microwave path could be subdivided into an audio and a data channel, that the receiver and remote control unit of the Fort Lee translator could be programmable, and that those units could be programmed to home in on the microwave audio path if the data path was interrupted.

282. The Bureau argues that when Loginow "blocked" 951 MHz, the output of the Fort Lee translator should not have been silence, as observed by Loginow. Similarly, Universal contends that the "loss of the WMG-499 signal" should not have caused the Fort Lee translator to begin broadcasting WMG-499 because there was "no WMG-499 signal to rebroadcast due to [Loginow's] jamming," and because that "entire circuit" had been "knock[ed] . . . off the air." Rather, the Bureau and Universal claim that the Fort Lee translator should have begun to rebroadcast the off-the-air signal of either WJUX or the Pomona translator. In support, they rely on Turro's testimony relating to an additional fail-safe he programmed into the Fort Lee translator.

283. These arguments are without merit. Turro testified that the additional fail-safe was designed to force the Fort Lee translator to receive the off-air signal from the Pomona translator or WJUX if the Fort Lee translator lost the 951 MHz input completely, that is, if no 951 MHz signal at all was being received. However, the evidence establishes that when Loginow performed his tests on May 15, 1995, he did not at any time cause the Fort Lee translator to completely lose the 951 MHz input. A signal from that frequency was never totally blocked, lost, or "knock[ed] . . . off the air." On the contrary, the dead carrier being generated by Loginow on 951 MHz gradually became substituted for the signals which were being received from WMG-499 on 951 MHz. In other words, the Fort Lee translator was receiving some signal on 951 MHz on a continuous basis throughout the course of Loginow's tests. Consequently, the conditions under which this additional fail-safe would have manifested itself were not present during the May 15, 1995, testing.

284. Section 74.531(c). Section 74.531(c) of the Commission's Rules provides, in pertinent part:

An aural broadcast intercity relay station is authorized to transmit aural program material between noncommercial educational FM radio stations and their co-owned noncommercial educational FM translator stations assigned to reserved channels (Channels

201 to 220) and between FM radio stations and FM translator stations operating within the coverage contour of their primary stations. . . .

See generally FM Translator I, 5 FCC Rcd at 7220-21; *FM Translator II*, 8 FCC Rcd at 5097-98; and *Satellite and Terrestrial Microwave Feeds*, 7 FCC Rcd 5546, 5547-48 (1992); *see also* Sections 74.501(b) and 74.532(a) of the Rules. The findings establish, and it is concluded that, from late October 1994 until it was deactivated in early July 1995, Turro's operation of WMG-499 was in violation of this rule.

285. Turro's application for what became WMG-499 stated that the Fort Lee translator (then) rebroadcast the signal of a noncommercial FM station in Franklin Lakes, New Jersey, and that WMG-499 would be used to feed 30-second announcements concerning financial support and operational communications from the studio of the noncommercial FM station to the Fort Lee translator. Turro's application was granted on September 23, 1993. Beginning in late October 1994, the Fort Lee translator ceased rebroadcasting the Franklin Lakes station and began to rebroadcast the signal of WJUX, Monticello, New York. WJUX was authorized to operate on Channel 259, and was a commercial FM station. On November 30, 1994, Turro formally informed the Bureau's Auxiliary Services Division that the Fort Lee translator was "now rebroadcast[ing] primary station" WJUX. By letter dated June 6, 1995, the Chief of the Commission's Microwave Branch directed Turro to show cause why his license for WMG-499 should not be revoked or cancelled. One of Turro's consulting engineers responded to the Commission by letter dated June 13, 1995, and Turro deactivated WMG-499 in early July 1995.

286. Turro readily admitted both in his response to the LOI to Turro and throughout the course of this proceeding that, from late October 1994 until early July 1995, WMG-499 had been used continuously to transmit aural program material from Jukebox Radio's Dumont studio to the Fort Lee translator. However, such use during this period violated Section 74.531(c) of the Rules. Specifically, beginning in late October 1994, WMG-499 had not been used for the purposes delineated in Section 74.531(c), namely, to transmit aural program material between co-owned noncommercial FM broadcast and translator stations, or between FM primary stations and translator stations operating within the coverage contours of the primary stations ("fill-in service"). Rather, WMG-499 had been used to transmit aural program material from a program production studio to a translator station. Nothing in Section 74.531(c), or in *FM Translator I*, *FM Translator II*, or *Satellite and Terrestrial Microwave Feeds*, contemplates or authorizes such use. Further, the record is clear that, during the period in question, the Fort Lee translator was not a noncommercial educational FM translator station, was not transmitting between co-owned stations, was not assigned to a reserved channel, and was not providing fill-in service.

287. Turro also admitted that, from late October 1994 until early July 1995, WMG-499 had been used continuously to transmit telemetry, also called operational communications, from Jukebox Radio's Dumont studio to the Fort Lee translator. Turro argues that his use of WMG-499 to transmit telemetry was expressly authorized by Section 74.531(f) of the Rules. This argument must be rejected. While Section 74.531(f) does authorize the multiplexing of an intercity relay transmitter to provide additional channels for the transmission of, among other things, operational communications, Turro's argument removes that subsection from its proper context. Read in context, Section 74.531(f) only permits such multiplexing if the intercity relay station is otherwise authorized to operate pursuant to Section 74.531(c). As discussed above, WMG-499 was not so authorized. To read Section 74.531(f) in any other manner would completely vitiate Section 74.531(c). Moreover, Section 74.531(f) specifically provides that "[a]n

... intercity relay station may not be operated solely for the transmission of operational ... communications.” Consequently, Section 74.531(f) does not unconditionally authorize the transmission of operational communications on an intercity relay station as asserted by Turro.

288. Turro further argues that his use of WMG-499 to enable him to transmit emergency messages, if necessary, was specifically authorized by Section 74.1231(g) of the Rules. Turro's argument is without merit. Section 74.1231(g) authorizes translator stations to transmit aural material which is limited, *inter alia*, to “emergency warnings of imminent danger.” But Section 74.1231(g) states that this material must be transmitted “as permitted” in Section 74.1231(f) of the Rules. However, Section 74.1231(f) does not authorize the transmission of this material by intercity relay station. Compare the Note to Section 74.1231(b) of the Rules (in connection with Sections 74.1231(b) and (h), the use of intercity relay stations to deliver signals to FM translator stations is authorized) with Sections 74.1231(f) and (g) (no similar statement).

289. Turro also argues that his operation of WMG-499 during the period from late October 1994 until early July 1995 was proper because there were no material changes in the purposes for which WMG-499 was being used, or in the actual use of WMG-499, after the Fort Lee translator started retransmitting WJUX. Turro further notes that, in his application for WMG-499, he identified the locations of the transmit and receive points and that those points remained the same after the change of primary stations. Turro's arguments are rejected. They are irrelevant to a determination of whether a violation of Section 74.531(c) occurred. As discussed above, an intercity relay station may only be used to transmit aural program material between co-owned noncommercial FM radio stations and noncommercial FM translator stations, or to transmit such material between FM radio stations and FM translator stations providing fill-in service. The Fort Lee translator was not providing fill-in service, and it ceased its affiliation with a noncommercial FM radio station in late October 1994. At the time the Fort Lee translator stopped rebroadcasting the Franklin Lakes station and began to rebroadcast commercial FM station WJUX, Turro's use of WMG-499 fell out of compliance with the provisions of Section 74.531(c). He therefore lost whatever authority he had under that section, and his license, to use WMG-499 for the purposes stated in his application, or for any other purpose. Similarly, the fact that the transmit and receive points of WMG-499 had not changed is irrelevant and could not in any case confer independent authority on Turro to use WMG-499 for purposes not authorized by Section 74.531(c).

290. The most appropriate sanction for Turro's violation of Section 74.531(c) of the Rules would be the imposition of a \$3,000 forfeiture. Thus, Section I of the “Guidelines for Assessing Forfeitures,” which appears as a Note to Section 1.80(b)(4) of the Rules, provides for a forfeiture penalty in the base amount of \$4,000 for violations which are very similar in nature to a violation of Section 74.531(c) of the Rules. See “Unauthorized emissions” (base amount of \$4,000); “Using unauthorized frequency” (base amount of \$4,000); “Construction or operation at unauthorized location” (base amount of \$4,000). Further, in accordance with Section II of the Guidelines, the base amount of the forfeiture would be reduced by \$1,000 because Turro never denied that he used WMG-499 for the purposes in question, Turro fully disclosed such use in his response to the LOI to Turro and throughout the course of this proceeding, no substantial harm from the unauthorized use of WMG-499 was demonstrated, it was not shown that Turro realized any substantial economic gain through the unauthorized use of WMG-499, and Turro had a history of overall compliance with the Commission's rules.

291. However, the assessment of a forfeiture in this case is precluded by the statute of limitations. Section 503(b)(6)(i) of the Act and Section 1.80(c)(1) of the Rules provide, in pertinent part, that no forfeiture penalty shall be imposed if the violation occurred more than one year prior to the issuance of the appropriate notice. Turro's violation of 74.531(c) occurred between late October 1994 and early July 1995. The *HDO* in this proceeding, which served as the appropriate notice of forfeiture (*HDO* at paras. 31-33), was released on April 18, 1997, nearly two years after the last violation occurred. Since this was well after the expiration of the statute of limitations, no forfeiture may be imposed. *Cf. Sun Over Jupiter Broadcasting, Inc.*, 8 FCC Rcd 8733 (Rev. Bd. 1993).

E. Issues 3 and 7: Misrepresentation/Lack of Candor Issues

292. Issue 3 was designated to determine whether Turro made misrepresentations to or lacked candor with the Commission concerning the operation of the Fort Lee and Pomona translators. Issue 7 was designated to determine whether MMBI made misrepresentations to or lacked candor with the Commission concerning the operation of WJUX. In specifying these issues, the Commission stated that "there is a substantial and material question of fact as to whether Turro and MMBI have misrepresented or lacked candor . . . with respect to material facts concerning the operations" of the Fort Lee and Pomona translators and WJUX, that it appeared that Turro's and MMBI's statements "regarding the origination of the programming on the translators and the operation of WJUX were inaccurate," and that there was "substantial evidence that Turro and MMBI had a clear motive to conceal or misrepresent these activities, most of which . . . constitute violations of the Commission's Rules." (*HDO* at paras. 17-18.) For the reasons which follow, Issues 3 and 7 are resolved in favor of Turro and MMBI.¹⁴

293. Misrepresentation and lack of candor in a licensee's dealings with the Commission are generally viewed as "serious breaches of trust." *Character Qualifications*, 102 FCC 2d 1179, 1211 (1986). Misrepresentation involves "false statements of fact," whereas lack of candor involves "concealment, evasion, and other failures to be fully informative." *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983). Direct misrepresentations or omissions to the Commission can result, by themselves, in disqualification. *Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 719 (Rev. Bd. 1983). However, intent to deceive is an essential element of a misrepresentation or lack of candor showing, and disqualification is not warranted in the absence of a deceptive intent. *Intercontinental Radio, Inc.*, 98 FCC 2d 608, 639 (Rev. Bd. 1984); *Fox River*, 93 FCC 2d at 129.

294. Issue 3 – Turro. The findings establish, and it is concluded, that Turro did not misrepresent facts to or lack candor with the Commission in his statements concerning the operation of the Fort Lee or Pomona translators or the origination of programming on the translators. On the contrary, the record reflects that, at all stages of this case, Turro dealt with the Commission and its representatives in a truthful, candid, and forthright manner.

¹⁴Most of the arguments advanced by the Bureau and Universal under the misrepresentation/lack of candor issues have already been raised by those parties in connection with the other issues in this proceeding. However, the Bureau and Universal now contend that the statements that Turro and Weis made with respect to those matters were not truthful.

295. The Bureau and/or Universal argue that Turro lacked candor in his January 30, 1991, request for a declaratory ruling by failing to disclose that his intentions were to provide 100 percent of the primary station's programming, to be the only purchaser of brokered air time on the primary station, and to have the translator station sell all of the commercial advertising during the brokered air time. These contentions must be rejected. First, the record does not show that Turro intended to deceive the Commission even assuming, *arguendo*, that he omitted any material information. Second, a review of contemporary case precedent establishes that, even if Turro had disclosed the above details to the Bureau in his request for a declaratory ruling, the Bureau's ruling would not have been substantially different. The following table summarizes some of the key elements of agreements which were considered and approved by the Bureau during the relevant time period.

<p><i>Joseph A. Belisle, Esq.</i>, 5 FCC Rcd 7585 (MMB 1990), released December 18, 1990.</p>	<ul style="list-style-type: none"> •“Network affiliation agreement.” •Broker will provide between 12 and 24 hours of programming per day.
<p><i>Roy R. Russo, Esq.</i>, 5 FCC Rcd 7586 (MMB 1990), released December 18, 1990.</p>	<ul style="list-style-type: none"> •“Reciprocal time brokerage agreements.” •Broker will provide all programming from 4 a.m. to midnight, seven days a week. •Arrangement involved an almost complete programming format change by the broker, the broker determined the advertising rates and scheduling, and the solicitation of advertising accounts. •Bureau noted that decisions made by the broker with respect to programming, advertising, and sales were “characteristic of all time brokerage agreements” and were permissible as long as they did not represent the ultimate decisions in those areas.
<p><i>J. Dominic Monahan, Esq.</i>, 6 FCC Rcd 1867 (MMB 1991), released April 4, 1991.</p>	<ul style="list-style-type: none"> •“Programming affiliation agreement.” •Broker will provide programming from 6 a.m. to midnight, seven days a week. •Broker retained the right to sell a majority of the advertising time of the station. •Bureau noted that the Commission sets no limits on the amount of time a brokered station could sell.
<p><i>Peter D. O’Connell, Esq.</i>, 6 FCC Rcd 1869 (MMB 1991), released April 4, 1991.</p>	<ul style="list-style-type: none"> •“Time brokerage agreement” and “program brokerage agreement.” •Station will sell all of its commercial advertising time to broker who will resell it and provide all advertising programming on the station. •Broker will provide up to 24 hours of programming per day. •Bureau noted that the Commission sets no limits on the amount of time a brokered station could sell.

<p><i>Brian M. Madden, Esq.</i>, 6 FCC Rcd 1871 (MMB 1991), released April 4, 1991.</p>	<ul style="list-style-type: none"> •“Time brokerage agreement.” •Station will make its facilities available to the broker 24 hours per day, seven days per week, “except for a maximum of two hours on Sunday between midnight and 6 a.m. for routine maintenance.” •Broker will provide an entertainment format, which may include news, public service programming, promotions, contests, and commercial matter. •Bureau noted that the Commission sets no limits on the amount of time a brokered station could sell.
<p><i>Gisela Huberman, Esq.</i>, 6 FCC Rcd 5397 (MMB 1991), released September 19, 1991.</p>	<ul style="list-style-type: none"> •Two “time brokerage agreements.” •Stations will make their facilities available for programming provided by the broker 24 hours a day for up to 166 hours per week, “except for downtime occasioned by routine maintenance.” •Broker will provide an entertainment format, which may include news, public service programming, promotions, contests, and commercial matter. •Broker will maintain remote control points for the stations. •Bureau noted that the Commission sets no limits on the amount of time a brokered station could sell.
<p><i>Joseph F. Bryant</i>, 6 FCC Rcd 6121 (MMB 1991), released October 31, 1991.</p>	<ul style="list-style-type: none"> •“Time brokerage agreement.” •Broker “leased” access to 15½ hours of air time per day and made changes in the station's format during those periods.

296. The Bureau next asserts that Turro falsely stated in his response to the LOI to Turro that he had no ownership interest in WJUX. The Bureau claims that Turro had such an interest because of the financial relationship he had with Weis and MMBI, and because of MMBI's complete dependence on Turro as its source of income and programming. These arguments are without merit. The record reflects that Turro's statement that he had no present or future ownership interest in MMBI was completely accurate. In addition, as discussed fully in the conclusions of law on Issues 2 and 6, the Unauthorized Transfer of Control Issues, the financial and programming arrangements between Turro and Weis were perfectly proper and comported in all respects with Commission (as well as Bureau) policy and precedent. Further, even assuming, *arguendo*, that such financial and programming arrangements constituted a transfer of control, they could not, as the Bureau apparently believes, have created a change in the “ownership” of WJUX.

297. The Bureau maintains that Turro did not disclose in his response to the LOI to Turro that he was providing all of the programming and commercials for WJUX or that he was guaranteeing payments to MMBI. The Bureau also alleges that Turro did not inform the Commission until the hearing that WMG-499 was used to deliver programming matter to the Fort Lee translator. These contentions are factually inaccurate. The record reflects that Turro did, in fact, disclose in his response to the LOI to Turro that he was providing programming, including commercials, to MMBI on a 7-day per week, 24-hour per day, 365-day per year basis. Similarly, Turro did, in fact, disclose that WMG-499 was transmitting programming to the Fort Lee translator. Turro also attached to his response, among other things, copies

of the Network Affiliation Agreement and his Guaranty of Payment. The latter indicated that Turro was personally guaranteeing Jukebox Radio Network payments to MMBI.

298. The Bureau asserts that Turro's statement in his response to the LOI to Turro that the Network Affiliation Agreement met the requirements of the Bureau Letter was false because that arrangement was not a time brokerage agreement. The Bureau also avers that Turro did not comply with the Bureau Letter because he did not fulfill "the express condition" contained therein that he buy "discrete blocks of time" on the brokered station, and there was no evidence presented that the monthly payments being made by Turro were comparable to the rates charged to other time brokers in the local radio market. These arguments are rejected. The fact that Turro entered into a network affiliation agreement, rather than a time brokerage agreement, is without decisional significance. Commission (as well as Bureau) precedent treats network affiliation agreements and time brokerage agreements in an identical fashion with respect to determinations regarding control. *See, e.g., Russo*, 5 FCC Rcd at 7586-87 (time brokerage agreements); *Belisle*, 5 FCC Rcd at 7585 (network affiliation agreement). In addition, the record reveals that the arrangement between Turro and MMBI was structured as a network affiliation agreement based upon the advice of counsel, and that counsel had read Turro's request for declaratory ruling and the Bureau Letter prior to rendering this advice. *Cf. RKO General, Inc. v. FCC*, 670 F.2d 215, 231 (D.C. Cir. 1980), citing *Asheboro Broadcasting Co.*, 20 FCC 2d 1, 3 (1969) (advice of counsel may be a mitigating factor in some circumstances). Further, the Bureau Letter contains no "express condition" that Turro buy "discrete blocks of time." The portion of the Letter to which the Bureau apparently refers merely contains a brief, general summary of what time brokerage arrangements "usually involve." In any event, there is no absolute requirement that time brokers purchase only discrete blocks of time. *See O'Connell*, 6 FCC Rcd at 1869 (under time brokerage and programming brokerage agreements, the broker was allowed to purchase all of the station's advertising time and provide up to 24 hours of programming per day). Moreover, to the extent that the record does not contain evidence of comparable rates, it is noted that the Bureau had the burden of going forward with the introduction of evidence on Issue 3 (*HDO* at para. 22), and that it failed to offer any evidence on that question.

299. The Bureau and Universal maintain that Turro had a motive for misrepresenting to the Commission his arrangement with MMBI. In this regard, they note that Turro was twice rebuffed by the Commission when he attempted to obtain a ruling permitting translator stations to be used to originate local programming. They also claim that the arrangement with MMBI was a "scheme" to deceive the Commission and to circumvent and evade those rulings as well as the Commission's translator rules and policies. These assertions are without merit. The record reflects that Turro did not circumvent the Commission or its rules. On the contrary, Turro requested from the Bureau the issuance of a declaratory ruling, Turro represented that certain "conditions would exist," Turro obtained the ruling he sought, and Turro lived up to his representations. Specifically, Turro stated that the licensee of the translator would purchase air time on the primary station, and it did. Turro stated that the translator would be operating outside of the originating station's primary contour, and it did. Turro stated that the primary station would not reimburse the translator licensee for air time, and it did not. Turro stated that the primary station would not financially support the translator licensee, and it did not. Turro stated that the translator licensee would abide by the Commission's time brokerage rules in connection with any air time that it purchased on the primary station, and it did. And, finally, Turro stated that the translator licensee may sell advertising to support its programming, and it did. Moreover, the Bureau must be presumed to have known of Turro's unsuccessful attempts to persuade the Commission to allow translators to originate

programming inasmuch as the Bureau itself issued one of the rulings and the others were published. Yet the Bureau gave Turro the declaratory ruling he had requested, although it was under no obligation to do so. Under these circumstances, Turro cannot be faulted for relying on the Bureau Letter in his operation of the Fort Lee translator. See *HDO* at note 13 (Turro's contention that the Bureau Letter authorized his arrangement with MMBI was "not unreasonable").

300. On the basis of the May 15, 1995, tests conducted by Loginow, the Bureau and Universal contend that Turro lied when he stated that the Fort Lee translator rebroadcast the off-air signal of WJUX or the Pomona translator, and when he stated that the Fort Lee translator did not rebroadcast the audio path on WMG-499. Their reliance on Loginow's testing is misplaced. As discussed in detail in the conclusions of law with respect to Issue 1, the Translator and Auxiliary Station Rules Issue, Loginow's test results were not probative since it was demonstrated that he reached an erroneous conclusion and caused the results he observed. Consequently, Turro's testimony on these matters was fully credited. The Bureau also reiterates its position that Loginow "blocked" the signals being received by the Fort Lee translator on 951 MHz. However, as shown in the conclusions on Issue 1, this view is totally incorrect.

301. The Bureau avers that Turro never showed the antenna in the basement of the Mediterranean Towers to Loginow, and never informed Loginow that there was such an antenna located in the basement. This allegation is highly misleading. Although Turro never specifically mentioned the basement antenna to Loginow, as correctly noted by the Bureau, the evidence is clear that during the course of the August 2, 1995, inspection, Turro informed Loginow that the roof-mounted antennas had been vandalized repeatedly and that he (Turro) had used other receive antennas located elsewhere in the building. Turro offered to show Loginow those antennas but Loginow told him that he was only interested in seeing the antennas in use that day. The record also reflects that Turro cooperated fully with Loginow during the course of this inspection, and that Loginow inspected as he saw fit. Given the above, the fact that Loginow did not avail himself of the opportunity to observe the other receive antennas that Turro used, including the basement antenna, can hardly be ascribed to or held against Turro.

302. Issue 7 – MMBI. The findings establish, and it is concluded, that neither MMBI nor Weis misrepresented facts to or lacked candor with the Commission in their statements concerning the operation of WJUX. On the contrary, the record reflects that, at all stages of this case, MMBI and Weis dealt with the Commission in a truthful, candid, and forthright manner.

303. The Bureau and/or Universal argue that Weis's statement in the response to the LOI to MMBI, that he was responsible for all of the funds used to purchase equipment for, and to construct and operate WJUX, was a lack of candor because Weis's actual source for those funds was Turro. Similarly, the Bureau claims that Weis lacked candor when he represented that he had control over the finances of WJUX. The Bureau also asserts that Weis knew that Turro had "undue control" over the station's finances, but failed to disclose that to the Commission. These arguments are without merit. Put simply, it has not been shown that Weis's statements were untruthful. As discussed fully in the conclusions of law on Issues 2 and 6, Weis, and not Turro, was in sole control of the finances of MMBI and WJUX, as had been represented to the Commission. In addition, the financial arrangements between Turro and MMBI were fully disclosed, were entirely proper, and complied with Commission (as well as Bureau) policy and precedent. The findings establish that, consistent with his statements, Weis did provide all of the equipment used to build WJUX and did pay all of the costs of the station's construction (with the

exception of Jukebox Radio Network equipment). Weis's statement that he was also responsible for all of WJUX's operating expenses and other financial obligations was totally accurate, and Weis candidly disclosed that Turro had paid MMBI's telephone bills. Further, it was not improper, or a violation of any Commission rule or policy, for Turro to have been the sole source of revenue for MMBI's operations. See *Russo*, 5 FCC Rcd at 7587; *Choctaw*, 12 FCC Rcd at 8541; *WGPR*, 10 FCC Rcd at 8145.

304. The Bureau and/or Universal maintain that Weis misrepresented facts in the response to the LOI to MMBI by stating that he controlled what was and was not broadcast on WJUX. In this regard, the Bureau and Universal allege that MMBI did not exercise any meaningful control over the programming of its station. The Bureau also contends that Weis knew that Turro had "undue control" over the programming of WJUX, but failed to disclose that to the Commission. These arguments must be rejected. Once again, it has not been demonstrated that Weis's statements were untruthful. As discussed in detail in the conclusions of law with respect to Issues 2 and 6, Weis, and not Turro, was in ultimate supervisory control of the programming of WJUX, as had been represented to the Commission. The Amendment to Network Affiliation Agreement gave MMBI the right, *inter alia*, to delete or preempt any Network programming, and to substitute its own programming for that of the Network. These provisions complied in all significant respects with the Commission's time brokerage and LMA policies, and the Commission (as well as the Bureau) has repeatedly held that licensees operating their stations in accordance with such agreements have retained ultimate programming control. *WGPR*, 10 FCC Rcd at 8142-43; *Choctaw*, 12 FCC Rcd at 8539; *Huberman*, 6 FCC Rcd at 5397; *Russo*, 5 FCC Rcd at 7586-87; *Belisle*, 5 FCC Rcd at 7585. Moreover, the record reflects that, consistent with his statements, Weis did exercise his ultimate authority over the programming of WJUX, and WJUX did substitute other programming for, and preempt, Network programming.

305. In connection with its arguments relating to the programming of WJUX, the Bureau avers that the Amendment to Network Affiliation Agreement was not "entered into" until after the letters of inquiry to Turro and MMBI were received. This is factually incorrect. Although Turro and Weis did not formally sign the Amendment until July 17, 1995, the uncontradicted and unrebutted evidence of record establishes that the Amendment was agreed to in November 1994 and was retroactive to the commencement of the Network Affiliation Agreement.

306. The Bureau and/or Universal claim that Weis misrepresented facts by stating that WJUX was fully staffed and had a properly equipped main studio, and that he lacked candor by failing to disclose the true nature of the positions of Blabey and Montana at WJUX. In this regard, the Bureau and Universal maintain that Blabey and Montana were token employees of MMBI because they performed minimal duties and received nominal salaries. These arguments are without merit. The record reflects that Weis's statements concerning Blabey and Montana, and the capabilities of the WJUX main studio, were entirely truthful and accurate. Moreover, for the reasons specified in the conclusions of law on Issue 5, the Main Studio Issue, it is clear that, consistent with Weis's statements, the presence of Blabey and Montana at the Ferndale main studio building constituted a meaningful management and staff presence, WJUX's main studio contained all of the necessary equipment for the production of programming, the equipment worked, and the main studio had continuous program transmission capability.

IV. ULTIMATE CONCLUSIONS

307. In sum, it has been concluded that Turro's operation of the Fort Lee and Pomona translators did not violate Section 74.1231(b) of the Commission's Rules, that beginning in late October 1994 Turro's operation of WMG-499 was in violation of Section 74.531(c) of the Rules, and that although the assessment of a forfeiture would be the appropriate sanction for such a violation, a forfeiture may not be imposed in this proceeding because the statute of limitations has expired. It has also been concluded that neither Turro nor MMBI engaged in an unauthorized transfer of control over WJUX in violation of Section 310(d) of the Act and Section 73.3540(a) of the Rules, that MMBI did not violate Sections 73.1120 and 73.1125(a) of the Rules with respect to the maintenance of a main studio, that for a 12-day period MMBI was in violation of Section 73.1125(c) of the Rules with respect to the maintenance of a local telephone number, but that no sanction is warranted for that violation. It has been further concluded that Turro did not misrepresent facts to or lack candor with the Commission concerning his operation of the Fort Lee and Pomona translators, and that MMBI and Weis did not misrepresent facts to or lack candor with the Commission concerning the operation of WJUX. Consequently, it is ultimately concluded that the public interest will be served by a grant of Turro's applications for renewal of the licenses for the Fort Lee and Pomona translators. It is also ultimately concluded that MMBI possesses the requisite qualifications to be and to remain a Commission broadcast permittee, and that no basis exists for the revocation of its construction permit for WJUX.

V. ORDERING CLAUSES

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, the above-captioned applications of Gerard A. Turro for renewal of licenses for FM translator stations W276AQ(FM), Fort Lee, New Jersey, and W232AL(FM), Pomona, New York, ARE GRANTED.

IT IS FURTHER ORDERED that, inasmuch as it has been concluded that Monticello Mountaintop Broadcasting, Inc., possesses the requisite qualifications to be and to remain a Commission broadcast permittee, its construction permit for FM radio station WJUX(FM), Monticello, New York, SHALL NOT BE REVOKED.¹⁵

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge

¹⁵ 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.