

RBI PFC at 60. RBI emphasizes that at page 120 of its PFC, when it says that Mr. Parker "reasonably accepted" the language of the Dallas Amendment which was "drafted by" Mr. Kravetz. That stretches the truth by suggesting that Mr. Kravetz was responsible for the language of the amendment. In fact, Mr. Kravetz testified that, had he been aware of the *San Bernardino Proceeding*, he "certainly would not have" drafted the Dallas Amendment as it was submitted. Tr. 2373. His information, however, was limited to what Mr. Parker had told him.

116. Again, so much for reliance on counsel.

117. The only arguably solid evidence of any "advice" of counsel which RBI has produced consists of the Wadlow Letter. According to RBI, in that letter Mr. Wadlow advised Mr. Parker "that [the *San Bernardino Proceeding*] did not present questions as to Parker's qualifications." RBI PFC at 115.

118. But that's *NOT* what the Wadlow Letter says.

119. The Wadlow Letter does *NOT* address broad questions of the overall impact of the entire *San Bernardino Proceeding* on Mr. Parker's qualifications. No. Rather, it refers *ONLY* to Judge Gonzalez's decision in *San Bernardino*. Adams Exh. 58. The Wadlow Letter contains no reference at all to any other aspect of the *San Bernardino* proceeding. *Id.* To the extent that the Wadlow Letter characterizes Judge Gonzalez's decision, that characterization is demonstrably wrong, as both Mr. Parker, Tr. 2007-2010, and Mr. Wadlow, Tr. 1822, eventually acknowledged on the witness stand. *See* Adams PFC at 163-165.

120. So RBI's far broader claim in its PFC is not supported by the evidence.

121. Moreover, the Wadlow Letter was written just one week before Mr. Parker and Mr. Wadlow both became embroiled in a months-long matter before the Commission which clearly put them both on notice that the Commission was highly interested in allegations of real-party-in-interest misconduct, even if those allegations had been favorably resolved at the hearing level. *See Adams PFC at 168-175.* In their respective PFC neither RBI nor the Bureau even mentions, much less substantively addresses, the Christine Shaw proceeding or the knowledge imparted to Messrs. Parker and Wadlow in connection with that proceeding during the four months commencing one week after the Wadlow Letter and ending several weeks before the filing of the WHRC(TV) Transfer Application. The documentary record on this point is extensive. *See Adams PFC at 168-175.* Messrs. Parker and Wadlow were examined about that documentary record, but they were curiously unable to recall anything about the many communications referred to in those documents.^{20/} But the documents on their face demonstrate that during the four months between the Wadlow Letter and the WHRC(TV) Transfer Application, Messrs. Parker and Wadlow conferred repeatedly about the Shaw situation and the Bureau's position therein. The Shaw situation clearly undermined whatever "advice" may have been contained in the Wadlow Letter.

122. To the extent that RBI seems to suggest that Mr. Wadlow may have also been involved in any way with Mr. Parker's "disclosures" concerning the *Mt. Baker*

^{20/} The Presiding Judge recognized the disjuncture between the documentary evidence and the litany of "I don't recall" from Messrs. Wadlow and Parker. When RBI objected to the receipt into evidence of some of that documentary evidence, the Presiding Judge overruled the objection, stating, "there's going to come a time when I'm going to start adding up, you know, the list of the not recalls", Tr. 1848.

Proceeding, see, e.g., RBI PFC at 54, 118, Mr. Wadlow acknowledged that he was not familiar with the *Mt. Baker* decision until recently. Tr. 1865. Thus, he could not have provided Mr. Parker with advice about the impact of that decision at the time of Mr. Parker's applications. ^{21/}

123. Again, so much for reliance on counsel.

(b) *OTHER MATTERS*

124. RBI also argues that Mr. Parker reasonably understood the approval of the settlement of the *San Bernardino Proceeding* as indicating that his disqualification had been reversed. RBI PFC at, *e.g.*, 106-107. This argument is based in part on the 1999 decision in *SL Communications, Inc. v. FCC*, 168 F.3d 1354 (D.C. Cir. 1999). The Court in *SL Communications* distinguished *Allegan County Broadcasters, Inc.*, 83 FCC2d 371 (1980). According to RBI, *SL Communications* conclusively establishes that the Review Board would not have approved the *San Bernardino* settlement if Mr. Parker and SBBLP were still disqualified.

125. That is wishful thinking on RBI's part. In fact, the *SL Communications* decision merely affirmed a Commission decision rejecting a proposed "white knight" settlement of a proceeding in which the sole remaining applicant for a new construction permit had been disqualified. In so doing, the Commission noted that, unlike the

^{21/} RBI also broadly claims that "the Sidley Attorneys advised Parker that neither the *Mt. Baker* proceeding nor the *Religious Broadcasting* proceeding raised any character issues as to his qualifications to hold Commission licenses." RBI PFC at 54. That assertion is then followed by citations to the transcript. Adams encourages the Presiding Judge to review each of the cited portions of the transcript, because none of them begins to support the broad proposition for which they are cited.

situation in *Allegan County*, the party which was proposed to obtain the authorization in *SL Communications* had not been an original applicant for the channel in question. In this context, the *San Bernardino Proceeding* was akin to *Allegan County*, **NOT** *SL Communications*. Moreover, the Commission emphasized that the disqualification decision in *SL Communications* had been "reviewed and affirmed by a Review Board, **as well as by the full Commission.**" 13 FCC Rcd 3259, 3263 (1998) (emphasis added). By contrast, according to the Commission, the charges in *Allegan County* "had not been fully resolved by the Commission" at the time of the proposed settlement. *Id.* Again, that too was the case with *San Bernardino* at the time of its settlement, as the matter had not yet been finally resolved and, indeed, had not even been presented to the Commission for its consideration.

126. So *SL Communications* is plainly distinguishable from the *San Bernardino Proceeding*. But more importantly, *SL Communications* was not issued until 1999. Adams is aware of no decision between the 1980 issuance of *Allegan County* and 1999 which even suggested, much less held, that the Review Board could not approve a settlement in which a potentially disqualified entity would receive payment for dismissal of its application. Such a holding would be flatly contrary to the policy expressly announced by the Commission in *Allegan County*:

[B]eginning with this case, we will no longer require the resolution of character qualification allegations pending against an applicant prior to that applicant's withdrawal, with reimbursement, from Commission proceedings.

48 R.R.2d at 943. Any rational reading of that policy indicates that, in cases such as *San Bernardino*, settlement would be approved irrespective of pending disqualification of any

of the dismissing parties. Thus, when Mr. Parker was making his "disclosures" to the Commission in 1989-1992, the *Allegan County* policy was in full force and effect, and there could have been no hint that SBBLP's disqualification would have impeded a settlement, as long as SBBLP was dismissing its application.

127. RBI also claims that "intent to deceive cannot be inferred where, as here, the information in question is a matter of public record disclosed by the applicant." RBI PFC at 112. That assertion, however, is contradicted by *Schoenbohm*. There, the precise nature of Schoenbohm's criminal misconduct was a matter of record before the Commission. Nevertheless, Schoenbohm attempted to dissemble, to misstate the nature of his misconduct. And the Commission determined that that dissembling and misrepresentation was in and of itself disqualifying. Thus, RBI's claim is wrong.

128. Oddly, the Bureau claims that Mr. Parker might have been led to believe that the Commission did not view his adjudicated misconduct to be of any further concern. *See* Bureau PFC at 63-64. The Bureau's claims, however, are not only unsupported in the record, they are contradicted by the record.

129. According to the Bureau,

the Commission took no further action with respect to Mr. Parker notwithstanding his ownership of other broadcast interests. [Despite its decision in the San Bernardino case], the Review Board never made a recommendation relative to Mr. Parker despite its knowledge that Mr. Parker held interests "in numerous other broadcast permits." Moreover, although a party to the proceeding, the Mass Media Bureau took no action against Mr. Parker.

Bureau PFC at 63. This assumes that, at the time of the Review Board's decision in San Bernardino and thereafter, Mr. Parker continued to hold "numerous other broadcast

permits". The record indicates that that was *NOT* the case.

130. The reference to "numerous other broadcast permits" appears in the Review Board's decision, 3 FCC Rcd 4090 (¶16). It is followed by a citation to Paragraph 61 of Judge Gonzalez's Initial Decision. Paragraph 61 of the Initial Decision lists Mr. Parker's other broadcast interests as of the B cut-off date in the San Bernardino matter, a date which would have been no later than 1983. The interests listed there involved ownership in television stations in Tacoma, Washington; Honolulu, Hawaii; Anchorage, Alaska; and Anacortes, Washington. 2 FCC Rcd at 6567 (¶61).

131. The Anacortes station was the focus of the *Mt. Baker Proceeding* which resulted in the loss of that authorization in August, 1988. In the KWBB(TV) Transfer Application, filed just seven months later on March 2, 1989, Mr. Parker did not indicate any continued ownership in the Tacoma, Honolulu or Anchorage stations. See Adams Exh. 50, pp. 26-27. As a result, the record evidence indicates that, contrary to the assumption which appears to underlie the Bureau's statement quoted above, at the time of the *Mt. Baker* and *San Bernardino Review Board* decisions Mr. Parker did *not* in fact own *any* other broadcast interests. Nor, according to the KWBB(TV) Transfer Application, did Mr. Parker have any other applications then pending. Neither the Commission nor the Bureau was thus in a position to "take further action" with regard to Mr. Parker's "other broadcast interests" because Mr. Parker did not have any such interests, as far as the record reflects.

132. Next the Bureau's findings state:

although [the Commission] virtually charged Mt. Baker with attempted deception, the Commission did nothing other than cancel its permit; it, too,

took no further action against any of Mt. Baker's principals.

Bureau PFC at 64. *See also* RBI PFC at 49. The Commission's decision in *Mt. Baker* makes obvious that, in canceling Mt. Baker's construction permit, the Commission believed that it was taking the harshest possible action. Mt. Baker had urged that the Commission assess a forfeiture rather than cancel the permit. The Commission flatly rejected that suggestion. 3 FCC Rcd at 4778 (¶8). The suggestion that some additional sanction could have been imposed in the *Mt. Baker* proceeding is thus contradicted by the Commission's decision there. And no sanctions could have been imposed on Mr. Parker outside of the *Mt. Baker* proceeding because, as noted above, Mr. Parker had no other broadcast interests or pending applications at that time.

133. Next the Bureau's findings state:

By not designating any pending application in which Mr. Parker had an interest or initiating a proceeding requiring Mr. Parker (or a related entity) to show cause why that station's license should not be revoked, the Commission apparently determined that the action taken in the particular proceeding was sufficient to address the problem then before it.

Bureau PFC at 64. Again, this statement assumes that Mr. Parker had some pending application which could have been designated for hearing, or some other license which could have been revoked. The record evidence contains no indication at all that Mr. Parker had any such application pending or license as of July-August, 1988, *i.e.*, the time of the *Mt. Baker* and *San Bernardino Review Board* decisions -- except, of course, the applications at issue in those two cases, both of which were denied in no uncertain terms. As a result, the statement that "the Commission apparently determined that the action taken in the particular proceeding was sufficient to address the problem then before

it" is completely without foundation.

134. Mr. Parker did subsequently file a number of applications. But the first two such applications (*i.e.*, the KWBB(TV) Transfer Application and the Los Angeles LPTV Application), both filed in 1989, failed to mention the San Bernardino proceeding at all, supposedly because that proceeding was not then final. Tr. 1941-1942. As a result, the Commission's processing staff would not have had any reason to review the San Bernardino proceeding in connection with those applications. Thus, grant of the two 1989 applications could not have been interpreted as an indication that the Commission had made any determination at all about the continuing effect of the San Bernardino matter.

135. Moreover, since Mr. Parker seemed to believe that neither the Mt. Baker nor the San Bernardino proceeding was final as of his 1989 applications, he could not logically have concluded that the continuing effect of either of those earlier proceedings had been resolved at that point.

136. The situation was different in 1991, at which point both the Mt. Baker and San Bernardino proceedings had been finally resolved. In Mr. Parker's four applications filed in 1991-1992, he made no mention of the basic qualifications issue which had been resolved unfavorably to Mr. Parker in the San Bernardino proceeding. And none of his six applications from 1989-1992 provided any indication that, in *Mt. Baker*, the Commission had found that Mr. Parker had engaged in attempted deception of the Commission.

137. Next the Bureau's findings state

the Commission's actions (or, more properly, its inaction) appear to have created a climate of ambiguity, which both Mr. Parker and his attorneys and advisors apparently relied upon in deciding how to answer questions appearing in subsequently filed Commission applications.

Bureau PFC at 64. Since, as demonstrated above, the Commission had no opportunity for any "action", its "inaction" could not have created any "climate of ambiguity" on which anyone could have relied. This is true of Mr. Parker more than anyone else, as he must have known that he had filed no applications and held no other broadcast interests. Therefore, in late 1988 Mr. Parker could not possibly have expected the Commission to take any action against him because he had given it nothing to act on. That being the case, Mr. Parker could not possibly have relied on Commission inaction as a basis for the manner in which he described the *Mt. Baker* and *San Bernardino* proceedings.

(3) SUMMARY CONCERNING PHASE II

138. The record evidence establishes that Mr. Parker has repeatedly and consistently engaged in fraud and deception before the Commission. His misconduct was twice adjudicated in 1988 in the *Mt. Baker* and *San Bernardino* proceedings. As discussed above, he repeatedly offered partial, misleading descriptions of those adjudications in applications filed between 1989 and 1992. And in October, 1992, in the Dallas Amendment, he compounded his misconduct by acting "deceitful[ly]", as the Bureau itself expressly recognizes. Bureau PFC at 68. And as recently as June, 2000, in attempting to explain the Dallas Amendment, Mr. Parker served up testimony which was, in the Bureau's view, "unsupported, self-serving and, in any event, unbelievable". *Id.*

139. So, in the Bureau's view, Mr. Parker engaged in fraud and deceit in the

1980's, he engaged in deceit in at least 1992, and he has now, in 2000, sought to defend himself by offering "unbelievable" testimony. Moreover, as discussed above at Paragraphs 98-101, Mr. Parker's efforts to re-characterize the facts of the *San Bernardino Proceeding* were themselves misrepresentative.

140. The Commission depends on the honesty and probity of its regulatees. *E.g., Leflore Broadcasting Co. v. FCC, supra.* A single instance of dishonesty may be adequate basis for disqualification. *Cf., Schoenbohm, supra.* Here the Commission is presented with an individual whose affirmative deceptions to the Commission have spanned more than a decade. Mr. Parker's misconduct is precisely the kind which the Commission has indicated time and time again the Commission cannot and will not tolerate.

141. The Bureau suggests that RBI should not be held wholly responsible for Mr. Parker's misconduct. Bureau PFC at 68-69. It is difficult to understand how the Bureau could reach such a conclusion. Since 1991, at the latest, Mr. Parker has been in control of RBI. While Mr. Parker attempted to depict himself as a minority investor subject to the direction of RBI's board of directors, he could point to no instance in which the corporation took action contrary to his own wishes. *E.g., Tr. 778-782.* He has, since October, 1991, controlled the largest single block of stock in a widely-held corporation and could realistically never be outvoted or ousted. RBI's minutes demonstrate the extent of Mr. Parker's control over the corporation's affairs. Mr. Parker has signed virtually all documents submitted to the Commission on behalf of RBI. *See* Bureau PFC at 69.

142. And Mr. Parker's inability to tell the truth cannot be divorced from RBI. Mr. Parker's dissembling mischaracterization of his past adverse adjudications appeared in the WTVE(TV) Transfer Application. The Dallas Amendment, which the Bureau regards as deceitful, was filed long after Mr. Parker had begun to wield control of RBI. And in the context of this very proceeding involving renewal of RBI's license, Mr. Parker has engaged in "unbelievable" testimony even according to the Bureau.

143. In other words, to the extent that the Commission has been asked to rely on the accuracy of information submitted by RBI, it has been asked to rely directly on Mr. Parker's word -- a word which has been established here to be consistently unreliable. The full Commission, given the opportunity to allow Mr. Parker to acquire yet another broadcast authorization in 1997, refused to do so because of the "serious character questions" which it perceived in Mr. Parker's history. *Two If By Sea Broadcasting, Inc.*, 12 FCC Rcd 2254 (1997).

144. As the Commission has expressly stated, "some behavior is so fundamental to a licensee's operation that it is relevant to its qualifications to hold any station license." *Character Qualifications Policy*, 102 FCC2d 1179 (¶92) (1986), *recon. granted in part and denied in part*, 1 FCC Rcd 421 (1986), *modified*, 5 FCC Rcd 3252 (1990), 6 FCC Rcd 3448 (1991), 7 FCC Rcd 6564 (1992). In so stating, the Commission expressed its agreement with the views of two commenting parties who had argued that

if the licensee engaged in fundamental misbehavior, such as clear misrepresentation to the Commission, that misconduct should be considered to apply to all of the licensee's stations.

59 R.R.2d at 830, ¶87.

145. To find that RBI, which is controlled *de facto* if not *de jure* by Mr. Parker, is qualified to remain a licensee under these circumstances would be to condone chronic deceit before the Commission. The Commission has never before engaged in such condonation, and it cannot afford to do so in light of the fact that the integrity of the Commission's regulatory processes is based on the honesty and probity of its regulatees.

C. **THE PHASE III ISSUE**

146. RBI misstates the record evidence under the Phase III issue. But by far the greatest flaw in RBI's PFC is its misunderstanding of the legal standards applicable to the instant case. Accordingly, the misstatements of the record will be addressed in connection with the following discussion of the proper scope of the legal issues.

147. As the Bureau correctly observes, the narrow question presented here is whether Adams "filed its application for the purpose of achieving a settlement, thereby abusing the Commission's processes." Bureau PFC at 56. RBI appeared initially to concur in this limited scope when it filed the "Motion to Dismiss Adams' Application or, Alternatively, to Enlarge Issues (Abuse of Process)" which led to the addition of the Phase III issue. In that Motion, RBI argued that Adams's application was improperly motivated by the prospect of some kind of for-profit settlement.

148. But the record as developed after addition of the issue, after discovery, and after the trial of the issue, contains no evidence at all of any intent by Adams even to consider any settlement, much less actually to enter into one. To the contrary, both the documentary and testimonial evidence establishes unequivocally that Adams's principals were all aware, at the time of the filing of Adams's application, that no for-profit settlement of comparative renewal proceedings was permitted. Adams Exh. 62; Tr. 2429-2430, 2467. Further, to the limited extent that Adams was approached about the possibility of settlement, Adams consistently declined to engage in any such discussions. *See* Adams PFC at 202, n. 86.

149. In its PFC RBI points to no evidence at all to support the notion that

Adams filed its application for the purpose of entering a settlement.^{22/} Seemingly in recognition of the lack of evidentiary support for that notion, RBI has shifted gears in its PFC. Now, according to RBI, Adams's supposed misconduct inheres in the notion that Adams's application was an "abuse of process" to the extent that it was motivated by Adams's perception that stations operating with home shopping programming may not serve the public interest. RBI PFC at, *e.g.*, 127, 133-134, 142-143.

150. RBI's position is completely untenable.

151. According to the Commission, the term "abuse of process"

can be generally defined as the use of a Commission process, procedure, or rule to achieve a result which that process, procedure, or rule was not designed or intended to achieve or, alternatively, use of such process, procedure, or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule.

Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process ("Comparative Renewal Process"), 4 FCC Rcd 4780, 4793, n. 3 (1989). Thus, if Adams's goal was to achieve a result consistent with the purpose of the comparative renewal process, Adams cannot be said to have engaged in any abuse of process.

^{22/} The Bureau concludes, correctly, that the evidence establishes that Adams did not file its application for any improper purpose. While the Bureau states that "there are circumstances that appear to indicate that Adams did not have a *bona fide* intent to build and operate a station," Bureau PFC at 58, the Bureau did not provide any citations to the record, or to other portions of its PFC, or to anything, in support of this odd statement. If the Bureau seriously thought that such "circumstances" existed, the Bureau could and should have identified them, or at least indicated where in the record we might look for them. Since the Bureau failed to do so, its vague and unsupported reference to such "circumstances" can and should be ignored.

152. The record clearly establishes that a primary factor motivating Adams to undertake the preparation and prosecution of its application was Adams's belief that television stations broadcasting home shopping programming were not serving the public and would, therefore, be subject to successful renewal challenge. *See* Adams PFC at, *e.g.*, 195-196. Such a goal was absolutely and unquestionably consistent with the intended purpose of the comparative renewal process. *E.g.*, *Comparative Renewal Process*, 4 FCC Rcd at 4781 (¶11) (identifying "the intended goals" of the comparative renewal process as "obtaining a license *or identifying deficiencies of incumbent licensees*" [emphasis added]); *Pueblo Broadcasting Corp.*, 57 R.R.2d 1053, 1059 (Rev. Bd. 1985) ^{23/}; *Formulation of Policies Relating to the Broadcast Renewal Applicant Stemming from the Comparative Hearing Process*, 27 FCC2d 580, 583 (1971) (referring

^{23/} In *Pueblo* the Review Board recognized that the Communications Act and the Commission's policies permit private parties to serve as private attorneys-general:

because to win they have to raise important public interest issues which might otherwise escape the notice of an agency which is evermore confined to Washington, D.C. and could not in any event possibly be aware of thousands of individual communities and their unique problems. . . .

. . . the public may benefit if one station is replaced by another which continues to provide the best practicable service. Also relevant and merging into this analysis is a second line of cases which begins with *Ashbacker*, and extends to *Victor Broadcasting*, 722 F.2d 756 (D.C. Cir. 1983).

. . . Despite the historical recognition of an existing station's legitimate renewal "expectancies", see cases cited above, and the difficulties inherent in challenges to license renewals, [citation omitted], both the Commission and the court continue to insist that this spur to competitive performance benefits the public. *Victor Broadcasting*, *supra*.

57 R.R.2d at 1059-1060.

to the comparative renewal process's "critically important competitive spur"); *NBMC v. FCC*, 589 F.2d 578, 579 (D.C. Cir. 1978) ("Congress also provided for a competitive spur to existing licensees by affording new parties an opportunity to apply for the same license"); *Deregulation of Radio*, 84 FCC2d 968, 984, 49 R.R.2d 1, 14, ¶37 (1981); *Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503, 507 (D.C. Cir. 1982); *Tele-Broadcasters of California, Inc.*, 58 R.R.2d 223, 234, ¶22 (Rev. Bd. 1985).

153. RBI's apparent position thus is illogical. RBI appears to argue that, if a comparative renewal challenger files its application because it is unsatisfied with the programming of the incumbent targeted by the challenge, then the challenger is engaging in an abuse of process. But as set out in numerous decisions, including those cited in Paragraph 152 above, the express purpose of the comparative renewal process as created by Congress, implemented by the Commission, and repeatedly endorsed by the Courts, was to encourage challenges to incumbents by parties not satisfied with the incumbent's performance. RBI's position would place challengers in a Catch-22: by seeking to advance the express purpose of the comparative renewal policy, a challenger would be abusing that process. RBI's position is nonsense and must be rejected. ^{24/}

^{24/} RBI's argument about "abuse of process" relies on a number of cases relating to "strike" applications. See RBI PFC at, e.g., 126, citing *Millar v. FCC*, 707 F.2d 1530 (D.C. Cir. 1983); *Capitol Broadcasting Co.*, 30 FCC 1 (1961); *Blue Ridge Mt. Broadcasting Co.*, 37 FCC 791 (Rev. Bd. 1964), *rev. denied*, FCC 65-5 (Jan. 6, 1965), *aff'd sub nom. Garden County Broadcasting Co. v. FCC* 6 R.R.2d 2044 (D.C. Cir. 1965) (memorandum opinion). Those cases did not involve the comparative renewal process. Rather, they involved situations where an application for a new authorization was filed in order to block, delay or impede a second application for a new authorization. Such situations normally arose when an existing broadcaster was faced with the prospect of potential competition in the form of a construction permit application for a new station.

(continued...)

154. Trying to flesh out its claim that Adams filed for some impermissible reason, RBI asserts that Adams has given "inconsistent testimony about why it filed its application." RBI PFC at 129. That is clearly wrong. Adams's position has consistently been that Adams believed that stations airing home shopping programming were not serving the public interest and that such stations would thus be susceptible to successful comparative renewal challenge. *See Adams PFC at, e.g., 195-196.*

155. As it has previously in this proceeding ^{25/}, RBI suggests that Adams could have or should have sought to buy an existing station, or possibly look for some other station to challenge. RBI PFC at 135-138. Such suggestions are far off the mark. Adams's principals, with first-hand familiarity with the comparative renewal process, invoked that process for the purpose of obtaining a television station and serving the public interest by focusing attention on the failure of at least one home shopping station to serve the public interest. *See Adams PFC at, e.g., 195-197.*

156. RBI challenges Adams's assertion in this regard, claiming that Adams

^{24/}(...continued)

In order to forestall or possibly even prevent the arrival of such new competition, the existing broadcaster would file its own application mutually exclusive with the pending application. The result would be substantial delay in the final resolution of the matter, delay which would work to the advantage of the existing broadcaster. In the instant case, Adams has not sought to delay anything. To the contrary, during the 1994-1999 pre-designation pendency of Adams's application, Adams filed three separate petitions for mandamus with the Court of Appeals in order to speed up the processing of this matter. Adams was seeking to avoid delay, not engender it.

^{25/} *See, e.g.,* RBI's "Motion to Enlarge Issues (Misrepresentation/Lack of Candor)", filed July 17, 2000. To the extent that RBI presents, in its PFC, arguments previously presented by RBI in that Motion and opposed by Adams in its August 4, 2000 Opposition thereto, Adams incorporates that Opposition by reference herein.

"knew the Commission had decided a year before Adams' application was filed that home shopping programming serves the public interest." RBI PFC at 129; *see also* RBI PFC at 141-142. But that's not what the Commission had decided. To the contrary, the Commission had merely decided that home shopping formats did not automatically preclude a finding that a home shopping station was operating in the public interest. *See Home Shopping Report and Order*, 8 FCC Rcd 5321, 5327 (¶31). The Commission's left wide open the possibility, if not the likelihood, that upon closer scrutiny home shopping stations were not in fact operating in the public interest. Adams's application was filed in light of that distinct possibility.

157. Adams's assessment was, of course, correct. As the record under the comparative renewal issue demonstrates, RBI failed to serve the public with any meaningful, locally-oriented, locally-produced issue-oriented programming throughout the license term. *See, e.g.*, Adams PFC at, *e.g.*, 32-68. Even the Bureau has concurred with Adams that RBI's demonstrated programming performance did not warrant a renewal expectancy. *See* Bureau PFC at, *e.g.*, 73-74. Thus, RBI's self-serving criticism of Adams's motivation is to no avail.

158. RBI also claims that Adams did not make any "legitimate effort to evaluate WTVE's programming". RBI PFC at 145-160. Again, much of this argument merely reiterates claims advanced by RBI in its currently-pending Motion to Enlarge filed on July 17, 2000, to which Adams has responded. Adams has incorporated its Opposition to that Motion herein and is reluctant to devote even more attention to RBI's baseless claims. However, in response to the RBI PFC, Adams is constrained to make the

following observations.

159. It is uncontested that Mr. Gilbert traveled on several occasions to Reading, that he interviewed a significant number of people -- including a representative of the local daily newspaper -- and was unable to find anyone who knew about the station or its programming. Adams PFC at 198. While RBI claims that Mr. Gilbert's efforts were "defective", RBI PFC at 147, it does not suggest that those efforts were not in fact made. Moreover, other evidence introduced in this proceeding is consistent with what Mr. Gilbert learned about Reading during his visits: the local newspaper did not even list Station WTVE(TV) in its television listings, *see, e.g.*, Bureau PFC at 6, and virtually none of RBI's own public witnesses demonstrated any significant familiarity with the station's programming, *see* Adams PFC at 69-88. So while RBI may claim that Mr. Gilbert's efforts were "defective", the evidence adduced in the hearing independently confirms that his observations were valid.

160. RBI also quibbles that Mr. Gilbert should have reviewed RBI's local public inspection file. RBI PFC at, *e.g.*, 145. *See also* Bureau PFC at 59. But such a review would have given RBI a tip-off that a challenge was being contemplated. Such a tip-off could have led to a last-minute effort by RBI to improve its programming and thereby stave off the anticipated challenge. It was obviously not in Adams's interest to provide such a tip-off.

161. Further, review of the public inspection file would merely have confirmed that the station was not serving the public. RBI's voluminous exhibits in the standard comparative renewal phase of this case were taken largely from the station's local public

file. As set forth in detail in Adams's PFC, at 32-68 and 227-231, and the Bureau's PFC, at 73-74, those exhibits fell far short of establishing substantial service to the public.

162. In addition to his multiple visits to Reading, Mr. Gilbert also commissioned Mr. Sherwood to tape the station's programming. There is no dispute that that taping effort was undertaken at Mr. Gilbert's request.

163. While RBI attempts to quibble about various aspects of the taping project, RBI fails to address, much less answer, the ultimate question: if Mr. Gilbert was not trying to obtain a solid record of the station's programming, why then did he commission the making of the tapes? What possible use to Mr. Gilbert or Adams would more than two weeks' worth of videotapes of non-WTVE(TV) programming have been? The fact is that Mr. Gilbert commissioned the tapes in order to be sure that Station WTVE(TV) was not serving the public interest. Adams has consistently taken that position, and RBI has countered it with nothing other than self-serving speculation.

164. RBI claims that Mr. Sherwood testified that "Mr. Gilbert never even mentioned WTVE or Channel 51", RBI PFC at 151. That's not right. In fact Mr. Sherwood acknowledged that Mr. Gilbert "may have" mentioned Channel 51. Tr. 2139. In light of the passage of time, however, Mr. Sherwood could not recall a specific channel number. *Id.* ^{26/} Similarly, RBI claims that Mr. Sherwood testified that

^{26/} While the Bureau also stated that Mr. Sherwood "did not even have access to WTVE(TV)'s programming", Bureau PFC at 59, that's not correct. Mr. Sherwood resided within 30 miles of Reading, *e.g.*, Tr. 2139, and thus was within the station's service area and had over-the-air access to the station.

he spoke with Mr. Gilbert only twice during the taping process. RBI PFC at 150. In fact Mr. Sherwood could not recall how many times he had spoken with Mr. Gilbert, although he did recall speaking with him "at length" at least once. Tr. 2149.

165. RBI persists in its claims that either Mr. Gilbert did not review the tapes, or that he did not review them carefully enough. RBI PFC at 150-160.^{27/} But Mr. Gilbert's testimony, both under the Phase III issue and in his pre-Phase III testimony in January, 2000, is consistent. He instructed Mr. Sherwood to tape the station's programming and to send him the tapes. A preliminary taping of 24 hours' worth of programming was undertaken on June 1, 1994 and sent to Mr. Gilbert. He reviewed it to confirm that Mr. Sherwood was taping what he was supposed to be taping. Of the first several PSA's he saw on that tape, the majority involved Pennsylvania.^{28/} Accordingly, Mr. Gilbert reasonably concluded that Mr. Sherwood was taping the right programming. Having reached that conclusion, he had no reason to doubt it as he reviewed the additional tapes provided by Mr. Sherwood.

166. RBI also makes repeated reference to a 30-second "identification of the

^{27/} At footnote 30 at RBI PFC page 153, RBI argues that Mr. Gilbert's claim of reviewing the tapes is "patently false". This assertion is based on an unsupported assertion concerning the capabilities of "a standard VHS video player/recorder". However, the record contains no information about (a) the specific equipment which Mr. Gilbert used or (b) the capabilities of *any* kind of video recording equipment. RBI's claim cannot be credited.

^{28/} At RBI PFC page 157, RBI claims that Mr. Gilbert's recollection of the Pennsylvania PSA's was "based wholly on Mattmiller's summary of the tapes and not on any actual recollection." But Mr. Gilbert's testimony about recalling the Pennsylvania PSA's occurred in January, Tr. 1085, *months before* Mr. Mattmiller's summary was prepared. RBI's claim is obviously fallacious.

Home Shopping Club" which appears in the Sherwood tapes at 50 minutes after the hour, according to Mr. Mattmiller's testimony. RBI PFC at, *e.g.*, 72, 74, 159, citing RBI Exh. 47, ¶7. According to RBI, Mr. Gilbert should have recognized from these hourly identifications, appearing at 50 minutes after the hour, that the tapes did not depict Station WTVE(TV) programming. *Id.*

167. RBI's argument on this point supports Adams. The Presiding Judge's attention is directed, for example, to the WTVE(TV) program log for July 18, 1994, which is included at pages 140-153 of Adams Exh. 7. That log indicates that between 45 and 55 minutes after each hour, a 60-second promotional announcement for Home Shopping Network was broadcast. Moreover, the log also indicates that a 30-second Home Shopping Network promotional announcement was broadcast at approximately 17 minutes after most hours. In other words, the fact that the Sherwood tapes showed Home Shopping Network promos at 50 minutes after the hour would *NOT* have enabled anyone to identify the tapes as not being Station WTVE(TV) programming since tapes of Station WTVE(TV) would have shown the same, if not more, Home Shopping Network promos.

168. RBI also claims that Adams made only "casual efforts to secure and maintain" the availability of a transmitter site. RBI PFC at 160-163. But as RBI acknowledges, not only did Adams obtain oral confirmation of the availability of its proposed site, Adams went further and entered into formal agreements concerning the use of that site. *Id.* The Commission's requirements concerning "site availability" did not require such additional efforts at all. *See, e.g., David Ortiz Radio Corp. v. FCC,*

941 F.2d 1253 (D.C. Cir. 1991). The fact that Adams undertook those additional efforts undermines, rather than supports, RBI's claims.

169. RBI also quibbles that the facts that Adams was involuntarily dissolved by Massachusetts, or that Adams had no formal business plan, or that Adams had a "motivational fee agreement" with its counsel, are somehow meaningful. RBI PFC at 163-166. The involuntary dissolution was, however, unknown to Mr. Gilbert until the June hearing. Within one week of learning about the dissolution, Mr. Gilbert caused Adams to be reinstated, as the record of this proceeding already establishes. As to the lack of a business plan, Adams's principals are all highly successful businesspeople with extraordinary records of accomplishment. *See* Adams Exh. 1. They also were familiar with the delays inherent in the Commission's comparative renewal process, delays which have in fact been realized already in this more-than-six-year-old proceeding. The fact that Adams elected not to undertake any formal business plan in 1994 is not probative of anything but the good business sense of Adams's principals.

170. As to the fee agreement, RBI claims that the agreement is "inconsistent with the intention to own and operate the station". RBI PFC at 166. But the agreement contemplates *inter alia* that the Adams application will be granted, which is completely consistent with such an intention. Moreover, contrary to RBI's assertion, the fee agreement does not memorialize an "oral agreement that was reached in 1993." RBI PFC at 81. Mr. Gilbert testified that no fee agreement was in place between Adams and its counsel initially; rather, the parties "just said we'll work it out." Tr. 1021. An oral agreement, ultimately reduced to writing in June, 1999, was reached at some point, but

the record does not indicate precisely when. The testimony certainly does not support RBI's claim of 1993, since Mr. Gilbert specifically stated that "we didn't have a fee arrangement at the beginning", Tr. 1021.

171. RBI also suggests that Adams's interactions with Telemundo are "inconsistent with an intent to own and operate a television station". RBI PFC at 166-169. As set out in Adams's PFC at 202-205, that simply is not true. To the contrary, the fact that, in July, 1999, Adams sought unsuccessfully to initiate discussions with Telemundo concerning possible affiliation once Adams's application was granted strongly supports the fact that Adams fully intended to prosecute its application successfully and to construct and operate the Reading station.

172. RBI wraps up its PFC with a wholly conclusory effort to liken this case to *WWOR-TV, Inc.*, 7 FCC Rcd 636 (1992), *aff'd sub nom. Garden State Broadcasting, L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993). The problem is that this case is not at all comparable to *WWOR-TV*. In *WWOR-TV*, the challenging applicant had asserted that its decision to file its application was based on its perception of the incumbent's supposedly inadequate programming performance. 7 FCC Rcd at 639 (¶27). The incumbent had assumed control of the station in question in April, 1987, so the challenger had no opportunity at all to consider the incumbent's programming performance until then. The question arose as to exactly when the challenger formed its intent to file its challenge application.

173. At trial, the challenger was unable to establish that date, although the challenger's principal insisted that the intent to file did not occur as early as April, 1987,

because "she would not have made an adverse judgment" about the incumbent's programming so soon after the incumbent had taken over. 7 FCC Rcd at 639 (¶28).

174. But evidence, discovered post-hearing, conclusively established that the challenger had formed its intent to file on April 30, 1987, a mere three weeks after the incumbent assumed control of the station. 7 FCC Rcd at 639 (¶30). Since the challenger's principal had conceded that such a limited timeframe would not have afforded adequate time in which to evaluate the incumbent's programming, the credibility of the challenger's showing evaporated.

175. In the instant case, the uncontested documentary and testimonial evidence establishes that Adams began considering the filing of an application based on a challenge to home shopping programming in mid-1993. After review of a number of relevant materials, including Commission decisions, over the course of several months, Adams determined the home shopping stations which would be coming up for renewal and which would, as a result, be possible targets. One was Station WTVE(TV).

176. It is not disputed that Station WTVE(TV) was broadcasting home shopping programming throughout the license term. The record establishes beyond argument that once Adams had determined that Station WTVE(TV) would be available for challenge, Mr. Gilbert undertook substantial efforts to inform himself of the station's public service programming and reputation in its service area. Satisfied that the station was broadcasting home shopping programming and not providing public service programming, Adams proceeded to file its application on June 30, 1994.

177. In *WWOR-TV*, the Commission cautioned that "we will not infer improper