

[W]e find no error in the ALJ's core conclusion that Van Osdel is neither the sole nor dominant management figure --- but a convenient vizard [and SBBLP] is a **transpicuous sham** [cite omitted], and the ALJ justly rejected its **attempted fraud**. Religious Broadcasting Network, 3 FCC Rcd 4085, 4090 (Rev. Bd. 1988). (Emphasis added.)

Mr. Parker received and read a copy of the Review Board's decision shortly after its release. (Tr. 2085.)

121. After the Initial Decision, the parties reached a settlement which the Review Board approved. 5 F.C.C. Rcd 6362, released October 31, 1990. SBBLP received \$850,000 to dismiss its application. Religious Broadcasting Network, 5 F.C.C. Rcd 6362 (Rev. Bd. 1990). Mr. Parker did not directly share in the payment to SBBLP. He testified that he "never got a dime." (Tr. 1945.) However, at one time Mr. Parker held a 20% interest in SBBLP which he transferred to a sister and her husband who did receive money from the settlement. Mr. Parker testified that his understanding at that time was that approval of the settlement resolved the real party-in-interest issue in favor of SBBLP, rationalizing that otherwise, SBBLP could not have participated in the settlement. (Tr. 2069-70, 2074-75.)

Mt. Baker

122. One month after the Review Board found Mr. Parker to be an undisclosed real party-in-interest, the Commission denied an application for review filed by another entity controlled by Mr. Parker. (Tr. 747.) Mt. Baker Broadcasting Co., Inc., 3 F.C.C. Rcd 4777 (1988). Mt. Baker asked the Commission to reinstate a construction permit for a new television station in Anacortes, Washington. The staff had cancelled the permit due to a substantial variance found between what had been authorized and what Mt. Baker had actually constructed. The Commission denied reinstatement and held:

[I]mproper construction did not occur through error or inadvertence; the facts clearly indicate an **effort to deceive** the Commission. (Emphasis added.)

3 F.C.C. Rcd at 4778. Mr. Parker received and read the Commission's decision shortly after its issuance. (Tr. 1908, 2076.) Notwithstanding the finding of an "effort to deceive the Commission", Mr. Parker testified that he understood that the Commission did not have a problem with anyone's character in the proceeding because no character issue was added and decided. (Tr. 2645.) The conclusion that the Commission had no problem is rejected in view of the decision's language.

Disclosures On Applications**Form 315**

123. Questions 4 and 7 of the Commission's transfer application form asks for information regarding character qualifications.

Question 4:**Legal Qualifications:**

- (a) Has an adverse finding been made, adverse final action taken or consent decree approved by any court or administrative body as to the applicant or any party to the application in any civil or criminal proceeding brought under the provisions of any law related to the following: any felony, antitrust, unfair competition, fraud, unfair labor practices, or discrimination? (Emphasis added.)
- (b) Is there now pending in any court or administrative body any proceeding involving any of the matters referred to in 4(a)?

If the answer to (a) or (b) above is Yes, attach as Exhibit No. ____, a full disclosure concerning the persons and matters involved, identifying the court or administrative body and the proceeding (by dates and file numbers), stating the facts upon which the proceeding was based or the nature of the offense committed, and disposition or current status, of the matter. Information called for by this question which is already on file with the Commission need not be refiled provided: (1) the information is now on file in another application or FCC form filed by or on behalf of transferee; (2) the information is identified fully by reference to the file number (if any); the FCC form number and the filing date of the application or other form containing the information and the page of paragraph referred to; and (3) after making the reference, the transferee states, "No change since date of filing."

Question 7:**Broadcast Interests:**

Has the applicant or any party to this application had any interest in or connection with the following:

- (a) an application which has been dismissed with prejudice by the Commission?

- (b) an application which has been denied by the Commission?
- (c) a broadcast station, the license of which has been revoked?
- (d) an application in any Commission proceeding which left unresolved character issues against the applicant
- (e) If the answer ---is Yes, state in Exhibit No. --, the following information
 - (i) name of party,
 - (ii) nature of interest, giving dates,
 - (iii) call letters of station,
 - (iv) location.

Question 4 calls for “full disclosure” about adverse findings of “fraud” and essentially asks for copies of the decisions. The word “fraud” is sufficiently descriptive to require disclosure of the adverse decisions against Parker in San Bernardino (“transpicuous sham” and “attempted fraud”) and Mt. Baker (“effort to deceive the Commission”). Question 4 was answered “no.” The information requested by Questions 7(a) and 7(b) were answered “yes.” Question 7(c) asks about revocations and the question was answered “no.” Question 7(d) calls for disclosure in the context of the Commission’s Allegan policy and that question was answered “no.”¹⁶

Form 346

124. Form 346 is used to apply for an application to construct a low power television station (LPTV). Form 346 questions concerning the legal qualifications of an applicant are substantially the same that Form 315 asks of parties to a transfer. But Question 4 is different in one material respect. In Form 315, Question 4 asks whether a party was the subject of an adverse finding made by “any administrative body.” In Form 346, the Question 4 counterpart asks whether an adverse finding has been made that was related to “fraud before another governmental unit.” (Emphasis added.) Since the adverse findings that would apply to Mr. Parker involve only the subject of “fraud” at the Commission and not at “another governmental unit,” the facts of this case do not fit with respect to Form 346 Question 4. However, the disclosures in Form 346 Question 7 do apply to Mr. Parker in the same manner as Question 7 disclosures apply in Form 315.

¹⁶ Allegan County Broadcasters, Inc., 83 F.C.C. 2d 371, 373 (1980) (subsequent procedures to be taken to address unresolved substantial character allegations not addressed previously in order to accommodate settlement).

Parker's Disclosures To The Commission**San Francisco**

125. On March 2, 1989, an entity named West Coast United Broadcasting ("West Coast") filed an application for consent to transfer control of Station KWBB(TV), San Francisco. (Adams Exh. 50.) West Coast's secretary signed the application on behalf of the transferor and the transferee giving for her address Mr. Parker's residential address. (Adams Exh. 50 at 23; Tr. 1939-40.) The application reported that Mr. Parker was a vice president and a director for West Coast and would continue as such following the transfer. (Adams Exh. 50 at 24, 34.)

126. West Coast responded to the questions with an unqualified "no" to both parts of Question 4. (Adams Exh. 50 at 7.) West Coast responded to Question 7 in the affirmative as to subparts (a) and (b) and in the negative as to subparts (c) and (d) thus denying that there were any unresolved character issues against Parker. The narrative disclosure stated in an exhibit:

Micheal L. Parker, Vice President and a director of West Coast, ... is an officer, director, and shareholder of Mt. Baker Broadcasting Co., which was denied an application for extension of time of its construction permit for KORC(TV), Anacortes, Washington, FCC File No. BMPCT-8607OIKP. See Memorandum Opinion and Order, FCC 88-234, released August 5, 1988. Mt. Baker Broadcasting Co. has pending before the Commission a Petition for Reconsideration of that decision.

(Id. at 26-27.) The narrative failed to mention the finding of the "effort to deceive the Commission." The narrative also failed to mention at all the San Bernardino decision or Mr. Parker's role in the flawed SBBLP application.

127. The law firm of Schnader, Harrison, Segal & Lewis ("Schnader, Harrison") submitted the application to the Commission. (Adams Exh. 50 at 1; Tr. 1858.) R. Clark Wadlow, a Schnader, Harrison partner, previously represented Mr. Parker, or entities in which he had attributable interests. (RBI Exh. 46 at 2.) Mr. Parker acknowledged having reviewed the narrative response in Exhibit III which he asserted had been drafted by Schnader, Harrison attorneys. Mr. Parker claimed that West Coast had relied upon legal advice to decide what was needed to respond to the application's questions. (RBI Exh. 46 at 6.) Mr. Parker testified that he believed the information referenced above in connection with Question 7 had been prepared by Mr. Wadlow. (Tr. 1941, 2012.) Mr. Wadlow was not certain that he had reviewed the application. (Tr. 1858, 1864-65.) Mr. Wadlow concluded that Question 7 was answered correctly, but he had no explanation as to why the San Bernardino decision was not referenced. Nor had he read the Mt. Baker decision at that time. (Tr. 1859-60, 1865.) Mr. Parker was not represented in Mt. Baker by Schnader, Harrison. (Tr. 1914.)

Los Angeles (LPTV)

128. On December 8, 1989, Mr. Parker filed an application for a construction permit for a new low power television station in Los Angeles. (Adams Exh. 49.) Mr. Parker answered questions 4 and 7 in the same manner as the disclosure in West Coast. He also included the same narrative statement relative to the Mt. Baker construction permit stating that an extension of time was denied and that a petition for reconsideration was pending before the Commission. (Adams Exh. 49 at 4-5, 11.) As was the case in the West Coast application, nothing appeared in the Los Angeles application relating to the "effort to deceive" in Mt. Baker and nothing at all appeared with respect to the San Bernardino decision which was not even mentioned.

Norwell (WHRC)

129. On July 23, 1991, an application was filed to transfer control of Station WHRC-TV, Norwell, Massachusetts, from Nikita Maggos to Two If By Sea Broadcasting Corporation ("TIBS"). Mr. Parker was the president, sole director and 100% shareholder of TIBS. (Adams Exh. 51 at 10.) The application was transmitted to the Commission by Mr. Eric Kravetz, a communications attorney. (*Id.*, Tr. 2343.)

130. In response to Questions 4 and 7, TIBS checked the same "no" and "yes" boxes as had West Coast. (Adams Exh. 51 at 9, 11.) The narrative exhibit contained the same information about the denial of Mt. Baker's extension application but no reference was made to a petition for reconsideration. The exhibit explaining Question 7 "yes" responses stated the following:

Micheal Parker was an officer, director and shareholder of Mt. Baker Broadcasting Co., which was denied an application for extension of time of its construction permit for KORC(TV), Anacortes, Washington. [citations omitted].

Although neither an applicant nor the holder of an interest in the applicant to the proceeding, Micheal Parker's role as a paid independent consultant to San Bernardino Broadcasting Limited Partnership ("SBB"), an applicant in MM Docket No. 83-911 for authority to construct a new commercial television station on Channel 30 in San Bernardino, CA, was such that the general partner in SBB was held not to be the real party in interest to that applicant and that, instead, for purposes of the comparative analysis of SBB's integration and diversification credit, Mr. Parker was deemed such. See Religious Broadcasting Network et. al., FCC 88R-38, released July 5, 1988. NM Docket 83-911 was settled in 1990 and Mr. Parker did not receive an interest of any kind in the applicant awarded the construction permit therein,

Sandino Telecasters, Inc. See Religious Broadcasting Network et al., FCC 9OR-101, released October 31, 1990.¹⁷

(Adams Exh. 51 at 17-1 8.)

131. Mr. Parker testified that he does not know the narrative's author. But he believes that an attorney drafted it and he suggested that Mr. Marvin Mercer, RBI's bankruptcy attorney, prepared the narrative with input from either Mr. Eric Kravetz or Mr. Wadlow's law firm (then Sidley & Austin). (RBI Exh. 46 at 7; Tr. 1798, 1952-54, 2058.) Mr. Kravetz, a communications counsel who did some work for Mr. Parker, denied any role in the narrative's preparation and had no knowledge as to who prepared it or how it was prepared. (Tr. 2344-46.) Mr. Wadlow also denied that he had any role. (Tr. 1805.) Ms. Paula Friedman, a former Sidley & Austin associate, testified that she had no role in the Norwell application and that so far as she knew, no one from Sidley & Austin had any role. (Tr. 2105-06.) Whoever was the drafter, Mr. Parker admitted reviewing the application and approving it, including the narrative. (RBI Exh. 46 at 7.)

132. Mr. Parker justified the omissions regarding the Mt. Baker and San Bernardino decisions based on a letter that he had received from Mr. Wadlow on February 18, 1991. (RBI Exh. 46 at 7 and Attachment D.) The Wadlow letter addressed the sufficiency of the narrative's disclosure and stated:

It is our opinion that the Administrative Law Judge ("ALJ") [in the San Bernardino case] simply concluded that SBBLP had failed to report your activities and involvements [sic] with SBBLP - - which the ALJ found to be such as to make you a real party-in-interest. However, the ALJ did not find that you had done anything improper [sic] or that anything you had done reflected adversely on you.

As I mentioned above, we have continued to represent you in other FCC proceedings, as we have for the last eight or ten years. You serve as a principal of other FCC licensees. We are aware of no question that has ever been raised as to your qualifications to hold such a position.

Mr. Parker and Mr. Wadlow testified the letter was prepared in haste because Mr. Parker had requested that it be prepared quickly in order to present it to third parties in connection with matters related to RBI's bankruptcy. (Tr. 1806-08, 2001-02, 2016-19, 2025; Adams Exh. 59.) The letter was not prepared in connection with disclosures to be made to the Commission.

¹⁷ Adams has objected in prehearing motions to the citations by Mr. Parker to non-published versions of Review Board decisions. While it was an irritant purposefully inflicted and although the rules require FCC Record cites, the practice does not constitute evidence of a lack of candor. See 47 C.F.R. §1.14.

133. Following the Norwell grant, three more applications were filed which contained the same questions and answers which had appeared in the West Coast and Norwell applications: Reading, Twenty Nine Palms and Dallas. The narrative describing the Mt. Baker and San Bernardino decisions which had appeared in the Norwell application was used once again. (Adams Exh. 52 at 7, 12, 30; Adams Exh. 53; and Adams Exh. 54 at 7, 10, 24-25; Tr. 1971-74.)

Reading (WTVE)

134. On November 13, 1991, an application was filed for the assignment of Station WTVE(TV), Reading, PA. (Adams Exh. 52.) The transferee was Partel, the company controlled by Mr. Parker that had entered into the MSA with RBI. The disclosure followed the pattern of answering "no" to questions about fraud and including in an exhibit the "boilerplate" narrative as was used for West Coast and Norwell. Sidley & Austin represented that it had no connection with Parker's disclosure.¹⁸ (Tr. 1805, 2105.) In response to Question 7(a) as to whether any party had any interest in or connection with any application that had been denied or dismissed with prejudice, Mr. Parker responded "yes." (Adams Exh. 52 at 12.) But Mr. Parker answered "no" to Question 7(d) asking whether there were unresolved character issues. The narrative descriptions of Mr. Parker vis a vis the Mt. Baker and San Bernardino proceedings were submitted to the Commission as follows:

Micheal Parker also was an officer, director and shareholder of Mt. Baker Broadcasting Co. Mt. Baker Broadcasting Co.'s application for extension of time of its construction permit for KORC(TV), Anacortes, Washington (FCC File No. BMPCT-86070KP) was denied. See Memorandum Opinion and Order, FCC 88 - 234, released August 5, 1988.

Although neither an applicant nor the holder of an interest in the applicant to the proceeding, Mr. Parker's role as a paid independent consultant to San Bernardino Broadcasting Limited Partnership ("SBB"), - - - was such that the general partner in SBB was held not to be the real party in interest to that applicant and that, for purposes of the comparative analysis of SBB's integration and diversification credit, Mr. Parker was deemed such. - - - . This proceeding was settled in 1990 and Mr. Parker did not receive an interest of any kind in the Sandino Telecasters, Inc., the applicant awarded the construction permit. (Citation omitted.)

(Adams Exh. 52 at 30.)

¹⁸ The distancing of the lawyers from authorship of the narrative's language creates a further inference that it was prepared by Parker or under Parker's direction and then given to the lawyers.

Twenty Nine Palms (KVMD)

135. On June 4, 1992, an application for the assignment of Station KVMD(TV) at Twenty Nine Palms, CA was filed. (Adams Exh. 53.) Mr. Parker was the transferee and he executed the transferee portion of the application. There was no law firm or lawyer identified with this application. Mr. Parker responded "no" to Question 4 about "fraud". He also answered "no" to Question 7(d) asking whether Mr. Parker had any interest in or connection with any application which left an unresolved character issue against the applicant. (Adams Exh. 53 at 6, 8.) Mr. Parker did answer in the affirmative to Question 7(a) and 7(b) asking whether he had any interest in or connection with an application which had been denied or dismissed with prejudice, referring to Parker's disclosure in an exhibit. (Adams Exh. 53 at 18-20.) The narrative accounts of the Mt. Baker and San Bernardino proceedings were the same as those made in the Station WTVE(TV) transfer quoted above. (Adams Exh. 53 at 19-20.)

Dallas (KCBI)

136. On August 3, 1992, an application for assignment of the license of International Broadcast Station KCBI, Dallas, TX, was filed. (Adams Exh. 54.) The assignee was TIBS, a Parker controlled entity. Mr. Parker responded "no" to the question about fraud. He also answered "no" to the question of whether he had any interest or connection with any applications which left an unresolved character issue against the applicant. In this particular application, the staff sought a clarifying amendment on whether basic character issues had been sought or added with respect to any of the applicants whose applications had been dismissed. (Bureau Exh. 2 at 3; Tr. 1977, 1979.) After receiving the request, Mr. Kravetz spoke with Mr. Parker and in October 1992, Mr. Kravetz drafted an amendment, which Mr. Parker signed:

Two If By Sea Broadcasting Corporation ("Two If By Sea") has applied for authority to acquire Station KCBI from Criswell Center for Biblical Studies. As part of that application, Two If By Sea listed applications in which its officers, directors and principals had held interests and which were dismissed at the request of the applicant. This will confirm that no character issues had been added or requested against those applicants when those applications were dismissed. (Emphasis added.)

(Adams Exh. 55 at 3; Bureau Exh. 2; Tr. 1980, 1982-83, 2355-56.) Mr. Parker testified that he or someone under his direction had provided Mr. Kravetz with the information and that Mr. Kravetz proposed the amendment which Mr. Parker reviewed "very carefully" and was "satisfied as to its accuracy." (Tr. 1983.) Mr. Kravetz testified that he had spoken to the FCC staff. (Tr. 2355.) Mr. Kravetz then drafted the amendment (Adams Exh. 55) based on information that Mr. Parker provided and which Mr. Parker reviewed and signed thereby giving his approval. (Tr. 2355-56.) In drafting the amendment, Mr. Kravetz relied exclusively on information provided him by Mr. Parker and made no independent research. (Tr. 2357.) Mr. Kravetz filed the amendment on October 29, 1992. The Commission staff granted the application one day later. (Adams Exhs. 55, 56.)

Evidence Of Lack Of Candor

137. Mr. Parker never told Mr. Kravetz that a real party-in-interest issue had been added in the San Bernardino proceeding. That was a critical piece of information and its withholding by Parker left Mr. Kravetz factually out in the cold. Mr. Kravetz was entitled to receive candid information from Parker before he drafted the amendment. Had Mr. Parker told Mr. Kravetz that a real party-in-interest issue had been requested and added in San Bernardino, Mr. Kravetz would not have drafted the amendment as he did. That conclusion is established by the uncontradicted testimony of Mr. Kravetz. (Tr. 2372.) Mr. Kravetz's testimony is credible. As a practicing attorney, there would be no motive for Mr. Kravetz to draft and/or file an incomplete or misleading amendment with the Commission. To the contrary, as a practitioner before the Commission, Mr. Kravetz had every motive to file a complete and truthful document. Therefore, it is accepted that Mr. Kravetz would have identified and fully described the San Bernardino proceeding had Mr. Parker informed him of the facts. In that event, Mr. Kravetz would have disclosed to the Commission staff that a real-party-in interest issue had been added in the San Bernardino proceeding and that it had been resolved by the hearing Judge adverse to Mr. Parker and that the Review Board had agreed with the Judge's conclusion. (Tr. 2372-74.)

138. Mr. Parker testified that he told Mr. Kravetz that there were no unresolved issues in the San Bernardino proceeding based on advice that Mr. Parker said he received from Sidley & Austin attorneys. (RBI Exh. 46 at 8; Tr. 1983-84.) But Mr. Parker received no such advice from Sidley & Austin. Mr. Wadlow testified that he could never have given such advice because he was aware that a character issue had been added against SBBLP in the San Bernardino proceeding. (Tr. 1813.) In direct contravention of advice that Mr. Parker would have received had the lawyers been fully informed by him, the amendment misleadingly concluded that:

No character issues had been added or requested against those applicants when those applications were dismissed.

(Adams Exh. 55 at 3.) That was not literally true and became misleading without a full explanation. A real-party-in-interest issue had been added in which Parker was involved and which was resolved on the merits against SBBLP and Parker. Initially, Mr. Parker contended in written testimony that the Dallas amendment was not meant to include information about the Mt. Baker or the San Bernardino proceedings:

Based on the previous advice from the Sidley attorneys about the Mt. Baker and San Bernardino proceedings, Linda or I indicated that there were no unresolved character issues pending when the applications to which I was a party were dismissed.

(RBI Exh. 46 at 8.) That statement, while incomplete, was literally accurate because with adverse character findings having been made on the merits, there were no unresolved character issues left to resolve.

139. But at the hearing, Mr. Parker took a different approach. He explained in open court that he had intended the amendment to cover only those applications in which he, Parker, was the named applicant or in which he had an interest. According to Mr. Parker's rationale, because the Dallas application noted that Mr. Parker was neither the applicant nor the holder of an interest in the applicant, the San Bernardino application was not relevant to the Dallas amendment:

The amendment says and gives the same disclosure --- . And it may be cutting fine hairs but the amendment says what the amendment says and it clearly says that while I was neither the applicant or a holder of an interest, this was (sic) the facts of the case.

(Tr. 1987-88.) Mr. Parker was less than candid in giving such testimony. His "fine hairs" explanation for omitting information shows Mr. Parker giving the Commission less than the full facts when he exchanged and introduced his written testimony. His live testimony that he held no interest in the San Bernardino application of SBBLP is intentionally deceptive because he had been found in that proceeding to be the real party-in-interest behind a "transpicuous sham." So in that respect he was a "holder of an interest."

140. Mr. Parker also wrongly suggested at the hearing that Mr. Kravetz had drafted the responsive amendment because Mr. Kravetz knew what had been represented in the original KCBI application concerning the San Bernardino application. (Tr. 1990.) That was at best a mischievous distraction. As noted above, Mr. Kravetz had no role in drafting the narrative in the Dallas application. (Adams Exh. 54 at 24-25.) And he had no knowledge about the real party-in-interest issue. (Tr. 2372) As for the Dallas amendment, Mr. Parker was solely responsible for the disclosure and took advantage of his counsel's lack of information. Yet, Mr. Parker seeks to convince in this proceeding that the Dallas amendment indirectly informed the staff of the legal effect of the San Bernardino proceeding because the Judge's adverse conclusions became subsumed in the Review Board's decisions that denied SBBLP any integration credit and accepted a settlement. (Tr. 2027.)¹⁹ But there is absolutely no basis in the language of the amendment and/or in Mr. Parker's testimony to excuse or justify an intentional omission by Mr. Parker in the Dallas amendment (Adams Exh. 55) of adverse findings against his qualifications in the Mt. Baker and San Bernardino proceedings.

¹⁹ This circular reasoning comes across in the testimony: [O]nce the ALJ's opinion was appealed, then the controlling document was the review board (sic); not just their opinion on the [\$]850,000 [settlement], but their opinion rendered in terms of – at least my understanding of what that opinion was --- that for comparative analysis she didn't get the credit, but they didn't extend on to the rest of opinion, and I'm sure you guys will argue about that, but that was understanding." (Tr. 2026-27.) Parker seems to have lost any semblance of truth and accuracy in that testimony when he stops short of the key finding that he was provocateur of a "transpicuous sham."

141. Mr. Parker has also testified in this proceeding that after the San Bernardino decisions denying comparative credit because Mr. Parker was the real-party-in-interest but allowing a settlement payment to be made to SBBLP, he believed that the real-party-in-interest issue "went away." (Tr. 2027.) Evidence cannot be found in this record that Mr. Wadlow shared Mr. Parker's view on the effect the settlement of the San Bernardino proceeding had on the Initial Decision's conclusions because Mr. Wadlow could not recall having so advised Mr. Parker on the subject. (Tr. 1829, 1856.) Mr. Parker testified that by the time of the San Bernardino dismissal, he had concluded in his own mind that the disqualifying issue had been resolved favorably by the Review Board notwithstanding the Board's critical language. (Tr. 2028, 2030, 2064-65.) Mr. Parker's explanation must be rejected. Mr. Parker acknowledged that he knew that a character issue had been added in the San Bernardino proceeding prior to the dismissal of the application. (Tr. 1992.) Even though not literally found to be "unqualified," Mr. Parker understood that the character issue focused, in large part, on him and that the character issue was going to have implications for him. (Tr. 2080-81.)²⁰

142. Mr. Parker continued to assert that prior to a Commission "by direction" letter to TIBS, he had formed his self-acquitting view that the Review Board in its approval of the San Bernardino settlement had favorably resolved the issue. (Tr. 2637-39.) That misapprehension was dispelled in 1997, when the Commission published that letter:

Serious character questions also remain regarding the assignee, Parker/TIBS. For example, in one instance an administrative law judge disqualified an applicant in a comparative hearing for a new television station after finding Parker to be an undisclosed principal in that applicant. *See Religious Broadcasting Network*, 2 FCC Rcd 6561, 6566-67 (I.D. 1987). The Review Board upheld the disqualification, characterizing the application as a "travesty and a hoax" 3 FCC Rcd 4085, 4090 (Rev. Bd. 1988), and the applicant as a "transpicuous sham" which had "attempted fraud" upon the Commission. *Id.* at 4091.

Two If By Sea Broadcasting Corporation, 12 F.C.C. Rcd at 2255, 2257 (1997). This "by direction" letter published for all to see the serious questions festering about Mr. Parker's character qualifications and came close to suggesting that Parker was "unqualified" to own or control a licensee. Despite those concerns about qualifications, it was later advised in a staff letter dated May 22, 1997, that the earlier "by direction" letter did not limit the transferability of any stations that were commonly controlled by Parker. (Bureau Exh. 2.)²¹ It seems from the later letter advice that it was contemplated that Parker's qualifications would be in hearing in connection with a contemplated assignment of a Hartford license (WHRC – TV) after the qualifications of the assignor were litigated in a pending renewal proceeding. (Bureau Exh. 2.)

²⁰ Consider the more detailed disclosure that Mr. Parker made to Telemundo when a business opportunity was involved. See Paras. 162-163 below.

²¹ Letter dated May 22, 1997 (Corrected) to Alan C. Campbell, Esq. from Barbara A. Kreisman, Chief, Video Division, Mass Media Bureau received in evidence as Bureau Exh. 2 in posthearing ruling, Order FCC 00M – 52, released August 18, 2000.

But the qualification questions of the contemplated assignee which was a Parker controlled entity, were never formally addressed. The statute of limitations barred the issues for this case. See Memorandum Opinion and Order FCC 99M -49, released September 3, 1999. The Hartford license is now the subject of a settlement and to further avoid addressing Parker's qualifications, Parker's interest has been assigned to (or bought out by) a "white knight." See Martin W. Hoffman, Trustee, et al., 15 F.C.C. Rcd 22086, 22089 n.4 (2000). It is truly remarkable that since 1989, Mr. Parker has been able to successfully navigate through the Commission always one tack away from anyone taking a dead reckoning on his character qualifications.²²

Mr. Wadlow's Letter

143. The Wadlow letter was written eight months after the Review Board had affirmed the Initial Decision in the San Bernardino proceeding, yet the letter makes no mention of the decision. (Adams Exh. 58.) It was written and delivered within 45 minutes of the request because it was needed by Mr. Parker to show to a third party. (Tr. 1866; 2002 – 2003.) The letter was written on stationary of the law firm of Sidley & Austin and used the colloquial "our opinion" and the collective "we." It had the trappings of and indeed it was an opinion letter of the law firm of Sidley & Austin. The letter represented that the Initial Decision in the San Bernardino proceeding had not been reviewed. But Mr. Wadlow had litigated on behalf of another party in the San Bernadino proceeding. It is not surprising he had not reviewed the Initial Decision in a matter which he actively litigated because, having first-hand knowledge, he did not need to review the facts. (Tr. 1831.) According to the letter, the Judge "did not find [Mr. Parker] had done anything improper or that anything [he] had done reflected adversely on [him]. (Adams Exh. 58.) Mr. Wadlow modified that conclusion by his testimony that the "conclusion [in the letter], other than the reference to the ALJ, is accurate." (Tr. 1822.) But the letter was never intended as advice on Commission disclosure thereby making it less relevant.

144. The Wadlow letter also stated that the law firm was "aware of no question that has ever been raised as to [Parker's] qualifications" to serve as a principal of Commission licensees. That legal opinion was based in part on the action of the Review Board to approve SBBLP for settlement whose application was denied but not dismissed. (Tr. 1823.) It is true that there has not been an adjudication by an Initial Decision, the Review Board or the Commission that Mr. Parker was "disqualified" to hold a license.²³ That is an important distinction because while there were decisions on the merits that Parker had been involved in disqualifying conduct, there was never any ruling that he was "disqualified." Mr. Parker was justified in relying on the legal

²² To avoid any future uncertainty, based on this record, Mr. Parker is declared to be "unqualified" to exercise ownership or control over RBI's license.

²³ The Commission suggested that Mr. Parker might be disqualified in the published "by direction" letter to TIBS, 12 F.C.C. Rcd at 2255, 2257. But that letter was not an adjudication.

advice as stated in the letter that he has not been “disqualified”. However, that letter provides no comfort with respect to answering “no” to Question 4 or in failing to fully disclose the findings of “fraud.”

Norwell Disclosure

145. The transfer application for the station in Norwell was filed by Mr. Kravetz for the transferor, Nikita Maggos. (Adams Exh. 51.) (Tr. 2344.) TIBS, the transferee, was a controlled by Mr. Parker who personally executed the transferee section. (Adams Exh. 51 at 14, 16-18.) Mr. Parker answered Questions 7(a) and (b) in the affirmative as to whether any party to the application had any interest in or connection with any application which had been denied or dismissed with prejudice. (Adams Exh. 51 at 11, 16-18.) In an exhibit, Mr. Parker described his interests in Mt. Baker and his participation in San Bernardino.

146. Mr. Kravetz was not connected with the Parker/TIBS disclosure in the Norwell application. He received the transferee’s disclosure from Mr. Parker. (Tr. 2346–47.) Mr. Kravetz did not review the disclosure or discuss it with Mr. Parker. (Tr. 2348.) The question asking about “fraud” was answered “no” by Mr. Parker and not by Mr. Kravetz. Parker also answered “no” to the question asking if there were unresolved character issues. Mr. Parker believed that his San Bernardino disclosure was sufficient given that he had no ownership interest, he did not directly benefit financially from the settlement, and the crux of the offending conduct was a failure to disclose the scope of Parker’s association with the SBBLP application. And Parker was also relying on advice from Sidley & Austin that his “qualifications” to hold a Commission license were in order. There is a substantial question as to Mr. Parker’s reasoning for making inadequate disclosure which is being addressed in this proceeding. But under the limited circumstances of his retainer, Mr. Kravetz was not responsible for Mr. Parker’s disclosures. Therefore, there is no issue concerning advice of Mr. Kravetz as a defense.

Dallas Disclosure

147. Disclosure also was made at a later date in an exhibit with which Mr. Kravetz had more of a hands on connection. (Adams Exh. 55.) Mr. Kravetz recalls that in October 1992, he was contacted on a question about the application by Mr. Parker or by a member of the Commission staff. (Tr. 2354.) The application had been filed on August 3, 1992. (Adams Exh. 54.) But Mr. Kravetz was not associated with that document. (Tr. 2354.) A question was posed by Commission attorneys who were processing the application. The question concerned the adequacy of disclosure in the application. Mr. Kravetz testified:

And I talked to Andrea Ellis, who was the FCC staff person at the time who was reviewing the [Dallas] application to find out what the defect was. She advised me that there was nothing explicit in

the application that talked about whether [the] character issue had been added or raised with regard to the other applications with which the applicant was connected – the applicant and its principal were connected.

(Tr. 2355.)

148. Mr. Kravetz spoke with Mr. Parker, advised him of the staff's concerns and of the need to "cure the defect", and "asked him if he [Parker] could provide a statement." (Tr. 2355-56.) Mr. Parker complied and Mr. Kravetz prepared an amendment in which he inserted "the additional information" that Mr. Parker provided. (*Id.*) Mr. Kravetz sent the document to Mr. Parker for his review and signature. (*Id.*) Mr. Kravetz undertook no independent research into the cases because that is not what he had been retained to do in preparing an amendment. (Tr. 2357.) Mr. Kravetz testified that if Mr. Parker had told him (Mr. Kravetz) that he (Mr. Parker) had been found to be a real party in interest in the San Bernardino proceeding, Mr. Kravetz would have insisted on disclosing the case and the fact of the added issue and the relevant case history. (Tr. 2374-75.)

149. The evidence shows that Mr. Parker handled all disclosure himself, without benefit of counsel. Mr. Kravetz drafted and filed a Dallas amendment based on information provided by Mr. Parker. Mr. Parker has offered his own reasons as to why he thought that the additional details about the San Bernardino proceeding were unnecessary. But the reasons given by Mr. Parker, which are his alone and not attributable to Mr. Kravetz, are self-contradictory and rejected. First, he testified that he did not consider the San Bernardino proceeding to have been included in the universe of applications covered by the Dallas amendment. (Tr. 1986-88.) Second, he asserted that he thought that the San Bernardino proceeding had been resolved on a comparative basis only without any finding of a disqualification. (Tr. 2027-28, 2064-67, 2070.) Third, he stated that he believed that the real party-in-interest issue had been favorably resolved in an approved settlement. (RBI Exh. 46 at 4; Tr. 2070.) But such reasoning as discussed and analyzed above, has no connection at all with Mr. Kravetz's limited legal services that were of a technical filing nature not involving research or counseling.

Mr. Parker Was Capable Of More Meaningful Disclosure

150. In stark contrast to the wobbly explanations as to why the obvious Commission holdings were not disclosed in Parker's applications, Mr. Parker later found it to be in his interest to be more complete in representing operative facts of the adverse findings. Far more informative facts were contained in Mr. Parker's letter sent in 1998, to Ms. Ann Gaulke, Vice President for Affiliate Relations, Telemundo Network, Inc. (Bureau Exh. 1 at 9-10.) Mr. Parker wrote to Ms. Gaulke that the San Bernardino proceeding found that he was an undisclosed real party in interest and that as a result an applicant was found disqualified. He also made reference to conclusions reached in the Initial Decision. He advised Ms. Gaulke that in the Mt. Baker proceeding, the Commission held that construction of a facility without disclosing it to the Commission "evinced an intention on the part of the permittee to deceive the Commission." (*Id.*) However, Mr. Parker represented to Ms. Gaulke that she need not be concerned because in

subsequent transfer applications, the Commission "passed on" his qualifications and the Commission never raised "any alleged defects in character on [Parker's] part." (*Id.* at 10-11.) The Gaulke letter was written by another or others but Mr. Parker read it and signed it. (Tr. 2629, 2679.) The Gaulke letter presents a marked improvement over Mr. Parker's earlier disclosures to the Commission.

151. In an effort to "educate" the proceeding on what was intended to be conveyed in the Gaulke letter, Mr. Parker testified that the fact of the San Bernardino settlement was not "significant in terms of this letter" though it was "significant in terms of the overall look at the case." (Tr. 2683.) Ms. Gaulke had requested a "due diligence letter" on "my problems vis-à-vis relicensure at the FCC." (Tr. 2663.) Mr. Parker considered himself to be "under an obligation to provide full disclosure of all information of potential consequence" relating to that question. (*Id.*) The Gaulke letter had legal implications which could have severe financial consequences if the information provided by Parker was misleadingly incomplete. Mr. Parker testified more than once that it was important that the letter disclose "all the bad things that can go wrong." (Tr. 2622, 2629-30.) By contrast, in disclosures to the Commission for license transfers in San Francisco, Los Angeles, Twenty Nine Palms, Norwell, Dallas and Reading, there was not the same concern. He believed that the far lesser disclosures in the transfer applications were adequate because the limited disclosures would be linked with a presumed "personal knowledge" of the details on the part of the staff. (Tr. 2664.)

Phase III

Abuse of Process

152. A substantial question was raised on whether Adams filed its application for the purpose of obtaining a settlement which would be an abuse of the Commission's process. The burden of proof and the burden of proceeding were assigned to RBI. The Bureau participated in the examination of witnesses.

153. Adams denies that it filed its application for the purpose of entering into any kind of settlement or other arrangement pursuant to which Adams would dismiss its application. (Tr. 2430.) Unrebutted testimony shows that Adams filed its application for the purpose of obtaining a construction permit and that it intends to build a station in Reading, PA. (Tr. 2429-30, 2465.) Adams principals testified without contradiction that the group was primarily interested in operating a new station and developing a community service for Reading. (Tr. 2430.)

154. All but one of Adams' principals also were principals of Monroe Communications Corporation ("Monroe"), a comparative renewal challenger in 1982 for a television station in Chicago. (Tr. 2429-2430.) After a decade of litigation, including appeals to a court of

appeals.²⁴ the proceeding settled with Monroe dismissing its application in return for a buy out of approximately \$18 million. (RBI Exh. 19.) The Commission approved the settlement and acknowledged that Monroe had not filed its application for the purpose of entering into a settlement. (RBI Exh. 22 at 3.)

155. The rules for settlement of comparative renewal proceedings were amended in 1989, seven years after the filing of the Monroe application and five years before the filing of the Adams application. 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, 4 F.C.C. Rcd 4780, 66 R.R.2d 708 (1989), *recon. denied*, 5 F.C.C. Rcd 3902, 67 R.R.2d 1515 (1990). The rulemaking was an outgrowth of an in-depth analysis and criticism of the prevalence of abuses of process found to exist in the comparative renewal process. Cf. Second Further Notice of Inquiry and Notice of Proposed Rule Making, 3 F.C.C. Rcd 5179 (1988). The Commission revised rules so that no for-profit dismissal of a comparative renewal challenger would be permitted. The prohibition rule against abuse of process was in play when Adams filed in 1994.

156. Mr. Gilbert was a principal of both Monroe and Adams. He was the primary witness for Adams, having a close working relationship with Adams' communications counsel dating back to the Monroe venture. A practicing lawyer, Mr. Gilbert was aware of the settlement limitations that took effect in 1991. When he received and read Mr. Cole's memorandum dated August 15, 1991, he was made aware of this new policy to limit settlements of comparative renewal proceedings to out-of-pocket expenses. (Adams Exh. 62.) Mr. Gilbert continued to be aware in 1994, when Adams's application was prepared and filed, that no for-profit settlement would be permitted under the Commission's rules, and he so advised all of the Adams shareholders when they invested. (Tr. 2429-2430, 2466, 2467.) The Adams principals went forward because there was still potential benefits for challengers. As experienced risk-takers, the Adams group could, through the successful prosecution of a "comparative renewal" application, acquire a valuable television broadcast opportunity for considerably less than the fair market value. (Tr. 2430, 2467.) The potential for gain was attractive to the Adams principals who been financially successful in a similar venture, but who were yet to own a station. (Tr. 2429, 2467; Adams Exh. 1.)

157. Adams also held a belief that the renewal process presented an opportunity to replace "home shopping" programming which, in Adams view, was not providing locally-originated programming that served any local public interest. (Tr. 2457-2458, 2467-2468.) However, the Adams group had no connection at all with the Reading community and it cannot be accepted that they picked RBI from a list of renewals out of concern at the time of target selection for the interests of local viewers of Channel 51. The prime motivation was a business opportunity that incidentally could also target "home shopping." Adams had an awareness of the criticisms of "home shopping" programming from source materials that Adams' counsel

²⁴ In re Monroe Communications Corporation, 840 F.2d 942 (D.C. Cir. 1988), Monroe Communications Corporation v. F.C.C., 900 F.2d 351 (D.C. Cir. 1990).

provided which presented adverse views from knowledgeable sources. (Tr. 2468-2471; Adams Exhs. 63, 64, 65, 67.) Adams formed a belief that "home shopping" stations generally do not accommodate locally-originated programming dealing with local community issues. (Tr. 2468.) Mr. Gilbert also believed that a station which provided no locally-originated programming would be vulnerable to a renewal challenge because of the difficulty in achieving a renewal expectancy. (Tr. 2457-2468.) Adams' counsel apparently shared Mr. Gilbert's view of that vulnerability.

158. After discovering that "home shopping" was a target of opportunity, Adams and counsel formulated their strategy to file against a vulnerable applicant wherever located. (Tr. 2471, 2473; Adams Exh. 66). The first opportunity that met Adams' schedule and that "was available" was a station in Marlborough, Massachusetts. (Tr. 2474.) Adams reviewed two-weeks of taped programming while retaining a real-estate firm to locate an antenna site. (Tr. 2474.) Mr. Gilbert also interviewed residents of the Marlborough service area. Adams concluded that it had a suitable candidate to challenge. However, Adams did not file for the Marlborough channel because Adams could not locate a suitable transmitter site. (Tr. 2475-2476.)

159. So Adams decided to remobilize and strike against a "home shopping" target found in Reading, PA. (Tr. 2476.) Adams retained an engineering firm to prepare the technical portion of an application. Adams' consultant focused on planning for "news gathering equipment" with a goal of providing "local service to the community." (Tr. 2390-2393; Adams Exhs. 73, 74.) That commitment to local service influenced budget figures which the consultant provided to Mr. Gilbert. (Tr. 2392-2393; Adams Exhs. 73, 74.) Prior to filing its application, Adams made no effort to purchase WTVE(TV) outright or to even determine the potential cost of purchase. (Tr. 2541.) In fact, neither Adams nor Monroe ever sought to purchase any television station, anywhere. (Tr. 2542.) Adams' stated reason for not attempting to purchase a station is that doing so would not achieve Adams' goal of a Commission precedent negating public interest "home shopping." (Tr. 1118.) Adams had already decided that a challenge presented the highest and best economic opportunity.

On-Site Survey

160. Between February and June 1994, Mr. Gilbert made several trips to Reading. (Tr. 2475-2476, 2478, 2538.) At no time during any of these trips did Mr. Gilbert watch WTVE's Channel 51. (Tr. 1064, 1065.) During those trips, Mr. Gilbert informally interviewed 30 to 40 people. (Tr. 2476-2477, 2538.) The interviews were conducted at business establishments and not in homes. (Tr. 2538.) Mr. Gilbert did not ask for the names of the people he interviewed, and he made no written record of the interviews. (Tr. 2538-2539.) Mr. Gilbert stated that none of the people he interviewed were aware of Station WTVE(TV). (Tr. 2539) In view of the uncontrolled, haphazard methodology employed by Adams, this evidence of investigating the needs of the community is accorded little weight. But the evidence is consistent with Adams' strategy and was not rebutted.

Flawed Program Taping

161. In May 1994, approximately one month before filing, Mr. Gilbert hired Mr. Paul Sherwood to tape RBI's "home shopping channel." (Tr. 2483-2484 and Tr. 2139, 2154-2156.) Mr. Gilbert was referred to Mr. Sherwood by Mr. Gilbert's daughter who worked with Mr. Sherwood's brother in Chicago. (Tr. 2484, Tr. 2138.) Mr. Sherwood is not a professional media consultant. He is a computer systems consultant. (Tr. 2137, 2149.) Mr. Sherwood has no expertise in analyzing or in evaluating the content of television programming. (Tr. 2149-2150.) Nor does he have any expertise in analyzing or in evaluating the public service performance of television stations. (Tr. 2150.)

162. For the duration of the Adams taping job, Mr. Sherwood lived in Chester Springs, Pennsylvania, approximately 30 miles from Reading. Chester Springs was serviced by Suburban Cablevision. (Tr. 2147-2148.) Suburban Cablevision did not carry Station WTVE(TV). (Adams Exh. 11.) But it did carry the "home shopping" national program. (Tr. 2148.) Mr. Gilbert's initial instructions to Mr. Sherwood were to tape the "home shopping channel." (Tr. 2139, 2140) To the best of Mr. Sherwood's recollection, Mr. Gilbert never even mentioned Station WTVE or Channel 51. (Tr. 2139-2140.) Mr. Gilbert never told Mr. Sherwood the purpose for the taping. (Tr. 2144, 2145-2146.)

163. Per instructions from Mr. Gilbert, on June 1, 1994, Mr. Sherwood began recording an initial twenty four hours of the "home shopping channel." (Tr. 2148, 2485-2486.) That recording was not of WTVE programming but of the "Home Shopping Club," a cable channel carrying the national "broadcast feed". (RBI Exhs. 24, 47 at 1-2; Tr. 2477-2478, 2488-2489.) The recording contains not a single station identification for Channel 51 in Reading; it only contains identifications for the "Home Shopping Club." (RBI Exh. 47 at 12) The recording also shows a depiction of the "Home Shopping Club" logo and repeats the words "Home Shopping Club" with the voiceover announcement:

You're watching America's original shop at home television service, bringing you 24 hours of savings, fun and excitement every day. Live from Tampa Bay, Florida, it is the Home Shopping Club.

(RBI Exh. 47 at 2.) The recording also contains hourly promotional announcements for upcoming segments of the "Home Shopping Club." (RBI Exh. 47 at 2.) The misguided project had taped Tampa Bay programming and was clearly started off the mark.

164. Mr. Gilbert reviewed the recording of June 1, 1994. (Tr. 2487.) Based on his review and despite the evident fact that the Tampa Bay recording was not programming of Station WTVE(TV), Mr. Gilbert instructed Mr. Sherwood to continue to record the programming, twenty-four hours per day, each day for the period June 13 to June 30, 1994. (Tr. 2477, 2478, 2489-2490.) (RBI Exh. 47 at 1.) Mr. Sherwood dutifully recorded the "Home Shopping Channel" from June 13 through June 30, 1994. (Tr. 2148.) Mr. Gilbert received a second batch of recordings (June 22 through June 30) from Mr. Sherwood which was after Adams had filed its application. (Tr. 2493; Adams Exh. 77.) The June 22-June 30 recordings

also were not of Station WTVE(TV). (RBI Exh. 47 at 1-2.) The June 22-June 30 recordings virtually mirrored the content of the June 1 tape and the June 13-June 21 recordings. (RBI Exh. 47 at 2.)

165. The only PSAs reflected in any of the recordings were those produced for national consumption by the Missing Children Help Center located in Tampa Bay, Florida. (RBI Exh. 47 at 3.) Of the missing children highlighted in those PSAs, only four are identified as missing from or last seen in Pennsylvania. Of those four, only one is identified as missing from or last seen in

the Philadelphia-Wilmington-Atlantic City area. None of the missing children were from or last seen in Reading. (RBI Exh. 47 at 3-4.) This best illustrates Adams' problem. There was no difference in the "home shopping" format that emanated from Tampa Bay. What Adams missed was WTVE(TV)'s noncommercial broadcasting and how and when it was presented to the community in between the predominant "home shopping" broadcasts.

166. It was five years later that Mr. Gilbert discovered the taping error. (Tr. 2499.) It is concluded that Mr. Gilbert believed that he had given adequate instructions on the tapings because there is no rational motive for Mr. Gilbert to deliberately skewer Mr. Sherwood's efforts or to intentionally send him down the wrong warren. (Tr. 2484-85; 2554-55.) The evidence of this faulty survey shows the value of careful prior planning. But it does not support a finding of an intent to deceive or an abuse of process.

Proposed Transmitter Site

167. On June 29, 1994, Adams offered to obtain an option for the prospective use of a transmitter owned by Conestoga Telephone & Telegraph Company ("Conestoga"). (Adams Exh. 68; Tr. 2480.) Adams wanted to lease space to affix a UHF antenna to Conestoga's existing tower, and to occupy 500-600 square feet of an existing equipment building at the site. Conestoga subsequently advised Adams that any lease concerning the use of the Conestoga tower would be contingent on the ability to obtain proper zoning permits to construct an additional building or expand the existing structure. (Adams Exh. 68; RBI Exh. 74.)

168. More than two years after the letter of intent, Adams and Conestoga had not reached an agreement regarding Adams' use of the proposed transmitter site. (RBI Exh. 74.) By letter dated August 8, 1996, Conestoga advised Adams: "At this point, we have no agreement whatsoever regarding this site." (RBI Exh. 74, Tr. 2531.) Gilbert, responded: "I am totally aware of the obligations stated in your letter of August 8, 1996.... Please forward me an executed copy of the Restated Option Agreement and License/Lease Agreement with the appropriate check and we can finally be on our way after all the many, many years." (RBI Exh. 75; Tr. 2532-2533.)

169. The Conestoga Option Agreement was not executed until December 1996. (Adams Exh. 71.) The Option Agreement was for a period of three years to begin with delivery of the executed agreement and payment to Conestoga. (Adams Exh. 69.) Adams delivered the executed Option Agreement and payment on December 20, 1996. (Adams Exh. 71.) The Option

Agreement was neither renewed nor extended during its term and, on or about December 20, 1999, it expired. (Tr. 2535; RBI Exh. 76; Adams Exh. 69 at 2; Adams Exh. 71 at 1 and 3.) On May 17, 2000, shortly before the Phase III hearing in this case, Adams sought to renew its option for the prospective use of the Conestoga tower. (Tr. 2535; RBI Exh. 76.) There is no evidence of an absolute rejection by Conestoga. It is concluded from this record that Adams continues to make reasonable efforts to perfect its transmitter site and has a reasonable chance of success.

Adams' Dealings With Telemundo

170. Ms. Anne Swanson is a partner of the law firm of Dow Lohnes & Albertson in Washington, D.C. specializing in communications law. On behalf of Telemundo, a Spanish-language network, Ms. Swanson spoke with Mr. Cole on April 30, 1999, about the possibility of settling this proceeding. This conclusion was confirmed by the law firm's cooperative discovery and by her straightforward testimony assisted by contemporaneous notes.²⁵ (Tr. 2215-2217, 2219-2222, 2301-2302.) (RBI Exh. 52 at 4-5.) During an initial conversation, Ms. Swanson initiated a query about Adams' level of interest in settlement, and specifically at what amount of money its interest might ripen into acceptance. Later that day, Ms. Swanson again spoke with Mr. Cole. He advised her that while Mr. Gilbert planned to pursue the application, Mr. Gilbert would not say "no" to a settlement. (Tr. 2219-2221; RBI Exh. 52 at 4-5.)

171. Mr. Gilbert was Adams' designated negotiator. (Tr. 2215-17, 2219-24.) So on the same day, April 30, 1999, Ms. Swanson telephoned Mr. Gilbert. (Tr. 2219-2220, 2222-2224, 2302.) (RBI Exh. 51 at 2.) Ms. Swanson asked Mr. Gilbert for a settlement figure and Mr. Gilbert responded that he could not give her a figure because Adams had not valued the station. (Tr. 2225-2226; RBI Exh. 52 at 5.) Mr. Gilbert committed Adams to pay one-third of the expenses for obtaining an appraisal. (Tr. 2223-2224, 2230-2231; RBI Exh. 52 at 5; RBI Exh. 57.) According to Ms. Swanson's contemporaneous, reliable and credible notes, Mr. Gilbert had indicated at that time that Adams would be reasonable with respect to a possible settlement. (RBI Exh. 52 at 5.)

172. On June 2, 1999, Ms. Swanson received the appraisal. The next day, she faxed the appraisal to Mr. Cole along with a letter reconfirming that Adams had agreed to pay for a third of the cost. (RBI Exh. 62 and Adams Exh. 75.) On June 7, 1999, Mr. Gilbert, Mr. Cole, Ms. Swanson and possibly Ms. Gaulke, a Telemundo vice president, participated in a telephone conference to discuss the appraisal and hoped for settlement. (Tr. 2268-2274.) (RBI Exh. 52 at 10-11.) The noninvolvement of RBI and Parker in the appraisal and negotiations was a concern since the participation of all three parties, the two applicants and the "white knight," would be

²⁵ Dow, Lohnes attorneys were most diligent and cooperative under intense demands to produce relevant evidence on the Telemundo settlement efforts. There were multiple in-camera inspections made for privileged matter after the documents were screened by Ms. Swanson and other attorneys of the firm, including another partner. Ms. Swanson was personally attentive to each discovery request, including a review and redacting of her personal diary, and she answered the questions with care and candor. For more details, see Protective Order, FCC 00M-48, released July 18, 2000 (just clerical/paralegal, copying and messenger costs of document search and production were calculated @ \$6,800).

needed to close any settlement. (Tr. 2270-72.) Mr. Gilbert did not want his time wasted and reported that Adams was only interested in pursuing serious settlement negotiations. From this evidence it is found that Mr. Gilbert was prepared to negotiate a serious settlement in June 1999. (Tr. 2273.) (RBI Exh. 52 at 11.) But the evidence does not show Mr. Gilbert as initiator of the discussions.

173. On a subject aside from settlement, Mr. Gilbert contacted Ms. Swanson on July 14 to express Adams' interest in a Telemundo affiliation. (Tr. 2277-2278; RBI Exh. 52 at 12.) The next day, Mr. Gilbert and Ms. Swanson discussed the possibility of Telemundo providing Adams with Spanish language programming in the event that Adams' application was successful. (Tr. 2281-82; RBI Exh. 52 at 14.) On July 16, 1999, Ms. Swanson spoke with Mr. Cole and with Ms. Gaulke about Adams' interest in affiliation and settlement. (RBI Exh. 50 at 10.) The question of a future Adams-Telemundo affiliation was deferred since RBI was then a Telemundo affiliate. (Tr. 2286; RBI Exh. 54 at 4.) On July 29, 1999, Ms. Swanson spent more time in considering the affiliation question which was eventually deferred. (Tr. 2285-86.)

Common Counsel For Monroe And Adams

174. There is another circumstantial question raised by the retainer arrangement between Adams and its counsel. Adams is represented in this proceeding by Bechtel & Cole, the same law firm that represented Monroe which succeeded in winning a money settlement. (Tr. 1018, 1042.) Adams' fee agreement with Bechtel & Cole provides that the firm is to be paid at a rate that is \$100 per hour less than their usual hourly rates with respect to the prosecution of Adams' application (\$125/hour versus \$225/hour). (RBI Exh. 21.) (Tr. 1019.) The fee agreement also provides that Bechtel & Cole be paid twice their usual hourly rate (\$450/ hour) in the event that Adams' application is granted or if the application is dismissed on terms that are "economically favorable," including a settlement for only reasonable and prudent expenses. (RBI Exh. 21.) The fee agreement that was signed on June 30, 1999, memorializes the substance of an oral agreement that was reached in 1993. (Tr. 1019-20.) Mr. Gilbert contends that there was no fee agreement until the written version was signed. Recall that Monroe had paid Bechtel & Cole "a substantial bonus" for its work. (Tr. 1014-15.) It is found that when the Adams application was filed in 1994, there was no question in anyone's mind that Bechtel & Cole would be satisfactorily compensated with or without a formal fee agreement. The Monroe past was the Adams prologue as far as legal fees were concerned. There is no feature of the fee agreement that is inconsistent with the testimony of Mr. Gilbert that the Adams application was filed to win the license.

Failure To Keep Current A Corporate Certificate

175. In the course of the hearing, it was determined that Adams had inadvertently permitted its corporate certificate to expire. Adams was incorporated in Massachusetts on November 23, 1993, before it filed its application in this proceeding. (RBI Exh. 71.) However, on August 31, 1998, Adams was involuntarily dissolved for failing to file state annual reports. (RBI Exh. 72.) The evidence shows that Mr. Gilbert and Adams' counsel were unaware of the

lapse until it was brought up in the hearing by RBI's counsel. Adams took immediate steps to correct the error and Adams is now current with respect to its incorporation. Order FCC 00M-50, released July 25, 2000 (revival certificate).

Credibility Findings

176. RBI sought misrepresentation/lack of candor issues against Adams after the conclusion of Phase III. The issues were denied. Memorandum Opinion and Order FCC 00M-56, released October 18, 2000. However, questions of Adams' candor which arose in the hearing of this case will be addressed here. The five subjects on which Reading challenges Adams' truthfulness are examined below and RBI's arguments are considered anew.

Application

177. There seemed to be a switch in testimony from Adams' asserting that its application was an opportunity to establish that it is impossible to broadcast in the public's interest through a "home shopping" format. That was the thrust of Mr. Gilbert's testimony in Phase I when he testified to the background of the Adams application.²⁶ Also, in the course of his testimony, Mr. Gilbert disclosed that Adams was discussing settlement possibilities beginning shortly before this case was set for hearing. That testimony raised questions of settlement intent, particularly when considered with the fact that the same principals, as members of the Monroe enterprise, had settled for cash. After hearing this testimony, RBI's motion to enlarge was granted in part and an abuse of process issue was added because substantial questions of fact had been raised. Memorandum Opinion and Order FCC 00M-07, supra and Memorandum Opinion and Order FCC 00M-19, supra.

178. It is important to note the negative fact that at no time in the deposition discovery phase was an Adams principal asked the question directly as to why Adams had filed or what was Adams' motive for filing. When Adams put on its case countering allegations of abuse of the hearing process, Mr. Gilbert testified that the prime motive for organizing Adams after a multi-million dollar settlement was for a business reason, i.e., that a challenge could result in acquiring a permit to construct a TV station at costs below the market value of the station. At the same time, Mr. Gilbert could achieve what he saw as an improvement in Channel 51's programming. (Tr. 2467-69.) Consistent with that testimony, in November 1999, in an attachment to an opposition to a motion, Mr. Gilbert declared that the Adams group intended to successfully prosecute its application and had no intention of settling. Mr. Gilbert's testimony was credible.

²⁶ On November 2, 1999, RBI filed a motion to add an abuse of process issue against Adams. The pleading cycle was concluded on December 1, 1999. The Presiding Judge waited to hear Mr. Gilbert's testimony before ruling on RBI's motion.

179. RBI seeks an adverse intent inferred from the fact that Adams did not pursue the option of purchasing a station that was broadcasting a home shopping format. Such a purchase would have permitted Adams to replace home shopping with its own programming. However, under Adams' cost benefit analysis, it would expend lower costs in a litigated challenge than in an open market purchase. RBI counters that Adams could have searched for a station that was available at a "bargain price" since Adams was not concerned about location. But Adams had no duty to bargain hunt rather than file a challenge. The controlling question is not to measure business options that were available to Adams in 1994.²⁷ It is to determine the primary motive underlying Adams' application.

Telemundo Discussions

180. The evidence shows that on April 30, 1999, the month before the HDO was released, Anne Swanson, counsel for Telemundo, spoke with Harry Cole, counsel for Adams, with respect to possible settlement. (Tr. 2215-17; RBI Exh. 52.) Ms. Swanson asked Mr. Cole how interested Adams might be in settling. Ms. Swanson heard that Mr. Gilbert would not say "no" to a settlement, thus encouraging further discussion. Ms. Swanson spoke directly with Mr. Gilbert and asked him to name a settlement price. Towards that end, both agreed to share the cost of an appraisal and Mr. Gilbert assured Ms. Swanson that he would remain reasonable as to agreeing on a settlement amount. (Tr. 2223-24; RBI Exh. 52 at 5.)²⁸ Then the discussion between Telemundo and Adams went no further.

181. RBI also seeks a finding of a lack of candor in Adams failing to fully explain in Phase I testimony the degree of interest that Adams had in Hispanic programming. The record evidence indicates that Adams would have liked to have a commitment from Telemundo that it would provide Hispanic programming. But Telemundo was then under contract to RBI and its counsel was concerned about a lawsuit if it pursued an opportunity with Adams. Mr. Gilbert should have been more forthright in answering deposition questions that skirted the issue of Adams having expressed an interest in obtaining the right to Telemundo programming. But Telemundo had cut off any such discussion in 1999, and the subject never became a matter of

²⁷ The business opportunity as seen by Mr. Gilbert did not include as a factor the lost opportunity to broadcast in his view of the "public interest" while the litigation was under way for these several years. But there is weight accorded to Adams' cost benefit analysis, the "horseback" economics of which were never challenged. More importantly, it does not negatively impact upon Adams' convincing credibility.

²⁸ There was a delay in the transmission of the appraisal documents to RBI in discovery. Adams contends that the delay was due to an oversight and that the identity of the appraisal was made clear in answers to interrogatories. According to RBI, Adams answers to interrogatories that are dated April 19, 2000, disclose that Adams was contacted by Ms. Swanson to negotiate a "white knight" settlement and that in June 1999, a copy of the appraisal was furnished to Mr. Cole. RBI was not caught by surprise as a result of the delay and there is insufficient evidence to support a finding that Adams had purposely withheld the documents.

negotiation. Such a "Q and A" in a deposition where the question of motive for filing was not asked directly will not support a disqualification and such evidence does not prove a lack of candor.

182. None of this evidence proves an intention on the part of Adams to settle when it filed in 1994. The motivation for the Swanson initiated discussions were consistent with pursuing Telemundo's interest in the Spring of 1999, by preserving an affiliation. Such efforts were initiated by Telemundo when Ms. Swanson saw RBI exposed to a serious renewal challenge. These conclusions show nothing untoward about settlement.

Sherwood Tapings

183. Mr. Gilbert testified with adequate candor to Mr. Sherwood's episodic taping. The "home shopping" format that was broadcast by Station WTVE(TV) was to be assessed for public service value by Adams. Mr. Gilbert was in charge of the taping project and programming evaluation. In June 1994, Mr. Sherwood taped what he and Mr. Gilbert believed to be programming that was being broadcast from Station WTVE(TV). (Adams Exhs. 76-77.) Mr. Gilbert reviewed the tapes, at times utilizing a fast forward feature. His testimony at deposition and in the hearing may have been lacking in clarity. But nothing of decisional significance was raised by RBI showing that Mr. Gilbert had intentionally misled. It happened that Mr. Sherwood, who was not experienced in taping television programming, accidentally taped national home shopping programming and the error was not caught. His review was in two stages that were prescribed by Mr. Gilbert. By happenstance, the first day of taping contained PSAs from Pennsylvania which, after review by Mr. Gilbert, led him to believe that taping was being made of WTVE(TV) programming. After a review of the test run, Mr. Gilbert perceived that it would be clear sailing and Mr. Sherwood was then virtually on his own as he taped for two additional weeks. Mr. Gilbert did monitor from afar by telephone but there was no hands-on supervision.

184. All taping was done in June 1994, shortly before Adams filed. The purpose of the taping and review was to document Mr. Gilbert's long-held negative views on "home shopping" formats which he had reached before the Sherwood tapings. So the short time between taping and filing has no decisional significance. More importantly, there was no misleading testimony in Mr. Gilbert's sometimes shaky account of what should have been an easy chore. There was no intentional misleading of the parties or of the Presiding Judge. The substance of the taping was sufficient for Adams to formulate or confirm a judgment on Station WTVE(TV)'s "home shopping" programming. It is concluded that there was in excess of two weeks of relevant programming taped which Mr. Gilbert reasonably monitored and reviewed. The net effect of the taping project was a good faith assessment by Adams of the programming of Station WTVE(TV) which was used by Adams to base a decision to file a challenging application.

Hispanic Programming

185. RBI requested adverse findings for allegedly misleading testimony on planned programming. The Adams principals gained appreciation for the benefit of Hispanic programming in the Monroe proceeding. Before filing in 1994, the Adams principals had formed a general intent to seek to offer Hispanic broadcasting if an affiliation could be arranged with a Hispanic network. RBI argues that there were conflicting accounts given by the Adams' principals. Mr. Umans testified that Hispanic programming had been decided upon from the outset, while Mr. Haag had no recollection, and the application makes no reference to programming. Mr. Fickinger testified that there never was a plan. But Mr. Fickinger also testified that it was always understood that at the appropriate time, there would be an effort made to offer Hispanic broadcasting. The Adams principals operated in a loose fashion in light of their past success over a period of many years and in view of the length of time that it takes to prosecute a challenging application. Evidently, the group saw no need for an internalized structure in view of the experience of having once endured a lengthy renewal hearing. The exploratory efforts of Mr. Gilbert with Ms. Swanson to discuss a relationship with Telemundo supports Adams contention that it was interested in providing a Hispanic programming format for Reading.

Corporate Status

186. There is no reason to spend any more time on the significance of a short lapse in Adams' certificate of incorporation which Adams took steps to correct as soon as was reasonably possible after its discovery. Order FCC 00M-50, supra. Compare Memorandum Opinion and Order, FCC 00M-56, released October 18, 2000.

CONCLUSIONS OF LAW

I

Comparative Renewal Hearing Standards

187. Integration of ownership into management was declared to be unlawful by a federal appeals court. Bechtel v. F.C.C., 10 F. 3rd 875 (D.C. Cir. 1993) (criterion of integration declared arbitrary and capricious) ("Bechtel II"). After Bechtel II, the Commission addressed the comparative standards to be applied in the few remaining comparative cases. Reexamination of the Policy Statement on Comparative Broadcast Hearings, First Report and Order, 13 F.C.C. Rcd 15920, 16004-16006 (1998) ("First Report and Order"). The Commission determined that its approach would be "simply to permit the renewal applicants and their challengers, within the confines of the generally phrased standard comparative issue, to present the factors and evidence they believe most appropriate." Id. at 16006. The parties in this case were put on early notice of the application of the newly adopted standard. Memorandum Opinion and Order, FCC 99M-47, released August 9, 1999.

188. The court left it to the Commission to adopt standards that might include the existing “enhancements” of local residence, civic involvement, and broadcast experience. The Commission did not reject these “enhancements.” Each enhancement could be considered as an individual objective comparative factor. However, with only a few comparative cases that could be litigated, the Commission decided not to adopt any new criteria. The Commission continues to recognize, however, that in a hearing in which a renewal applicant carries the burden of proof in showing “substantial performance”, a high level of performance will be the most important factor and will trump other comparative considerations. First Report and Order, supra at 16005-16006.

Renewal Expectancy Requires Substantial Performance

189. RBI has the burden to show that it is entitled to a preference as a renewing licensed broadcaster. 47 U.S.C.A. §309(e). RBI’s showing must be based on non-commercial programming that was broadcast on Channel 51 during the renewal period. If RBI’s service is shown to be only “minimal”, RBI receives no preference. Central Florida Enterprises, Inc. v. F.C.C., 683 F.2d 503, 506 (D.C. Cir. 1982). The “public interest” supercedes self interests of the incumbent and the challenger:

The merit or lack of merit in the incumbent’s record – and the degree of renewal expectancy to which he is thereby entitled – and all the other factors are all to be weighed, all at once, all with an eye toward the public interest.

Id. at 506 – 507 n.16.

190. The Commission awards a renewal expectancy only to those renewal applicants who demonstrate a performance during the renewal period that was “substantial.” See Cowles Broadcasting, Inc., 86 F.C.C. 2d 993, 1006 – 1008 (1981), aff’d sub nom. Central Florida Enterprises, Inc. v. F.C.C., 683 F. 2d 503 (D.C. Cir. 1982), cert denied, 460 U.S. 1084 (1983). The renewal expectancy is so important that the enhancement factors of challengers pale before a showing of an incumbent’s “meritorious service.” F.C.C. v. National Citizens for Broadcasting, et al., 436 U.S. 775, 805 (1978). Under the Cowles standard, where past service is shown to be “substantial” it must also be considered to have been “meritorious.” Central Florida Enterprises, Inc. v. F.C.C., supra at 506. And where service is “meritorious,” the renewal expectancy “should not be destroyed absent good cause.” F.C.C. v. National Citizens for Broadcasting, supra at 805.

191. RBI’s programming will be considered in the context in which RBI was operating between 1989 and 1994. RBI was in Chapter 11 from 1986 to 1991. RBI had made a business decision to specialize in “home shopping” and there is no prohibition against broadcasting a “home shopping” format. The Commission found that a licensee can fulfill its public interest obligation by offering a predominance of “home shopping,” provided that there is an appropriate amount of public interest broadcasting provided. See Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992, as amended, 47 U.S.C. Section 614(g)(2), 8 F.C.C. Rcd 5321 (1993) (“Home Shopping Order”).