

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

MT. BAKER BROADCASTING
CO., INC.

For Reinstatement of Construction Permit of
Station KORC(TV), Anacortes, Washington

MEMORANDUM OPINION AND ORDER

Adopted: July 11, 1988;

Released: August 5, 1988

By the Commission:

1. The Commission has before it for consideration: (a) the June 23, 1987, action of the Chief, Video Services Division, cancelling the construction permit of Mt. Baker Broadcasting Co., Inc. (Mt. Baker) for Station KORC(TV), Channel 24, Anacortes, Washington, and deleting the call sign; (b) the staff's January 25, 1988, action denying reconsideration of that action; and (c) Mt. Baker's February 25, 1988, application for review of those actions.

2. On July 1, 1983, the Commission issued Mt. Baker a construction permit to build a new television station on the channel, and it was initially afforded until January 1, 1985, in which to complete construction. With the grant of three applications for extensions of time, Mt. Baker's construction period was extended until July 1, 1986. Those applications were granted in light of the standards in effect at that time for reviewing extension applications, and on the basis of the permittee's representations that construction was proceeding, including statements that equipment had been ordered, that the tower and transmitter building would be completed by August 1985, and that the station would begin operation in October 1985. Despite its previous representations, the station was still not operational by July 1, 1986, and Mt. Baker filed its fourth extension request. The staff found, however, that, after 3 1/2 years, Mt. Baker had still not shown that any equipment had been delivered, that the tower and transmitter building had been erected, or that the studio facilities had been completed. Consequently, the staff was unable to conclude that the station could be completed by an estimated "on air" date of December 31, 1986. Therefore, on December 5, 1986, Mt. Baker's extension application was denied, and its construction permit was cancelled.

3. On December 31, 1986, the permittee sought reconsideration of the staff's December 5 action, arguing that the station was "commencing program tests with its facility" as of that date. Mt. Baker therefore requested reinstatement of its permit to enable it to apply for its "license to cover completed facilities. In a supplement, Mt. Baker added that its tower and transmitting equipment had been installed during December 1986 and that equipment tests had begun on December 24. On the basis of Mt. Baker's representations, the staff reinstated the construction permit on January 12, 1987, on the condition that a license application be filed within ten days, in accordance with

the Commission's Rules.¹ At the same time, the staff set a new expiration date for the reinstated construction permit of January 30, 1987.

4. By April 28, 1987, however, a license application had still not been filed. On that date, the Commission's Field Operations Bureau conducted an inspection of the station, which revealed that the station had been constructed and was being operated with substantially different facilities than those authorized. Specifically, the construction permit authorized an Andrew 33H 7 10/A21138 antenna installed on a tower 403 feet above ground level (AGL) with operation at 3630 kW visual effective radiated power (ERP). In contrast, the inspection showed that Mt. Baker had built a tower 100 feet AGL on which it installed a Scala SL-8 paraslot antenna. Further, the station was found to be operating at 10.3 kW ERP, using a transmitter specified to produce peak output power of only 1000 watts (1 kW). The facilities built are equivalent to those used by many television translator or low power television stations. Because Mt. Baker's construction permit had expired with no license application having been filed, the staff concluded that Mt. Baker was operating without authority and, on June 23, 1987, cancelled the construction permit and ordered Mt. Baker to cease operations by June 29. Mt. Baker's petition for reconsideration of that action followed on October 27, 1987.

5. In support of its petition for reconsideration, Mt. Baker admitted that the station had been built with facilities other than those authorized, but argued that the staff should consider its service record and good faith efforts to build. Specifically, the permittee stated that it had attempted to correct the operating violations identified during the Field Operations Bureau inspection. Mt. Baker also asserted that, on May 6, 1987, it had filed an application to modify its construction permit to reflect facilities already constructed, although there is no record that any such application has been filed. The staff found that, in Mt. Baker's December 31, 1986, request for reinstatement of its construction permit, the permittee represented that construction had been completed and that program tests had been commenced. There was no indication, however, that construction and operation were other than that authorized. Consequently, the staff found that Mt. Baker's construction permit was reinstated on the incorrect assumptions that the station had been built with authorized facilities and that the filing of a license application for those facilities was imminent. When the inspection of the station revealed that this was not the case, and when Mt. Baker failed to file a license application as it had been ordered to do (and also failed to seek a further extension), the staff cancelled the permit and ordered the station off the air. The staff also determined that good faith had not been shown, or the station would have been built as authorized. Consequently, on January 25, 1988, Mt. Baker's petition for reconsideration was denied, and its application for review followed on February 25, 1988.

6. In support of its application for review, Mt. Baker argues that a forfeiture is the appropriate sanction for unauthorized construction, not cancellation of the construction permit. It also reiterates its contention that it has made a substantial commitment of resources to the project and that it has provided a first local television service to Anacortes. Finally, it asserts that no other applicant will be allowed to apply for the channel (because of the community's proximity to Seattle) until the "freeze" on certain applications for new television stations is lifted.²

7. Section 73.3598(a) of the Commission's Rules provides a permittee with 24 months to complete construction of a new television station and to file a license application. In addition, a permittee may seek extensions of time of up to six months, upon a showing of one of the following three circumstances: (1) completion of construction with testing underway; (2) substantial progress in construction; or (3) reasons clearly beyond the permittee's control that prevented construction, if all possible steps have, nevertheless, been taken to resolve the problem and proceed with construction. Section 73.1620(a) provides that, "upon completion of construction in accordance with the terms of the construction permit" [emphasis added], the permittee can conduct program tests, provided that a license application is filed within ten days. Mt. Baker has not established that it was prevented from constructing its authorized facilities because of reasons beyond its control. When the staff reinstated Mt. Baker's construction permit on January 12, 1987, it did so based only on the reasonable belief that the station had been constructed as authorized and that the filing of the license application was imminent. Although Mt. Baker argues that it has spent more than 600,000 in construction and operation of the station, such expenditures have not been documented. Moreover, Mt. Baker has not shown that the money was spent on constructing authorized facilities, and the amount used for operating expenses has no bearing on the progress made in construction. In any event, the alleged expenditure of funds for constructing facilities that differ so substantially from the authorized facilities provides no persuasive basis for acting favorably on Mt. Baker's application for review.

8. Mt. Baker contends that the imposition of a forfeiture is often the penalty for unauthorized construction of a broadcast station. Forfeiture might be appropriate in some cases where construction differs by a modest degree from the facilities authorized. The departure in this case is clearly not modest; for example, operation with 10.3 kW ERP, compared to 3630 kW authorized. In addition, there are no significant mitigating circumstances in this case, but there are substantial aggravating factors. In that regard, improper construction did not occur through error or inadvertence; the facts clearly indicate an effort to deceive the Commission. A license application would have revealed what had been built and would, almost certainly, have been denied, but Mt. Baker did not file one, and the deception was not uncovered until the Field Operations Bureau inspection. Even then, Mt. Baker took no steps toward remedying the situation. It could have sought authority to modify its facilities before undertaking construction, but no such application was filed.³ It could have filed an application for additional time to build after January 30, 1987; it did not. Finally, it was ordered to file a license application within ten days of beginning operation; again, it did not. For all these reasons, we conclude that a forfeiture is inappropriate in this case. Moreover, such action comports with Section 319(b) of the Communications Act of 1934, as amended, which provides that a construction permit will be "forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow."

9. Finally, we reject Mt. Baker's argument that the "freeze" will preclude others from providing service to Anacortes on the channel. The "freeze" is temporary and, in any event, it can be waived in an appropriate case. *Advanced Television Systems and Their Impact on the Ex-*

isting Television Broadcast Service. Mimeo No. 4074, RM-5811 (released July 17, 1987). Consequently, we find no basis to disturb the staff's actions in this matter.

10. Accordingly, IT IS ORDERED, That Mt. Baker's application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

¹ Section 73.1620(a)(1) of the Commission's Rules provides that a television station may begin program tests upon notification of the Commission, provided that a license application is filed within ten days.

² On July 16, 1987, we adopted an Order in the Rule Making proceeding entitled *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, Mimeo No. 4074, RM-5811 (released July 17, 1987). In that Order, we imposed a "freeze" on the acceptance for filing of applications for new television stations in cities within the minimum co-channel separation distance of 30 specific cities, one of which is Seattle, Washington, which is approximately 59 miles from Anacortes.

³ Mt. Baker also states that, on May 6, 1987, it filed a modification application specifying the facilities it had already constructed. Although it maintains that the application was filed with the appropriate fee, there is no record in our Fee Section or anywhere else in the Commission of any such application being filed.

B

**Attachment B Decision,
MM Docket No. 83-911, FCC 88R-38
Religious Broadcasting Network,
San Bernadino, CA**

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket Nos. 83-911
et al.

In re Applications of

RELIGIOUS
BROADCASTING
NETWORK
San Bernardino, California

et al.

For Construction Permit for a
New Television Station
San Bernardino, California

Appearances

Morton L. Berfield and *Roy W. Boyce*, on behalf of Religious Broadcasting Network; *Michael H. Rosenbloom*, *Richard H. Waysdorf*, and *Rebecca L. Dorch*, on behalf of Solano Broadcasting Limited; *Thomas A. Hart, Jr.* and *Frederick W. Chockley*, on behalf of A&R Broadcasting Company, A Limited Partnership; *J. Geoffrey Bentley* and *Geraldine M. Carr*, on behalf of Buenavision Broadcasters; *John Wells King*, *James E. Dunstan*, and *Melodie A. Virtue*, on behalf of SSP Broadcasting, A Limited Partnership; *James A. Gammon* and *Diane H. Ming*, on behalf of Good News Broadcasting Network; *William M. Barnard*, *James K. Edmundson*, and *Mark Van Berg*, on behalf of Sandino Telecasters; *Robert A. Beizer*, *R. Clark Wadlow*, and *Craig J. Blakeley*, on behalf of Inland Empire Television; *David Tillouson*, *Susan A. Marshall*, and *Gerald P. McCartin*, on behalf of Television 30, Inc.; *Steven A. Lerman*, *Dennis P. Corbett*, and *Sally A. Buckman*, on behalf of San Bernardino Broadcasting Limited Partnership; *Ashton R. Hardy* and *James J. Popham*, on behalf of All Nations Christian Broadcasting, Inc.; *Martin R. Leader*, *David D. Oxenford*, and *Lisa R. Mikalonis*, on behalf of Channel 30, Inc.

DECISION

Adopted: June 17, 1988;

Released: July 5, 1988

By the Review Board: MARINO (Chairman),
BLUMENTHAL, and ESBENSEN.

Board Member BLUMENTHAL:

BACKGROUND

1. This proceeding involves twelve mutually exclusive applications for authority to construct a new commercial television broadcast station on Channel 30 at San Bernardino, California. The applicants are: Religious Broadcasting Network (RBN), Solano Broadcasting Limited

(Solano), A&R Broadcasting Company, A Limited Partnership (A&R), Buenavision Broadcasters (Buenavision), SSP Broadcasting, A Limited Partnership (SSP), Good News Broadcasting Network (Good News), Sandino Telecasters (Sandino), Inland Empire Television (Inland Empire), Television 30, Inc. (TV 30), San Bernardino Broadcasting Limited Partnership (SBB), All Nations Christian Broadcasting, Inc. (All Nations), and Channel 30, Inc. (Channel 30). By *Hearing Designation Order*, Mimeo No. 6506, released September 20, 1983, these applications, along with twenty-five others that were subsequently dismissed,¹ were designated for hearing on an air hazard issue against Solano and on the standard comparative issue. Presiding Administrative Law Judge (ALJ) Joseph P. Gonzales subsequently added a real party-in-interest issue against SBB and a misrepresentation/lack of candor issue against Sandino. *Memorandum Opinions and Orders*, FCC 84M-4973 and FCC 84M-4974, released November 28, 1984. The air hazard issue was resolved favorably to Solano by summary decision. *Memorandum Opinion and Order*, FCC 84M-1422, released March 21, 1984. Thereafter, in an *Initial Decision (I. D.)*,² FCC Rcd 6561 (1987), the ALJ disqualified both SBB and Sandino on the real party-in-interest and misrepresentation/lack of candor issues, respectively, and granted Channel 30's application after concluding that it was comparatively superior to the other nine applicants. The proceeding is now before the Review Board on exceptions filed by the parties. We have reviewed the *I. D.* in light of the exceptions and reply briefs, oral argument held April 1, 1988, supplemental briefs filed April 20, 1988, and our examination of the record. We adopt the ALJ's findings and conclusions, except as modified herein, and affirm his ultimate conclusion that the grant to Channel 30 is consistent with applicable Commission policies and precedent.

2. In the *I. D.*, the ALJ considered the applications of all twelve remaining applicants according to the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Policy Statement*), under which the competing applicants are scored against one another on the following two cardinal criteria: (1) diversification of control of the media of mass communications, the Commission's "factor of primary significance"; and (2) "best practicable service." Under criterion (2), the Commission considers such secondary qualities as integration of active ownership with day-to-day management of the proposed station, local residency, local civic activities in the community that would betoken a knowledge of, and interest in, the subject community, racial and sexual characteristics of the applicant (see *Cannon's Point Broadcasting Co.*, 3 FCC Rcd 864 (1988)), prior broadcast experience, and proposed signal coverage differences. See *Policy Statement*, 1 FCC 2d at 395, *et seq.* In almost all cases, those applicants without any other significant mass media holdings are considered comparatively superior to competitors already owning other media interests, the *Policy Statement* being sharply and very deliberately skewed to favor newcomers.³ For practical reasons, therefore, our review of the exceptions centers first on those directed to the ALJ's findings and conclusions relative to the "primary" comparative factor of diversification of control of the media to assure that those applicants with other attributable media holdings have been appropriately charged with such interests; and to assure at the same time that no applicant has been improperly charged with an existing media interest, if such an interest has been erroneously attributed to that ap-

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plicant. After disposing of any "diversification" exceptions, we shall turn to the numerous exceptions relating to "best practicable service" to determine, if possible, any other meaningful comparative differences as between the twelve competing applicants.

DIVERSIFICATION OF CONTROL OF THE MASS MEDIA

3. In general, the *Policy Statement's* reference to other communications media focuses initially upon co-owned broadcast interests. See 1 FCC 2d at 394-395. Newspaper ownership is also considered significant under FCC "diversification" policies, see *id.*; see generally *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), as are co-owned cable television interests, although cable television interests have not been, until recently,³ regarded by the Commission as very significant media outlets of speech or expression. *Greater Wichita Telecasting, Inc.*, 55 RR 2d 926, 929 (1984) (Comm'n) (CATV interests have traditionally been less important for diversification purposes than broadcast interests, since broadcast stations provide unique local and informational programming to their communities of license and adjacent areas).⁴ However, those applicants currently possessing other mass media interests who desire to eliminate in advance any apparent "diversification" handicap *vis a vis* competing applicants holding no other mass media properties may avert any such potential "diversification" demerit by one of two avoidance measures. One, an applicant may make a timely pledge to divest any or all current media interests if that applicant is finally awarded the new facility; an avoidance mechanism we just recently elaborated upon in *Martin Intermart, Inc.*, 3 FCC Rcd 1650, 1651 (Rev. Bd. 1988), *erratum*, 3 FCC Rcd 2155.⁵ A second method that an applicant can use to avoid being charged with another extant media ownership interest is to structure its application in a two-tiered mode, so that one principal of that applicant who currently holds other media interests is confined to a "passive" role in the new applicant entity; e.g., by confining that media-burdened principal to the role of a "non-voting" stockholder (if the new applicant is a corporation) or to the role of a "limited" partner (if the new applicant is a limited partnership). The existing media holdings of such purely "passive" applicant principals are not ordinarily attributable for the purpose of FCC media "diversification" policies. See, e.g., *Cleveland Television Corp.*, 91 FCC 2d 1129, 1131-1133 (Rev. Bd. 1982) (media interests of an applicant's nonvoting shareholders not cognizable in comparative "diversification" calculations), *aff'd*, 732 F.2d 962 (D.C. Cir. 1984); *Capital City Community Interests, Inc.*, 2 FCC Rcd 1984-1989 (Rev. Bd. 1987) (media interests of an applicant's "limited" partners not cognizable in comparative "diversification" calculations).⁶ Of course, if it is determined that a putatively "passive" principal of an applicant takes, in actuality, an *active* role in the media affairs of that applicant, that principal's other media holdings will be attributable to the subject applicant, just as if the active principal were a "voting" stockholder or, as the case may be, a "general" partner. See *Tulsa Broadcasting Group*, 2 FCC Rcd 6124, 6131 (Rev. Bd. 1987).

4. With that brief background in place, we will review the exceptions to the *I.D.* as they affect the *Policy Statement's* focus on diversification of media control. One set of exceptions asserts that the ALJ erred when, at *I.D.*,

paras. 314-315, he did not assess a "diversification" demerit against RBN, because RBN's proposed General Manager and Chief Executive Officer, Reverend Roy Kenneth Foreman, had entered into a January 27, 1984 agreement with the Construction Permittee of UHF Channel 65, San Jose, California, to provide a minimum of twelve hours a day of programming produced by Reverend Foreman's Cathedral of Faith; and, the agreement further provided, to pay all of the operating expenses of Channel 65. This 1984 agreement was not modified by Reverend Foreman's pledge to resign from Cathedral of Faith until four days after the "B" cut-off day, the established deadline for avoiding the attribution of any other media interests. Initially, we find that the twelve hours per day of Cathedral of Faith programming that was to be supplied to Channel 65 is a media interest to be considered in this case. (As we discuss *infra*, however, Cathedral of Faith has now contracted to purchase outright Channel 65.) In one of the few decisions in which the Board has contemplated the question of whether a program production entity is a medium of communications within the purview of the *Policy Statement*, the Board stated that it would not generally consider such media activities unless the "production company undermines the objectives underlying the principle of diversification of control of mass media, i.e., maximizing available program services and viewpoints . . ." *Morris, Pierce & Pierce*, 88 FCC 2d 713, 724 (Rev. Bd. 1981), *review denied*, FCC 83-31, released January 25, 1983. See also *Golden State Broadcasting Corp.*, 94 FCC 2d 212, 214 (Rev. Bd. 1983) (radio production company supplying public affairs programming to 21 Arizona radio stations raises media "diversity" concerns)(subsequent history omitted).⁷ As we view the instant facts, we submit that there can be no serious debate about whether ownership, for example, of a sizeable broadcast network (an obvious illustration of a "program production" entity) would trigger the Commission's customary media diversification concerns. See, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). And, while the program production interests at issue here are certainly a far cry from a major national or regional broadcast network, Cathedral of Faith's contract to fully provide twelve hours per day of television programming to a same-state television station must register cognizably upon the Commission's idealized standard of "maximizing available program services and viewpoints." We do not say that such an impact equates to actual broadcast station ownership; but, neither can such a media activity be entirely ignored under the traditional diversification tenets of the *Policy Statement*. Moreover, we note that, on March 11, 1987, RBN amended its application to report that Cathedral of Faith, for whom Reverend Foreman and several other RBN directors now work in the area of programming production and distribution (*I.D.*, para. 314), filed an application with the Commission to permit it to purchase outright Channel 65, San Jose. Accompanying that March, 1987 RBN amendment was again the pledge of Reverend Foreman to resign from all of his positions with Cathedral of Faith, should the RBN television application here be granted.⁸

5. The operative questions here, then, are whether the ALJ erred or permitted RBN to improperly improve its comparative "diversification" standing by accepting RBN's pledges to untether Reverend Foreman from his 1984 Channel 65 programming contract; and/or, later, by accepting RBN's March, 1987 pledge that Reverend Foreman would resign all of his Cathedral of Faith offices

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should RBN be now awarded the instant Construction Permit. Finding that the extensive Cathedral of Faith programming activities of Reverend Foreman were and are cognizable, *I.D.*, para. 315, we nonetheless agree with the ALJ that Reverend Foreman's divestiture (and/or resignation pledges) were sufficiently timely to avoid any "diversification" demerit which might otherwise have attended his Cathedral of Faith Channel 65 relationships. The Board, of course, keenly appreciates the necessity of establishing firm procedural deadlines in the comparative process, and we recognize that the missing of certain important filing deadlines, even by a single day, can sometimes be fatal to a litigant.¹⁰ Nor do we wish to become arbitrary in the application of established administrative deadlines by appearing to countenance tardiness in one case, but not excusing it in another. However, after much consideration of the facts and circumstances here present, we shall affirm the ALJ's rulings which spared RBN the burden of any potential Cathedral of Faith related "diversification" demerit. As to the ALJ's acceptance of Reverend Foreman's pledge to separate himself from his 1984 agreement to supply Channel 65's programming, a pledge coming four days after the "B" cut-off date, we find RBN's minor deviation to be unremarkable, especially in view of the fact that our prior determinations regarding "program production" activities were not, in retrospect, as well set out as we would have now preferred. *See supra, Morris, Pierce & Pierce : Golden State Broadcasting Corp.* Hence, RBN may not have been certain at the "B" cut-off deadline that the Cathedral of Faith/Channel 65 program supply contract was, in fact, a reportable mass media interest having measurable comparative consequences. Even in its exceptions, RBN continues to argue that the Channel 65 program contract was "not a media interest to be reported in FCC Form 301,"¹¹ and it would appear that RBN's March 2, 1984 amendment reporting the Channel 65 contract was, from its perspective, merely intended as *ad cautelam ex abundantia*.¹² In these circumstances, the ALJ was not unreasonable in accepting RBN's 1984 amendment only four days after the "B" cut-off date. The March 11, 1987 amendment, reporting the outright purchase of Channel 65 by Reverend Foreman's Cathedral of Faith, presents another question. There can be no doubt that Channel 65 itself is a cognizable media interest; nor is there any question that Reverend Foreman's dominant positions with both Cathedral of Faith and RBN would otherwise carry cross-ownership consequences, *see Policy Statement*, 1 FCC 2d at 394 n.5. And, finally, the Board had announced in *Santee Cooper, supra* note 3, that after-acquired media interests would be attributable to an applicant unless a "contemporaneous" divestiture pledge attended the new media acquisition, *see* 99 FCC 2d at 794-796. In that regard, we later clarified that "contemporaneous" within this context generally means within the 30-day period permitted by Section 1.65 of the Commission's Rules (47 CFR §1.65) for the reporting of decisionally significant changes in an applicant's status. *Jerome Thomas Lamprecht*, 99 FCC 2d 1219, 1222 (Rev. Bd. 1984), *review denied*, 3 FCC Rcd 2527 (1988). Here, the outright purchase of Channel 65 by Reverend Foreman's Cathedral of Faith occurred on February 2, 1987; but RBN's request to amend its application to report that Channel 65 purchase, and Reverend Foreman's concomitant resignation pledge, were not filed with the ALJ until March 20, 1987. However, it will be recalled that, at the time Cathedral of Faith entered into the 1984 program supply contract with Chan-

nel 65, Reverend Foreman had *already* pledged to resign his Cathedral of Faith positions in the event that RBN here received the San Bernardino Construction Permit, *I.D.*, para. 315. This later (1987) pledge of Reverend Foreman may be seen, then, as essentially redundant of his prior (1984) divestiture pledge. Hence, while RBN's March 20, 1987 filing was technically late under Section 1.65 of our rules, that lateness does not require the attribution of Channel 65 to RBN for comparative "diversification" purposes. *Compare Jerome Thomas Lamprecht, supra*, where an applicant was charged with a media interest acquired in May, 1983, but where a post "B" cut-off divestiture pledge was not tendered until February, 1984, and the Board rejected that applicant's exceedingly late attempt to upgrade its comparative position. Accordingly, we affirm the ALJ's refusal to assess any "diversification" penalty against RBN.¹³

6. Having found no error in the ALJ's disposition of the "diversification" aspects of RBN's application, we turn next to his treatment of the other applicants as they relate to their media interests. At *I.D.*, paras. 158-160, the ALJ lists the various media interests of Buenavision principal Frank Dominguez as follows: (1) 24% equity interest and Chairman of the Board of Buenavision Telecommunications, Inc., operator of a cable television system in East Los Angeles; (2) 51% equity interest in Buenavision Telecommunications of Boyle Heights, Inc., operator of a cable television system in Boyle Heights, California; (3) 40% equity interest in Buenavision Cable Television of Colton, Inc., operator of a cable television system in Colton, California. Dominguez is also a principal of Community Service Television Company, Construction Permittee of Channel 60, St. Louis, Missouri and of LPTV Channel 31, San Diego, California. And, he also owns 51% of VistaCom, an applicant for "various low power television stations." Buenavision excepts because the ALJ charged it with a comparative demerit for Dominguez' 51% interest in the Boyle Heights cable television system after finding that no timely (pre-"B" cut-off) pledge was specifically made with respect thereto. *Id.*, para. 166. However, Buenavision explains that at the time Dominguez pledged to divest himself of his East Los Angeles cable system, the Boyle Heights system was a component part of that same cable television franchise and that Dominguez' May 1983 divestiture pledge covered the Boyle Heights component as well.¹⁴ No competing applicant here has challenged this representation. We have reviewed the record on this point and agree with Buenavision that Dominguez' 1983 cable television system divestiture pledge was intended to cover, and did cover, the Boyle Heights system as well as the East Los Angeles and Colton cable television systems. We must, therefore, reverse the ALJ on this minor point, and vacate his assessment of the "diversification" demerit against Buenavision.

BEST PRACTICABLE SERVICE

Integration of Ownership with Day - to - Day Control of the Station

7. After the element of diversification of control of the mass media, the *Policy Statement* favorably emphasizes the integration of ownership with actual day-to-day control over the proposed broadcast facility. 1 FCC 2d at 395. Quite frequently, these days, the quantitative difference in the amount of ownership "integration" credit awarded is

all that dispositively separates the winning applicant from the also-rans. See, e.g., *Jerome Thomas Lamprecht, supra*, 3 FCC Rcd at 2527 (100% fulltime "integration" factor prevails over competitor's 76% corresponding factor). While several recent applicants have questioned the rationality of basing broadcast Construction Permit awards on bare percentage differences in "integration" proposals, see, e.g., *Marin Intermart, supra*, 3 FCC Rcd at 1652 & n.3, the Commission has yet adhered to its position that quantitative (percentage) differences in ownership "integration" proposals cannot be overcome by any measure of qualitative differences in the pertinent characteristics of closely competing applicants. *Horne Industries, Inc.*, 98 FCC 2d 601, 604 n.12 (1984)(citing *Alexander Klein, Jr.*, 86 FCC 2d 423, 428-429 (1981)). Accordingly, we next turn our attention to the exceptions taken to the ALJ's disposition of the various ownership "integration" proposals advanced by the applicants.

8. Before we do so, however, it is especially useful in this particular case to explain that the Commission's ALJs these days are - necessarily and properly we believe - scrutinizing very carefully the putative ownership structures and the "integration" proposals of many recent applicants to guard against what FCC Chairman Dennis R. Patrick recently described as an influx of "sham applications that manipulate comparative criteria to maximize a paper preference while disguising the real party in interest" who actually controls the broadcast applicant entity.¹⁵ As many of our recent comparative cases reveal, the Commission's application processes are currently plagued with fraudulent applications wherein the real-parties-in-interest contrive to artificially structure an applicant entity around so-called principals who are, in fact, no more than false fronts interposed solely to increase that applicant's chances to prevail under the *Policy Statement's* various comparative criteria. Where such shams are detected, they are rightfully rejected by the Commission. See, e.g., *Pacific Television, Ltd.*, 3 FCC Rcd 1700 (1988)(aff'g ALJ and Review Board rejection of sham ownership proposal). See also *KIST Corp.*, 102 FCC 2d 288 (1985), *aff'd*, 801 F.2d 1436 (D.C. Cir. 1986); *NEO Broadcasting Co.*, 103 FCC 2d 1031 (Rev. Bd. 1986), *review denied*, 1 FCC Rcd 380 (1986).¹⁶ Because of this recent outbreak of sham broadcast applications, *bona fide* applicants and the Commission's ALJs have been compelled to examine much more closely the alleged ownership structures and, more specifically, the purported "integration" designs of numerous competing applicants to determine whether their proposals genuinely reflect the composition of the particular applicant or whether that applicant is, in reality, an utterly artificial construct devised exclusively for the purpose of deceitfully exploiting the Commission's comparative system. As illustrated clearly by the case at bar, separating the wheat from the chaff amongst our recent comparative applicants remains an imperfect science. For, of the twelve competing applicants remaining in this case, the ALJ here refused to credit, in whole or in some material respect, the proffered "integration" proposals of all twelve. Although the Board, for the reasons set forth below, rehabilitates several of the applicants and restores, in whole or part, the "integration" credit originally sought by some applicants, we do not denigrate the ALJ's vigilance in the present environment described aptly by FCC Chairman Patrick. Unless sham applicants are stoutly rebuffed, the very fabric of the Commission's licensing process will be

irreparably rent, and our broadcast license rolls reduced to a shabby sodality of frauds, mountebanks, and sundry speculators of the very lowest echelon.

9. *Channel 30*. Channel 30 is a California corporation composed of fourteen individual shareholding principals, four of whom (controlling approximately 33% of the corporation's total shares of stock) are represented here as the entity's only voting shareholders. *I.D.*, para. 7. The remaining ten shareholders (controlling approximately 66% of the corporation's stock shares) are represented as "nonvoting". For purposes of computing an applicant's quantitative "integration" factor, we examine only the "integration" proposals of the voting shareholders on the Commission's generally accepted premise that nonvoting principals have absolutely no management control over the operational activities of that corporation. See, e.g., *Cleveland Television Corp., supra*; see generally *Atribution of Ownership Interests, supra* note 6. Channel 30's four voting shareholders are listed as follows:

Voting Shareholders	Voting Stock	Ownership Interest
Lucille Gilbreath	28.6%	10.924%
Betty Cox Johnson	28.6%	10.924%
Lucy Lopez	28.6%	10.924%
Suzanne Schott	14.3%	.840%

10. The ALJ credited the individual "integration" proposals of Gilbreath, Johnson and Lopez, see *I.D.*, para. 34, but he denied such credit to Schott, primarily because he found her to be "in effect a 'stand-in' for her husband," a communications consultant from whom she had originally acquired her Channel 30 stock. *Id.*, para. 30.¹⁷ Animating the ALJ's apprehension that Schott would not play a true or meaningful managerial role at the proposed station was the fact that her testimony relating to her intended management duties was "noticeably confused" (*id.*). The ALJ also recorded that Schott had neither broadcast nor any other managerial experience. In rejoinder, Channel 30 accurately observes that a lack of previous managerial experience is not a valid basis for denying "integration" credit, the Commission considering such inexperience to be a remediable condition. *WFSP Inc.*, 99 FCC 2d 444, 446 (Rev. Bd. 1984)(citing *Webster - Baker Broadcasting Co.*, 88 FCC 2d 944, 951-952 (Rev. Bd. 1982)). Channel 30 further contends that although Schott's answers did reflect some confusion on a few minor points, some of that uncertainty was the product of unclear questions and Schott's occasional inarticulateness. It argues that nothing in the record justified a finding that Schott would not "integrate" fulltime into station activities or perform the proposed role of the director of the station's public affairs department, for which role she is said to be slated.

11. We have reviewed the record on these points very closely and must find that no Commission law or precedent supports a denial of Schott's "integration" credit on the grounds stated by the ALJ. Unlike, for example, the sham principal in *Pacific Television, Ltd., supra*, there is here no evidence that Schott was totally unfamiliar with her application or wholly ignorant of her future status or her proposed duties. And, unlike the situation in *N. E. O. Broadcasting Co., supra*, there is no reliable evidence here of a blatant sham. Schott asserted that her stock was transferred to her by her husband because he was, at that time, seriously ill (and is now deceased, see *supra* note 17). Her explanation is plausible, and essentially unchallenged except for the purely speculative ruminations of her opponents, none of whom sought a real-

party-in-interest issue against Channel 30. Without such an issue, or the adduction of evidence compelling the addition of such an issue, we will not presume Schott to be a dummy for her husband. See *Tequesta Television, Inc.*, 2 FCC Rcd 7324, 7325 (Rev. Bd. 1987)(paras. 5-6); see also *I.D.*, para. 3 (adding real-party-in-interest issue against SBB Broadcasting, another applicant in this very case). Finding no substantial basis in the record evidence or in the law to reject Schott's tendered "integration" proposal, on the particular grounds cited by the ALJ, the *I.D.* is reversed in that respect. However, for reasons set forth more fully *infra*, para. 54, our award of a 100% quantitative "integration" credit to Channel 30 is tentative and subject to Commission clarification on the comparative status of applicant principals owning less than cognizable levels of equity in a broadcast property. See also *infra*, para. 37 & n.37. As with the other eleven applicants discussed below, we will defer discussing Channel 30's qualitative "enhancing" attributes until a later section of this decision (see *infra* para. 52, *et seq.*), after we have completed our review of the exceptions directed to the basic quantitative aspects of the full dozen "integration" proposals here under basic review.

12. *Sandino*. The ALJ rejected all ownership "integration" credit for Sandino's purported sole "general" partner, Jose M. Oti, after finding that Sandino had misrepresented the ownership composition of its "limited" partnership during the course of a partially aborted merger involving Sandino and a now-dismissed competing applicant, Crocker Communications Corp. As originally filed, Sandino was the sole proprietorship of Jose Oti. *I.D.*, para. 36. According to Sandino, counsel for Crocker Communications Corp. approached Sandino counsel in January 1984 with a view toward merger of the two separate applicants. After agreeing to discuss this matter, the parties met in February and April of 1984 to negotiate the concluding details. On May 14, 1984, Sandino and Crocker Communications filed with the ALJ a "Joint Petition for Approval of Merger Agreement and Dismissal of Application," representing therein that (1) Crocker Communications was voluntarily dismissing its own pending application and that (2) Crocker's chief principal, Frankie Crocker, and another individual, Meshulam Riklis (who had theretofore been merely a financier of the original Crocker application) would become merely "limited" partners of the newly reconstituted Sandino application. The "Joint Petition" declared that, under the merger agreement, Oti would become a 30% equity owner and the sole "general" partner of Sandino, with "limited" partners Crocker and Riklis owning, respectively, 20% and 50% of the new Sandino partnership's equity. On May 21, 1984, the ALJ routinely granted the "Joint Petition" and ordered Sandino to expeditiously file with him the limited partnership agreement formalizing the subject merger.

13. However, the approved merger was never finally consummated as proposed in the "Joint Petition" for reasons essentially immaterial to our immediate regulatory concerns.¹⁸ Suffice it that Frankie Crocker subsequently and repeatedly declined to execute the new Sandino limited partnership agreement; and, ultimately, on August 2, 1984, Sandino filed still another "Petition for Leave to Amend" in which Crocker's participation was expunged and Riklis' "limited" partnership interest increased to 70% of the total equity of Sandino. Sandino's August 2 petition

for leave to amend was opposed by RBN, and on November 28, 1984, the ALJ added an issue to be tried against Sandino:

To determine whether Sandino Telecasters or any of its principals (including Crocker Communications Corporation) has misrepresented facts or been lacking in candor with respect to matters arising from a merger agreement between Sandino Telecasters and Crocker Communications Corporation and, if so, the effect thereof on the basic or comparative qualifications of Sandino Telecasters.

Memorandum Opinion and Order, FCC 84M-4974, released November 28, 1984. After hearing this issue, and in the *I.D.*, the ALJ held that Sandino lacked candor in submitting the May 14, 1984 merger agreement and depicting itself therein as a reconstituted limited partnership. In that regard, the ALJ concluded that Oti had concealed the status of his unsuccessful negotiations with Crocker until he had reached a new accord with Riklis to assume the obligations on which Crocker had reneged. *I.D.*, para. 43. Sandino's exceptions hold Oti blameless for Crocker's failure to execute the limited partnership agreement anticipated in the original May 14 merger documents.

14. We begin our analysis with the principle first announced in *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 (1981), in which the Commission declared that an applicant's failure to identify its "limited" partners¹⁹ alleged in that case to hold a 71% equity interest in one of the applicants, was not cause for dismissal of that application because - under the Commission's prevailing premise - "limited" partners play no legal role in the management or control of an applicant entity. Thus, when the *Anax* applicant sought in the midst of the licensing proceeding to amend its application to raise the "general" partner's original ownership share of 28% to 99% (by assuming the unidentified "limited" partners' 71% purported equity interest), the Commission nevertheless held that no "significant" ownership change of that applicant entity had occurred. *Id.*, at 488. At the time, the *Anax* ruling that a majority ownership transfer in mid-hearing did not constitute a significant ownership shift was quite novel, but the *Anax* Commission reasoned that the addition or deletion of "limited" partners did not affect the "control" aspects of an applicant entity or confer upon it any comparative advantage. Indeed, so institutionalized has the *Anax* ruling become that current applicants need not even identify any of the entity's "limited" partners (or, if a corporation, "nonvoting" shareholders), see FCC Form 301 (as revised October 1986), Pike & Fischer Rad. Reg., pp. 98:301 - 1 *et seq.*, irrespective of the fact that such undisclosed principals might actually own as much as a 99% equity interest in the particular broadcast applicant or licensee.²⁰ Hence, under the prevailing *Anax* principle, Sandino's May 14, 1984 amendment petition seeking to add Crocker and Riklis as "limited" partners jointly holding a 70% equity interest in the Sandino application was legally permissible; and, in routinely accepting that Sandino amendment, the ALJ so recognized. The critical question here is whether Sandino should have been fatally disqualified later when, on August 2, 1984, Oti despaired of including Crocker as a 20% "limited" partner in Sandino, and instead added Riklis alone as Oti's solitary "limited" partner. We have reviewed the evidence and the

testimony on this point and find that no actionable misrepresentation occurred in Oti's May 14, 1984 petition, nor did Sandino display a disqualifying lack of candor in not reporting earlier Crocker's recalcitrance over signing the new Sandino limited partnership agreement. Neither the ALJ nor any other party disputes Oti's version of the events leading to Crocker's eventual elimination from the Sandino application. And, inasmuch as Riklis had never been more than a passive financier - first to Crocker, then to Oti - we perceive no motive for distorting the actions of Frankie Crocker, whose proposed 20% interest in Sandino was simply a *quid pro quo* for Crocker's withdrawal of his own long-shot application. Under the circumstances conveyed by Oti, circumstances not contradicted in the *I.D.* or the record, we find that the ALJ's disqualification of Sandino from this proceeding was error. Though this Board has no compunction against disqualifying a license applicant for serious misrepresentation, *see, e.g., KQED, Inc.*, FCC 88R-25, released May 16, 1988, we find no deliberate misrepresentation or lack of candor on Sandino's part. We therefore grant its exceptions and award to it a 100% quantitative "integration" factor based on the proposed fulltime management commitment of Sandino's sole "general" partner, Jose M. Oti.

15. *San Bernardino Broadcasting*. SBB attempted to portray itself as a "limited" partnership constructed of two disparate ownership components: (1) a corporate "general" partner identified as San Bernardino Valley Broadcasting Co. and owned entirely, in turn, by Anita Van Osdel; and (2) an array of sixteen other individuals said to be collectively the "limited" partners of SBB. However, Van Osdel's corporation - the sole purported "general" partner of SBB - holds merely 10% of the total equity of SBB, while the collective "limited" partners own in the aggregate fully 90% of this applicant's equity. Pursuant to a real-party-in-interest issue added by the ALJ, *see Memorandum Opinion and Order*, FCC 84M-4973, released November 28, 1984, the ALJ disqualified SBB as an applicant. *See I.D.*, paras. 51-60.

16. We affirm, *con brio*, the ALJ's refusal to award "integration" credit to SSB; its application was and remains a travesty and a hoax. We need not repeat, point-by-point, all of the findings of fact which the ALJ has set out to support his conclusion that the progenitor and the real-party-in-interest of SBB is definitely not Van Osdel, she being merely a fig leaf for the true kingpin of SBB, one Michael Parker, who currently holds an interest in numerous other broadcast permits (*I. D.*, para. 61), and who could not in his own identity have hoped to prevail in this very close comparative contest. As the *I.D.* adequately chronicles, Michael Parker prefabricated the SBB application for Channel 30 prior to the intromission of Van Osdel, who purportedly materialized as SBB's sole "general" partner only the day before the SBB application was filed with the FCC. Van Osdel allegedly received her "controlling" 10% equity interest from Parker's own employee, S. Kim O'Neal, while Parker transferred the equity interest previously held in his own name to his sister (and brother-in-law), Sally (and Larry) Peterson, who are currently listed as holding 20% of SBB's total equity. Having ostensibly yielded up his entire SBB interest, Parker signed an agreement with Van Osdel - the new SBB "regent" - by which Parker became SBB's chief "consultant". For this, Parker was slated to receive "60,000 for past services to the applicant and an hourly fee for future services." *Id.*, at para. 54 (citing Tr. 3351-52,

3361). In his new subservience, though, Parker's actual role was remarkably identical to his previous position. For example, Parker - not Van Osdel - "arranged" the station's financing with an individual with whom he had shared an office; Parker - not Van Osdel - selected, and communicated with, SBB's lawyer and its engineer. Indeed, Van Osdel did not even review the by-laws of SBB's corporate "general" partner at the time she became an applicant. Tr. 3551. Moreover:

The Certificate of Limited Partnership lists Mr. Parker's office as the principal place of business for the corporate general partner (Tr. 3414-15). Mr. Parker maintained the corporation's books and records (Tr. 3572). He also accompanied Ms. Van Osdel when she opened the corporate general partner's bank account, and at his suggestion the account requires the signature of any two of the following four persons: Mr. Parker, himself; his brother-in-law, Mr. Peterson; his employee, Ms. O'Neal; and, finally, Ms. Van Osdel (Tr. 3364). When Ms. O'Neal left Mr. Parker's employ, Arlene Meryhew another Parker employee, became her replacement. Ms. Van Osdel alone cannot sign corporate checks, although corporate checks can be executed without her participation.

I.D. at para. 55. Parker accompanied Van Osdel to First Interstate Bank to open the corporate checking account, but Van Osdel - SBB's putative sole "general" partner - did not acquire the corporate checkbook, for reasons that appear as follows in the record:

JUDGE GONZALES: I'm a little confused. Mr. Parker was with her at the bank when she got the temporary checks?

MR. ANDREWS: And opened the account. And then Mr. Parker --

JUDGE GONZALES: And she took them home and then mailed them to Mr. Parker?

MR. ANDREWS: That's the deposition testimony.

JUDGE GONZALES: Why wasn't the checkbook just given to Mr. Parker at the Bank?

THE WITNESS: Because --

JUDGE GONZALES: Was it always your intention to give them to Mr. Parker?

THE WITNESS: Yes it was, but I stuck them in my briefcase and I forgot --

JUDGE GONZALES: You inadvertently kept them, is that it?

THE WITNESS: Yes.

Tr. 3400. When questioned about the applicant's books and records, Van Osdel responded:

Q. Mrs. Van Osdel, who maintains the records of the capital accounts on the books of the partnership or the partnership books, the limited partnership books?

A. Mike Parker.

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Tr. 2113-14. Moreover, SBB's Certificate of Limited Partnership states:

that the address of the partnership's principal place of business in Washington is San Bernardino Valley Broadcasting Company, a Washington limited partnership, care of San Bernardino Valley Broadcasting Company, 4041 Rustin Way, Suite 1-D, Tacoma, Washington.

Tr. 2088-89. The Tacoma address of SBB is of course Parker's, not Van Osdel's.

17. Other record evidence affirms that Van Osdel's role was purely nominal. Thus, as to the substance of SBB's application:

Q. Mrs. Van Osdel, what information did you contribute to this application?

A. Personal information.

Q. For example?

A. Name, address.

Q. Who did you provide that information to?

A. Kim O'Neal.

Q. And again Kim O'Neal at that time was employed by Mr. Parker?

A. Yes.

Q. Did you choose the engineer?

A. No.

Q. Did you choose communications counsel?

A. No.

Q. Had the remainder of this application been filled in when you signed it.

A. I reviewed it.

Q. You reviewed it.

JUDGE GONZALEZ: I don't believe that is responsive.

* * *

Q. Were all of the questions in the application answered at the time you reviewed it?

A. Yes.

Tr. 2112-13. As another illustration, Parker also arranged for the equipment leasing for the station, and Van Osdel was asked:

Q. Do you know what equipment you intended to lease?

A. No, I don't.

Q. Do you know who procured that letter for the applicant?

A. Mr. Parker.

Q. Do you know who he spoke with?

A. No, I don't.

Q. Do you know if Mr. Parker had a previous relationship with Republic Leasing.

A. No, I don't.

Q. Do you know anything about the Utility Finance Corporation?

A. No, I don't.

Q. Did you ever procure a proposal from the Utility Finance Corporation?

A. Not to my knowledge.

Q. Do you know if anyone on behalf of the applicant ever procured a proposal from Utility Finance Corporation?

A. I don't know that.

Tr. 3401-02. One final example, though, will impart the true substance of Van Osdel's role and highlight the speciousness of Van Osdel's claims of exclusive control over SBB:

Q. Ms. Van Osdel, you also said that you saw an opportunity to meet the programming of the community, and that was one of the reasons you got involved, is that correct?

A. That's correct.

Q. But you didn't have anything whatever to do with developing the program percentages which were originally placed on the application, did you?

A. No, I didn't.

Tr. 3595. Parker, naturally, had devised SSB's proposed television programming, the very essence of a station's most elemental activity.

18. After finding that significant and material questions of fact surrounded SBB's claim that Van Osdel was the sole controlling party in its application, the ALJ added against SBB the aforementioned real-party-in-interest issue. As if to evidence Van Osdel's purported new supremacy, the applicant hastily reported back that Parker's consultancy had been inexplicably and summarily "terminated." *I.D.*, para. 55. But, citing *National Black Media Coalition v. FCC*, 775 F.2d 342, 356-357 (D.C. Cir. 1985), the ALJ correctly held that actions *post litem motam* are entitled to little evidentiary weight, and Parker's alleged "termination" occurring after the ALJ's addition of the real-party-in-interest issue is wholly unpersuasive. Having reviewed, in totality, the underlying record on this matter, we find no error in the ALJ's core conclusion that Van Osdel is neither the sole nor dominant management figure purported by SBB, but a convenient vizard. She can claim no serious or material role in SBB's most elementary affairs. SBB is a transpicuous sham. *compare Pacific Television, supra*, and the ALJ justly rejected its attempted fraud.²¹

19. A & R. Relying upon our decision in *Cotton Broadcasting Co.*, 104 FCC 2d 473, 475-477 (Rev. Bd. 1986), the ALJ rejected A&R's claim for ownership "integration" credit because all of its principals (save one, Charles E. Walker, a 27.5% equity partner) are denominated as both "general" partners of A&R and, at the same time,

"limited" partners. See *I.D.*, paras. 102, 133. The ALJ also found that Walker, identified as A&R's managing general partner prior to the "B" cut-off date (but now depicted as merely a "limited" partner), was, and will be, the dominant principal of the subject group. A&R asserts that its partnership complies with state law and that its activities and its ownership structure prior to the "B" cut-off deadline are irrelevant.

20. We shall affirm the ALJ's denial of "integration" credit to A&R because the Commission has made clear that, while it will ordinarily accept the premise that "limited" partners are purely passive investors who take no part whatsoever in company management, any management-type activities evidenced by such principals negates the efficacy of the claim of "limited" partner status. See *Attribution of Ownership Interests*, *supra* note 6, 97 FCC 2d at 1022-1023; *on reconsideration*, 58 RR 2d at 616-620. It is true, as A&R's exceptions contend, that the regulatory purpose behind the Commission's premium on ownership "integration" is to strengthen "the bond between legal responsibility and day-to-day management authority."²² The problem here, however, is that all of A&R's principals (including Walker) are apparently unable to determine whether they wish the tightly confined personal liability of "limited" partners or the plenary management authority and responsibility of a company's "general" partners. Declining to make that fundamental election, the majority of A&R's principals wish to be regarded as both - and at once. While the Board appreciates that there could be some unspoken business reasons for principals to adopt the bifurcated equity allocation reflected in A&R's dualistic partnership structure, and it is equally cognizant that the Commission desires to accord all applicants flexibility in "structuring [their] business proposal" without "second-guess[ing] an applicant's business judgment - so long as it is, in fact, a good faith business decision." *Victory Media, Inc.*, 3 FCC Rcd 2073, 2075 (1988), we decline to speculate here whether the majority of A&R's principals intend to assume all full legal responsibility for their company or, instead, retreat to the legal shelter of their concurrently alleged "limited" partnership status. Moreover, even if we were to ignore entirely the "limited" partnership elements of the A&R structure as to its five "dual" partners, we could award A&R no more than a 73% quantitative "integration" factor, because Charles E. Walker - presumably bound by the identical "limited" partnership constraints as his five associates - has been shown on this record to be a very active principal indeed, and not a mere passive investor. Recalling that, up until the "B" cut-off date, Walker had exercised all powers and prerogatives as A&R's managing general partner, the ALJ found that even after that date Walker took a highly active role in A&R's basic business affairs. Thus:

Mr. Walker continued to be actively involved in prosecuting A&R's application even after he resigned as general partner. Mr. Walker took an active role in discussions among A&R principals with respect to matters concerning the applicant (Tr. 2381). He continued to attend A&R meetings (Tr. 2333), and he continued to vote on matters on the agenda of the partnership (Tr. 2334-35). Mr. Walker also approached Ms. Shelton about joining the partnership, after he had already converted his interests

from that of a general partner to a limited partner (Tr. 1029). As a limited partner, he also retained significant voting rights.

I.D. at para.135. The underlying record affirms the ALJ's determination that Walker, who deliberately altered his nominal status on the "B" cut-off date "so as to receive enhanced comparative credit" (A&R Exceptions at 5), must be regarded not only as an active partnership principal, but the dominant figure of the whole A&R combine. Walker has not been, nor is he now, a mere passive investor, totally and securely insulated from A&R's affairs, so the ALJ was correct in disregarding Walker's putative "B" cut-off switch to "limited" partnership status. All in all, A&R is plainly not what it purports to be; and even if it were, the institutional schizophrenia of those principals who desire to be regarded simultaneously as "limited" (*viz.*, "passive") and "general" (*viz.*, "active") partners bespeaks of an applicant unprepared to equate full legal liability for their company with a *corresponding* degree of management authority and responsibility. Cf. *Greater Wichita Telecasting*, *supra* note 22, 96 FCC 2d at 989. A&R cannot have it both ways, and then expect the Commission to decide which modality reflects its genuine character.²³

21. *Solano*. As it was with ancient Gaul, Solano is a tripartite formation consisting of (1) Solano Broadcasting Company (SBC), itself a partnership of four individuals (Henry T. Mendoza, III; David Garcia; Annabel R. Verches; Patrick D. Pattison) reported to hold 20% of Solano's total equity; (2) C30-I, a partnership consisting of fifteen different individuals; and (3) C30-II, a partnership consisting of yet six additional individuals. *I.D.*, paras. 63-64. Solano would have it that the four SBC principals are Solano's only "general" partners, whilst C30-I and C30-II are but "limited" partners in the larger Solano confederation. Because he found that at least several of the principals of C30-I and C30-II went greatly beyond the roles of mere "passive" investors, and took an active part in arranging and directing Solano's most basic business affairs, the ALJ counted both C30-I and C30-II as tantamount to "general" partners. Since only the four SBC principals are proposed for actual "integration" into the management of Solano's intended station, the ALJ awarded it "at most" a 20% quantitative "integration" factor, corresponding directly to SBC's 20% equity share of the larger Solano enterprise. *Id.*, para. 98.

22. In determining that at least several of the principals of C30-I and C30-II - Solano's putative "limited" partners - were exceedingly active in the affairs of Solano, the ALJ found, for example, that James F. Parker (a 12.65% partner in C30-I) and Michael Rosenbloom (a 23.33% partner of C30-II) were largely responsible for organizing Solano, drafting its partnership documents, and generally orchestrating the affairs of the SBC "general" partners. *Id.*, para. 93. Both Parker and Rosenbloom, who are Solano attorneys, were extensively consulted throughout the application process, see *id.*, para. 95-96, and the ALJ concluded that the purported "general" partners of SBC were fundamentally ignorant of Solano's financial plans (including the very basis on which Solano certified as to its financial ability on its application). *Id.*, para. 95. The ALJ also held that "Solano's limited partners also took an active role in selecting the principals of Solano's general partners as well as determining their specific roles at the

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station." *Id.*, at para. 96. Without generally refuting the ALJ's portrayal of the activities of certain principals of C30-I and C30-II, and more specifically the activities of attorneys Parker and Rosenbloom, Solano's exceptions contend that the ALJ's "conclusions bear absolutely no relationship to the actual record evidence" but rather "rely on a pick and choose approach, with [record] citations to a handful of out-of-context questions and answers and serious distortions of the facts."²⁴ Thus, Solano submits that three out of SBC's four "general" partners have appreciable broadcast experience, and it was their decision to seek the financial support of a "limited" partnership to obtain the necessary backing for the station.²⁵ Moreover, Solano contends that the "limited" partners of C30-I and C30-II have exerted no influence over SBC or its principals, and will exercise no control over Solano's future business affairs. Its exceptions highlight transcript citations claimed to support the proposition that SBC's four "general" partner principals were, in fact, actively involved in the preparation of the application and the conduct of Solano's later activities.

23. Before we review the actual record, we must confront a preliminary matter of law relating to the question of whether attorneys who actively participate in the affairs of a broadcast applicant may be considered "passive" investors of the applicant, so that the equity interests of such attorneys are not attributable for our purposes of calculating their applicant's "diversification"²⁶ and "integration" factors. Solano's exceptions do not deny that Parker and Rosenbloom have been very actively involved in the applicant's affairs to date, at least to the extent of providing critical legal advice throughout the whole of Solano's existence. *See Solano Exceptions passim*. But, as expressly discussed in several recent cases, the Commission has held, as a matter of law, that attorneys who hold equity interests in an applicant and who simultaneously perform legal services for that applicant cannot be considered mere "passive investors." Hence, in *Mark L. Wodlinger*, FCC 88R-29, released June 1, 1988 (at para. 9), the Board applied the policy set forth in the Commission's *Clarification on Ownership Attribution*, 1 FCC Rcd 802, 804 (1986)(emphasis added), which holds that such attorneys must be considered "active" principals because:

it would be difficult to envision legal services that are more directly related to the media activities of the partnership than those concerning the licensing and operation of broadcasting entities.

* * *

A partner whose contribution to the partnership is in the form of personal services and expertise rather than in the form of a financial investment is the *antithesis* of a passive investor.

In *Wodlinger*, therefore, the Board attributed to the affected applicant the 50% equity interest of an attorney who had played an active role in the affairs of that applicant, thus reducing its overall quantitative "integration" factor to 50% because the *Wodlinger* attorney, like Parker and Rosenbloom here, did not propose to actually "integrate" into the station's management. *Accord*, *Washoe Shoshone Broadcasting*, 88R-30, released

June 13, 1988 (at para. 18) (Rev. Bd. 1988)(attorney's 20% equity interest not excluded from his applicant's "integration" calculations).

24. In view of the extensive involvement of attorneys Parker and Rosenbloom in Solano's most basic operational affairs and the conclusive presumption of "active" participation of attorneys iterated in the Commission's 1986 *Clarification on Ownership Attribution*, it is manifest that the Board cannot consider those two Solano principals to be purely "passive investors;" and *Wodlinger* is now controlling as case precedent.²⁷ A more difficult question here, though, is whether to include in our "integration" calculations only the personal equity interests of Parker and Rosenbloom, or whether Parker's participation in Solano's affairs was in a representative capacity for *all* of his C30-I co-partners, and that of Rosenbloom for his C30-II co-partners, with the net result that both of these two "limited" partnership legs of the Solano triumverate must be considered "active" members of the composite applicant. Based on the record in this proceeding, we must find that C30-I and C30-II, acting through Parker and Rosenbloom respectively, exceeded the Commission's boundaries for true "limited" partners. As reaffirmed several times, the Commission has indicated that it will not consider "passive" any principal of a broadcast licensee where that putatively passive principal has any material involvement in the subject entity's affairs. *See, e.g., Ownership Attribution, supra* note 6, 58 RR 2d at 616-620. Through Parker's representation, the C30-I partners have here been materially involved in Solano's affairs to this date. The same must be said of the C30-II principals who, through their representative partner, Rosenbloom, have gone beyond the Commission's declared "active"/"passive" borders.

25. But even if we put aside, *arguendo*, the "active" status of Parker and Rosenbloom in orchestrating and directing Solano's most basic affairs, other substantial evidence of record creates serious doubts that the four "general" partner principals of SBC were ever truly at the helm of the Solano enterprise. For instance, although the Commission's current broadcast application form (FCC Form 301) does not even solicit the identities of an applicant's "limited" partners, the "general" partners must certify - under penalty of perjury - that "sufficient net liquid assets are on hand or available from committed sources to construct and operate for three months without [operating] revenue." FCC Form 301, Section II. In that regard, the Board has held that the so-called "active" principals - who bear the factual and legal burden of FCC application certification - may not for certification purposes rely simply upon the undocumented assurances of the applicant's "passive" principals that all of the necessary finances will be forthcoming, without acquiring first-hand knowledge of the sufficiency of the assets upon which their personal certification is based. *Las Americas Communications, Inc.*, 1 FCC Rcd 786, 787-789 (Rev. Bd. 1986). To permit such principals to certify to their financial resources on nothing but the undocumented assurances of other "passive" principals would be to negate entirely the efficacy of the sworn certification itself.²⁸ Here, the record reflects that - at very best - only one of Solano's four "general" partners had an understanding of Solano's potential financial resources. Indeed, at hearing,

SBC's President (and 31.67% equity holder), Henry T. Mendoza, was questioned about Solano's finances and its FCC financial certification:

Q. Did you at the time know what -- was it your understanding that the basis for this certification was bank financing?

A. Not bank financing.

Q. What was your understanding of the source of the funding?

A. My understanding of the source of the funding was that the limited partners had guaranteed that they could come up with enough money to operate the station as we proposed to do it if we got the license.

Q. Had you ever been shown financial documentation supporting that proposition, balance sheet, financial --

A. Me personally?

Q. Yes.

A. No.

Q. Do you have any knowledge whether Mr. Pattison was shown that documentation?

A. I have no knowledge.

Tr. 579. Although Solano claims that SBC "general" partner Patrick Pattison was aware of Solano's financing, none of the other three "general" partners exhibited an inkling of the basic financing of their proposed station. In fact, when questioned at hearing as to whether he understood his liabilities as a "general" partner of Solano, David Garcia (one of SBC's four principals) replied: "No." Tr. 664. Although Garcia testified that he "glanced" at Solano's limited partnership agreement, he did not know any of its "limited" partners, Tr. 658-660, and he indicated that Rosenbloom had informed him of the identity of SBC's other "general" partners, none of whom Garcia had ever even met, Tr. 661. Garcia also testified that he was not informed of the structure of the company to which he had already lent his name, Tr. 662, and that he did not even inquire as to who his new "limited" partners were. *Id.* Pattison, another SBC "general" partner, and its proposed station general manager, was equally uncertain of the role of Solano's "limited" partners:

Q. Do you know what the financial involvement and when I say you, do you or to your knowledge does Solano Broadcasting Company know what the financial involvement of the limited partners have been to this point?

A. The financial involvement?

Q. Yes.

A. No.

Tr. 851. Finally, it appears from the Solano "limited" partnership agreement that the putative "limited" partners are liable for *all* of Solano's liabilities and that, upon any default of a "general" partner in paying his (or her) debts to the "limited" partners (who have the *exclusive* right to lend money to the "general" partners for Solano expenses), the "limited" partners may choose new "general"

partners. *I.D.*, para. 97. And nothing on this record suggests any ability whatsoever on the part of the four current "general" partners to repay the "limited" partners for their collective 20% equity interest in Solano.

26. Considering all of the foregoing, we cannot find that the four SBC "general" partners have exclusive control over Solano. Solano, based on this record, is nothing more than the artificial construct of two very enterprising attorneys, who put the application together, assembled the (presumed) financing package, and then recruited four putative "general" partners who were not only unfamiliar with each other or their own "limited" partners, but whose general knowledge of the venture to which they had nominally committed themselves was *de minimis*. Hence, we will not affirm even the (maximum) 20% "integration" credit awarded to Solano by the ALJ. Without going so far as to label Solano a "sham" (for we have seen far worse), we reject its most critical claim that the SBC "general" partners are the controlling principals of this applicant.

27. *Buenavision*. The ALJ found that although Buenavision purports to be a partnership composed of three individuals, H. Frank Dominguez (51%), Sylvia Herrera (5%), and Stella Ornelas (44%), all of whom have pledged to "integrate" fulltime at the proposed station, he refused to award this applicant a 100% quantitative "integration" factor. His refusal was based upon two discrete grounds: First, citing *Payne Communications, Inc.*, 1 FCC Rcd 1052, 1055-1057 (Rev. Bd. 1986), the ALJ noted that Buenavision was not secured by a written partnership agreement, either at the time it filed its application or during the hearing, and that, therefore, he could not accept the applicant's quantitative reckoning, *I.D.*, para. 161; and, second, the ALJ found that Dominguez, who owns numerous other communications interests (*see supra* para. 6; *I.D.*, paras. 158-160), has not in fact treated Buenavision as a partnership at all, but as a sole proprietorship wherein Ornelas and Herrera "are nothing more than nominal partners with no influence or control" over Buenavision's affairs. *I.D.* at para. 164. Buenavision argues that it should not be bound by *Payne* retroactively, and that Ornelas and Herrera are genuine partners who will have ownership responsibilities at the proposed station.²⁹

28. As explained in *Payne*, the Commission's award of a preference for ownership "integration" credit is premised upon its expectation that applicants who receive such a preference will adhere to their pledges "on a permanent basis," *Policy Statement*, 1 FCC 2d at 395 n.6; *see also Reginald A. Fessenden Educational Fund*, 100 FCC 2d 440, 451 (Rev. Bd. 1985), *review denied*, 59 RR 2d 1267 (1986), and that mere oral understandings - terminable at will or whim - provide insufficient assurance of the stable ownership structure necessary to predict such permanence. *See Payne*, 1 FCC Rcd at 1056. Moreover, our *Payne* decision observed that, until a paperwork reduction revision of our broadcast application form, all applicants were required to submit therewith their basic organizational documents so that the Commission could be completely certain of the actual identities of the applicants' equity holders as well as the legal nature and extent of those equity interests. *Id.* In revising its broadcast application form in 1981,³⁰ the Commission merely eliminated the prior requirement that an applicant *submit* its organizational documents to the Commission at the time of application; but, the application form itself (FCC Form 301, General Instruction E) contin-

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ued to require that such documents "be made available for inspection by the public." Nothing in the Commission's 1981 revision of its Form 301 relieved an applicant of the obvious necessity to *actually be* of legal form and substance at the time of application. Unless an applicant possesses a formal legal identity and structure at the time of application, it is unclear to whom any Construction Permit grant should be made.³¹

29. The case at hand provides a perfect example of just why we cannot accept, for critical comparisons between applicants, a claim that an applicant is bound together by nothing more than an "oral understanding." For as the ALJ here found, Buenavision is - in soul, spirit and substance - the creature of Frank Dominguez. We have reviewed the underlying record and find that the ALJ synopsis accurately and well the facts surrounding the Buenavision application. Thus:

Ms. Ornelas and Ms. Herrera had not even spoken to each other until the date of the hearing (Tr. 1195), and there had been no partnership meetings or telephone conferences between the partners concerning the partnership business (Tr. 1122, 1195). Neither person had any input concerning the decision to establish the Executive Committee which is charged with running the station (Tr. 1176, 1232), and both testified that they did not discuss their proposed management positions with anyone, including Mr. Dominguez (Tr. 1164, 1189-92, 1205-06, 1226-27). Ms. Ornelas first learned of her position as Public Affairs Director from reading Buenavision's integration statement after it had been filed (Tr. 1191, 1206-07). Ms. Herrera learned of her position as Community Affairs Director in the same manner (Tr. 1226).

I.D., at para. 163. Moreover:

there were no discussions prior to the filing of the Buenavision application between Mr. Dominguez and Ms. Herrera as to the terms of the partnership (Tr. 1225-26, 1235). In addition, nothing was said as to her particular role at the station (Tr. 1215-16, 1218-19), what her salary would be (Tr. 1235), or about the nature of the partnership's management structure (Tr. 1228). Similarly, no one explained to Ms. Ornelas the substance of any of the terms of the preexisting oral partnership agreement when she was brought into the partnership just shortly before the B cutoff date (Tr. 1167). She testified that she first learned of her 44 percent interest in the applicant one week after the B cutoff date amendment was filed (Tr. 1167, 1189-90). Ms. Ornelas did not discuss the matter with Mr. Dominguez (Tr. 1118), and no one asked her if she agreed to take a 44 percent interest and presumably, no one asked her whether or not she could afford such an interest (Tr. 1167-68). As of the date of the hearing, the only terms of the Partnership Agreement apparently decided among the partners were each partner's share in the station's profits, the equal voting provisions, and each partner's responsibility for a portion of the debt of the venture (Tr. 1073, 1166). No other terms which are typically indicated in a partnership agree-

ment were even discussed, such as what happens on the death of a partner (Tr. 1233). All of these decisions were left entirely up to Mr. Dominguez.

I. D. at para. 162. We firmly agree with the ALJ that this is no *bona fide* "partnership", in word or deed, but a wholly fictional contrivance of Dominguez, knowingly intended to artificially skew our comparative processes. See *generally supra*, para. 8 & note 15. While we make nothing of the ALJ's conclusion that Dominguez has "controlled" Buenavision (Dominguez is openly said to hold a 51% interest), we find that the other two purported principals were hastily recruited as partners in name only, and that neither had any clear idea of any rights or obligations (particularly financial) they might now have, or incur in the future, as Buenavision principals. Or of any actual managerial authority or responsibility at the proposed station. Buenavision is all smoke, and Dominguez the smoke machine. At very best, Buenavision would garner only a 51% "integration" factor for Dominguez, leaving it far out of the running. At worst, it is yet another sham. See *Pacific Television, supra*.

30. SSP. The ALJ awarded SSP a 51% quantitative ownership "integration" factor, corresponding directly to the percentage equity interest of Sandra S. Phillips, the sole "general" partner of the applicant, and the only SSP principal proposing to be involved in the management of the intended broadcast facility. *I.D.*, para. 168. The remaining 49% of SSP, a California limited partnership, is the ARW Company, whose stock - in turn - is wholly owned by Larry Hillblom. *Id.* Although SSP's 1983 limited partnership agreement conforms to the Uniform Limited Partnership Act (as well as to state law), the ALJ declined to regard the 49% equity holder (ARW) as "passive" because SSP's agreement:

contains no provision restricting the limited partner or any of its principals from being an employee, agent or consultant to the partnership's proposed station, or otherwise prohibiting the involvement of the limited partner or its principals in the operations of the proposed station. Furthermore, the Agreement is silent as to the financial obligations of the principals, although it appears from the testimony that the parties to the Agreement view Ms. Phillips as having no obligation to make any capital contributions to the venture (Tr. 1291-92).

I.D. at para. 176. On exception, SSP complains that its 1983 limited partnership agreement complies with the general FCC requirements in effect at the time it was formed,³² and that the Commission did not (1) even enunciate its limited partnership requirements until its 1984 *Ownership Attribution* report; or (2) begin to require the explicit contractual provisions referenced by the ALJ until a 1985 reconsideration of its *Ownership Attribution* report. See *supra* note 6. Arguing that it has been unfairly victimized by the retroactive application of the Commission's 1985 *Ownership Attribution* reconsideration standards to a limited partnership agreement executed in 1983, SSP cites our language in *Independent Masters, Ltd., supra*, 104 FCC 2d at 188 n. 25, for the proposition that we should not apply literally the greatly strengthened 1985 limited partnership insulation standards to entities formed prior thereto.

31. We concur with SSP's reading of *Independent Masters*. See also *Chester Associates*, *supra*, 2 FCC Rcd at 2031 n.9. In *Chester*, the Board explained further that while it would not retroactively demand literal compliance with the strictures of the Commission's 1985 *Ownership Attribution* reconsideration, it would generally consider the Commission's *Ownership Attribution* requirement that limited partnership agreements assure that the "limited" partners not be "involved in any material respect in the management or operation" of the subject partnership. See *Ownership Attribution*, *supra* note 6, 58 RR 2d at 618 (quoting original 1985 *Ownership Attribution* order, 97 FCC 2d at 1023). SSP here concedes that its limited partnership agreement does not contain the specific contractual clauses articulated in the 1985 *Ownership Attribution* reconsideration order. But, as in *Chester Associates*, the SSP agreement is said to incorporate the ULPA, a contention no party here seriously challenges. Furthermore, SSP submits that its "limited" partner (ARW) had no input into the application prior to its filing; that its "general" partner (Phillips) did not consult with the "limited" party as to any aspect of prosecuting the SSP application; and that³³:

By executing the Certificate of Limited Partnership, SSP was certifying under oath to the State of California that its Limited Partner would not be involved in the day-to-day operation of the business and would not otherwise exert control of the management of the business. In specifying in Paragraph XV that limited partners are given no rights to elect or remove a general partner, terminate the partnership, amend the agreement, or sell assets, SSP was further limiting the minimal statutory powers granted its Limited Partner. On its face, SSP has fully demonstrated that the *de jure* control of SSP is firmly lodged with the General Partner. The Partnership Agreement and the record itself are in direct contravention to the Findings of the Judge below.

Nothing in the *I. D.*, or in the underlying record, or even in the exceptions discredits these SSP representations. Accordingly, we must agree with SSP that the ALJ's conclusion that SSP's "limited" partner will not assume a "passive" role in this partnership's affairs is not supported by the requisite substantial evidence of record. Although the ALJ seems to have assumed that because the "limited" partner here would be furnishing virtually all of SSP's initial financing, it - not Phillips - would possess *de facto* control, see *I.D.*, para. 176, we cannot endorse that presumption. It is true, we concede, that the Commission until very recently regarded financial domination (or even strong financial leverage) to be a very strong indication of *de facto* control, or potential *de facto* control. See, e.g., *Heimeyer v. FCC*, 95 F.2d 91, 99 (D.C. Cir. 1937) ("It is well known that one of the most powerful and effective methods of control of any business, organization, or institution . . . is the control of its finances"); accord *WLOX Broadcasting Co. v. FCC*, 260 F.2d 712, (D.C. Cir. 1958); *Stereo Broadcasters, Inc.*, 87 FCC 2d 87, 95 (1981) (control of finances one of the factors considered "most indicative" of control). Whatever the Commission's past equation of financial control with ultimate *de facto* control of an entity, it is obvious from recent case law that the Commis-

sion no longer draws a strong correlation between the two. E.g., *KIST Corp.*, *supra*, 102 FCC 2d 288, 290-291 (1985); *Victory Media*, *supra*, at para. 9 & n.1.

32. For all of the foregoing reasons therefore, we shall modify the ALJ's "integration" award to SSP, and elevate its quantitative factor to the 100% to which it is by operation of law entitled, i.e., by extrapolating Phillips' 51% equity interest as SSP's sole "general" partner to an effective 100% management control factor.

33. *Good News*. After considering the totality of the record evidence, the ALJ rejected this applicant's central claim that it is, and will in the future be, solely controlled and managed by its 10% "general" partner; rather, he found that the applicant is a product of, and controlled by, Good News' 90% "limited" partner, Elias Malki Middle East Gospel Outreach, and - more specifically - Elias Malki himself. See *I.D.*, paras. 198-204. The ALJ reports that, until the "B" cut-off deadline, Malki "was president of [the] applicant's general and limited partners" and "was also designated to serve as general manager of the proposed station." *Id.*, at para. 196. However, when advised by counsel that he should resign as president of the "general" partner (then composed of four individuals), Malki replaced himself as President of the "general" partner with his own daughter (Rebecca Ekizian), who is now said to be the chief "general" partner in the Good News combine. Notwithstanding Malki's alleged withdrawal from the "general" partnership, Malki - as president of Good News' 90% "limited" partner - was seen by the ALJ as continuing to be the dominant Good News principal. For example, the ALJ notes that even after the Good News partnership agreement was amended, Malki attempted to retain control of Good News by providing in the revised agreement that his "limited" partnership would retain the power to unilaterally remove any "general" partner. *Id.*, para. 198. Later, upon advise of counsel, that particular provision was removed; but:

The amended Agreement, however, continues to provide that no additional persons can be admitted as either a general partner or a limited partner without the written consent of the limited partner (SSP Ex. 6, Provision 9; SSP Ex. 7, provision 9). Furthermore, the Agreement is silent as to how the parties' interests are voted in partnership matters. One of the directors of the general partner testified that the limited partner votes its 90 percent interest and each of the three directors of the general partner individually votes her respective 3 1/3 percent interest (Tr. 1340-41, 1343).

Id. In its exceptions, Good News concedes Malki's total dominance of the applicant up until the "B" cut-off deadline, but submits that the record evidence is insufficient to show that its three "general" partners have not controlled Good News since Malki's reluctant withdrawal as managing "general" partner. It relies primarily upon the Commission's decision in *KIST Corp.*, *supra*, for its postulate that the Commission will accept, at face value, even the most improbable claims as to ownership structure and management control, if the written partnership agreement establishes "the proper division of authority."³⁴

34. We find that neither *KIST Corp.* nor any subsequent case stands for the proposition that the Commission will ignore any and all extrinsic evidence that an applicant's purported ownership structure falsely portrays the true and actual locus of control in that entity. Indeed, *KIST* itself is a testament to the heightened scrutiny to be given an application where it appears that the party actually controlling an applicant contrives to camouflage that control by interposing a false layer of purportedly "active" principals so as to artificially enhance its comparative position. Specifically reaffirming in *KIST* its previous warning that it would sharply strike down any "sham" applications, *see id.*, 102 FCC 2d at 290 n. 5, the Commission affirmed the Board's rejection of an application where the alleged "active" principal (1) "exercised virtually no control over the preparation of the application"; (2) "had no involvement in obtaining financial commitments"; (3) "ha[d] contributed no capital to the enterprise; and (4) where the putatively "passive" principal had "clearly dominated the affairs" of the applicant. *Id.*, at 292-293 n.11. Likewise, in *Pacific Television, supra*, the Commission rejected as a "sham" the application of an entity where an allegedly "active" principal was uncertain as to even the voting structure of the partnership. *see id.*, 3 FCC Rcd at 1700, and where the equity contribution of that principal had been paid by her brother, another partner, a contribution to be "reimburs[ed] at some unspecified time in the future" (*id.*).

35. The record evidence against Good News is, if anything, much stronger than that laid out by the Commission in *KIST* or *Pacific Television*. Good News concedes, as it must, that until Malki's last-minute withdrawal as its President (in favor of his own daughter), Malki made all of the decisions concerning the application, including the form and contents of the Good News application itself.³⁵ Further, it's exceptions acknowledge "that Elias Malki paid the general partner's [sic?] initial capital contribution, and . . . assumed the financial responsibility for prosecuting [Good News'] application."³⁶ And, other than Malki, none of this applicant's principals, and especially its reputed "general" partners, exhibited more than the slightest acquaintance with the company they reputedly "controlled". Thus, as the ALJ found, one of the three putative "general" partners, Shirley Robbins (Good News' Secretary), had not maintained the applicant's books and records. Tr. 1321. Even more basically, when asked how the partnership would function, Robbins testified:

Q. On a matter on which the partnership as a whole must vote, does the limited partner vote its 90 percent interest and the general partner its 10 percent interests?

A. Yes.

Q. At a meeting of the limited partnership, who will vote for the general partner?

A. Who will vote for the general partner?

Q. Yes.

A. The general partners.

Q. You'll all vote three and one-third percent or will one person vote the 10 percent?

A. No, no. The three.

Q. All three of you will vote your respective shares?

A. Right.

Tr. 1340-1341. In other words, Robbins seemed to believe that the three "general" partners would command only 10% of the vote on critical business matters. She also testified that Malki never told her of his own investment in the station, Tr. 1344, and that - even as the partnership's purported Secretary - she could only recall "some" of the details of the Good News partnership agreement. Tr. 1347. Incredibly, Robbins acknowledged that she had never met Ekizian, with whom she had casually agreed to become a "general" partner, and who - for reasons Robbins was unaware of - became the instant President of Good News when her father "withdrew" for strategic reasons. Tr. 1348. It seems to have neither occurred nor mattered to Robbins that she had just taken on an unknown business partner (Ekizian) who, as President of the "general" partnership, could bind the partnership (and Robbins personally) to the enormous legal and financial liabilities attached to the construction and operation of a full power television station.

36. Just as implausible was the testimony of a second Good News' "general" partner, Viola Douglas. While identified as the partnership's Treasurer, Douglas had very little knowledge indeed of her company treasury. She did not recall who opened the "general" partner's bank account, Tr. 1483, and she did not know how she got its checkbook. Tr. 1486-1487. Equally as astonishing, Douglas evinced no understanding of the impact of her new "general" partnership on her *personal* treasury. For instance, Douglas could not say for certain whether she was legally obligated for any of Good News' expenses in prosecuting this application; when asked whether such expenses were solely the responsibility of the "limited" partner, Good News' Treasurer responded:

Q. That's entirely the limited partner's responsibility? I'm waiting for an answer. Is that entirely the limited partner's responsibility?

A. I can't say it's a responsibility, but I believe -- well, I'll withdraw that because I don't know. I would hate to place something on -- and then it's not there.

Tr. 1509-1510. Good News' President, Ekizian, knew even less than her Treasurer about the applicant's finances. *See I.D.*, paras. 200, 201 (and transcript passages cited therein). Finally, although Good News asserts that Malki retreated to the role of a "limited" partner prior to the application amendment deadline, the "general" partners seem to think that they will be "working together" with Malki once their application is granted. *See, e.g.*, Tr. 1396.

37. For these reasons, as well as those additionally expressed by the ALJ at *I.D.*, paras. 202-203, we affirm his conclusion that Good News is (not surprisingly) controlled by its 90% owner, Elias Malki. Ignoring, for the moment, the minimal 3 1/3% equity interest of each of the three "general" partners (equity interests so insignificant that they are, in fact, not even cognizable by the Commission as palpable ownership interests in media properties, *see Ownership Attribution, supra* note 6³⁷), and the fact that the 90% equity principal, Malki, had furnished every material element of the entire Good News application, in-

cluding all of its financing, its lawyers, and its engineer, the preponderance of the other record evidence demonstrates that the three so-called "general" partners are no more than paper proxies for Malki. As was the case with San Bernardino Broadcasting (*supra*, paras. 15-18) and Buenavision (*supra*, paras. 27-29), Good News is another of those "sham" ownership structures" artificially projected "to take advantage of various comparative preferences" (*see supra* note 15). The last-minute "withdrawal" of Malki was exposed on this record as transparent legerdemain, which fooled no one, least of all Malki's three hasty conscripts, who knew (or disinterestedly assumed) from the outset that they were essentially window dressing in Malki's Middle East Gospel Outreach boutique. As did the ALJ, we say: No sale!

38. *Inland Empire*. Structured also as a two-tiered partnership, with three "general" partners and nine "limited" partners, Inland Empire as well sought a 100% quantitative "integration" factor for proposing that all three of its "general" partners (owning just over 23% of the partnership's total equity) would actively manage the intended station. Its "limited" partners, it contended, are purely passive investors. All three "general" partners (David Duron; Robert Navarro; Susan Racho) have lived in the station's proposed service area for many years and have extensive past broadcast experience. *See I.D.*, paras. 206-220. Unlike several (if not most) of the other applicants here, it appears, *mirabile dicu*, that one of Inland Empire's "general" partners, David Duron, actually took the lead in creating this applicant, structuring its organization, selecting the other two "general" partners for their broadcast experience, local residence, civic activities, *etc.*, and in seeking out resource support from "limited" partners. *See id.* para. 235.³⁸ Although the record is devoid of incriminating evidence that this applicant is a sham in which - as we have seen with several other applicants above - the so-called "passive" principals were, in fact, the active parties (and *vice versa*), the ALJ awarded Inland Empire only a 42.8% quantitative integration factor to correspond directly to "general" partner Duron's "voting" shares of the partnership. *See id.*, paras. 205, 235(a). The ALJ's reasoning stemmed from his reading of two disparate sections of Inland Empire's partnership agreement: Section 7(b), which the ALJ read as providing that "four-fifths of each general partner's interest will vest in stages over a four-year period of time, and each stage in the vesting process is dependent upon that general partner's continued employment at the station" (*I.D.* at para. 232, citing SBB Exh 6.); and Section 12(a) which gives the managing "general" partner (Duron) the right to discharge either of the other two "general" partners as station employees without a showing of good cause. *Id.*

39. Inland Empire's exceptions rejoin that, in construing its partnership agreement, the ALJ read its Section 7(b) out of context. It argues that all three of its "general" partners currently have vested their full equity interests, and that Section 7(b) becomes operative only if a "general" partner elects to quit the partnership or if such a partner is removed by a vote of 80% of the other partners "for good cause, which is limited by definition to four discrete circumstances: death, conviction of a felony, disability for a period of six months, or engaging in an act which could result in the partnership being disqualified as a licensee."³⁹ It further points out that its Section 7(b) is expressly captioned "Vesting of General Partner's Partnership Interest When Terminating as a General Partner",

and that the condition that a "general" partner will lose a portion of equity interest only if he or she does not fulfill the obligation to stay for five years to manage the station compliments perfectly the Commission's requirements that an "integration" pledge reflect an intention to remain for a considerable period (*see supra* para. 28, citing *Policy Statement*, 1 FCC 2d at 395 n.6). And, although Inland Empire concedes that its managing "general" partner, David Duron, does possess authority to remove the other "general" partners as station employees, (1) Duron cannot unilaterally remove them as *partners* without the good cause conditions set forth above and that (2) Section 7(b) of its partnership agreement is an express manifestation of the partnership's strong desire to retain the other two (Navarro and Racho), whom Duron meticulously selected as "general" partners for their past broadcast experience and other personal qualities. It argues, rather cogently we believe, that if it (or Duron personally) harbored any hidden intention to summarily dispatch Navarro or Racho, it never would have invited them to join Inland Empire in the first place or provided in Section 7(b) of its agreement a compelling incentive for each of them to stay involved for a full five years, lest they sacrifice a portion of their vested equity.

40. We agree with Inland Empire and find nothing in its partnership agreement that undermines the *bona fides* of its proposed ownership structure: nor does it transgress the Commission's requirement that its "limited" partners not be able to influence or control its "general partners", who may be removed only for the aforementioned circumstances constituting good cause. *See Clarification on Ownership Attribution, supra*, 1 FCC Rcd at 803 (ability to remove "general" partner for good cause - *viz.*, "malfeasance, criminal conduct or wanton or willful neglect" - does not constitute undue control by "limited" partners). On the other hand, that selfsame *Attribution Clarification* order presents an obstacle which precludes our acceptance of this applicant's claim that several of its "limited" partners be considered mere passive investors. As was the case with Solano (*see supra* para. 23), six of Inland Empire's "limited" partners are members of the law firm that provided the basic legal advice for the partnership in which they here claim to be passive. *See I.D.*, para. 235. But, as we held with respect to Solano and quite recently in *Mark L. Wodlinger, supra*, the Commission's *Clarification on Ownership Attribution* order has declared, *ipso jure*, that a lawyer who furnishes personal services and expertise to an applicant in which the lawyer is a principal "is the antithesis of a passive investor."⁴⁰ Given what is, for all intents and purposes, a conclusive presumption that attorneys who furnish legal advice and services to applicants in which they themselves are principals are the "antithesis" of passive investors, we must - at a minimum - regard Inland Empire's local attorney, Pierce O'Donnell, an 18.24% equity holder, as an active applicant principal. As the ALJ reports at *I.D.*, para. 235, O'Donnell (along with his law partner, Jeffrey S. Gordon, a 12.16% principal of Inland Empire) has been actively involved in the preparation of this applicant's organizing agreements, and he cannot be considered a fully insulated financial investor who has not communicated with the "general" partners on key matters of substance. While the *I.D.* is unclear as to whether O'Donnell's other four law partner principals in Inland Empire also provided legal advice and service to the applicant, we observe that the combined equity holdings of O'Donnell and Gordon amount to more than 30% of Inland Empire's total equity,

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see *id.*, para. 205, and that inasmuch as neither attorney intends to actually "integrate" into station management, it could not garner more than a 70% quantitative factor at best. If, as with Solano, we reduce that factor even further to reflect the equity interests of O'Donnell's four other law partner principals (whose interests he and Gordon presumably represented in working with the applicant's "general" partners), its quantitative "integration" factor would drop off even further. Since the Commission's "integration" analysis puts its highest premium on this quantitative factor, see *Horne Industries, Inc.*, *supra* para. 7, and several of the other competing applicants here are entitled to a 100% quantitative factor, Inland Empire is out of the running (unless, as raised in note 40 of our margin, the Commission further clarifies its *Clarification on Ownership Attribution* in a manner that permits lawyer principals to be regarded as "passive"; the same holds true for Solano).

41. TV 30. Like several other applicants here, TV 30 is projected as a California corporation possessing two classes of shareholders: five of its shareholders are represented as holding only nonvoting stock while two others, Rumiko Naito and Howard Teruro, are said to hold respectively 80% and 20% of its voting stock. *I.D.*, para. 237. Proposing to actually "integrate" only those two "voting" shareholders, TV 30 sought, of course, an extrapolated 100% quantitative "integration" factor. It ran afoul of the ALJ, who determined that inasmuch as four of the five members of TV 30's corporate Board of Directors (holding approximately 80% of its overall equity) were from the ranks of its "nonvoting" stockholders, its two sole "voting" shareholders did not possess full control of the corporation. Reasoning that these four TV 30 directors could not - at the same time - be considered mere "passive" investors, the ALJ held this applicant to be entitled to a 20% "integration" factor "at the very most." *Id.*, at para. 252. Before the Board, TV 30 argues that we should not consider its four directors to be "active" principals, or proportionately diminish its quantitative "integration" factor, because these four "nonvoting" shareholders will not actually (according to TV 30's exceptions) participate in the management of the company. In support of this facially paradoxical proposition, TV 30 brandishes a most imaginative syllogism: it posits (1) that "[t]he Commission [has] recognized the limited role of nonvoting stockholders in its recent *Ownership Attribution*"⁴¹; (2) and that four out of its five corporate directors are nonvoting stockholders which "precludes [them] the means to influence or control the activities of the issuing corporation"⁴²; ergo, (3) its nonvoting shareholders cannot be considered "active" principals, despite their 80% majority on TV 30's Board of Directors.

42. Against the force of such potent syntactic polemics, we shall affirm the ALJ. As we have rehearsed in prior paragraphs, the Commission will generally refrain from attributing ownership interests to media principals who, by dint of their "passive" equity interests, will have "no material involvement" in the management or operation of the entity concerned. *Ownership Attribution*, *supra* note 6, 58 RR 2d at 618. Rather than attempting to explain just exactly how its four subject principals intend to constitute an 80% majority of TV 30's Board of Directors while simultaneously eschewing any "material involvement" in its management, TV 30's exceptions resort to the same keen powers of dialecticism reflected in the prior paragraph. To wit, its exceptions reference numerous cases in

which individuals identified as officers and directors of broadcast applicants were not accorded "integration" credit, notwithstanding their corporate offices. It urges: "The Commission has consistently held that officers and directors, who propose to work in a management capacity, but who own no stock, are not entitled to integration credit."⁴³ From that unremarkable principle, TV 30's exceptions go on to deduce:

Thus, if the Commission is correct, as TV-30 submits it is, in holding that the interests of non-voting stockholders, and the interests of officers and directors are each not "cognizable" for integration purposes because each lacks the power to influence the operation and management of a corporation, the fact that a non-voting stockholder is also an officer and/or director cannot operate to raise the non-voting stockholder's interest to a "cognizable" interest. Even with the title of officer or director, a non-voting stockholder remains just that, a non-voting stockholder, with no power to control the company.

43. However, what TV 30 conveniently fails to iterate - but which the cases it cites do make clear - is that "integration" credit is tied directly to *equity ownership*. see *Policy Statement*, 1 FCC 2d at 395-396. Naturally, if a broadcast entity's officers or directors *own* no equity, they receive no *ownership* "integration" credit. But, that plainly is not the case with TV 30's four directors, who actually *own* 80% of its total equity, yet do not envision fulltime roles at the intended station. As a matter of general commercial law, corporate directors "direct or manage the corporation through officers." H.G. HENN & J.R. ALEXANDER, *LAW OF CORPORATIONS* §203 (1983), and corporate directors "are required to use their best judgment and independent discretion, and are responsible for the determination and execution of corporate policy" as well as being charged with "supervision and vigilance for the welfare of the whole enterprise." *Id.*, at §207. Cf. *Letter to William S. Paley*, 61 RR 2d 413 (1986) (corporate Board of Directors hold control of corporation, notwithstanding substitution of C.E.O.). The law also applies in California. Cal. Corp. Code §300 (business and affairs of corporation are to be managed under direction of board of directors and all corporate powers exercised by, or under, direction of that board). It would be curious to most full-witted observers were we to hold in the face of these iron-clad legal obligations that TV 30's directors were mere "passive" investors in that same corporation.

44. Somewhat like A&R (*supra* paras. 19-20), TV 30's principals here seek to run with the hares and hunt with the hounds, never choosing one role over an *opposite* role. Whatever the intended purpose of its unfathomable ownership and management structure *on paper*, we find that the four "nonvoting" shareholders who occupy four-fifths of TV 30's directorship seats are, by fundamental operation of law, active equity principals of the TV 30 corporation. Since none of these four principals propose to devote their fulltime efforts to the station itself, the ALJ's award of a net 20% "integration" factor seems more than generous in view of the transcendent supervisory role of four of its (nonvoting shareholder) directors.

45. *All Nations*. The *I.D.* reports that All Nations is a nonprofit corporation governed by a five-person Board of Directors. Because nonprofit corporations have no "equity

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owners" in the sense that commercial entities do, our practice has been to calculate ownership "integration" credit for such organizations by constructively equating its governing directors with "owners" under the *Policy Statement*. See generally *Reginald A. Fessenden Educational Fund*, *supra*, 100 FCC 2d at 447, 451; see also *Farragut Television Corp.*, 5 FCC 2d 93, 97-99 (Rev. Bd. 1966). While All Nations had here proposed to "integrate" full-time four out of five of its directors into station management, the ALJ awarded it only a 40% quantitative factor, *I.D.*, para. 284, after faulting the "integration" proposals of two of its directors. More specifically, the ALJ rejected such credit for All Nations' directors Edward B. Bass and Oscar M. Canales after reviewing their testimony and opining that neither individual would hold true management functions at the station; rather, he considered that the roles they would fill would be advisory, not supervisory. *Id.*, paras. 281-283. Needless to say, All Nations' exceptions take umbrage at the ALJ's refusal to credit the "integration" proposals of Bass and Canales, and it claims, in essence, that the ALJ based his misimpressions on "inconsequential tidbits of testimony," whereas an objective reading of the larger hearing record would demonstrate that both individuals will perform managerial roles at its intended station.

46. The Board has closely reviewed the testimony of all of All Nations' principals and finds that, although much of the testimony of Bass and Canales was inexpert and at times suggested that they viewed their potential roles as essentially consultative rather than managerial,⁴⁴ other portions of the testimony of the All Nations' directors is consistent with functions generally considered managerial. Although this is a very close factual issue, where some deference is due to an ALJ's first-hand judgment,⁴⁵ we do not believe that the adverse inferences drawn from the testimony presented are supported by a preponderance of the record evidence as a whole. But, as we've acknowledged, it's *still* a close call. Moreover, we ourselves question whether it is proper to accept Bass' fulltime "integration" pledge in view of the fact Bass currently serves as Associate Pastor of a Los Angeles church, a position he does not intend to relinquish, notwithstanding his instant pledge to devote fulltime to the management of this new San Bernadino UHF television station. It is well-established that where fulltime "integration" is proposed, those having other substantial vocational commitments must make a persuasive showing as to how both occupations can be fulfilled at once.

It is both a long-held and routinely-applied principle of our comparative broadcast law that persons seeking comparative credit for ownership integration must demonstrate on the record how they can accommodate their outside professional and business activities so as to fulfill their specific commitments to the proposed station. *Margaret Garza*, 1 FCC Rcd 1294 (Rev. Bd. 1986); *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 596 (Rev. Bd. 1982). *rev. denied*, FCC 83-415 (Comm'n 1983), *aff'd mem. sub nom. Blake - Potash Corp. v. FCC*, No. 83-2112 (D.C. Cir. April 26, 1985); *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969).

Leininger - Geddes Partnership, 2 FCC Rcd 3199 (Rev. Bd. 1987), *review denied*, 3 FCC Rcd 1181 (1988). And, where a vocational conflict is apparent on its face, a loose prom-

ise to "diminish" the time devoted to a current occupation is too indefinite a vow to accept as satisfactory. See *id.*, 2 FCC Rcd at 31⁹⁹ (practicing attorney's *ipse dixit* offer to devote to station "whatever time it takes" to qualify for fulltime "integration" credit found unacceptable). In this case, Bass' promise strikes us as equally vague. See *I. D.*, para. 270. However, the record on this matter is brief and inconclusive, and no opposing party has lodged exceptions directly on this point, thereby waiving any such objections to the ALJ's findings with respect to Bass' pastoral position (see 47 CFR §1.277(a)).⁴⁶

47. As explained in the immediately previous footnote, All Nations' proposed 80% fulltime "integration" level places it comparatively below those with a 100% factor according to the Commission's *Horne Industries* formulation (see *supra* para. 7). Its hopes of prevailing lie, no doubt, in gaining a dispositive preference for its particular program format,⁴⁷ a matter we discuss *infra* at paras. 57-60 (along with a similar complaint by TV 30), after we conclude our review of the exceptions directed to "integration" matters. For present purposes, however, we concede All Nations an 80% quantitative "integration" factor, despite our own misgivings about the fulltime pledge of Edward Bass.

48. *RBN*. Like All Nations, above, RBN is reported to be a nonprofit corporation governed by a five person Board of Directors. Unlike All Nations, RBN sought a 100% fulltime "integration" credit for proposing that all five of its directors manage the intended station. But, the ALJ awarded RBN only an 80% factor after finding that one of its directors, Lorita F. Stewart, will have no supervisory duties in her proposed capacity as the station's Director of Public and Community Affairs. *I.D.*, para. 312.

49. Whereas the ALJ placed great weight on Stewart's testimony "that she will not supervise any other person at the station" (*id.*, citing Tr. 455), there is a much more basic reason why Stewart is not entitled to management "integration" credit. The seminal *Policy Statement* under which we adjudicate clearly states that such credit is to be considered only where an "integrated" owner (or, as in this case, a director of a nonprofit entity) will be "exercising policy functions." 1 FCC 2d at 395 (emphasis added). Although represented by RBN as the station's intended Director of Public and Community Affairs, *I.D.*, para. 302, Stewart at hearing testified as follows:

Q. Ms. Stewart, could you explain to me what types of station policies you will determine as director of public and community affairs?

A. I will determine no station policies, only -- I have a vote on the board of directors, come to a meeting and then and there I will get my vote.

Q. But as director of public and community affairs, in that employee position you will not be setting any station policies?

A. No, none at all.

Tr. 457. After reviewing the entirety of Stewart's testimony, we find that the ALJ's refusal to regard Stewart's function - at least as *Stewart* anticipates her function - as managerial or contemplative of significant policy-making authority or responsibility was clearly correct. No

"integration" credit can be awarded to RBN for her presence, and it shall receive no more than an 80% fulltime award.

50. *Summary of Quantitative Integration Credit.* Based upon the foregoing review of the exceptions of all twelve remaining applicants, we have found that Sandino and SSP are entitled to a 100% quantitative fulltime integration factor, and Channel 30 a problematical 100% (see *infra* para. 54), after which come All Nations and RBN (with 80% at best), Inland Empire (with approximately 70% at best), and Buenavision (at 51% even if, *arguendo*, it is not dispatched as a complete sham). While we have declined to award Solano a specific quantitative "integration" factor, because its two "limited" partnership groups prominently include attorneys who have actively advised and serviced their applicant, and because its putative "general" partners seem to know very little of their application, Solano could not receive a grant here in any event without a remand for an evidentiary hearing to determine the basis on which its "general" partners certified their financial qualifications to the Commission (see *supra* para. 25). TV 30 receives, at most, a 20% factor. A&R has received no "integration" credit, because neither we nor its principals can determine their true ownership status, *viz.*, active or passive. And, finally, we affirm the ALJ's outright rejection of the "integration" proposals of SSB and Good News: these latter two are prototypical shams, in which an offstage conductor wields the baton, while stand-in performers fiddle with their borrowed instruments, forget the score (if they've ever perused it), and reduce the proceedings to burlesque.

51. Since, holds the Commission, "it is well established that qualitative attributes . . . may enhance the value of an integration proposal but cannot overcome clear quantitative differences." *Horne Industries, supra*, 98 FCC 2d at 604 n.12, we will turn our review to the qualitative attributes of those three applicants here held to be entitled to a 100% fulltime quantitative "integration" factor, Channel 30 (tentatively), Sandino, and SSP, none of whom are encumbered by any "diversification" (or signal coverage) demerit.

Comparison of Qualitative Attributes of Channel 30, Sandino, and SSP

52. *General Considerations.* Once competing parties are ranked on the "diversification" and quantitative "integration" criteria, and assuming no significant signal coverage differences, see, e.g., *Washoe Shoshone Broadcasting, supra*, our comparative analysis focuses upon the other attributes set out in the *Policy Statement*, and in even newer policy edicts, to determine whether any decisional distinctions exist as between the ranking applicants. Three qualitative *Policy Statement* attributes to be considered are (1) local residence in the community or proposed service area, with past local residence taking considerable precedence over recent or proposed future residence, 1 FCC 2d at 395-396; (2) civic activities in the community of license and, to a lesser degree, in the larger service area, *id.*; and (3) broadcast experience. *Id.* More recently, the Commission also considers the racial and sexual make-up of an applicant, see generally *Cannon's Point Broadcasting, supra*. In that latter regard, the Commission has held that the comparative preference for a 100% fulltime "integrated" minority applicant is of approximately the same weight as that for local residence, *Radio Jonesboro*, 100 FCC 2d 941, 945 (1985), but that

"minority ownership and participation has more significance as an enhancement factor than female ownership and participation." *Horne Industries*, 98 FCC 2d at 603. With that Commission value structure as our guide, we compare those applicants who are, in the Board's intermediate appellate view, entitled to the all-important 100% quantitative "integration" factor.

53. *Channel 30.* All four of Channel 30's proposed "integrated" principals are entitled to some local residence credit: Suzanne Schott, holding a 14.3% "voting" interest, is a long-time resident of the proposed station's service area, *I. D.*, para. 14, and its three other principals (each holding a 28.6% voting interest) are also long-time residents of the proposed service area. *Id.*, paras. 9, 19, 23. Further, all four were credited by the ALJ with civic activities in the service area, see *id.* at paras. 10, 15, 20, 24. One of its principals, Betty Johnson (a 10.9% equity holder) has some minor broadcast experience, *id.*, para. 25. All of its "voting" principals are female, *id.*, para. 7, and one, Lucy Lopez (a 10.9% equity holder) is Hispanic. *Id.*, para. 21.

54. Despite the fact that Channel 30 proposes to "integrate" all four of its "voting" shareholders, there remains a serious question as to whether it is entitled to a 100% effective "integration" factor. As indicated in paragraph 11, *supra*, one of Channel 30's four voting shareholders, Suzanne Schott, owns less than 1% of its total equity. And, as discussed briefly at paragraph 37 & n.37 with respect to another applicant (Good News), the Commission has for many years held that even "nonpassive" ownership interests of less than 1% are simply too insignificant to be legally cognizable as a media interest. Indeed, the Commission has recently raised that threshold cognizability level from 1% to 5%, *Ownership Attribution, see supra* nn. 6, 37, finding that ownership interests of less than 5% are so insubstantial that no individual (or entity) holding less than 5% level of a company's "nonpassive" equity could likely effect the management of a broadcast licensee. In fact, as we read the Commission's *Ownership Attribution* orders, ownership holdings of less than 5% need not even be reported to the Commission, the agency considering such holdings to be, in essence, *de minimis*. The question for us, then, is: can an individual receive ownership-management "integration" credit while holding less than a legally cognizable level of ownership equity? Or, more specifically in the case at bar, should Schott receive full ownership "integration" credit, thus raising Channel 30's quantitative "integration" factor from 87.5% to a possibly dispositive 100%, when Schott herself owns but a mere 0.840% equity interest in her company? While we understand that Schott is depicted as holding 14.3% of the "voting" stock in Channel 30, it is not clear from the Commission's *Ownership Attribution* orders that this claim is determinative. From the Commission's orders themselves, it would appear that cognizability turns on the level of "nonpassive" equity, *simpliciter*, and not upon any free-floating voting arrangements. Accordingly, it is not clear that Channel 30 should receive an extrapolated 14.3% ownership-management "integration" credit for Schott's 0.840% equity interest. We discuss the consequences of this enigma in our conclusions, *infra* para. 61.

55. *Sandino.* Jose Oti, Sandino's sole voting principal, has no significant past local residence, see *id.*, para. 38, nor (it follows) local civic activities to his credit, though his promise to move to San Bernardino should he be awarded the station is entitled to some relatively slight

recognition under the *Policy Statement*. He has some broadcast experience, *id.*, para. 39, and is Hispanic. *Id.*, para. 40. Although Oti's racial preference outranks Channel 30's sexual preference, *Horne Industries*, and his broadcast experience is superior to Channel 30, it appears to us that Channel 30's past local residence and service area civic activities overbalance Oti's credentials by some palpable margin. Unless Channel 30's quantitative "integration" factor is reduced for the reasons discussed, Sandino would rank below Channel 30, all relevant comparative factors duly considered.

56. SSP. Having restored SSP to a 100% quantitative "integration" factor, our attention is upon Sandra Phillips, its sole "general" partner, the attributes of "limited" partners playing no part whatever in our comparative functions. Phillips has no past local residence (or, of course, local civic activities) on which to rely. *I.D.*, para. 171, and no past broadcast experience. *Id.*, para. 172. Like Oti, above, she promises, if selected, to move to San Bernardino. All told, however, given that the Commission officially prefers racial minorities to females as broadcast licensees, *Horne Industries*, SSP must be considered inferior to Sandino as an applicant.

PROGRAMMING ISSUES

57. TV-30 excepts to the ALJ's *Memorandum Opinion and Order*, FCC 84M-1466, released March 23, 1984, which denied TV-30's request for a "specialized programming" issue. TV-30 here asserts that, in its petition to enlarge issues, filed October 21, 1983, it made a substantial showing of a need for Asian-language programming in its proposed service area. Therein, TV-30 reflected the size of the Asian population within its contour (approximately 5% of the gross population), and it submitted a specialized programming proposal purporting to meet the needs of the Asian population. Nevertheless, based on TV-30's own admission that there is currently 50 hours a week of Asian programming available in the San Bernardino area, the ALJ concluded that no programming issue was justified.

58. In *George E. Cameron Jr. Communications*, 71 FCC 2d 460, 464-466 (1979)(subsequent history omitted), the Commission held that inquiry into the relative need for specialized programming under the standard comparative issue would be permitted only upon a threshold showing that the proposed format is not available in the particular market in a "substantial amount". See also *Comparative Broadcast Hearing Procedures*, 75 FCC 2d 721 (1980); *Wilshire District Broadcasting Co., Inc.*, 101 FCC 2d 908 (Rev. Bd. 1985). On its face, 50 hours of weekly programming directed at a 5% minority audience does appear "substantial" by Commission tenets. Thus, in *Flini Family Radio, Inc.*, 69 FCC 2d 38, 45 (Rev. Bd. 1977), a case cited with approval by the Commission in *Cameron* at n.6, as illustrative of the availability in the service area of a reasonable amount of the specialized religious format proposed by one applicant, other area stations were then broadcasting approximately 40 hours of such programming, and the Board declined to award a preference. More recently, in *Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1098 (Rev. Bd. 1982), the Board concluded that 21 hours of a certain variety of specialized programming in the service area was ample to meet the Commission's "substantial amount" test and to defeat the request to add a specialized format issue. The Commission did not dis-

turb this holding. See *Order*, FCC 83I-129, released November 9, 1983. Clearly, in light of this case precedent, TV-30's exception must fail.⁴⁸

59. All Nations likewise excepts to the ALJ's *Memorandum Opinion and Order*, FCC 84M-1473, released March 23, 1984, wherein he also refused to add a comparative programming issue as requested in All Nations' petition to enlarge issues filed October 21, 1983. All Nations here asserts that it conducted ascertainment surveys of community leaders and the general public, and conducted a special survey of the Hispanic community, which constitutes 25% of the San Bernardino area population. Based on its ascertainment of the community's needs, All Nations submits it proposed specific programs to deal with the major needs in the area. Among other things, All Nations proposed to broadcast 32.1% of its programs in Spanish to address the problems ascertained in the Hispanic community. Moreover, citing *United Broadcasting Co.*, 59 FCC 2d 1412 (Rev. Bd. 1976), All Nations sought similar recognition of its proposed "short message format", and it here contends⁴⁹:

In *United Broadcasting Co.*, 59 FCC 2d 1412, 37 RR2d 1169 (Rev. Bd. 1976), the Review Board added a comparative programming issue based on the form of the proposed programming. One important factor considered in the decision was the short message format proposed by the applicant. All Nations proposed to utilize the short message format to disseminate information in both English and Spanish regarding employment opportunities, crime prevention, youth, and senior citizen activities, services available to alcohol and drug abusers, and environmental and weather alerts. Proposal at 27-38.

60. We agree with the ALJ, albeit for somewhat different reasons, that a comparative programming issue is not warranted. Unlike TV-30, which sought a "specialized" programming issue, All Nations is here seeking what is commonly known as a "comparative" programming issue. The Commission's comparative programming issue has its genesis in the *Policy Statement*, 1 FCC 2d at 397, where the Commission, eschewing minor differences among applicants' proposed program plans, stated that it will accord decisional significance "only to material and substantial differences" and that such differences "will be considered to the extent that they go beyond ordinary differences in judgment and show a superior devotion to public service." In *Chapman Radio & Television Co.*, 7 FCC 2d 213, 214-215 (1967), the Commission required petitioners seeking comparative programming issues to make a *prima facie* showing of significant differences in proposed programming and to relate their claimed substantial superiority to ascertained needs. The *Chapman* standard is still good law. See *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181, 189 (Rev. Bd. 1986); *Chase Communications Co.*, 100 FCC 2d 689, 691 n.6 (Rev. Bd. 1985). The persuasive threshold showing required by *Chapman* has not been met in this case. Although All Nations addressed one prong of the *Chapman* test by tying its program proposal to its ascertainment surveys,⁵⁰ it has not satisfied the second, more crucial prong of demonstrating that its program proposal is substantially and materially different from those of the other applicants and represents a superior devotion to public service. In other words, despite its conclusory claims of superiority, All

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Nations did not make a specific comparison between its programming proposal and those of the other applicants. Furthermore, while it claimed its programming was fashioned to meet the needs of the Hispanic community, other applicants also proposed significant Spanish programming. See Reply Exceptions of Channel 30 at 22; Reply of SBB at 4-5. In addition, the claimed superiority of All Nations' other programming categories is also open to questions. See *id.* (comparing All Nations' proposed news programming with that of TV-30's, and All Nations' proposed "all other" nonentertainment programming with that of Good News). Finally, insofar as All Nations' reliance on *United Broadcasting* emphasizes its "short message" format, the programming issue there turned on that petitioner's *prima facie* showing of significant differences in the *scheduling* of public affairs programming by the respective applicants. That is, petitioner was able to show that it would present the primary portion of its public affairs programming during hours when the listening audience would best be able to hear it, and that it would publicize said programming throughout the day, whereas, by contrast, half of the public affairs programs of its competitor would be presented between 3:00-4:00 a.m., and four of the latter's other public affairs programs would consist of brief two-minute vignettes. See 59 FCC 2d at 1422-1423. No comparable showing of significant scheduling differences between the applicants has been made by All Nations here. In sum, All Nations has not satisfied the Commission's intentionally stringent requirements for a comparative programming issue, and its exception is denied.

CONCLUSIONS

61. With none of the twelve competing applicants bearing the onus of a "diversification" demerit or, conversely, enjoying a dispositive signal coverage advantage, the *Policy Statement*, as amplified by subsequent Commission case precedent, enjoins our attention to ownership/management "integration", with a decisional emphasis first upon any "clear quantitative difference" as between the various applicants. Of all of the instant applicants, we have found that only Sandino and SSP are entitled to an unqualified 100% factor in that regard, which then brings us to the ALJ's recommended selection of Channel 30. Because of its wider array of qualitative "integration" enhancements (including, at varying levels, local residence and civic activities, minority and female ownership, broadcast experience (albeit slight)), Channel 30 would be a clear winner, if regarded as entitled to a 100% quantitative "integration" factor. However, as discussed at para. 54, *supra*, the question of whether to award any "integration" credit for Channel 30's Suzanne Schott, whose equity interest in the corporation is an infinitesimal 0.840%, and far below the Commission's current 5% threshold cognizability level for media interests, is not a matter of settled law. Though the Board itself would be strongly disinclined to award any ownership "integration" credit to a principal whose equity holding is deemed so insignificant by the Commission as to be neither cognizable nor even reportable as a media ownership interest *per se*, at least as we construe those *Ownership Attribution* orders, the Commission itself has not directly spoken to this unusual question. Hence, despite our own rhetorical questions, we will - if perhaps only tentatively - credit Channel 30 with Suzanne Schott's "integration" portion. Just as in *Independent Masters Ltd.*, *supra*, where

thorny questions arose concerning the application of the Commission's newer *Ownership Attribution* policies to unforeseen situations arising in the comparative licensing context, we will heed the venerable maxim of cautious judicature, "in dubio, pars miuor est sequenda." See 104 FCC 2d at 193. With a 100% quantitative "integration" factor, Channel 30's broader qualitative attributes, as we have said, sustain its present hold on first place. Were Channel 30's quantitative "integration" factor to drop off to the 85.7% level set by the ALJ, *I.D.*, para. 317, the contest between it and Sandino would be exceptionally close, perhaps too close to discern any meaningful distinction between the two.⁵¹ In so stating, the Board recognizes that in *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 (Rev. Bd. 1981),⁵² the Board opined that one applicant's 12.5% quantitative advantage in fulltime "integration" credit constituted the "clear quantitative difference" requisite to a decisional distinction. However, upon review of a subsequent case, the Commission "decline[d] to extend *New Continental*" to a Board decision in which it speculated that a 10.8% advantage was "probably" a clear quantitative difference. *Meiro Broadcasting, Inc.*, 2 FCC Rcd 1474, 1475 & n. 9 (1987). Thus, were we to reduce Channel 30 to an 85.7% quantitative factor and apply strictly the *New Continental* calibration, Sandino - with a 100% factor - would summarily prevail.⁵³ Inasmuch as the eleven competing applicants here rebuffed are entitled to file applications for full Commission review of our decision, 47 U.S.C. §155(c)(4), it is virtually certain that our treatment of Channel 30's "integration" element will be the subject of much appellate comment, and we are confident that the Commission will take any such occasion to specifically address the "nice" question which may ultimately divide Channel 30 from the permanent possession of the television Construction Permit we hereinbelow award to it.

62. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed November 2, 1987, January 6 and April 29, 1988, by Solano Broadcasting Limited ARE GRANTED, and the amendments ARE ACCEPTED; that the petitions for leave to amend filed December 23, 1987 and June 8, 1988, and the motion for leave to amend filed February 5, 1988 by Sandino Telecasters ARE GRANTED, and the amendments ARE ACCEPTED; that the petition for leave to amend filed February 12, 1988 by Channel 30, Inc. IS GRANTED, and the amendment IS ACCEPTED; that the motion to strike filed December 17, 1987 by Solano Broadcasting Limited IS DENIED; and that the petition for leave to file, filed April 21, 1988 by Good News Broadcasting Network, IS GRANTED; and

63. IT IS FURTHER ORDERED, That the Application of Channel 30, Inc. (File No. BPCT-830506LS) for authority to construct a new television station on Channel 30 at San Bernardino, California IS GRANTED; and that the applications of Religious Broadcasting Network (File No. BPCT-830505KV), Solano Broadcasting Limited (File No. BPCT-830506KK), A&R Broadcasting Company, A Limited Partnership (File No. BPCT-830506KM), Buenavision Broadcasters (File No. BPCT-830506KN), SSP Broadcasting, A Limited Partnership (File No. BPCT-830506KO), Good News Broadcasting Network (File No. BPCT-830506KR), Sandino Telecasters (File No. BPCT-830506KT), Inland Empire Television (File No. BPCT-830506KU), Television 30, Inc. (File No. BPCT-830506KV), San Bernardino Broadcasting, Limited Part-

nership (File No. BPCT-830506KX). All Nations Christian Broadcasting, Inc. (File No. BPCT-830506LA) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

¹ See *Order*, FCC 83M-4753, released December 19, 1983; *Order*, FCC 83M-4754, released December 19, 1983; *Order*, FCC 83M-4755, released December 19, 1983; *Order*, FCC 84M-1962, released April 25, 1984; *Order*, FCC 84M-2252, released May 11, 1984; *Order*, FCC 84M-2405, released May 22, 1984; *Order*, FCC 84M-2535, released June 1, 1984; *Order*, FCC 84M-3484, released August 10, 1984; *Order*, FCC 84M-4235, released October 2, 1984.

² The *Policy Statement's* tilt toward those applicants with no other mass media holdings is evidenced not only by its heavy emphasis on the basic "diversification" criterion, but under the "integration" criterion as well. Thus, the *Policy Statement* declares that it favors the "integration" of ownership into active station management not only on its own merits, but because placing a comparative premium on fulltime management participation by licensee principals in one case "frequently complements the objective of diversification, since concentrations of control are necessarily achieved at the expense of integrated ownership." 1 FCC 2d at 395.

³ See *Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 794 (Rev. Bd. 1984), *aff'd in principal part sub nom. Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730 (1986)(Comm'n), *aff'd per judgment sub nom. Plantation Broadcasting Corp. v. FCC*, 812 F.2d 1443 (D.C. Cir. 1987). There the Board relieved one of the applicants of a comparative "diversification" demerit for ownership of a nearby cable television system, because that applicant held such interests for less than one month in the midst of the comparative hearing.

⁴ However, as we suggested some time ago in *Santee Cooper Broadcasting Co.*, *supra* note 3, the existing FCC policy of according very little relative weight to cable television system co-ownership relative to co-ownership of other mass media outlets is becoming increasingly untenable, both factually and legally. In *Santee Cooper*, we observed:

As we have repeated from *Greater Wichita, supra*, CATV systems are of lesser concern than broadcast stations from the standpoint of media "voices." Yet, with the growth of such phenomena as the Cable News Network, for example, cable is clearly moving away from its origins as a passive carrier of distant TV signals and becoming more of a media "voice" in its own right. See e. g., *Children's Television Programming*, 55 RR 2d 199, 208 (1984); *Fairness Doctrine Inquiry*, 49 Fed. Reg. 20317, published May 14, 1984, at paras. 26-44.

99 FCC 2d at 794 n.54. Other factual, legal, and policy developments since *Santee Cooper* reinforce our view that, for example, counting one competing applicant's ownership of one (or more) distant television (or even radio) broadcast station(s) more heavily against it than a competing applicant's co-owned cable television system(s) under the rubric of media "diversification" is patently

anachronistic. For instance, in considering television station transmitter relocations, the Commission has recently indicated, albeit indirectly, that it now regards a local cable television system as virtually a fully acceptable substitute for an existing local television station. See *KTVU, Inc.*, 57 RR 2d 648, 650 (1984)(Comm'n) ("In recent years it has become apparent that for some purposes the public interest is best served by treating [TV, CATV, Translators] as a single video marketplace.") More recently, the court discoursed upon the Commission's updated view of cable television's status as a very significant mass medium in its own right.

Abandoning its initial view of cable as an auxiliary service that merely supplemented broadcasting by improving reception in outlying areas, the Commission now recognized cable as a legitimate, independent vehicle for providing alternative video services to the public.

Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1442 (D.C. Cir. 1985), *cert. denied sub nom. Nat'l Ass'n of Broadcasters v. Quincy Cable TV, Inc.*, 106 S. Ct. 2889 (1986). Under these changed circumstances, where cable television is now regarded by official observers as an independent mass medium of expression, so much so as to be entitled to rather exacting First Amendment protections (*Quincy*), and a mature video media service that may now be permitted to wholly supplant an existing local television signal (*KTVU*), the Board firmly believes that *Greater Wichita Telecasting, supra*, must be revisited and reconciled with the agency's radically altered perception of the status of cable television in the contemporary mass media universe. Cable television should play no less a role in the Commission's "diversification" considerations than any other mass medium.

⁵ The deadline after which an applicant cannot make a cognizable media divestiture pledge is the so-called "B" cut-off date. "The 'B' cut-off date is the last date for filing minor amendments by all mutually exclusive applications subsequently filed as of the 'A' cut-off date." *Clay Television, Inc.*, FCC 88-95, released March 16, 1988, at para. 2, 3 FCC Rcd 1590. For an illustration of this avoidance mechanism applied in practice, see *WHW Enterprises, Inc.*, 89 FCC 2d 799, 813-814 (Rev. Bd. 1982)(subsequent history omitted).

⁶ In not attributing - for routine comparative purposes - the extant media holdings of an applicant's "nonvoting" shareholders or, as the case may be, an applicant's "limited" partners, the Board generally tracks the Commission's rules and policies regarding such "passive" ownership interests as set forth in *Attribution of Ownership Interests*, 97 FCC 2d 997 (1984), *reconsidered*, 58 RR 2d 604 (1985), *further clarified*, 1 FCC Rcd 802 (1986). See *Daytona Broadcasting Co., Inc.*, FCC 86-182, released April 18, 1986, at para. 7 (*Attribution of Ownership* policies applicable in comparative "diversification" calculations).

Several other directors of RBN are also affiliated with Cathedral of Faith and are engaged in the production and sale of its programming to San Jose area cable television systems. *I. D.*, para. 314. However, their roles in this regard are not so significant that any measurable "diversification" onus would attach to RBN. Conversely, the role of Reverend Foreman, in both the Cathedral of Faith programming and in the proposed San Bernardino station, is dominant and does present certain "diversification" questions.

⁸ In *Morris, Pierce & Pierce*, the Board declined to assess a "diversification" demerit to an applicant, one of whose principals (and 25% equity holder) owned a majority interest in a radio production company. 88 FCC 2d at 723. No evidence appeared in that case to suggest that the goal of media diversity in the Fort

Myers Beach, Florida area would be impacted because of that particular production company interest. See also *Pittsfield Community Television Ass'n*, 94 FCC 2d 1320, 1321-1322 (Rev. Bd. 1983) (no "diversification" demerit assessed based upon advertising agency interest or individual's mere employment with a large national network in program production capacity).

⁹ Exceptions have been taken to the ALJ's acceptance of RBN's March 11, 1987 amendment, to the extent that Reverend Foreman's pledge therein to resign his Cathedral of Faith offices came more than 30 days after Cathedral of Faith (on February 2, 1987) agreed to purchase outright Channel 65.

¹⁰ For example, in a recent case the Court of Appeals dismissed an appeal of a Commission decision because the appellant failed by one day to meet a pleading deadline. *Punta Ybel Communications, Ltd. v. FCC*, No. 86-1670 (D.C. Cir. February 29, 1988). See also *Channel One Systems, Inc. v. FCC*, No. 88-1100 (D.C. Cir., June 14, 1988). However, the deadline missed in *Punta Ybel* was a statutory deadline (47 U.S.C. §402(c)), and the comparative "divestiture" deadline at issue in the case at hand is purely internal.

¹¹ RBN Exceptions at 5.

¹² Indeed, the ALJ determined that the Channel 65 programming contract was not a cognizable media interest. While we disagree with that judgment, we have in the text recognized the possible ambiguity surrounding such program production activities in the context of the Commission's "diversification" considerations.

¹³ Nor may we exact a comparative penalty from RBN under Section 1.65, since there is no suggestion here of an intent to conceal decisional facts from the Commission or a pattern of carelessness or inattentiveness to the Commission's reporting requirements. See *Merrimack Valley Broadcasting, Inc.*, 55 RR 2d 23, 24-25 (1983), modified on reconsideration, FCC 84-496, released October 23, 1984.

¹⁴ Buenavision Exceptions at 28-32.

¹⁵ Remarks by Dennis R. Patrick, Chairman of the Federal Communications Commission, before the National Association of Broadcasters, April 12, 1988, Las Vegas, Nevada. In that same speech, Chairman Patrick vowed to "move aggressively against those who set up 'sham' ownership structures to take advantage of various comparative preferences."

¹⁶ For further insights into this unfortunate phenomenon, see, e.g., *Newton Television, Ltd.*, 3 FCC Rcd 553, 558-559 n.2 (Rev. Bd. 1988). See also Tillotson, *FCC's Comparative Process Is A Sham and A Shamble*, BROADCASTING, Oct. 5, 1987, at 22; Barnes, *Investors Use Blacks As Fronts To Obtain Broadcasting Licenses*, Wall St. J., Dec. 11, 1987, at 1, col. 1. As we noted in *Newton Television*, the foremost victims of these sham applicants are bona fide minority (and female) applicants who must compete against these well-heeled poseurs in very expensive comparative licensing proceedings for the relatively few broadcast frequencies remaining unoccupied.

¹⁷ The evidence (Tr. 2175) reveals that Ms. Schott's husband had transferred the Channel 30 stock to her because his ill health would have prevented his active participation in corporate affairs and, later, at the proposed station. It is now reported that Mr. Schott has since passed away. Channel 30 Exceptions at 10 n.5.

¹⁸ Sandino asserts that although Frankie Crocker had fully joined in the May 14, 1984 "Joint Petition" signalling the merger and the simultaneous withdrawal of Crocker's own application, Crocker later refused to sign the new limited partnership agreement, despite the proddings of Oti, Riklis and Sandino counsel. See Sandino Exceptions at 7-11. Sandino's exceptions contend, without challenge by the other parties, that Crocker obstinately refused to sign the partnership agreement because of a disagree-

ment between him and Riklis over past legal expenses; and, thereafter, Crocker spurned all of Sandino's attempts to communicate with him. Finally, claims Sandino, Oti and Riklis "had no choice but to exclude [Crocker] from Sandino." *Id.*, at 10. Consequently, Oti and Riklis sought to amend the Sandino application to specify Oti as the sole "general" partner (and 30% equity owner) and Riklis as the sole "limited" partner (owning the remaining 70% of the equity).

¹⁹ Actually, in *Anax*, the applicant had represented that 71% of its equity was held by "additional limited partners." 87 FCC 2d at 484.

²⁰ See *Attribution of Ownership Interests* (*supra* note 6), 1 FCC Rcd at 804.

²¹ Because we affirm the ALJ's conclusion that SBB's application is essentially a sham, we need not determine whether a principal holding a mere 10% equity interest in an applicant can - without additional evidentiary factors - claim to exercise exclusive control over that applicant's activities. This matter is discussed at greater length in *Independent Masters, Ltd.*, 104 FCC 2d 178, 190-193 (Rev. Bd. 1986), a case recently settled without Commission resolution of the issue. See FCC 881-046, released May 25, 1988.

²² A&R Exceptions at 6 (quoting *Greater Wichita Telecasting, Inc.*, 96 FCC 2d 984, 989 (1984)).

²³ Additionally, inasmuch as we have affirmed the ALJ's conclusion that Charles E. Walker's role is active rather than passive, A&R - with only a 73% quantitative integration factor - is effectively out of contention with those applicants who propose to "integrate" all of their owners. See *infra*, para. 51.

²⁴ Solano Exceptions at vi.

²⁵ *Id.*, at 3.

²⁶ In fact, a number of Solano's "limited" partners also hold a variety of other media interests, see I.D. paras. 86-92, but it appears that all of Solano's principals have made a timely pledge to divest those other media interests should Solano prevail in this proceeding. The ALJ, therefore, assessed Solano no "diversification" demerit; nor shall we.

²⁷ The Board recognizes, with appropriate empathy, see e.g., *Independent Masters, supra* note 21, 104 FCC 2d at 189 n. 25; *Chester Associates*, 2 FCC Rcd 2029, 2031 n.9 (Rev. Bd. 1987), that many of the activities of attorneys Parker and Rosenbloom on behalf of Solano and the respective principals of C30-I and C30-II occurred prior to the Commission's 1986 Ownership Attribution clarification, wherein the Commission first discussed with specificity the role of equity-holding attorneys. However, we held in *Wodlinger* that the Commission's clarification language, and the underlying reasoning, precluded the Board from any different result with respect to entities formed prior to that clarification. We also note that, in the instant case, Rosenbloom at least has continued his advisory and representational activities to this very day, see, e.g., Tr. of Oral Arg. of April 1, 1988 at 4011-4031, despite the potential implications of the Commission's 1986 Ownership Attribution clarification order. As Rosenbloom himself stated at oral argument:

MR. ROSENBLUM: There are two lawyers involved in the Solano matter. One is Mr. Parker in Texas and one is myself.

I am before you. I have participated in the prosecution of this case from the moment the case was filed. I've advised on legal matters before the Commission; and I am not a potted plant.

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Id., at 4013. A blooming rose, perhaps, but definitely neither green in FCC matters, nor potted in any respect.

²⁸ A good example of such certification foolishness is to be found in the aforesaid *Washoe Shoshone Broadcasting*, FCC 88R-30 at paras. 44-52.

²⁹ BuenaVision Exceptions at 7-21.

³⁰ Revision of Form 301, 50 RR 2d 381 (1981).

³¹ The Board notes that in *Victory Media*, *supra*, the Commission reversed the Board's refusal to recognize a purported corporate applicant which did not file its state certificate of incorporation until the "B" cut-off date, had issued no stock, had no by-laws, and whose certificate of incorporation specified only one class of stock (voting), whereas the applicant predicated its quest for an effective 100% quantitative "integration" factor on its parolclaim that it had two classes of stock (voting and nonvoting). See 3 FCC Rcd at 2074-2075. In that case, the Commission stated that the applicant's "informality" was not significant. Id. However, the Board does not read *Victory Media* so broadly as to suggest that the Commission is satisfied for its required regulatory purposes to rely upon "oral" corporations, "oral" partnerships, or an applicant's claim that it will adopt its actual legal form and substance at some unspecified time in the future. That, of course, would be absolutely absurd, and we must believe that *Victory Media* turned on the particular facts of that case.

³² SSP Exceptions at 6-7. Indeed, it was not until the Commission issued its 1984 Ownership Attribution, *supra* note 6, that the Commission expressly announced that it would rely upon, for its own purposes, the Uniform Limited Partnership Act to ensure that "limited" partners were adequately insulated from control of a broadcast entity. See 97 FCC 2d at 1022-1023. Shortly thereafter, and upon reconsideration (in 1985), the Commission abandoned its intended reliance on the ULPA, and indicated that it would demand far more stringent contractual provisions in limited partnership agreements. Ownership Attribution, *supra* note 6, 58 RR 2d 615-620. The SSP limited partnership agreement does not contain the express contractual provisions set forth in the Commission's 1985 reconsideration order (and, more specifically, paras. 48-50 thereof).

³³ SSP Exceptions at 14.

³⁴ See, e.g., Good News' Exceptions at 6.

³⁵ Id., at 6-7.

³⁶ Id. As discussed *supra*, para. 31, the Board recognizes that the Commission has of late deemphasized financial dominance as a key test of defacto control. However, neither the Commission nor the Board completely ignore the financial relationships between an applicant's principals, see, e.g., *KIST Corp.* and *Pacific Television*, especially where collateral evidence suggests that a particular principal is more than a "passive" financier. Financial dominance remains one link in the chain of evidence that can lead to a determination that an applicant's so-called "active" principals are actually subordinate.

³⁷ In its *Ownership Attribution* report, the Commission held that its prior 1% attribution benchmark was too low, and it declared that - in general - any ownership interest below 5% for "Non Passive Investors" is simply too insignificant to effect control of a broadcast entity, even in "closely-held" companies. See 97 FCC 2d at 999-1012. Indeed, individual equity interests of less than 5% need not even be reported to the Commission as a palpable broadcast ownership interest. Id., at 1028. Here, Good News' three "non-passive investors" each own less than 5% of their entity's total equity.

³⁸ By inadvertence, the I.D. denominates two of its paragraphs as number 235. We will refer to the second of these as "235(a)."

³⁹ Inland Empire Exceptions at 19-20 (citing Section 12(a) of its partnership agreement).

⁴⁰ Citing *Louisiana Super Communications Ltd. Partnership*, 102 FCC 2d 1293, 1297-1300 (Rev. Bd. 1985), the ALJ did not regard the legal activities and services of Inland Empire's "limited" partners as negating their claims of passivity. I.D., para. 235. However, *Louisiana Super* was decided nearly one year prior to the Commission's issuance of its *Clarification on Ownership Attribution*, and is, of course, superceded thereby. The Board concedes, moreover, that it may have improvidently failed to expressly apply the Commission's conclusive presumption with respect to lawyer principals in other cases decided both before and after the Commission issued its *Clarification*. See, e.g., *Victory Media, Inc.*, *supra*, 2 FCC Rcd at 1760-1761, remanded, FCC 88-134, released April 12, 1988; *Tulsa Broadcast Group*, *supra*, 2 FCC Rcd 6129-6130. To the extent that these or other cases are inconsistent with the Commission's 1986 *Clarification* order with respect to attorney principals, we are confident that any such errors will be corrected upon proper review. Or, as the case may be, the Commission may take the opportunity to further clarify its position on this increasingly prevalent issue in adjudicatory cases.

⁴¹ TV 30 Exceptions at 6.

⁴² Id.

⁴³ Id. at 7-8.

⁴⁴ A perfect "tidbit" of such testimony is found in All Nations' own exceptions: it reproduces the following record exchange with F. Patrick Pearce, Jr., its intended station's operations manager:

Q. Would Mr. Bass in his capacity as Coordinator of Black Programming, would he be responsible for producing specific public affairs programming?

A. Yes, I think he would certainly help in that area.

All Nations Exceptions at 20. Pearce also testified that, in Canales' role as coordinator of Hispanic programming, Canales would have only a "very strong role in the selection of Spanish language programming." Id. (quoting Tr. 1770).

⁴⁵ Technically speaking, it is to an ALJ's "credibility" findings to which both the Board and Commission show considerable obeisance. *TeleStar, Inc.*, 2 FCC Rcd 5, 12-13 (Rev. Bd. 1987), *aff'd*, FCC 88-171, released May 19, 1988, and the ALJ did not here find any of All Nations' witnesses to be lacking in credibility. Indeed, the ALJ accepted as true the testimony offered, but drew adverse inferences therefrom. See I.D., paras. 281-283.

⁴⁶ The reticence of the exceptors on this matter may be explained by the fact that, at best, All Nations seeks only an 80% fulltime "integration" factor, and may therefore not have been viewed as a comparative threat to those receiving or seeking a 100% corresponding factor.

⁴⁷ All Nations Exceptions at 24-31.

⁴⁸ We also reject TV-30's claim that, because of licensee discretion, the amount of Asian-language programming now available "could disappear". This contention is speculative; and - by TV 30's standard - no current amount of specialized programming could ever be deemed "substantial." Ironically, there is no greater guarantee that TV-30 would continue its proposed specialized format, which is why the Commission is very reluctant to base its comparative preferences on programming differences as a general rule. For a fuller discussion, see *Knoxville Broadcasting Corp.*, 103 FCC 2d 669, 689-691 (Rev. Bd. 1980) (referencing the procedural *cordon sanitaire* of the threshold showing).

⁴⁹ All Nations Exceptions at 29.

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