of defendants in the future.[2] This distinction is important, particularly when the qualifications of a licensee are at issue. For, as the relevant case law demonstrates, the focus of the proceeding should be, in large part, to determine whether the past conduct clearly evidences a pattern of egregious misbehavior that is, more likely than not, likely to continue into the future.[3] Accordingly, for this Court to find that defendants are

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[2] *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, para. 7 (1985), (Policy Statement and Order), (hereinafter, "*Character Policy I*") where the Commission adopted a statement of general applicability and future effect designed to implement and interpret its policy concerning enforcement of its rules. The Commission so noted that, "future inquiries into an applicant's basic character eligibility will be narrowed to focus on the likelihood that an applicant will deal truthfully with the Commission and comply with the Communications Act and our rules and policies. An analysis of these specific traits will serve as guidelines for all future inquiries regarding applicant misconduct."; *see also Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd. 3252 (1990), (Policy statement and Order),(hereinafter, "*Character Policy II*") (which made the tenets of *Character Policy I* applicable to all license proceedings, not just broadcast); *see also In the Matter of Family Broadcasting, Inc.*, 12 FCC Rcd 18700 (Adm. L. J. 1997), (hereinafter, "*Family Broadcasting I*"), where the presiding judge honored the pledge of Family to continue operations in compliance with Commission rules and granted Family a favorable summary decision; *see also In the Matter of Family Broadcasting, Inc.*, FCC 01D-02, EB Docket No. 01-39, para. 34 (released August 7, 2001) , (hereinafter, "*Family Broadcasting II*") where it was found that the legal conclusions drawn from the record demonstrated that Family was not qualified to remain a Commission licensee and that its licenses should be revoked. " The Bureau has made its case that Family cannot be trusted to be truthful with the Commission or to operate its stations in accordance with the Communications Act and the Commission rules or with a genuine concern for public safety". *Id.*

[3] *See Character Policy I* at para. 60 "[w]hile the Commission has considered mitigating factors, if any, in drawing conclusions regarding the treatment of misrepresentation in a case, the choice of remedies and sanctions is an area in which we have broad discretion." The Commission further states *id.* at n.79, "[i]n cases of misrepresentation we are not required to consider the station's past program performance". *But, see, id.* at para. 102, where the Commission notes factors relevant to predictive judgements about future performance, "[a]dditionally, the applicant's record of compliance with our rules and policies, if any, should ordinarily be taken into account."; *see, also, Family Broadcasting II*; *In re Applications of the Seven Hills Television Company*, 2 FCC Rcd. 6867, para. 67 (1987), "[a]nd finally we would not find Seven Hills basically qualified without considering the public interest performance of KTVW-TV over the past license period and balancing that performance, if appropriate, against any statutory

unqualified to hold a Commission license, the Bureau must have shown not only past misdeeds, but that those misdeeds evidence defendants' recalcitrant nature that is likely to result in future violations of Commission rule and law.

Standard and Burden of Proof

161. For the Court to find that any allegation contained within the Hearing Designation Order is true, the Court must concurrently find that the Bureau has met its burden of proving that such alleged violation of law or policy occurred.[4] Accordingly, the burden of bringing forth that evidence necessary to demonstrate that any punitive action against defendants is

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violation."; *Westinghouse Station License Renewal*, 44 FCC 2778 (1962) where the Commission stated, "We are thus faced with a difficult choice between two conflicting considerations–a most serious reflection on applicant's character and a most convincing showing of an excellent service of long duration in the public interest." The Commission balanced the considerations in light of its responsibility to the public interest and determined to resolve the conflict in favor of license renewal "because of the outstanding nature of Westinghouse contribution to the public interest in broadcasting"; *In the Matter of Marc Sobel*, 12 FCC Rcd. 22879, para. 78 (1997) (hereinafter, "*Marc Sobel*") "[t]he record amply demonstrates that Sobel cannot be expected to meet the burden of licensees to be forthcoming in their dealings with the Commission and to comply with the rules and policies"; *Agape Broadcasting Foundation, Inc.*, 1 FCC Rcd. 758 (1986), para. 15 of the Ultimate Findings of Fact and Conclusions of Law, "[t]hus the record clearly shows that over a fourteen year period Agape only made use of its frequency four of those years, and two of those four years it employed a substandard transmitter. During the 10 years of silence it showed little, if any, inclination to serve the Dallas listening public. Thus the conclusion is inescapable that Agape is not qualified to remain a Commission licensee". Accordingly, the Commission has long looked to its expectation of future compliance in determining those sanctions which are appropriate.

[4] "The 'preponderance of the evidence' standard is the traditional standard in civil and administrative proceedings. It is the one contemplated by the APA, 5 U.S.C. § 556(d)." *Sea Island Broadcasting Corp. of S.C. v. FCC*, 627 F.2d 240, 243 (D.C. Cir. 1980), cert. denied, 449 U.S.. 834 (1980); *see, also, Steadman v. SEC*, 450 U.S. 91 (1981) where the Supreme Court reviewed the language and legislative history of the APA, codified 5 U.S.C. § 556(d), which led the court to conclude that it was intended to establish a standard of proof and that the standard is the traditional "preponderance of the evidence" standard.

justified clearly rests on the Bureau.[5] Defendants aver that the Bureau's burden has not been met in nearly all instances and, where that burden may be found to have been met, the facts and circumstances of this matter, as demonstrated by the testimony and evidence presented herein, do not support those actions suggested by the Bureau in the form of the suggested forfeiture, revocation or disqualification of the defendants to be Commission licensees.[6]

162. As a general proposition, defendants aver that the Bureau has not shown that defendants evidenced a specific intent to deceive the Commission[7] or violate a Commission rule. Absent such a showing of specific intent to deceive the Commission, based on a preponderance of the evidence presented by the Bureau, the Bureau's burden is more often simply unmet.

Forgery

163. The allegation of forgery against the defendants remains unproven and the facts demonstrate that such actions did not occur. Forgery, in the context of this proceeding, is

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[5] The appropriate standard of proof is set out in 5 U.S.C. § 566(d), with the burdens of proceeding and proof on the Commission. *In The Matter of Silver Star Communications-Albany, Inc.*, 3 FCC Rcd. 6342, para. 24 (1988) (hereinafter, "*Silver Star Communications*").

[6] A sanction may not be imposed ... except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. 5 U.S.C. § 556(d).

[7] Specific intent in this context would include a showing that defendants knowingly intended to deceive the Commission. *Algreg Cellular Engineering*, 12 FCC Rcd. 8148, 8175 (1997) *citing*, *In re Application of Fox Television Stations*, 10 FCC Rcd. 8452, 8478 (1995) (hereinafter, "*Fox Television Stations*").

the unauthorized use of another's identity with the specific intent to deceive the Commission via the affixing to applications the signatures of third persons, including persons who have passed away. For the Bureau to have shown that forgery has taken place, the evidence would need to show that (i) defendants caused signatures to be affixed to those applications; (ii) that those signatures were not made by the persons represented by those signatures; (iii) that the act of signing the applications was without authority; and (iv) that such actions were performed with specific intent to deceive the Commission.[8]

164. Many applications and forms have been made a part of the record evidence of this matter. Among the many applications and forms presented as evidence in this matter, the specific applications and forms for which an allegation of forgery might attach are as follows: (A) that application for authority to assign the license for station KCG967 from Ruth Bearden to Ron Brasher dated October 18, 1994; (B) that application executed on behalf of O.C. Brasher to obtain a T-band license for Allen, Texas; (C) that application executed on behalf of Ruth Bearden to obtain a T-band license for Allen, Texas; (D) that application executed on behalf of Jim Sumpter to obtain a T-band license for Allen, Texas; (E) that

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[8] In order to show deceit, the Commission must show that the party in question had the specific intent to deceive. An intent to deceive cannot coexist with an actual belief that an act is in compliance. The record must establish, not only that an act may have a deceptive effect, but that the licensee knowingly intended to deceive the Commission. *See*, *Fox Television Stations*; *see also Leflore Broadcasting Co. v. FCC*, 636 F. 2d 454, 462 (D.C. Cir. 1980) "[t]he fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity would be enough to justify a conclusion that there was fraudulent intent."; *see, also, KQED*, at para. 43-45 where an applicant failed to personally sign a document. The Review Board refused to assume that this act represented a conscious course of misrepresentation; *In re Application of Alden Communications*, 3 FCC Rcd. 5047, at para. 5 (1998) use of another's name, with permission, to sign an accurate filing held not intentionally misleading.

application executed on behalf of Norma Sumpter to obtain a T-band license for Allen, Texas; (F) that application executed on behalf of Melissa Sumpter to obtain a T-band license for Allen, Texas; (G) that application executed on behalf of Jennifer Hill to obtain a T-band license for Allen, Texas; (H) that application to modify the license for WPCF910 held in the name of Norma Sumpter; and (I) those client copies of those applications described herein at (E),(F) and (G).

165. Ruth Bearden documents: Testimony at trial is unequivocal as to Ron Brasher's belief that he was acting as the executor of Ruth Bearden's estate in his acceptance of that assignment of the license for station KCG967. Although there was no testimony at trial, nor exhibit presented, which demonstrated the identity of the person who executed the application for assignment on behalf of the late Ruth Bearden, defendants aver that even if Ron Brasher executed a relevant document on behalf of his deceased mother, he did so under the belief that such action was authorized as executor of his mother's estate. Ron Brasher's testimony also supports the fact that he was not sophisticated and was instead ignorant of the Commission's Rules and the obligations as executor to the application process. Although he may have chosen, instead to first assign the license to "the Estate of Ruth Bearden" and then to himself, thus avoiding any appearance of impropriety; the testimony at trial demonstrates that Mr. Brasher simply lacked the legal knowledge that a two-stepped process might be dictated to be in complete conformity with the Commission's processes. Therefore, as a conclusion of law, the assignment might be found to not be in complete conformity with the technical requirements of the Commission's processes in the handling of an estate which includes a radio license, but

there is no evidence that defendants engaged in forgery in the assignment of the station license.[9]

166. The application prepared in Ruth Bearden's name which resulted in a license to operate a T-band facility was borne of Ron Brasher's desire to assist his uncle, Ed Bearden. Ron Brasher was fully forthcoming at deposition and trial in his description of the way that he employed his late mother's name for the express purpose of having an application prepared and sent to PCIA with an intent that the application create a license for the operation of ten mobile units to be employed by Ed Bearden. And although Ron Brasher suggested that his authority to so act might also be found to have arisen out of his authority as executor of his mother's estate, in fact, Ron Brasher's statements attest to his belief that his efforts in causing the application to be prepared were likely outside the standards of conduct for a Commission licensee. Although such conduct is unfortunate and Ron Brasher evidenced regret for those actions, the actions taken do not arise to the level of proof of forgery since Ron Brasher continued to rely on his authority as executor.

167. It is significant that Ron Brasher took affirmative steps to halt the coordination process; informed PCIA to cancel the application coordination process; never constructed or operated the subject facility; never derived or attempted to derive any economic benefit or other advantage from the license; and allowed the license to cancel prior to the publication of the hearing designation order. Accordingly, all steps taken by Ron Brasher evidence a

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[9] The Bureau did not establish the identity of the person who signed on behalf of Ruth Bearden; did not show that Ron Brasher was not acting under authority granted as executor of the subject estate; and did not show that the assignment evidenced any specific intent to deceive the Commission.

consistent desire to prevent the application from being received by the Commission and any license ever being issued; and, upon ultimately realizing that the license was inadvertently granted, to eschew any advantage or benefit from such unintended result. In fact, had PCIA performed as required by Ron Brasher, no license would have been issued in the first instance and this activity would not have been at all relevant to this matter. Accordingly, as a matter of law, Ron Brasher's conduct may be found to be an unfortunate lapse in judgement, but those actions taken by Ron Brasher clearly demonstrate that he went to considerable lengths to prevent any deception of the Commission. On balance, the Court should recognize the limited nature and the passage of time related to this application, including the intervening actions taken by defendants to prevent the filing of the application, and find that Ron Brasher's actions were sufficient to demonstrate a lack of specific intent to deceive the Commission.

168. O.C. Brasher documents: The original application filed by O.C. Brasher for operation of a T-band channel in Allen, Texas was executed by O.C. Brasher and there exists no evidence to the contrary. The reason why this application was not coordinated and did not result in a grant of authority is unknown. The unrebutted testimony of Ron Brasher regarding the replacement application, executed by Ron Brasher in his deceased father's name, is that Ron Brasher believed he was acting under that authority granted to him as executor of O.C. Brasher's estate and in accord with that durable power of attorney granted by O.C. to Ron Brasher in 1992.[10] Ron Brasher testified that he believed that the

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[10] *See, In Re Applications of Rosemor Broadcasting*, 54 FCC 2d 394, para. 50 (1975) where the Court found that persons acting under a belief that their efforts are proper will not be found to possess the specific intent to deceive the Commission.

durable power of attorney did not terminate upon the incident of O.C. Brasher's death and that he was preserving the assets of O.C. Brasher's estate by continuing to forward the application process.[11] It is also significant that the replacement application duplicated the original application in frequency, location, etc. Therefore, the evidence shows clearly that Ron Brasher specifically intended to continue the efforts authorized by O.C. Brasher in his original application and was preserving the asset of the original application, which asset was identified as a portion of the O.C. Brasher estate in later-filed construction information provided to the Commission as early as 1997. Although one may quarrel with Ron Brasher's appreciation of estate law, the effect of a durable power of attorney and rights granted thereunder, and Ron Brasher's execution of the replacement application without indicating then that the application was intended to create a license in the estate of

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[11] *See, Roberts v. Stewart*, 15 S.W. 1108 (Tex. 1891) where an administrator or executor is charged with the duty of using reasonable care for the preservation of the property of the estate; *see, also, Atlantic Insurance v. H. L. Fulfs*, 417 S.W. 2d 302, 305 (Tex. Civ. App. 1967) where the court noted that "pursuant to Section 37 of the Probate Code and Sections 232 and 233 thereof, the personal representative of an estate, immediately upon receiving letters, shall take into possession the personal property, records, books, title papers and other business papers of the estate to later be delivered to the person or persons legally entitled thereto when the administration has been closed. He is required to use ordinary diligence to collect all claims and debts due the estate and to recover possession of the estate to which its owners have any claim or title."; *see, also, Radford v. Coker*, 519 S.W. 2d 934 (Civ. App. 1975) where representatives of estates are bound to exercise a high degree of good faith and fair dealing and preserve to beneficiaries of estate, so far as this can be done without injury to creditors, that part of the estate most beneficial to beneficiaries; *see, also, Lowrance v. Whitfield*, 752 S.W. 2d 129, 135 (Tex. App.-Hous. [1 Dist.] 1988) where the appellants argued that the execution of a mineral lease is an act done for preservation, rather than for settlement of the estate, because it does not relate to the payment of debts or distribution of assets, and that therefore an independent executor cannot execute a mineral lease. The court disagreed and concluded that under the circumstances the independent executor does have the authority to execute an oil and gas or mineral lease during an administration of the estate for the purpose of preserving and protecting the assets of the estate. "To hold otherwise could subject an independent executor to potential liability for nonfeasance in preserving the assets of the estate". *Id.*

O.C. Brasher, the evidence presented by the Bureau does not support a finding of forgery with specific intent to deceive the agency.

169. The later submitted management agreement executed on behalf of O.C. Brasher was intended to demonstrate the terms under which the station would be managed as a portion of the estate. By the time the management agreement was executed on March 29, 1999, Ron Brasher had already submitted information to the Commission in the form of a construction letter, dated December 9, 1997, which indicated that the station was constructed for the estate of O.C. Brasher. Accordingly, Ron Brasher reasonably believed that the Commission was fully aware of the fact that O.C. Brasher was deceased. There is no evidence that the management agreement was prepared or executed with any intent to deceive the Commission. Rather, the management agreement was to serve as a document which illuminated the terms under which the station would be managed, or would have been managed, had O.C. Brasher lived. No reasonable review of the evidence would support any finding that the management agreement was intended to elicit any benefit from or to deceive the Commission. Instead, it was solely intended as a memorialization as the cover letter to that filing fully explained. Accordingly, the evidence shows that no forgery occurred.

170. T-Band Applications of Jim Sumpter, Norma Sumpter, Melissa Sumpter, and Jennifer Hill (collectively "the Sumpters"): Although the Sumpters each stated that either they did not recall having executed these applications or that they believed that they had not executed these applications, there was no evidence presented that proved that the Sumpters did not themselves cause signatures to be affixed to the subject applications. In fact, the only

testimony regarding the matter that eliminates a person from consideration as the signer of the documents was that provided by Ms. Bolsover, the Bureau's handwriting expert, who testified that Ron Brasher did not execute the applications. Despite Ms. Bolsover's having received handwriting samples from Ron and Pat and David and Diane, etc. the handwriting expert could not identify who the signer of the documents might have been. Absent some tangible proof that defendants caused the signatures to be affixed to the applications, the Bureau's burden to demonstrate wrongdoing by defendants is fatally lacking, requiring a leap of imagination that is not consistent with a preponderance of the evidence.

171. Client Copies of T-Band Applications: Expert testimony presented at trial stated that it was likely that the client copies of the applications for Norma, Melissa and Jennifer, were each executed by them. Pat and Ron each testified that they were eye witnesses to the signing of the client copies by each of the three female Sumpters. Ron Brasher included in his testimony that he had noticed that the dates affixed to the client copies were not the same as the original applications, but rather, were consistent with the date that the actual signing took place. Finally, the condition of the copies due to photocopying using a highly inferior machine located in the home of Ron and Pat Brasher further suggests the location where the execution took place, a location that is fully consistent with defendants' testimony. Therefore, all documentary and expert testimony points to the fact that Norma, Melissa and Jennifer executed the client copies.

172. Although the Sumpter females testified that the signatures looked like theirs, none would admit to having signed the client copies. Additionally, Jim Sumpter's testimony regarding his and Norma's whereabouts on the date in question only demonstrated that he might

have been out of town on the following day. Given the evidence and testimony presented, forgery could only be suggested to exist if one were to fully discount the testimony of the Bureau's expert witness, the documentary evidence, Ron and Pat's testimony, and the physical condition of the documents; in favor of the uncertain denials of the Sumpter females. Perhaps the most telling evidence is that which does not exist – there exists no executed client copy with Jim Sumpter's name affixed to it. If, as the Bureau has attempted to suggest, the client copies were simulations created by defendants, why would the defendants have stopped short of simulating Jim Sumpter's signature? The simple answer is, they wouldn't have. Instead, the evidence clearly shows that the Sumpter females signed the client copies and further testimony shows that it is likely that Jim Sumpter was fully aware of these actions.

173. Material Elements: Aside from the sometimes questionable application of Ron Brasher's status as executor of his parents' estates and holder of the durable power of attorney, the Bureau failed to demonstrate any motivation for defendants to have committed forgery.[12] The evidence shows that this matter arose out of the actions taken by a formerly close family. The evidence shows that Norma had applied for licenses in the past, therefore, there is every reason to believe that she would have applied for the T-band license. Both Jennifer and Melissa testified that they had good relationships with Ron and Pat Brasher during the relevant time period. Each testified (although could not support with any

[12] In determining whether specific intent exists, the Bureau's ability to infer that intent must be based upon a showing of motive to deceive the Commission. *See*, *In the Matter of Black Television Workshop of Los Angeles*, 8 FCC Rcd 4192 (1993) and *WMOZ, Inc.* 36 FCC 202, 209 (1964).

document or evidence of any kind) that they believed that they had executed applications to the FCC in the early 1990s. Carolyn Lutz testified that she was not aware of the applications being placed on file in the names of the Sumpters, but in fact did not testify that any of the Sumpters ever denied having supported an application in their name prior to the family's receipt of the Net Wave Petition. The weight of Carolyn Lutz's testimony carries with it a strong bitterness towards Ron Brasher for involving her in this matter. In her deposition she refers to Ron Brasher as a user and manipulator and feels that he deserves to lose in this situation. Lutz states that she is no longer willing to cut Ron any slack, that she immediately assumes the worst of Ron, and is more than happy to tell the court this fact. But where does this distaste for Ron and hope that he fails in this matter come from? Lutz came to work for Metroplex and then left to pursue another job only to return to Metroplex as an employee. Surely one who despises another so much would not return to the employment of that person. The surrounding circumstances make it apparent that her testimony and feelings towards Ron are a direct result of the Net Wave petition and her fear of what repercussions might result from her involvement in the business. The facts clearly show, therefore, that it was family (i.e. Metroplex) business as usual until the Net Wave petition was filed and the multiple sides of the family suffered the schism which resulted in the conflicting testimony.

174. All of the Brashers and Sumpters testified that Metroplex's business was a constant topic at meals, meetings, at Jim's office and at family get-togethers. Pat and Norma talked regularly and went shopping together each Saturday, often accompanied by Jennifer and Melissa. The families went to church together, visited regularly, attended weddings

together, and relied upon one another. Pat looked to hire or employ the services of her family, thereby spreading the benefit of Metroplex's success to the Sumpter, Lutz and Lewis families. All evidence and testimony speaks to a close-knit family that sometimes participated together in the filing of applications to the FCC. Yet, against this uncontroverted backdrop of long family harmony, the Bureau's case requires that it show that the family had, for no reason shown or suggested, decided to no longer cooperate in the filing of the applications for the T-band channels. Further, that this unexplained and undemonstrated rift in the family was such that Ron and Pat Brasher were compelled to forge the signatures of the Sumpters, while revealing their scheme to Norma's sister, Carolyn Lutz, who prepared the list of applicants to be sent to John Black.

175. Also, the Bureau has not shown why Ron or Pat Brasher would seek or make the client copies for reasons other than as defendants testified. If one is forging signatures, why then would one make another copy of the allegedly errant applications, employing a different copy machine, and execute them in a wholly different manner with a different date? Finally, if the forgery occurred, why did the Sumpters receive the mail? Surely, Ron and Pat had to know that PCIA correspondence, FCC correspondence, original licenses, etc. would all be sent to the addresses appearing on the applications. Yet, still unexplained by the Bureau, the mailing addresses on each of the subject applications related to the homes and/or businesses of the Sumpters, allowing each of the Sumpters to open and fully examine the contents of that correspondence. Simply put, the uncontroverted scenario which is fully shown by the evidence and testimony does not suggest that forgery occurred or that defendants attempted to hide from the Sumpters the

existence of the T-band licenses granted in the individual names of the Sumpters.

176. As discussed *supra*, Norma and Jim have held licenses in the past. Norma applied for and was granted two licenses to operate 900 MHz stations and Jim possessed an 800 MHz end user license at one time, for the purpose of receiving service on the GE system[13]. Norma cancelled one of her 900 MHz licenses and the other she knowingly permitted to be operated under her name with the call sign WNZU648. This license was modified by an application prepared by Ron and upon which he listed himself as "preparer." Ron had contacted Norma and explained to her that the site needed to be moved but that he required her participation and consent to file the application. Ron took the appropriate actions to insure Norma understood why it must be moved and that her consent was required. This action is fully inconsistent with the picture suggested by the Bureau, that Ron somehow acted in a rogue fashion without regard to the rights of the other licensees.

177. Further evidence demonstrates that each of the Sumpters ratified the actions taken in filing the T-band applications. Each executed at least one document in support or recognition of their application, each received official correspondence regarding their application, each caused FCC correspondence regarding their license to be forwarded to defendants, and the female Sumpters executed the client copies. The Sumpters executed official notifications

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[13] The evidence states that Jim received service from the GE system during a time when all such customers were required to be individually licensed. *See, In The Matter of Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems*, PR Docket No. 92-79, 7 FCC Rcd. 5558 (1992), (Report and Order) where the Commission discontinued end user licensing. However, before the Commission amended its rules, and at the time Jim was receiving service from the GE system, *47 C.F.R. § 90.655* required end users of conventional or trunked SMR systems to license their associated control points, control stations, and mobile radio stations.

of construction (FCC Forms 800A) and requests for assignment of the licenses.[14] Although Jennifer Hill testified that she threw away the 800A sent to her, that discarded document somehow reappeared in the hands of her father by means that are unexplained and as mysterious as the Sumpters' collective claim that they did not receive license copies, official Commission correspondence, or even solicitation from vendors which might have suggested the existence of each Sumpters' T-band license. The totality of the evidence, thus, shows that the Sumpters participated in each and every phase of the licensing process and that each voluntarily participated in supporting the continued existence of their license by executing supporting documents. The circumstances evince participation, ratification and agency.[15] It does not support a conclusion of forgery.[16]

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[14] Only Jim and Norma Sumpter executed a Form 800A (EB Exhibits 38 and 46), Melissa and Jennifer did not and because so, they both received notice of cancellation of licenses from the FCC.

[15] A signature to an instrument may be attached by (1) the hand of a party thereto, (2) by the hand of another at the request of a party, or (3) by means of the mark of a party when he is unable to write his name, *Pitney v. Pitney*, 202 P. 940 (Cal. App. 1 Dist. 1921); *see, also, Kadota Fig Ass'n of Producers v. Case-Swayne Co. et al.*, 167 P.2d 523, 527 (Cal. App. 3 Dist. 1946) where it was found that a party may adopt his signature written by another person, as valid and binding, by subsequent approval or ratification, even though the signature was originally forged; *see, also, Volandri v. Hlobil*, 339 P.2d 218, 220-221 (Cal. App. 1959) "[o]rdinarily, the law requires that a principal be appraised of all the facts surrounding a transaction before he will be held to have ratified the unauthorized acts of an agent. However, where ignorance of the facts arises from the principal's own failure to investigate and the circumstances are such as to put a reasonable man upon inquiry, he may be held to have ratified despite the lack of full knowledge"; *citing, Hutchinson Co. v. Gould*, 181 P. 651, 653 (1919); *see, also,* Locke, *Ratification of Forged or Unauthorized Signature*, 7 P.O.F. 2d 675, 682 where a principal accepts property as a consequence of an unauthorized act and retains such property after discovering the circumstances without repudiating the act, this conduct indicates an intent to ratify; *see also Hefner v. Vandolah*, 62 Ill. 483 (1872) where it was found that to establish ratification, it is not necessary that there had been any previous agency created; *see, also, Unauthorized or Forged Signature*, 3 Am. Jur. 2d Agency § 192 (1986) which gives a checklist of facts and circumstances tending to establish that the signature of one person forged on an instrument by another was effectively ratified by the

Instead, it demonstrates that the Sumpters, despite their varied and differing forms of denial, participated either directly or by authorized surrogate in obtaining the T-band licenses and decided jointly to deny that participation following their receipt of the Net Wave petition.[17]

Misrepresentation and Candor

178. The issue of whether defendants committed acts of misrepresentation and/or lack of candor must be logically considered between acts taken before and during the investigation. Although the case law demonstrates that egregious acts of

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person whose name was signed. Such facts and circumstances include: ratifier's knowledge, ratifier's failure to repudiate transaction, and ratifier's recognition and approval of similar forgeries by signer.

[16] *See In The Matter of Danville Television Partnership*, 16 FCC Rcd. 9314 (2001) (hereinafter, "*Danville Television Partnership*") where the putative 51% partner, Powley, declared that without her knowledge or consent, another person, Eleazer, forged her name to documents filed at the FCC. She claimed that she did not report this to the Commission at the time of the application's filing because she did not become aware of this forgery until the document surfaced during litigation. Eleazer stated that he obtained Powley's consent telephonically and explains that he had no motive to misrepresent her approval of the filing of the application, because as a partner, he was empowered to submit it under his own signature. The Commission was persuaded by this explanation, and noted that, even if Eleazer incorrectly believed Powley's signature was necessary, at the time of the application's filing, the parties were not then adversarial, and it seemed unlikely that she would have withheld consent that he sign on her behalf.

[17] *See Testimony of Diane Brasher*, Transcript at 1614–1616, where Diane testified as to Jim Sumpter's overbearing nature towards the other members of his family and that Norma, Melissa and Jennifer defer to Jim on many matters to this day; *see, also, Testimony of Jim Sumpter*, Transcript at 1967, where Jim acknowledged that he has exercised some control over his daughters' lives and that his daughters have followed his advice on everything he has instructed them on with regard to this FCC investigation; *id.* at 1953, where Jim stated that he was comfortable with his three family members putting in applications for licenses that would be used in connection with DLB Enterprises in the late eighties/early nineties.

misrepresentation or lack of candor during either phase might result in severe sanctions, including in the most egregious cases, revocation; the case law further demonstrates that misrepresentation and lack of candor during the investigation and hearing phase are given greater weight in balancing the character qualifications of a licensee.[18] This considered, the case law also supports a finding that mere mistake or error, even carelessness, is insufficient to find that misrepresentation or lack of candor exists.[19] Indeed, the relevant law demonstrates fully that a showing of intent to deceive, either by the intentional making of a false statement or intentional omission of material facts, must be shown for

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[18] *See In The Matter of Fox River Broadcasting, Inc.*, 88 FCC 2d 1145 (1981) where the Commission found a party unfit to be a Commission licensee. The facts demonstrated that the party in question misrepresented facts to the Commission and that he lacked candor in his various statements and testimony about prospective employment of two individuals at his proposed station; *see, also, RKO General, Inc.*, 82 FCC 2d 291 (1980) (hereinafter, "*RKO*") where the Commission concluded RKO was not qualified to be a Commission licensee. It was found that RKO demonstrated a general lack of candor in its dealings with the Commission. On numerous occasions RKO withheld information that it knew or should have known to be relevant and material to matters pending before the Commission. At other times RKO made statements to the Commission that RKO knew or should have known would have the tendency to mislead the Commission on relevant or material matters; *Marc Sobel*, where the Commission concluded that Sobel was unfit to be a Commission licensee. Sobel unlawfully transferred control of his 800 MHz stations without Commission authorization and made misrepresentations and lacked candor with the Commission. Sobel's conduct was deemed egregious in that it was "willful, repeated and continued throughout his hearing"; *In Re Applications of Otis L. Hale/Mobilfone Communications*, 95 FCC 2d 668 (1983) (hereinafter, "*Otis Hale*") where the Commission concluded that Otis Hale did not possess the requisite character qualifications to be a Commission licensee. He deliberately and continuously lied to the Commission, he lacked candor, solicited false testimony and tampered with a government witness in an effort to cover up his past misrepresentations.

[19] "The bare existence of a mistake in an application, without any indication that the licensee meant to deceive the Commission, does not elevate such a mistake to the level of an intentional misrepresentation or raise a substantial and material question of fact". *Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979).

misrepresentation or lack of candor to be found.[20] The evidence presented at trial does not support a finding that defendants engaged in either misrepresentation or lack of candor because the evidence does not support a finding that defendants specifically intended to deceive the Commission.

179. Pre Investigation: The central activity upon which the Bureau's case rests is the defendants' participation in the filing of applications in the names of other persons for the purpose of acquiring licenses that would be heavily used by defendants' customers. For misrepresentation to be found to have existed, the Bureau would need to show that this activity was done with a specific intention to deceive the Commission for the purpose of covering up a violation of the agency's rules. No other motivation is suggested by the Bureau. The testimony of the defendants (excepting that regarding the Ruth Bearden T-band application) and John Black do not support a finding of this intention. Rather, the testimony demonstrates that defendants were attempting to find a different, albeit legal, method for acquiring T-band channels in Allen, Texas. That the chosen licensing method might have resulted in the appearance of impropriety is discussed below. However, at the time the applications were filed, defendants believed that they were enjoying a wholly permissible and widely used loophole.

180. That defendants did not intend to do anything more than enjoy this supposed loophole is supported by the evidence. The testimony shows that Ron Brasher consulted John Black

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[20] Unless there is evidence showing deceptive intent, the Commission will not find that misrepresentation or lack of candor has occurred. *RKO General, Inc. v. FCC,* 670 F. 2d 215, (D.C. Cir. 1981), cert denied, 456 U.S. 927 and 457 U.S. 1119 (1982); *see, also, Abacus Broadcasting Corp.*, 8 FCC Rcd. 5110, 5112 (Rev. Bd 1993) No lack of candor where filing was misleading, but made without intent to deceive.

on numerous occasions regarding what licensing method might be employed to gain the channels. Mr. Black testified that it was not uncommon for persons to file in others' names. Ron Brasher testified that he had reviewed the Commission's records and found numerous cases where other licensees had employed this method, even providing at trial the names of some of those other entities. Dawn Daniels testified that PCIA is aware of a number of cases where persons properly manage facilities in which the license is held in another's name. PCIA, in the person of Scott Fennell, also consulted with Ron Brasher in those earlier efforts, to direct Ron Brasher toward a solution for the conundrum of the Commission's rules and the interpretation of those rules by PCIA. Therefore, the activity leading to the filing of the applications indicates that defendants were not attempting to violate the Commission's rules. Rather, defendants chose a path that was illuminated by a respected consultant in John Black; an employee of the frequency coordinator, Scott Fennell; and by defendants' examination of the Commission's licensing data base. All information provided to and garnered by defendants indicated that the chosen licensing method was proper. So, relying on that advice and evidence, defendants proceeded to join others in leaping through the loophole described by these trusted advisors.

181. As further evidence of defendants' lack of intent to deceive the Commission, the Court may examine the face of the applications in question. On each application the Court will find control point information that provides the address and phone number for Metroplex. Ron Brasher testified at trial that this consistent provision of identical control point information on third parties' applications, either as an identical address or telephone number, is what alerted him to what other licensees in the Dallas area were doing. His

simple review of the Commission's data base showed that other entities had acquired licenses employing third party names, but had listed their address and/or telephone number as the control point on the applications and, later, the licenses. Therefore, defendants' replicated this apparently acceptable method of licensing. Taken apart from their replication of other licensees' previous licensing methods, it stretches credulity to contend that defendants simultaneously intended to hide and misrepresent their involvement in the licenses, while simultaneously providing a clear commonality among each of the applications in the form of Metroplex's address and telephone, which information later appeared on the face of each of the licenses as the control point. Additionally, applications in the names of Ron, Pat and David Brasher are obvious in their commonality. Also, the earlier applications prepared by defendants on FCC Forms 574 even list Ron Brasher as the preparer. It is clear, therefore, that the evidence presented by the Bureau does not suggest an intent to deceive the Commission, unless we are to presume that obvious commonality equates to deception.

182. In response to the Net Wave petition, defendants openly admitted that the licenses were held by a number of family members. There was no attempt to conceal this fact. What was not known by defendants at the time prior to receiving the Net Wave petition was that a T-band license had been issued in the name of Ruth Bearden. That grant was wholly unexpected, particularly in view of Ron Brasher's earlier attempt to quash the coordination, his direction to PCIA to cancel all further work, defendants' wilful decision not to construct or operate the facility, and defendants' knowledge that they had never filed a notification of construction of the facility with the Commission. Under reasonably

expected circumstances, defendants believed that the application was either never filed or had been summarily withdrawn by PCIA pursuant to Ron's instruction; or, further, that the license was not granted or had been previously cancelled. What to do with this newly discovered fact, that grant had occurred and that the license lay uncancelled within the Commission's database, became problematic in response to the Net Wave petition. The only obvious and proper course was to determine a way to cause the Commission's database to reflect that the license had cancelled.[21]

183. At this juncture it is should be noted that Net Wave's petition was without procedural foundation and did not require any response from defendants. A petition for an order to show cause is informal in nature in that only the Commission may move for such an order.[22] Although the Commission informally accepts such petitions, the Commission is fully within its discretion to reject without comment such petitions.[23] Accordingly, any response by defendants was wholly voluntary in nature, including defendants' admissions regarding the family connection among the named licensees. The Net Wave petition was filed by a competitor seeking an advantage in the marketplace. At the time the petition

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[21] In fact, the license was cancelled automatically as a matter of law due to non-construction of the facilities. 47 C.F.R. § 90.631(f).

[22] A review of Part 1 of the Commission's rules and Title 47 demonstrates that only the Commission is empowered to commence a revocation proceeding, not an informally petitioning competitor. 47 C.F.R. § 1.91.

[23] 47 C.F.R. §1.41. *See, Humboldt Bay Video Co.*, 56 FCC 2d 68 n. 9 (1975) (hereinafter, "*Humboldt Bay Video*") "[w]ithin its broad discretion in this area, the Commission can refuse to show cause based upon the petition of a third party even if it is determined that a violation of a Commission rule exists."; *citing, West Valley Cablevision, Inc.*, FCC 69-896, 19 FCC 2d 431 (1969); *Ohio Video Services, Inc.*, FCC 70-1315, 26 FCC 2d 809 (1970).

was filed many T-band channels were available for Net Wave's use, *i.e.* Ron Brasher testified that he remembered 108 channels available for his use in constructing the Allen, Texas facility. Accordingly, the Net Wave petition was not about spectrum. It was about causing trouble. It has, no doubt, exceeded the expectations of its drafters.

184. Post Commencement of Investigation: As the court has recognized, the facts and circumstances of this matter are complex and difficult to grasp. As the Bureau sought information via formal inquiries, defendants attempted to respond to each question or request for documents by providing thorough information and documentation. And, as testified by Ron Brasher, defendants and their counsel were not always successful in delivering precisely accurate information to the Bureau within the time period provided for response. When inadvertent errors became apparent, clarifications were provided in the form of further documentation, forthcoming responses within depositions, hundreds of documents presented pursuant to discovery, and candid responses at trial. When only memory served of events which had occurred years before, that memory was plumbed and the quality of response sometimes reflected the quality of recollection at the time.

185. The record shows that defendants' counsel had difficulty appreciating all of the facts of this matter and that, at times, communication between defendants and counsel broke down, resulting in problems in response. For example, within one response the answer given to a Bureau inquiry focused on the wrong Ruth Bearden station, thus providing an inaccurate or incomplete response to the specific question.[24]

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[24] EB Ex. 21 at 25.

186. Further problems arose due to the unsophisticated nature of defendants. As trial testimony showed, defendants did not grasp the relevancy of many documents. For example, the existence of the durable power of attorney was not made known to defendants' counsel until approximately one to two weeks before the hearing.[25] At trial, defendants sometimes had difficulty appreciating the questions asked by Bureau counsel and the Court. However, despite these problems, defendants made a good faith effort to be fully forthcoming with the Court regarding the facts and circumstances of this matter, even when such testimony resulted in personal embarrassment for the defendants.

187. Based on the voluminous documents provided by defendants and the Bureau's showing, what this Court must then find is that defendants did not attempt to deceive or mislead the Commission in the course of the investigation. Problems which arose were the direct result of the complexity of this matter, the memory of the defendants, the unsophisticated nature of the defendants, the quality of recordkeeping, and the nature of the facts which fully demonstrate a complex web of intrafamily relationships, time lines, events of death, handling of estate matters, comings and goings of employees, two persons (brother and father) named O.C., use of nicknames and more – all of which resulted in a highly difficult task of reporting to the Bureau. This difficult situation was made more challenging by the fear and anxiety of the situation which has created a likely permanent rift between the Sumpters and the Brashers, severing the relationship between confidential financial advisor/accountant (the very person upon which a person might depend to assist in the assembly of information and facts) and defendants.

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[25] Tr. at 279.

188. Finally, the Court may note that defendants did not seek discovery from the Bureau. There was no effort to engage in gamesmanship at or before trial. Instead, defendants sought simply to reveal the entire story, in all of its complex details, during the investigation, the discovery phase, and at trial. Rather than challenge the Bureau's request for voluminous amounts of information, defendants only tried to comply in an expeditious manner. Defendants lodged not one single objection to any of the Bureau's discovery requests, despite the fact that those requests created great difficulties in the assembly of documents and information, often causing defendants to have to assemble documents which were over five years old. The arduous and complex task of remembering, finding documents, and assembling the facts from memory has been quite difficult, but it has always been performed in good faith.

189. Based on the foregoing, defendants respectfully request that the Court find as a conclusion of law that the Bureau has not shown that the defendants have engaged in misrepresentation or lack of candor.

Abuse of Process

190. Abuse of the Commission's processes arises from the use of a Commission process to achieve a result that the process was not intended to produce or use of that process to subvert the purpose that the process was intended to achieve.[26] Again, the intent of the

[26] *Broadcast Renewal Applicants*, 3 FCC Rcd. 5179, 5199 n. 2 (1988).