

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

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 system¹³. 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

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

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 apprised 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

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

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

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 uncanceled 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 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

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

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.

²⁵ Tr. at 302.

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).

actor is entirely relevant.²⁷ As shown *supra.*, defendants' intent was to comply with the agency's rules, albeit using what was believed to be a common loophole. However, in any event the claim of abuse is unsupportable in view of the relevant law and procedure which fully demonstrates that had defendants obtained competent counsel for the purpose of preparing their applications to the Commission, defendants would have been (and are) fully eligible to apply for and hold the licenses in question.²⁸

191. As evidence of that eligibility, defendants first point out the grant of the license for WIL990 in Dallas, Texas. That license authorized Ronald Brasher to operate upon five T-band channels, which license was granted on May 28, 1996, immediately preceding the preparation of the applications for Allen, Texas. Yet, the testimony given at trial reveals that some interpretation of the Commission's rules, which interpretation has not been offered by the Bureau or any of the witnesses, precluded the defendants from immediately duplicating that licensing method in Allen. The only explanation provided at trial relates to 47 C.F.R. §90.313 and the supposed obligations on applicants arising out of an unpublished interpretation of that rule that was made effective by the internal policies of PCIA. Further testimony demonstrated that both John Black and PCIA's representative,

²⁷ A conclusion that an entity abused the Commission's processes requires a "specific finding, supported by the record, of abusive intent". *Evansville Skywave, Inc.*, 7 FCC Rcd. 1699, 1702 n. 10 (1992); *see, also, Eunice Wilder*, 4 FCC Rcd. 5310, para. 251 (1989) with regard to required disclosures in the application process, only intentional non-disclosures will support a finding of abuse of process.

²⁸ No abuse of process was found where it was also found that the Bureau presented no evidence or other showing that the licensee was ineligible to hold the license in question. *In the Matter of James A. Kay, Jr.*, WT Docket No. 94-147, FCC 99D-04, 10 FCC Rcd. 2061, para. 205 (released Sept. 10, 1999) (hereinafter, "*James A. Kay, Jr.*").

Scott Fennell, assisted in trying to explain that interpretation to Ron Brasher and the possible method for complying with that rule section via the use of managed facilities.

192. To assess what results the combined efforts of the Brashers, Black and Fennell, were attempting to achieve, one looks first to the subject rule. The rule reads in pertinent part:

§90.313 Frequency loading criteria

(a) Except as provided for in paragraph (b) of this section, the maximum channel loading on frequencies in the 470-512 MHz band is as follows:

(2) 90 units for systems eligible in the Industrial/Business Pool (see §90.35(a))

(c) ...A licensee will be required to show that an assigned frequency pair is at full capacity before it may be assigned a second or additional frequency pair. Channel capacity may be reached either by the requirements of a single licensee or by several users sharing a channel.

193. Taken together, the subsections of Section 90.313 require that a licensee show that a channel is fully loaded prior to requesting additional channels. Testimony at trial is clear that the concrete companies which would use the Allen, Texas channels immediately placed up to 700 mobile units on the Allen, Texas system. Stated another way, the demand, *i.e.* hold orders, for use of the Allen, Texas system justified the immediate grant of eight channels or, if one will, the grant of the channels licensed to Norma, Jim, Melissa, Jennifer, O.C., Ron, Carolyn, and David. With further loading of an additional handful of mobile units, a ninth channel would be justified under the rules.

194. What this demonstrates is that defendants never needed to seek the assistance of third parties. Instead, defendants were fully eligible to apply for and receive a license to operate

on each of the channels in their own names, or in Metroplex's name, in the first instance. All defendants needed to do was to include with the application evidence of the hold orders of the concrete companies to demonstrate loading and defendants' application for eight channels would have been fully eligible for grant. The, albeit somewhat absurd, alternative would have been to file an initial application for one channel, followed by seven successive applications for modification to add each additional channel, each application being immediately granted to reflect the loading that existed prior to the time when the first application was filed. If construction was an issue (and there is no evidence that it was) defendants could have constructed all eight channels, providing power to each one on successive days (or hours) that each application to modify was granted by the Commission. In either event, defendants would have been fully eligible to apply for and be granted, under a single call sign, at least eight channels and, by now, more.

195. The case law clearly demonstrates that abuse of the Commission's processes will not hold when the actions taken by party do not violate the intent of the Commission's rules and which result in the grant of a benefit for which the entity would have otherwise been fully eligible.²⁹ The clear intent of the subject rule is to prevent spectrum warehousing and to assure that the T-band channels are constructed, made operational, and are fully used to provide communications service to the public. The testimony and associated evidence is entirely clear that the subject channels were acquired to serve the public, were used to serve the public, and have been employed at loading levels which are fully consistent with the criteria set forth in Section 90.313. The Bureau does not allege that defendants

²⁹ *Id.*

engaged in spectrum warehousing or otherwise obtained the channels for any nefarious reasons which are inconsistent with the intent of the Commission in the creation of the rule. That claim is conspicuously missing in the Hearing Designation Order. What the testimony and evidence fully show is that defendants employed the channels in the exact manner contemplated by the Commission. Accordingly, this court should find as a matter of law that defendants did not intend to nor engaged in abuse of the Commission's processes.

Real Party In Interest

196. Perhaps the most difficult issue to resolve in this matter is the issue of the real party in interest to those T-band licenses which are the subject of this matter.³⁰ The reason this issue presents difficulty is due to the facts concerning the use of the licenses, the eligibility of the applicants/licensees, and the defendants' intent.³¹ The Commission's concern with identifying the real party in interest to a license is clearly to provide to the agency an opportunity to review the qualifications of its applicants and licensees to determine

³⁰ The test for determining whether an individual is a real-party-in-interest is whether that individual "has the ownership interest or is or will be in the position to actually or potentially control the operation of the station." *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 427 (Rev. Bd. 1983) (hereinafter, ("*High Sierra*"); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd 1974).

³¹ The intermingled web of family relationships in this case creates the difficulty in analyzing the real party in interest issue. "A party seeking a real party in interest issue where family members are involved bears a heavy burden, because the Commission is aware that even independent family relationships may have attributes, such as financial and business ties, which in non-family situations would be persuasive indicia of common ownership or control or real party status." *In The Matter of K.O. Communications, Inc.*, 13 FCC Rcd 12765, para. 20 (1998); citing *Canon Point Broadcasting Co.*, 93 FCC 2d 643, 646 (1983); see, also, *KTRB Broadcasting Co., Inc.*, 46 FCC 2d 605 (1974).

eligibility and suitability.³² However, even this general consideration is fraught with legal and factual problems when one introduces the issue of managed facilities and the issue of when does a management agreement imbue the manager with such indicia of ownership that the manager may be found to be the real party in interest. To separate this issue from the issue of “control” the matter must necessarily focus more on the issue of ownership of the license. Accordingly, the question becomes who owned those property rights, however defined, in the subject applications and licenses.

197. Taken in the objective, each of the Sumpters was fully qualified to hold an FCC license. All were of majority. All were citizens. None were found to have committed any felony or other disqualifying act. So, taken in the objective, each of the Sumpters were fully qualified to hold a Commission license and the Commission was provided an opportunity to pass on the qualifications of each when the T-band applications were submitted.
198. Similarly, each of the defendants were qualified to hold a Commission license and each had been found qualified in the processing of grants of applications in each of the defendants’ names. Therefore, again the Commission was provided an opportunity to review and pass on the eligibility and suitability of each of the defendants and did not find any of the defendants ineligible.
199. Based solely on providing the Commission the opportunity to review and pass on the eligibility of each licensee, the evidence demonstrates that the agency was provided that

³² *Arnold L. Chase*, 5 FCC Rcd. 1642, 1643 (1990) “[i]t is an abuse of process to specify a surrogate to apply for a station so as to deny the Commission and the public the opportunity to review and pass on the qualifications of that party.”; *Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd 12020, 12060 (ALJ 1999).

opportunity. So, in the objective, the intent of the real party in interest rules and policies has been served by defendants.

200. One may then examine the intent of the parties in obtaining the licenses. Those licenses obtained by parties to operate on the defendants' 900 MHz system are not relevant to this issue, since each such subject license was an "end user" license and the testimony shows that each such license was intended to authorize the use of radios in the individual licensees' vehicles. Ergo, the customer/licensee was, in fact, the real party in interest to those facilities installed within their own (or their respective families') vehicles. That the record demonstrates that defendants obtained no economic or competitive benefit from the issuance of these licenses further supports the conclusion that no real party in interest issue might attach to the grant of those licenses.
201. The defendants' intent in obtaining the T-band licenses in Allen, Texas is fully known. The evidence also shows that defendants were unaware of any legal bar to their obtaining licenses in the manner chosen. Therefore, if one focuses solely on the intent of defendants as a sidebar to the earlier treated issue regarding whether an abuse of process occurred, in support of a violation of the real party in interest rules, again the allegation is without support.
202. If one focuses on the issue in view of the implications that defendants engaged in either a misrepresentation or lacked candor by filing in the names of family members, then one necessarily backs into the issue of intent. Defendants did not attempt to deceive the Commission or hide their involvement in the facilities. The control point information listing Metroplex's address and telephone number on each application and license belies

that claim. Therefore, there is no credible evidence that defendants were doing anything other than taking advantage of what they were led to believe was an acceptable loophole. Accordingly, the blurring of misrepresentation, lack of candor and real party in interest concepts will not produce a foundation for finding that defendants acted inappropriately. Further, the licensing method was fully consistent with tax advice given by Jim Sumpter to segregate such assets into the names of individuals.

203. The issue of real party in interest, therefore, becomes one of who the intended owner of the licenses was to be and who ultimately controlled the fate of that property.³³ The facts present a clear picture that defendants believed that the licensees maintained that control.

204. The most illuminating evidence as to the defendants' states of mind is as follows. The testimony at trial demonstrates that defendants were concerned about whether Carolyn Lutz should hold a license because she might cause the channel to be no longer available for serving Metroplex's customers. Additionally, the testimony demonstrates that upon request by Norma Sumpter, defendants shut down the T-band channels licensed to Norma and Melissa Sumpter. This action occurred prior to the filing of the Net Wave petition. The facts also make it clear that Norma was in absolute control of the 900 MHz licenses that they were applied for and granted in her name. For instance, Norma filed for cancellation of the first 900 MHz license granted to her. With regard to the second 900

³³ *Id.* at 1648 n. 5 The phrase real party in interest is used in connection with pending applications, while de facto control is used in connection with a licensed station. In either case, the pertinent concern is whether someone other than the named applicant or licensee is in control; *High Sierra* at 427; see, also, *In re Applications of Brian L. O'Neill*, 6 FCC Rcd 2572, para. 24 (1991) (hereinafter, "*Brian L. O'Neill*") "[a] real party in interest inquiry is relevant only to an undisclosed interest in an application, not a license."

MHz license, it is undisputed that Ron informed her of the need to move the antenna site and that her consent was required. Norma acknowledged this exchange with Ron and admitted providing her consent to the modification. Based on these undisputed facts, it is clear that defendants believed that the ultimate control and ownership of the licenses and the rights represented thereby were held exclusively by the licensees. Or, stated another way, defendants believed that the real party in interest to each of the licenses was the licensee or its representative, *i.e.* Norma for Melissa or Ron for O.C. Any other conclusion is simply inconsistent with the testimony provided at trial. Any contrary *post hoc* interpretation supplied by the Bureau is based on its interpretation of laws and cases of which defendants were unaware.

Unauthorized Transfer of Control

205. The case law in this area demonstrates that the issue of whether a license has been assigned without Commission authority will be determined on a case-by-case basis,³⁴ particularly when the subject stations were operated by some combination between licensee and the party to whom control is deemed transferred.³⁵ In the Hearing

³⁴ Whether transfer of control has occurred is a matter of interpretation of unique facts regarding a specific license, not a codified formula. Ergo, those facts are relevant to individual cases and the facts presented therein; *Fox Television Stations*, at para. 154 “[d]etermining de facto control is more complex for it involves an issue of fact which must be resolved by the special circumstances presented. Case by case rulings are therefore required.”; *Storer Communications, Inc.*, 101 FCC 2d 434 (1985).

³⁵ Stations are often financed, serviced, supplied and operated by contractors, managers, cooperative associations, joint venturers, manufacturers and service companies, on behalf of licensees.

Designation Order, the Bureau refers to an old case, *Intermountain*,³⁶ in which the decision set forth indicia of control of a common carrier station. The six elements cited in *Intermountain* are instructive in nature and not intended to create a six-prong test.

Rather, the elements are those to which that court looked to determine whether control of a license had passed.

206. Defendants do not claim that they consulted *Intermountain* prior to engaging in their dealings with the Sumpters or Ms. Lutz. In fact, the record evidence shows that defendants were ignorant of many areas of the law related to third party licensees. Instead, defendants employed a different kind of test for selecting third parties that might serve as licensees of the Allen, Texas channels to be employed as a part of Metroplex's system. Testimony shows that the first test was whether the person was a member of the family. The reason for this criterion is obvious. Ron and Pat Brasher cared deeply about family and chose to extend the benefits of their radio systems to family.
207. Additionally, those family members who participated in the licensing of the Allen facilities had knowledge of Metroplex's business. Jim Sumpter obviously had intimate knowledge of Metroplex's business and, in fact, created the accounting method that guided Pat in commencing and continuing the operations. Norma went shopping with Pat each Saturday and they discussed Metroplex business with great regularity. Norma also participated in the accounting function in her role as Jim's assistant, including writing checks for FCC filing fees on Jim's business account. O.C. Brasher lived with Ron and

³⁶ *Applications of Microwave Transfers to Teleprompter Approved with Warning*, 12 F.C.C. 2d 559 (1963), (Public Notice), (*i.e.* *Intermountain Microwave Standard*).

Pat and was also fully aware of the efforts of the business. Jennifer was studying to become a CPA and worked on Metroplex's accounts in Jim's office – again gaining knowledge of Metroplex's operation. And Melissa was, like the others, around for those dinnertime and other time discussions about what Metroplex was up to and where it might go. Carolyn Lutz actually worked for Metroplex and assisted in the preparation of the applications to the FCC. So, in the instant case, family equaled knowledge of what Metroplex was, what it was attempting to accomplish, how the licenses might be used, and the process in which one engages in obtaining a license. Each of the licensees also had some appreciation of the potential value of a license. The sale price and associated profit obtained by defendants when the 800 MHz system was sold was no secret within the family. Finally, each of the licensees regularly visited (or worked at) Metroplex, saw and operated an installed mobile unit that was served by the Metroplex system, and had a general idea of what a repeater did. So, the licensees' knowledge was not just theoretical or financial. It was tangible, as well.

208. For Ron and Pat, family meant knowledge; and it also meant trust. The testimony about Ron and Pat's discussions regarding whether Carolyn Lutz should be a licensee centers on the issue of trust, *i.e.* would Carolyn's personal situation create a future, adverse impact on the business or, in sum, could they trust her. It is obvious that defendants trusted the Sumpters.

209. The financial aspects of the relationship were secondary but still of great importance. Defendants did not expect or receive any financial assistance from the licensees, excepting those few occasions when a licensee bore its own FCC filing fees. The subject channels

were being placed within the whole of the Metroplex system and it was understood that the channels would be used primarily to provide service to Metroplex customers and, secondarily, to provide service to mobile units mounted in the licensees' cars if they so desired. However, even a cursory review of the ways that revenue and fees passed through the family shows that what was good for Metroplex was good for all of the licensees. When Metroplex made money, it provided a salary to Carolyn Lutz, money to run the home O.C. lived in, and greater demand for accounting services from Jim. In other words, many hands washed each other for the combined and greater good of the family.

210. In light of the testimony provided by each witness, attesting to the close relationship of each of the family members and the way that each relied, either directly or indirectly, on the success or failure of Metroplex, the picture which becomes increasingly clear is that Metroplex was a family owned and operated business. In corporate parlance, Pat served as CEO. Jim was the Chief Financial Officer. Ron was Senior Vice President. Norma was assistant to the CFO, with Jennifer and Melissa sometimes serving in the family accounting department. Mr. Lewis was Vice President of Public Safety Accounts. David served as Chief Operations Officer. Diane was Corporate Secretary and Vice President of Finance. Carolyn Lutz was Assistant to the Vice President of Finance. And O.C. was of counsel. The licensees each served roles in the greater entity, the family. As testified, Metroplex did not have directors. This is consistent not with the operation of a typical, incorporated business, but with a family or joint venture.

211. Defendants aver that during all times relevant *de facto* control of the subject licenses was

held by the family and that such control never transferred, until such time as this matter fractured involuntarily the family unit. No other logical interpretation exists based on the totality of the evidence. Insofar as the primary operational concern used by the members of the family was Metroplex, one could also hold that Metroplex was always in control of the operations of the stations and that control was reflected on the face of each license. Yet, it was Ron and Pat that bought the repeaters and paid the site rentals. Metroplex paid rent to Ron and Pat. Yet again, both Metroplex and the elder Brashers went to Jim Sumpter for comprehensive financial advice and services, and those accounts served as the cornerstone of Jim Sumpter's accounting business for years. Again, the intertwining of family and business relations is so dense in practice that for one to try to define a single person or entity as the singular agent of operations, finance, installation, site rental, financial decision making, employment, and collective risk of operation is an impossible task. The facts are clear. This family owned the licenses. This family ran the business. This family risked the economic vagaries of the market. This family paid the bills and one another. And this family operated as a cohesive, well run organization of cooperating individuals until the Net Wave petition was served on each one. The defendants and the Sumpters did not cause a transfer of control, unauthorized or otherwise. An involuntary transfer of control occurred as a result of the fear attendant to the Net Wave petition. And that transfer of control did not affect the majority share of the family, but rather caused some of the "shareholders" to tender their interest to the other members.

212. To further illustrate that the licenses and stations and the business as a whole was a family enterprise or joint venture, one need only apply the indicia of control articulated in

Intermountain.

213. (1) Does the licensee have unfettered use of all facilities and equipment? Certainly, Ron and Pat did in their individual capacity as owners of the repeater equipment. Additionally, Metroplex and its employees could enter and use those facilities, including Mr. Lewis and Carolyn Lutz. Therefore, at least six of the family members fulfilled this test. And five held licenses in their own names at one time or another.
214. (2) Who controls daily operations? Pat works part time at Metroplex, whereas David is there every day, as was Carolyn Lutz. Testimony shows that Ron is down to about two days per week following retirement. Decisions about which bills to pay, when and how much to pay in taxes, was a joint decision of Jim Sumpter and Pat. Jim Sumpter advised Ron and Pat on the purchase of repeater equipment and oversaw all of the accounts. Other operational decisions were joint decisions of the family members in informal gatherings.
215. (3) Who determines policy decisions, including preparing and filing applications with the Commission? Although testimony shows that Ron did the yeoman's share of the licensing task, testimony further shows that Carolyn assisted in the effort, Pat and Carolyn wrote the filing fee checks, Norma participated in a number of licenses, Jim participated exclusively in financial transactions, including sale of licenses, and the remainder of the task was outsourced to John Black. Other policy decisions were the results of family get togethers where different combinations of family members discussed what steps to take next in any given area.
216. (4) Who is in charge of employment, supervision, and dismissal of personnel? Testimony

shows that such decisions were a joint consideration by Pat and Jim, with Pat having the final say. However, the record shows that no family member was ever discharged – thus, the family was unable to “fire” itself, a status equal to ownership.

217. (5) Who is in charge of payment of financial obligations, including expenses arising out of operations? Initial payment for equipment came from Ron and Pat’s private account. Metroplex paid rents to Ron and Pat out of the company revenue. Payments for FCC filing fees came from both corporate and personal accounts of a number of the family members.
218. (6) Who receives monies and profits from the operations of the facilities? Each family member received money, either directly or indirectly, from the operations of the facilities. Such monies were in the form of wages, salaries, rents, benefits, radio equipment, radio service, and the value of accounting services to an increasingly profitable business.
219. The success or failure of the family business, including the use of the subject licenses, had a direct impact on the economic livelihood of the entire family and each of its members. Defendants recognize that Ron and Pat own the repeater equipment and the shares of stock in Metroplex. But it would be overstatement to say that together, Ron and Pat, made all of the operational and financial decisions regarding the use of the licenses or were the only beneficiaries of operation. Were that true, Norma could not have caused the T-band channels licensed to her and Melissa to be turned off based on no more than a telephone call to Carolyn. Certainly, terminating that service was not in the best interests of Ron or Pat, leaving sunk investment in repeater equipment stranded.
220. Insofar as defendants’ method of licensing the facilities for the purpose of conforming the

Commission's records to reflect this common control is necessary, defendants are fully willing to cause a formal assignment of the subject licenses to DLB Enterprises, Inc. Applications are pending before the Bureau to assist in this process. And, given the disastrous effects of the Net Wave petition and the attendant egregious harm to family cooperation, grant of such assignments are wholly appropriate. This family does not operate as it once did. Norma and Pat do not go shopping every week as they once did. Carolyn Lutz gives Ron a wide berth following her resignation from Metroplex. And Jennifer and Melissa have been instructed by counsel to avoid their aunt and uncle.

221. So, what was once a cohesive family unit, closely working together and living together, is now fractured and the licensing of the facilities should conform to that personal tragedy. The Sumpters have filed applications indicating their desire to have the licenses assigned from their names, and the Commission should grant those assignments. Because it is those applications that reflect the present status of control of the stations, following the personal maelstrom visited upon the family by the Net Wave petition and this proceeding.

Appropriate Remedies

222. The Hearing Designation Order suggests the issuance of a forfeiture or revocation or a finding that defendants lack the character qualifications to hold a Commission license. Simply stated, the Bureau is asking for that which is sometimes referred to as the "death penalty."³⁷ This severe form of punishment is rare in the history of communications law.

³⁷ See, *In The Matter of Petition for Declaratory Ruling Concerning the Requirement for Good Faith Negotiations Among Economic Area Licensees and Incumbent Licensees in the Upper 200 Channels of the 800 MHz Bands*, 16 FCC Rcd. 4882, para. 5 (2001), (Memorandum

Case law directs that the court should not lightly consider such a final and extreme measure unless the facts overwhelmingly support such a decision.³⁸ It is wholly clear that the un-controverted facts within this matter do not support the disqualification of the defendants.³⁹

223. The Court's decision to not disqualify defendants would be consistent with recent case law. In the summary decision issued in *In re Family Broadcasting, Inc.*,⁴⁰ that court found that the licensee had admitted to engaging in dozens of misrepresentations, fraudulent statements, abuse of the Commission's processes, etc., including failures to respond to Commission inquiries and to answer truthfully multiple requests for information; which finding resulted in a revocation of license and a disqualifying of the licensee. But what is of further significance is that the licensee was given a second

Opinion and Order) where the Commission refers to reply comments of an interested party stating "that license revocation is the 'Death Penalty' of the industry and should not be considered or undertaken lightly".

³⁸ See, *FCC v. WOKO*, 329 U.S. 223 (1946) where the Communications Act does not require the imposition of the ultimate sanction of revocation in every case of a willful violation of a rule; see, also, *Tulsa Cable Television*, 68 FCC 2d 869, 877 (1978) and *Humboldt Bay Video*, where it was found that Congress left to the Commission the discretion in each particular case to decide appropriate sanctions, weighing the nature of the violations and surrounding circumstances to determine whether the ultimate sanction of revocation should be invoked.

³⁹ Even when the Commission found that Qwest Communications International, Inc. engaged in hundreds of instances of fraud upon consumers and unlawful acts of slamming, the Commission proposed a forfeiture and did not assign a character qualification issue to the proceeding. *FCC Proposes \$2 Million Fine For Long Distance Phone Provider Qwest Communications For Slamming*, News Release (released October 19, 1999).

⁴⁰ See *Family Broadcasting II*.

chance.⁴¹ This matter was the second enforcement action taken against the licensee and that licensee had broken specific promises given in the first enforcement matter to the Commission to act in accord with its rules.⁴² *Family Broadcasting* is also significant in that the Court held that “the impact of the violations were not sufficiently catastrophic in their consequences to warrant a forfeiture.”⁴³ *Id* at para. 48. In this matter, the Bureau has not shown that any adverse consequences arose out of any action taken by defendants, except those adverse effects on defendants themselves.

224. Acting *pro se*, defendants engaged in a series of acts which were designed to obtain that spectrum necessary to operate their growing business to provide radio services to the public. Defendants relied on the questionable advice provided by a consultant and PCIA. Defendants then relied on their close family relations to file applications in the names of others in a manner which they believed was consistent with the Commission’s rules and policies and in accord with the accounting system devised by Jim Sumpter. Defendants

⁴¹ Another recent instance in which the Commission has given a second chance occurred where the FCC proposed a fine of \$140,000.00 against Peninsula Communications, Inc. The Commission found that Peninsula apparently failed to comply with an order to cease translator operations in various communities in Alaska. By failing to cease operations, Peninsula violated statutory requirements that transmissions of radio energy can lawfully only be performed with a FCC license. The Commission found that these violations were intentional, which caused the Commission to adjust the penalty by merely increasing the proposed fine. *Federal Communications Commission Proposes \$140,000.00 Fine Against Peninsula Communications, Inc. for Failure to cease Translator Operations*, News Release, August 29, 2001, Action by the Commission, August 23, 2001, by Notice of Apparent Liability for Forfeiture and Order (FCC 01-242), Chairman Powell, Commissioners Tristani, Abernathy, Copps and Martin, File No. EB-01-IH-0403.

⁴² *Family Broadcasting II*, at para. 44.

⁴³ *Id.* at para. 48; citing, *Oil Shale Broadcasting Co. (KWSR)*, 68 FCC 2d 517, 528-529 (1978).

relied on Ron's status as executor of O.C. Brasher's estate and as holder of that durable power of attorney in forwarding a replacement application in O.C.'s name. And although the record is clear that Ron also had prepared an application in the name of his late mother for the purpose of assisting another member of the family, the record also shows that Ron took affirmative steps to quash that application to assure that it never reached the Commission. Although this one incident demonstrates a woeful lack of judgement, the intervening effort to provide a remedy prior to the causing of any effect on the Commission's processes demonstrates an, albeit belated, fidelity to the Commission's rules.

225. As shown above, defendants' actions and the documentary record do not support a finding of misrepresentation or lack of candor. To the contrary, each of the subject licenses clearly showed Metroplex as the control point; there was no effort to conceal the Brasher family name on the applications; Ron Brasher was listed as preparer on earlier applications; and most of the checks for filing and coordination fees came from the Brasher account.⁴⁴ Nor have the defendants ever denied the family connection among the licenses. If the court finds that the actions taken are not in conformity with the Commission's rules, then that lack of conformity was unknown to defendants at the time

⁴⁴ See, *James A. Kay, Jr.*, at para. 205 where it was found that the Bureau offered no evidence showing that Kay in any way acted to conceal his involvement in the applications. Much like the facts regarding Ron Brasher and the license applications in question, in many instances Kay's name and telephone number was provided in the applications as the contact person and the one who prepared the application.

the actions were taken. Instead, the testimony demonstrates that defendants were unaware that violations of Commission rules were possible by their actions.

226. The allegation of forgery is simply unfounded and unproven. Nor has the Bureau shown any motivation for such action. The record clearly shows a close, cooperative family which together participated in the licensing and operation of radio facilities. There was no need to engage in forgery. And if applications were improperly signed by third parties, the identity of the signing party has not been established to be the defendants. In fact, the only expert testimony presented is that Ron was not the signer of the Sumpter T-band applications. Instead, the record is rife with evidence of ratification of each application by and through the licensees' independent acts involving the receipt of official correspondence, forwarding of mail, execution of notifications of construction, supportive letters, and participation in applications for assignment. Despite the testimony of ignorance or lack of memory by some of the licensees, which must be viewed in light of each Sumpters' fear of punishment, the expert witness testified that it is likely that Norma, Melissa and Jennifer signed their "client copies." The record thus points to each Sumpter's participation in the licensing of their subject stations and, by obvious inference, Jim's participation and knowledge since Jim was the recognized leader of the Sumpter branch of the family.

227. The allegation of abuse of the Commission's processes also lacks the necessary foundation in fact and law. As shown above, defendants were fully eligible in their own names to

obtain and hold each of the subject licenses.⁴⁵ Acting *pro se*, the defendants simply didn't know how to accomplish this feat. And out of that ignorance sprang the series of events which have left this family in tatters.

228. Defendants aver that no unauthorized transfer of control of the subject licenses occurred.⁴⁶ In view of the facts, defendants urge the Court to find that the family was and is in control of the facilities through a series of financial, contractual, and operational interworkings that were designed by Jim Sumpter and executed by the defendants.⁴⁷ Grant of those applications for assignment of some of the licenses may clarify, in a wholly administrative

⁴⁵ See, *supra*, paragraphs 193-195, regarding defendants' eligibility to hold the licenses in question.

⁴⁶A determination of whether a transfer of *de facto* control has occurred requires that the Commission consider the totality of the circumstances to ascertain where actual control resides. *Brian L. O'Neill*, at para. 25; See, e.g., *Stereo Broadcasters, Inc.*, 55 FCC 2d 819 (1975); *George E. Cameron Jr. Communications*, 91 FCC 2d 870 (Rev. Bd. 1982); and *Blue Ribbon Broadcasting, Inc.*, 90 FCC 2d 1023 (Rev. Bd. 1982) (hereinafter, "*Blue Ribbon Broadcasting*").

⁴⁷ Defendants respectfully note that a finding of unauthorized transfer of control is usually the basis for forfeiture, not revocation. See e.g., *In re Citicasters Co.*, DA 01-823 (released April 4, 2001); *Brian L. O'Neill; Salem Broadcasting, Inc.*, 6 FCC Rcd 4172, 4173 (1991); *In Re Applications of Roy M. Speer*, 11 FCC Rcd 6905 (1991); *First Broadcasting Corp.*, 3 FCC Rcd. 2758 (1988); *In The Matter of Liability of Cate Communications*, 60 RR 2d 1386, (1986); *Ms. Sally Hoskins*, 13 FCC Rcd 25,317 (1998); see, also, *Danville Television Partnership* where the Commission concluded that Danville willfully and repeatedly engaged in an unauthorized transfer of control in violation of 47 U.S.C. § 310(d) of the Communications Act of 1934. The Commission determined that the appropriate sanction for this violation was a monetary forfeiture; *In The Matters Of NORCOM Communications Corp.*, 15 FCC Rcd. 1826, para. 28 (1999) (Summary Decision of Admin. L. J., John Frysiak) "[h]owever, an unauthorized transfer of control, standing alone, is not a sufficiently egregious violation, under FCC precedent, to implicate disqualification of the entities involved."; *In Re Applications of Deer Lodge Broadcasting, Inc.*, 8 FCC 2d 1066, para. 66 (1981) where it was found that Commission precedents did not dictate that Deer Lodge must lose its license for the unauthorized transfer of control. The cases relied upon by the Commission for denial of licenses were found to be typical of a long line of cases where unauthorized transfers of control were accompanied by deliberate attempts to conceal the illegal transfer by misrepresentation and other deceptive activities.

manner, the identity of the entity which controls the licenses today, by consolidating the licenses under a different, still cooperative unit of the family. But the facts demonstrate that the family, as a single, formerly cohesive unit, was the entity which always controlled the licenses in the past.

229. The death penalty and revocation are punishments reserved for the most egregious violations of law.⁴⁸ Such punishment is exacted only when clear evidence demonstrates that a person cannot be trusted to hold a Commission license because that person has committed repeated and egregious acts of fraud, misrepresentation, felonious acts, and a consistent disregard for the authority of the Commission and the importance of adhering to the rules promulgated by the agency.⁴⁹ The facts in this case do not support a finding of such behavior and such punishment would be inappropriate.⁵⁰
230. Further, the use of the death penalty is to be reflective of the conduct which the court believes is most likely to occur in the future.⁵¹ In this case, all questionable acts engaged in by defendants are many years old during a time when defendants acted *pro se*. Since

⁴⁸ The agency has held that when parties make their actions known to the Commission and no culpable non-disclosure or concealment appear on the record, then the severe sanction of revocation of a license is not warranted. *Blue Ribbon Broadcasting*, at para. 9. *Compare, Marc Sobel*, where Sobel's conduct was deemed egregious in that it was "willful, repeated and continued throughout the hearing"; *see, also, IBD Communications Group*, 10 FCC Rcd. 1110, n. 42 (1994) "[i]n general unauthorized transfers of control lead the Commission to consider license revocation only when the violation is concealed through misrepresentation or other deception."

⁴⁹ *See, Fox River Broadcasting, RKO, Marc Sobel, and Otis Hale.*

⁵⁰ *See, In re Weigel Broadcasting Co.*, 2 FCC Rcd. 1206 (1987) "The absence of any affirmative evidence of an intent to deceive forecloses the need for a license revocation hearing."

⁵¹ *See, Character Policy I, Marc Sobel.*

that time, defendants have retained communications counsel and have come to understand that future regulatory matters should and must be reviewed and directed by that counsel to assure fidelity to the Commission's rules and policies. Now in retirement, Ron Brasher, appreciates that despite his status as executor of an estate or holder of a durable power of attorney, procedural rules regarding the handling of estate matters before the Commission are subject to not only his impression of probate law, but also subject to the codified duties to comply fully with the dictates of Commission rules and decisions.⁵²

231. During the pendency of the investigation and the subsequent hearing, defendants were forthright in their participation and cooperation. No requested documents were withheld. All questions were answered, even when the questions were personal or the answers embarrassing. Sensitive financial information was freely provided. And no objection was lodged to any Bureau request.⁵³ Instead, the investigation included a peering into the good, but sometimes muddled, and the bad, but formerly cooperative, intra-family relationships among the parties and the witnesses. Significantly, the Court may note that excepting the report of the expert witness and the few pages of John Black's personal

⁵² Compare, *In the Matter of Chameleon Radio Corporation*, FCC 97D-11, 12 FCC Rcd 19348, para. 38 (1997) where the Commission concluded that Chameleon was unfit to be a Commission licensee because the Commission found that there was nothing to indicate that Chameleon either understands or can be expected to meet the burden of licensees to be forthcoming in their dealings with the Commission and to comply with its rules and policies.

⁵³ See, *In The Matter of Application of Nomar Vizcarrondo*, 65 RR 2d 1712, 4 FCC Rcd. 1432 (1989) where the amateur radio station licenses of several persons were revoked for various violations of the rules, finding that the willful nature of those violations made revocation the proper sanction, and that no mitigating circumstances existed. However, three of the licensees were found to have been cooperative in the Commission's investigation and this cooperation was a mitigating factor warranting a finding that those cooperative licensees would not be permanently disqualified.

correspondence, the hundreds of pages of exhibits employed by the Bureau were all supplied by the defendants.⁵⁴

232. What is abundantly clear is that the Net Wave petition ruined this family. The Sumpters each testified to their individual fears about jail, fines, loss of professional licenses, and a host of other imagined outcomes to their personal involvement in this matter. The Sumpters' shared fears were borne of the irresponsibly strident language contained in the Net Wave petition which employed invective regarding the family's efforts saying that the licensees had been "false and misleading" and that the family's action "constitutes a fraud," is "unlawful," is an "illegal paper licensing game" and a "licensing scam," or a "crude frequency grab." Further, Net Wave said the Sumpters were involved in a "blatantly illegal plan ...all in flagrant contempt of the public interest." The purple prose contained in the Net Wave petition sent a shock wave through this family, the effects of which are still being felt today.

233. A trusted accountant/brother in law, withdrew services. A sister resigned her position at Metroplex. Nieces were directed to file unflattering affidavits with the Bureau, designed to protect the Sumpters at the expense of their aunt and uncle's reputation and livelihood. Counsel directed the Sumpters to cease their formerly close association with the Brashers, and the schism continues to effect both holidays and the simple pleasant ritual of two sisters' going shopping together on Saturdays. Trust has been replaced with distrust and

⁵⁴ Conspicuously missing was any document supplied by the Sumpters, despite one's reasonable expectation that an accounting firm would maintain records of such claimed occurrences as, say, the repayment of filing fees by defendants.

fear. This matter has created a chasm between them all and has plunged the lives of the licensees into uncertainty and fear of economic ruin.

234. And where is Net Wave? Its damage done, it has moved on over the horizon, no doubt pleased with the unexpected and unearned results of its competitively motivated petition. It did not participate in trial. The principals of Net Wave have not had their families torn apart. No witness from Net Wave appeared at trial or appeared to give a deposition or was inconvenienced or bore the cost of participation. In fact, the record shows that Net Wave was never injured by the acts of which its petition complained. At the time the petition was filed there was ample T-band (and other) channels ripe for licensing by Net Wave for the purpose of any operation it chose. This fact begs the question of whom is the victim in this matter?
235. The Commission was not injured. Its processes do not preclude the existence of managed facilities and its intention in the creation of Section 90.313 has been fully served. The public has enjoyed the use of the radio systems in providing service to hundreds of radio units. Metroplex provides radio sales, service and maintenance to both public and private sector customers who have presumably benefitted by the family's investment and diligence in those operations. No allegation of spectrum warehousing stands. To the contrary, the facts demonstrate that the licensing resulted in full loading of the subject channels. And the Commission's encouragement of deployment of new and flexible technology has simultaneously been served by defendants' willingness to launch a new mobile data system, previously unknown in the Dallas area. In sum, the actions taken by defendants were in complete conformity with both the spirit and the intention of the Commission's

rules for use of T-band facilities and did not result in injury or harm to Net Wave, the Commission, the public interest, or any person, thus a forfeiture is not necessary or warranted, *see, Family Broadcasting*.

236. These defendants have suffered a long and arduous and painstaking investigation which results demonstrate a theme of unsophisticated, ignorant, and ambitious actions taken by persons acting *pro se* who thought that they had found a convenient loophole to duplicate in Allen their licensing efforts in having granted WIL990 in Dallas. The attorneys fees, travel costs, duplication costs, and the costs to their reputation have been quite daunting. The uncertainty to their family business has been quite devastating, resulting in numerous loss opportunities. But the worse effect of the investigation and the hearing has been the loss of family. Defendants aver that a decision to revoke their licenses or disqualify the defendants will insure that the loss will be tragically permanent. Simple fairness and compassion dictate a different outcome.

Conclusion

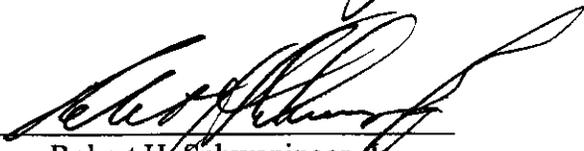
237. For the reasons stated above and for good cause shown, defendants respectfully request that the Court find that the allegations contained within the Hearing Designation Order have not been supported by the facts of record; that the Bureau has not satisfied its burden of proof as to any specific allegation; that the applications for assignment be granted; that no licenses be revoked; and that defendants have the character qualifications to remain Commission licensees. In the event that the Court finds that wrongful acts have occurred, defendants respectfully request that no forfeiture be applied since no harm has occurred as

a result of defendants' actions, which occurred without specific intent to deceive the Commission.

Respectfully submitted,

RONALD D. BRASHER
PATRICIA A. BRASHER
DLB ENTERPRISES, INC. d/b/a
METROPLEX TWO-WAY

By 
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By 
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Revised Copy

Dated: October 1, 2001

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CERTIFICATE OF SERVICE

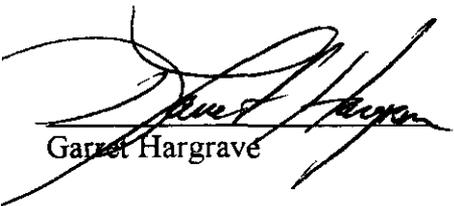
I, Garret Hargrave, hereby certify that the original and copies of the foregoing Proposed Findings of Fact and Conclusions of Law in Case No. 00-156 was served by hand delivery and/or UPS Express Delivery upon the below listed parties on this 1st day of October, 2001.

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