transferee, but rather, Ron and Pat individually might, under *Motorola*, be found to have such status. Therefore, the Bureau's use of *Motorola* does not support its contention that DLB was the controlling entity. To the contrary, *Motorola* points in another direction.

197. Pointing in still another direction, and equally applicable to this matter, is the Commission's decision in *In the Matter of Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, 15 FCC Rcd 5299 (2000) (hereinafter *Service Rules*). The Commission's licensing of guardband managers shows that the Commission is no longer wedded to outdated definitions of licensee which include either the ownership of equipment or even supervision of the daily operations of systems. Licensees are now viewed as spectrum managers and are allowed by private contract to cause others to construct, own and operate equipment under the authority granted the licensee. In fact, in *Service Rules* at 5325, the Commission precluded those managers and affiliates from operating on more than 49.9% of the licensed spectrum for their own use. Employing the Bureau's test to those licenses, each guardband manager is engaging in an unauthorized transfer of control by leasing the use of the spectrum to others who will own and operate their own private equipment.

198. The Court may also find instructive the Commission's efforts to create band managers who would be licensed for swaths of private radio spectrum.[58] In the Commission's exploration of this licensing regimen, the licensee would rarely, if ever, have a proprietary

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[58] *In the Matter of Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies; Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz; Petition for Rule Making of The American Mobile Telecommunications Association*, 15 FCC Rcd 22709 (2000).

interest in the equipment or provide that level of supervision suggested in *Motorola*.[59] What the Bureau's argument points out, therefore, is that the law regarding control of facilities is not so clearly articulated and may, indeed, be in such a state of flux as to be undefined.[60] Certainly, the Bureau has not assisted in articulating a single or even controlling standard to assist the Court. And the one standard suggested by the Bureau, *Motorola*, cuts against the Bureau's conclusion regarding DLB's interest in the Sumpter stations.

199. Employing the language of *Motorola* at 14, the Court should consider "the totality of the circumstances to ascertain where actual control lies" citing, *Stereo Broadcasters, Inc.* 87 FCC 2d (1981); *George F. Cameron, Jr. Communications*, 91 FCC 2d 870 (Rev. Bd. 1982).[61] Upon review of all of the relevant facts and circumstances, including the myriad of duties, obligations, levels and manners of involvement, participation in licensing, and the manner in which the Brashers and Sumpters worked together to obtain spectrum and operate the systems for the shared benefit of each and all of the family members,

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[59] In fact, *Motorola* stands for the proposition that the Commission has broad discretion in the area of encouraging and maximizing the use of spectrum. The use of the subject spectrum resulted in maximized use of channels to provide service to the public, thus reaching the intent of the Commission in its development of its approaches to the issue of control.

[60] Determining *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. *Fox Television Stations* at para. 154; *Storer Communications, Inc.* 101 FCC 2d 434 (1985).

[61] Contrary to the Bureau's attempt to assert a two-prong test from *Motorola*, *Motorola* clearly states at paragraph 15 that, "[t]he Commission has recognized that with the diversity of fact patterns which can arise in the business world, no precise formula for evaluating questions of transfers of control can be set forth." *Motorola*, para. 15; *citing, News International, PLC*, 97 FCC 2d 349 (1984).

defendants aver that control of the licenses and the systems resided with the family at all times relevant to the case at bar.

200. The Bureau also failed to note the outcome in *Motorola* regarding the Mt. Tamalpals' license, *id* at 22-24. As in that case, there was no attempt to conceal the common control of the systems and Defendants admitted immediately that each of the systems were managed by the DLB.[62] As in that case, Defendants were unaware that their actions might be deemed to be inappropriate and, instead, were under the impression that their licensing method was fully consistent with the Commission's rules and industry practice, which impression was supported by the advice of trusted advisors.[63] Absent the intent to deceive the Commission for the purpose of hiding a violation of law, which intent the Bureau has failed to demonstrate, *Motorola* is instructional in that the Commission in *Motorola* did not disqualify the transferor or the transferee. In *Motorola*, the Commission dismissed an application for assignment of the subject license and provided renewal for only a one-year period.[64] No forfeiture was demanded and the character qualifications of the licensee were not called into question. Instead, the Commission noted that the participants were likely unaware of the legal consequences of their actions. The evidence in this matter fully demonstrates that Defendants were equally ignorant of the legal consequences of their actions and, thus, should be entitled to similar treatment.

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[62] Transcript at 156-157.

[63] Transcript at 586, 589.

[64] *Motorola* at para. 26.

201. Also missing from the Bureau's legal analysis is any case law or legal support for its proposed punitive actions against the alleged transferee. As the Court is aware, the obligations to the Commission are those of the licensee and the case law provided by the Bureau stands for the proposition that such duties may not be assigned. The obligation to act in accord with the Commission's rules and policies regarding the Sumpter licenses was the Sumpters, and the effect of noncompliance would also rest with the Sumpters. The Bureau has not, therefore, shown why the Court should penalize the alleged transferee which, according to the case law provided by the Bureau, would not be the focus of agency action.[65]

202. At paragraph 94, the Bureau questions the testimony of the Defendants regarding whether Norma's and Melissa's T-band stations were shut off pursuant to the licensees' instructions. Obviously, if the licensees could cause the station operation to be discontinued based on no more than a telephone call,[66] that ability would evidence knowledge of operations and control. Ron testified that the stations had been shut down.[67] David testified that he believed that the stations were shut down based on information received from Ron.[68] The Bureau points to Defendants' earlier responses

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[65] See, e.g. *Marc Sobel*, wherein the Commission directed its punitive authority on the transferor, not the transferee, James Kay, who was exonerated of any culpability due to his ability to demonstrate that he would have been eligible to hold the subject licenses.

[66] Transcript at 560-561.

[67] Transcript at 477, 560-561.

[68] Transcript at 1005-1006, 1031-1032.

which stated that the stations were constructed and operational.[69] In fact, both stations were constructed and made operational, only to be later shut off.[70] Perhaps most disturbing about this contradictory testimony is that the facts could have been easily discerned at any time by the Bureau, simply by requesting that the channels be monitored by the local field office. Yet, instead of performing this simple investigatory task, the Bureau relies upon contradictory testimony that does not carry its burden of proof to demonstrate that the Defendants' statements are in error or not credible.

203. The above considered, the Bureau has not shown that DLB was the unauthorized transferee of the subject stations or the real party in interest to the applications and licenses. Despite its sweeping conclusions proffered without the benefit of often contradictory facts and evidence, the Bureau's case fails to demonstrate any intent to deceive the Commission or abuse its processes. As further support of the Bureau's acceptance of the identities of the real parties in interest to the licenses, Defendants note the Bureau's actions taken in *In the Matter of Carolyn S. Lutz et al.*, DA 01-2152, EB Docket No. 00-156 (released September 17, 2001) (*Lutz*), attached hereto. In *Lutz*, the Bureau has cancelled the licenses held by Carolyn Lutz and the Sumpters based on the requests of the licensees and has terminated this proceeding as it applies to those licensees. The Bureau did not seek disqualification of the therein named licensees. Rather, pursuant to the requests made by the persons whom the Bureau determined by its actions to be the real parties in interest to each of those licenses, possessing all necessary

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[69] Transcript at 477.

[70] Transcript at 477, 560-561.

indicia of control to cause the licenses to be cancelled by the filing of their requests, the Bureau cancelled the licenses. This action was not challenged by Defendants, since Defendants do not and have never possessed the authority to cause or prevent the cancellation of the licenses. Defendants, in recognition of the licensees' authority, have had to suffer the outcome of the individual licensees' decisions. This is an action that could have taken place at any time by any of the Sumpters and Defendants would have been powerless to prevent it. No contract between the Defendants and the Sumpters barred the Sumpters from cancelling their licenses, causing their stations to be deconstructed, or, as was shown, demanding that a system be shut down. The Sumpters are not in breach of any agreement and Defendants must suffer all economic injury arising out of those licensees' decisions. What the Bureau's action clearly demonstrates is that Defendants were subject to the whims of their family members, to either continue the cooperation which all had enjoyed, or to go their separate ways by causing the loss of the licenses. It is clear, therefore, that in the final analysis, Defendants' ability to operate the subject stations was ultimately controlled by the licensees.

Misrepresentation and Lack of Candor

204. The Bureau continues to pervert the facts of this matter by attempting to show that Defendants acted in allegedly improper ways for the singular purpose of obtaining spectrum to serve its customers. The Bureau's entire argument in this case is premised on the Court's accepting the Bureau's unproven claim that the Defendants were driven to forgery, deceit, abuse of process, lying, misrepresentation and a host of other misdeeds

because of Section 90.313(c). Apart from Defendants' desire to obtain additional spectrum, the Bureau has shown no motive for the actions alleged.[71] And given the backdrop of family harmony testified to by all witnesses,[72] the Bureau's assertions are simply not credible. The Bureau has still failed to show why Defendants would act in the manner described. The questions that still protrude from the Bureau's case are, why would Defendants forge the names of family members who had shown themselves fully willing to participate in licensing? Also, why would Defendants forge applications, then assure that all of the mail regarding the applications would be sent to the named licensees? If the Defendants were intending to deceive the Commission, why would each of the subject licenses identify DLB as the control point, listing its telephone number? The Bureau's pleading does not address these questions much less answer them. For the answer is obvious. Defendants did not forge signatures nor seek to deceive the Commission. Rather, pursuant to the advice given by others, defendants took a procedural path that each believed was in accord with the agency's rules and policies and the practices enjoyed by others in the market.[73]

205. At paragraph 99 the Bureau claims that "DLB lied" in the submission of applications to the Commission in the names of O.C. Brasher and Ruth Bearden. The sweeping condemnation does not reflect the testimony given. The testimony clearly shows that the

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[71] 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. *In the Matter of Black Television Workshop of Los Angeles*, 8 FCC Rcd. 4192 (1993).

[72] Transcript at 814-815, 1109-1110,1793, 2214.

[73] Transcript at 586-589.

actions taken regarding the O.C. Brasher license was intended to benefit the estate and that Ron believed he was empowered to do so as O.C.'s guardian or executor.[74] No contrary testimony was provided. As to the Ruth Bearden license, the evidence shows that Ron took affirmative steps to assure that the application would not reach the Commission;[75] and he never constructed the facility.[76] Therefore, the facts simply do not support the Bureau's blanket statement. Nor has the Bureau shown any basis for attributing to DLB actions taken by Ron.

206. The Bureau's reference to O.C.'s 800A fails to note that Ron signed that 800A in 1997 on behalf of O.C.'s estate as the form clearly shows.[77] That the Bureau did not even recognize this act in its conclusions is more than telling. It evinces the Bureau's selective use of facts without demonstration of any required balancing of the totality of the evidence. Ron's execution on behalf of O.C.'s estate further demonstrates that Ron was being fully candid, as early as 1997, with the Commission regarding O.C.'s passing. Therefore, the Bureau's bombastic claims regarding the handling of O.C.'s estate and the relevant application are wholly without merit. No where does the Bureau acknowledge that the original application for the station was executed by O.C. prior to his death.[78] No where in paragraph 99 does the Bureau present the evidence of the power of attorney held

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[74] Transcript at 225-226, 299-301, 330-334, 348.

[75] Transcript at 202-204; EB Ex. 14.

[76] Transcript at 137-138.

[77] RB/PB Ex. 3.

[78] Transcript at 335; EB Ex. 68.

by Ron.[79] And no where does the Bureau discuss Ron's contrary belief that he was acting with full authority.[80] That Ron believed that he had all actual and necessary authority to employ his father's name as O.C.'s guardian or executor is an uncontested portion of the evidence. It is irrelevant whether the Bureau concurs in Ron's legal conclusion, acting *pro se*, regarding his status or whether the Bureau believes that Ron acted appropriately in the use of O.C.'s name. What is singularly important is whether Ron believed he had that authority.[81] The Bureau points to not a scintilla of evidence which shows that Ron did not believe that he possessed that authority. Therefore, the only evidence presented regarding Ron's intent clearly shows that Ron believed he was acting properly.

207. Nor is the Bureau's coloring of the facts useful in its description of Defendants' response to the Bureau's inquiries. The Bureau's reference at paragraph 99 that Defendants were "forced to admit" anything is ridiculous. When the Bureau asked a question, Defendants answered the question asked. Nothing more is required under rule or law. Defendants were fully candid in their responses to each question asked. If the Bureau was not content with the manner of its questioning and, thus, the information obtained as a result of that questioning, then the Bureau does not have the Defendants to blame. What the Bureau may credit Defendants with is the production of hundreds of pages of documents, without

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[79] RB/PB Ex. 2.

[80] Transcript at 225-226, 299-301, 330-334, 348.

[81] 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 substantial and material questions of fact. *Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1415 (1979). *See, also, Rosemor Broadcasting* and *Fox Television Stations*.

delay, in association with the responses given. No document or record evidence was withheld from examination, if that document was responsive to the Bureau's inquiry. In fact, almost the totality of the evidence presented by the Bureau was a reiteration of the statements, admissions, and evidence provided by Defendants.[82] So, rather than cracking under the Bureau's pressure in the agency's successful effort to "force" admissions out of Defendants, the true facts demonstrate that Defendants were fully forthcoming.[83]

208. The conclusions offered at paragraph 100 are a repeat of the Bureau's earlier, factually unsupported conclusions. The Bureau lacked evidentiary support for these specious claims then, and nothing contained within the pleading since has added any additional support. The repetition of these claims does not offer greater weight to the conclusions nor do anything to assist the Bureau in meeting its burden of proof.

209. Paragraph 101 contains sweeping conclusions which are not entirely explained. Defendants are not privy to the Bureau's legal conclusions regarding what constitutes "functioning as a licensee." Absent an explanation as to the Bureau's interpretation of this phrase, neither Defendants nor the Court is positioned to adopt this conclusion.

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[82] *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.

[83] *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.

Regarding the Bureau's further statements at paragraph 101, Defendants can discern no significance as to where David was employed. The place of a person's employment is not relevant to the status of private radio licensee. Nor is there any prohibition on a person employing their initials in the making of an application or for filing for two radio licenses simultaneously. The Bureau fails to point out David's unrelated explanation for this method of seeking authorizations,[84] thereby once again choosing to base its conclusions only on a paucity of facts and evidence. Certainly, the Bureau has not shown how David's actions are attributable to DLB. However, of perhaps greater significance, the Bureau's failure to show that any actions taken by David or Defendants were improper or a violation of law renders the Bureau's conclusions pointless.

210. The Bureau's conclusions at paragraph 102 are the product of the clarity of hindsight and have no basis in the facts. Even a cursory review of the response to the Net Wave petition demonstrates that the thrust of the petition was not one of fact recitation, but rather a reply that Net Wave had not shown that the named parties had violated the Commission's rules or policies. Stated another way, the voluntarily made response (there was no codified obligation for the named persons to respond) did not provide a litany of facts and representations, but rather explained the weakness and failings in Net Wave's allegations. The Bureau's attempt to mischaracterize that effort is obvious. Regarding the Sumpters' authority or ratification, the evidence provided at trial shows clearly that the Sumpters did ratify the response, provided the response would "take care of" the

[84] Transcript at 1035.

controversy.[85] It was only following the Sumpters' unpublished, joint conclusion that the responsive pleading may not be sufficient for such purpose, that their fears ran away with them and they sought independent counsel.[86] Of greatest significance within that pleading was Defendants' immediate willingness to claim responsibility for operation of the subject stations, citing the commonality of the licenses and applications which was obvious on the face of each. Defendants hid nothing and offered that information necessary to support their responsive petition. They were under no obligation to provide more and the Bureau's belated attempt to find such an obligation is at odds with the status of the controversy at that time.

211. Paragraph 103 again fails to express any wrongdoing in which Defendants engaged. According to the Bureau, DLB "related that it had taken certain actions with respect to each licensee," a vague reference at best to which Defendants aver the evidence shows that the statement, as expressed, is true; "that each licensee retained certain rights" which the *Lutz* decision shows is also true, the licensees had the right to cause cancellation of their licenses, among other less important rights; and "that each licensee had been responsible for reviewing and signing its own application," which is also a true statement in that each licensee or its legal agent was believed to have fully reviewed and executed the applications. The Sumpters' later denial of participation in the making and execution

[85] Transcript at 1850-1854.

[86] Transcript at 1964-1965.

of the applications is contradicted by Defendants.[87] Defendants do not deny that they hoped to "put at end any Commission investigation." Such hope is both logical and natural. But to subscribe to such hope, without evidentiary support, a desire to keep the Commission from learning the truth is both gratuitous and needlessly inflammatory. Defendants aver that the truth was always provided, despite the few instances where immaterial mistakes were made[88] that were later corrected prior to hearing. That the Bureau did not get its definition of the full story in the first instance is a result of the complexity of the details, the lack of sophistication of the Defendants, and the quality and scope of the questions posed in the Bureau's inquiry. The Bureau appears to be suggesting that Defendants were not entitled to avail themselves of their rights, including the right to answer only the questions presented in the Bureau's inquiry. The Bureau discounts the pages of response and the hundreds of pages of documents provided to it. Instead, the Bureau's argument suggests that when it might ask a licensee for the time, the licensee is supposed to supply the instructions for building a watch. Anything less is, in the Bureau's view, improper.

212. Paragraph 104 takes another step beyond the pale in logic and reasonable reliance upon the record. By April 1999, the Bureau had been informed of O.C.'s death for over a

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[87] Transcript at 414-417, 421-426, 818-823. *See, also, American International Development, Inc.*, n. 35 where the Commission found that the detail with which the Zozayas recalled the events in question may reflect the truth of their story, not its falsity.

[88] In fact, any suggestion that D.L. was Diane was the product of defendants' counsel's mis-impression at that time and should not be imputed to defendants. Certainly, counsel's individual mis-impression does not evidence any bad intent on Defendants' behalf.

year.[89] The management agreements provided in association with that response were not held out to be record copies of agreements executed by the licensees. The response clearly states that the management agreements were intended to memorialize the verbal agreements between manager and licensee.[90] How the Bureau could have been fooled is beyond imagination. How the Bureau may now claim that the management agreements evidenced an intent beyond a written memorialization for the purpose of illuminating the relationship between the parties for the purpose of being fully responsive to the Bureau's inquiry is a mystery of epic proportion.

213. At paragraph 104, the Bureau's proposed conclusion of law has left the stage of reasoned analysis and is tantamount to name calling. The Bureau provides nothing within the record to support its baseless contentions and, instead, has supplied invective in place of serious investigation. Ms. Lutz presented herself to the Commission as a licensee in her individual response to the Bureau's inquiry;[91] Ms. Lutz was fully informed as to the existence of her application, license and station;[92] and Ms. Lutz negotiated with Ron the terms of her management agreement.[93] None of these facts are present in the Bureau's conclusions. Rather, the Bureau sweeps all away with a its repeated claims of "lies" and "concocted stories" and "false statements". But most disturbing is the Bureau's claim

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[89] The Form 800A Ron executed on behalf of O.C.'s estate as "O.C. Brasher EST. R.D. Brasher" is dated 11/17/97. (RB/PB Ex. 3.)

[90] *See,* Response of DLB Enterprises, Inc., page 7, dated April 5, 1999. (EB Ex. 19.)

[91] EB Ex. 63.

[92] Transcript at 1166-1169, EB Ex. 63.

[93] Transcript at 1194-1199, RB/PB Ex. 1.

with one breadth that the management agreements were put forth to deceive the Commission regarding the status of the named parties, as though the documents were intended to be something other than a post hoc representation; and then, with equal bluster the Bureau quotes from the response Defendants' clear explanation that none of the management agreements were previously reduced to writing.[94] By the Bureau's own flawed logic and selection of facts, the Bureau has undermined its own claims.

214. The Bureau's subscribing to Jim Sumpter at paragraph 105 its receipt of the information regarding the health of O.C. and Ruth is a bald attempt to suggest that defendants were not forthcoming and this statement is simply without evidentiary support. Searching for anything it might convert by logical alchemy into a hint of a misdeed, the Bureau points to Pat's statement that she did not assist in the preparation of the subject applications. That she wrote the associated checks for filing fees does not make that statement false. The remainder of the paragraph is a hodgepodge of claims that go nowhere. The Bureau provides its legal opinion regarding Ron's authority as executor of his parents' estates and as holder of a power of attorney, however, the Bureau's opinion is irrelevant. Ron believed he was acting as executor or under the power of attorney.[95] Since Ron believed that he was so acting (and no contrary evidence exists), then the Bureau's claim lacks the requisite showing of bad intent required to prove its allegation.[96] And, as always in the Bureau's pleading, the Bureau fails to provide explanatory or mitigating evidence which

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[94] EB Ex. 17 at 2, EB Ex. 19.

[95] Transcript at 225-226, 299-301, 330-333, 597-599.

[96] *See, Rosemor Boradcasting* and *Fox Television Stations.*

appears on the record. Ron's admission at deposition and later at trial that the Ruth Bearden application was filed to assist his uncle was a clear indication of his willingness to be forthcoming, even when the truth was embarrassing. And the Bureau does not describe the affirmative steps taken by Ron to assure that the application never reached the Commission and never produced a license.[97] Nor does the Bureau remind the Court that the station was never constructed and no benefit was obtained via the making of the original application. That DLB later filed for the channel, in full view of the Bureau's investigation, indicates nothing more than Defendants' attempt to continue operations during the pendency of this matter.

215. Paragraph 106 states nothing but generalities without any specific claim being made. However, in an abundance of caution, the statements therein are denied by Defendants.

216. The Bureau's claims at 107 are simply absurd. There is no contrary evidence to Ron's claim that he foolishly attempted to obtain a license for use by his uncle. That the Bureau is not convinced is not relevant and amounts to the Bureau's testifying. Amazingly, the Bureau is willing to believe that not one of the Sumpters received any license from the Commission or any other correspondence until 1999, but the Bureau blandly claims that Ron's testimony is false. Perhaps the problem that the Bureau has is more simply explained. Ron did receive a copy of the license and cancellation notice, but not via

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[97] Ron attempted to cancel the coordination of the application so that no application would ever be submitted to the FCC. (Tr. at 202-204.) Ron "called PCIA to get the ...frequency advisory number ... Then [he] asked that the [application] be cancelled. They said send a letter .. And they told [Ron] exactly who to send it to. [Ron] faxed it and mailed the letter too." (Tr. at 202-203, 206.) The letter requesting cancellation and the accompanying fax cover sheet were addressed to Dawn Daniels from Ron and was dated July 30, 1996. (Tr. at 204; EB Ex. 14.)

normal Commission correspondence. Rather, it was part of Ron's investigation into the relevant record following the receipt of the Net Wave petition. Again, the Bureau received an answer at trial which was equal to the question asked.

217. At paragraph 108, the Bureau finally admits that contrary testimony exists regarding one of the central portions of this case. The problem with the Bureau's recitation of the evidence is that it is inaccurate, incomplete and does not come close to logical reasoning. The Bureau concludes that the execution of the Sumpters' applications was performed by DLB. The Bureau does not explain why such actions would be necessary. The evidence shows that the Sumpters were willing to be licensees for the purpose of later assigning the licenses to Ron,[98] so why forge? It cannot be because of some looming deadline.[99] The record shows that research and preparation of the applications stretched over some months, so there was obviously no hurry to file, thus providing ample time for the Brashers to request the Sumpters' assistance.[100] It cannot be because the Sumpters were

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[98] *See*, Letters from Norma, Jennifer and Melissa dated November 29, 1997 where each claimed, "I know that you had used my name but I understood that if a channel was awarded then you would immediately transfer it to your name." (EB Ex. 47, EB Ex. 53, EB Ex. 56.)

[99] In *American International*, the Review Board noted a possible motive for misrepresentation was if Mrs. Zozaya failed to sign the document on June 27, then Mr. Zozaya may have signed her name himself in order to guarantee that the applciation was filed before the June 30 deadline. *American International* at para. 15.

[100] The two concrete companies requesting service approached DLB "in the beginning of the year '95." (Tr. at 112-113.) In the Spring of 1996, Ron spoke with Scott Fennell, of NABER (now PCIA), and asked Mr. Fennell if Metroplex could apply for multiple channels in Allen, TX. (Tr. at 585.) Mr. Fennell told Ron that he could only apply for one channel at a time. Because Ron needed multiple channels to provide services for the concrete companies, he continued to search for a way to obtain multiple channels. After Ron spoke with Mr. Fennell, Ron contacted John Black and Mr. Black confirmed the restrictions enumerated by Mr. Fennell. (Tr. at 586.) Mr. Black told Ron that Ron could apply for multiple channels using different entities as the

unfamiliar with FCC licensing. Both Norma and Jim had held licenses in the past[101] and Jennifer and Melissa testified that they had signed applications.[102] It cannot be due to strained family relations. All witnesses testified to the close family relationship enjoyed in 1996.[103] In sum, there is no motivation shown or known for the Defendants to have committed forgery.

218. The entry of a date on an application by Ron is wholly insignificant. Preparers of documents often include missing dates next to signature lines. Neither the signer, nor the preparer deem that activity to be forgery. The Bureau does not claim that such action is improper. So, that information is insufficient to demonstrate anything.

219. The Bureau's reliance upon the Sumpters' conveniently collective and overly unified remembrance of a trip to see a sick aunt is not well placed. Had the Brashers suddenly

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applicants, and that this was done throughout the industry. (Tr. at 586.) To confirm these licensing practices, Ron "pulled a 1995 listing of T-band frequencies and monitored it and found confirming [data] to say, yes, this was so." (Tr. at 586-587.) Ron and Mr. Black began the process of searching for specific frequencies to be used by Metroplex. (Tr. at 106.) It took Ron approximately two weeks to compile a list of eight or nine frequencies in which he was interested. (Tr. at 110-111.) Ron sent a list of these frequencies to Mr. Black. (Tr. at 116.) It took Mr. Black about one week to review Ron's list and create a final list of the licenses Ron needed. (Tr. at 115-11) In approximately June of 1996, Ms. Lutz typed a list of the names and addresses for the Sumpter applications to be sent to Mr. Black. (Tr. at 612-613.) On June 12, 1996, after Ron received a final list of frequencies from Mr. Black, Ms. Lutz faxed Mr. Black the names and addresses of the license applicants. (Tr. at 116-117, 120, 612, 1671; EB Ex. 66.) Mr. Black received the fax and numbered the applicants for his own reference. (Tr. at 1628.) Mr. Black prepared the applications and sent them to Ron. (Tr. at 413.) The applications for authorization bearing the Sumpter names are dated 6/18/96. (EB Ex. 35, EB Ex. 41, EB Ex. 49, EB Ex. 54.)

[101] Transcript at 371, 389, 1988, 2117; EB Ex. 42, EB. Ex. 43, EB Ex. 45.

[102] Transcript at 1058-1059, 1071, 1315, 1374; EB Ex. 52, EB Ex. 55.

[103] Transcript at 404, 814-815, 1613-1615, 2212-2214.

and conveniently remembered some event that was supportive of their position, the Bureau would have claimed that the testimony was patently false and evidenced a lack of candor due to Defendants' failure to remember that information earlier. Yet, employing a differing test to the Sumpters, the Bureau is willing to forgive and forget. What the Bureau forgot was that the evidence shown at trial does not place the Sumpters out of town on the relevant date. The receipt was for the following day.[104] There is no evidence which supports the Sumpters' belated story other than the harmonious chants of a well rehearsed and frightened family.

220. The expert witness did not testify at trial that signatures had been "lifted" and any such suggestion is wholly contained in testimony which this Court has excluded and which was not subject to cross examination by Defendants.[105] Defendants cannot fathom why the Bureau has ignored the clear ruling of the Court on this matter, but in accord with the Court's earlier ruling, this claim by the Bureau must be given no weight. Defendants leave it to the Court's good discretion to direct the Bureau otherwise for its wilful failure to follow the Court's ruling.

221. Turning to the execution of the "client copies," the Bureau's conclusions make no sense. If the Defendants were attempting to gin up copies with forged signatures, why didn't they produce one for Jim? The Bureau cannot explain and does not try to explain why the

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[104] EB Ex. 70.

[105] The Defendants aver that the Bureau is estopped from making a claim that the handwriting expert testified that the signatures were lifted because to do so would be contrary to the Bureau's own Findings of Fact. Note paragraph 62 of the Bureau's P.F.F., where the Bureau asserts that, "Finally, although Ms. Bolsover believed the signatures on the 'Client Copies' were authentic...".

execution of the client copies is fully consistent with defendants' testimony, including the fact that Jim was not present.

222. What is also consistent with Defendants' testimony is the Sumpters' states of mind. Each testified that they were frightened. Jim and Jennifer were in fear of losing their licenses to practice public accountancy.[106] Melissa was told she might lose her nursing credentials.[107] All testimony by the Sumpters demonstrated a shared terror that this matter could ruin them collectively and individually. The Sumpters' bunker mentality was obvious and tangible. And within the confines of that bunker, the Sumpters concocted a shared story. What the Sumpters forgot when this story was first revealed was the fact that they had signed the client copies. Their counsel assisted in preparing their affidavits, basing his writing on the contents of the Commission's records which did not contain copies of those documents. The Sumpters were not reminded of their execution of the client copies until after they had first produced their shared statement of events, including claims of ignorance and nonreceipt of license copies, etc. That Jim was their representative with counsel was also a factor, for Jim was the only one of them who would have no personal recollection of those events. And ever since the Sumpters first decided to deny, deny, deny; they have suffered the difficulty of trying to prop up those false denials when contrary facts have been shown. Ignorance and fear and family are strong elements that can cause persons to perform acts which they might otherwise avoid. Defendants aver that the Sumpters have suffered throughout this experience. It is

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[106] Transcript at 1058, 1099, 1100, 1102, 1891.

[107] Transcript at 1101, 1367.

unfortunate, however, that the Sumpters have attempted to relieve their suffering by casting a false light on Defendants.

223. The Bureau's attempt to find motivation for forgery is in vain. They have shown none, other than Defendants' general desire to obtain additional spectrum. The Bureau's attempt to demonstrate that Defendants caused false signatures to be affixed to documents is also in vain. There exists no evidence that Defendants caused such an event. The Bureau's attempt to prop up the Sumpter story also falls short. The record simply does not support it. On balance, therefore, the Court must find that the Bureau has not carried its burden of proof, because the logical and evidentiary gaps in the Bureau's case are wide and obvious.

224. At paragraph 109 the Bureau questions the evidence regarding the shutting off of Norma's and Melissa's stations. The Bureau's evidence is that Norma and Ms. Lutz do not remember the event. This nonsupportive testimony is both consistent with the Sumpters' shared tale and insufficient to prove the truth of the Bureau's allegation. That Ron earlier testified that the stations were constructed and made operational is true. However, it is apparent that Ron was speaking to whether the stations were *ever* constructed and *ever* made operational. That a misimpression was inadvertently given to the Bureau as to the then-current status of the facilities is unfortunate, but not material to the issue of misrepresentation or candor.

225. Paragraph 110 offers additional conclusions premised on earlier conclusions which have been shown to be without evidentiary support. It is obvious that all licensees believed that all station equipment would be purchased by Ron and Pat, all site leases would be

paid for by Ron and Pat, and that DLB would market services against all such stations. The method of purchasing and financing station build-out was devised by Jim, and the Brashers faithfully followed his advice.

226. Defendants respectfully request that the Court review, in general, the documentary evidence provided in this matter to determine the speciousness of the Bureau's claims at 111. Although Ron was central to the process of causing applications to be prepared, there is not one document within the record which evinces Ron's use of a typewriter in his notes, correspondence, or personally prepared applications to the FCC.[108] Ron did not type.[109] Therefore, to type up his correspondence to John Black, Ron would have turned to an office employee – in this case, Ms. Lutz. Ms. Lutz's claims to the contrary are inconsistent with logic and the normal activities of the DLB office, but are entirely consistent with the shared Sumpter story. Given her admitted antipathy for Ron, her bias and reason for denial are more than obvious.[110]

227. The Bureau's conclusions at paragraphs 112-113 are all smoke without substance. David testified that he used initials in one filing and his full name in another. David testified that his participation in the management agreements was intended to illuminate unwritten understandings and was not intended for any other purpose.[111] And David did not deny

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[108] *See*, EB Ex. 19 at 163, Letter to John Black; *see, also,* EB Ex. 10 at 1, where at the top of the page Ron hand wrote his correspondence to John Black.

[109] Transcript at 613.

[110] Ms. Lutz testified that she does not care for Ron Brasher at all. She claimed that Ron is a "user", "manipulator", and "deserves to lose out in this situation." (Tr. at 1259.)

[111] Transcript at 930-931.

his knowledge of the Net Wave petition.[112] Where, then, is the misrepresentation in David's testimony? Despite the Bureau's table pounding, the only conclusions within these paragraphs are sound and fury. Nor does the Bureau's continued fury prove any point at paragraph 114. Is the Bureau suggesting that over two years following the filing of an FCC Form 800A, which clearly stated that the O.C. station was constructed on behalf of O.C.'s estate; and following several parties' statements to the Bureau, including Defendants', that O.C. was deceased, that David was attempting to hide the fact of his grandfather's death? The Bureau's conclusions are simply not credible.

Conclusion

228. The Bureau's presentation of its case demonstrates that the Bureau lacks the necessary evidence to demonstrate that Defendants are unqualified to be Commission licensees or that any revocation of licenses is warranted.[113] And the Bureau's decision in *Lutz* has

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[112] Transcript at 911, 914, 931, 999, 1009.

[113] The Bureau cites to *Liberty Cable Co., Inc.*, 15 FCC Rcd. 25050, 25073 (2000) (hereinafter *Liberty*), and states that under the circumstances the Commission must revoke all licenses and deny all applications. However, the facts in *Liberty* differ quite significantly from those in the present matter. In *Liberty*, the Commission reached its conclusion for several reasons: (1) Liberty's overall record of compliance with the Commission's rules and policies was extremely poor; (2) the record did not support a finding that Liberty's violations did not involve intentional misconduct; (3) Liberty's violations were serious, willful, recent, and repeated throughout most of Liberty's history as an OFS licensee. *Liberty* at para. 64. The Bureau's assertions that Defendant's licenses must be revoked and applications denied are further not supported by the Bureau's citation to *47 U.S.C. §312(a)(1). Sec. 312(a)* does not limit the Commission's power to revoke a station license for only false statements made in an application.

rendered moot any action regarding the licenses captioned in that proceeding. Most disturbing in the Bureau's case is the litany of inaccurate statements and the liberal use of selective facts, which demonstrate the Bureau's unwillingness to balance contradictory facts and testimony in a reasonable manner. Far more often than not, the Bureau simply ignores those contradictions as though each did not exist.

229. For examples, the Bureau ignores the effect that the advice given by John Black and Scott Fennel to Ron had on the circumstances. The Bureau treats not at all the commonality on the face of each subject license, whereon Ron caused to be shown the same address and telephone number as the control point, thereby hiding nothing from view including common operation. The Bureau gives no weight to the admission of O.C.'s death on the earlier filed FCC Form 800A, demonstrating Defendants' candor even prior to the time when the Bureau made inquiry about O.C. The Bureau gives no weight to the evidence that the Sumpters' addresses were used in the preparation of their applications, thus directing Commission correspondence to the licensees, which evidence clearly belies the claim of forgery or the Sumpters' collective denial of knowledge of the existence of the T-band licenses. The Bureau ignores the fact that the licensing of multiple channels by a single entity for the purpose of serving immediately over 700 mobiles is consistent with

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47 U.S.C. 312(a)(5) also grants the Commission the power to do so for violation or failure to observe any cease and desist order issued by the Commission. However, recent action by the Commission indicates that license revocation is not necessarily warranted for willful and intentional violations of *47 U.S.C. 312. See, Federal Communications Commission Proposes $140,000.00 Fine Against Peninsula Communications, Inc. for Failure to Cease Translator Operations*, News Release, August 29, 2001, where the Commission levied a fine against Peninsula Communications, Inc. for intentional failing to comply with an order to cease translator operations in various communities in Alaska.

the agency's rules and fully consistent with the intention in creating the subject rule. The Bureau does not take into consideration the *pro se* status of the Defendants in 1996 and the effect that lack of counsel had on their actions. The Bureau does not seem to find it important that the Sumpters evinced a willingness to participate in licensing for the claimed purpose of later assigning licenses to Ron. The Bureau does not focus on the family status between the Sumpters and the Brashers, treating each more like arms-length entities rather than family members. The Bureau's claims suggest that in a case as complex and difficult as this, stretching over a number of years, that absolute consistency in reply, without inadvertent error or unmeaning mistake, is the standard for proving that misrepresentation did not occur, as though Defendants were the ones with the burden of proof. The Bureau willingly assigned no duty to the licensees captioned in *Lutz*, and instead provided each with immunity despite the fact that the duty attendant to licensee which the Bureau claimed was breached was, by statute, theirs. And, the Bureau strained again and again to assign all alleged misdeeds to DLB, despite knowing that Ron and Pat owned the equipment and site leases individually pursuant to Jim's advice. These are but a representative handful of examples of flawed reasoning within the Bureau's case which did not show balancing of the evidence or a complete recitation of relevant facts. Having thus failed to employ those facts, the Bureau's case is fatally flawed beyond redemption and does not support its request for sanctions against Defendants.[114]

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[114] 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).*

230. No where in the Bureau's case does it deal with the actual nature of the Defendants. The Brashers lacked legal knowledge or acumen, did not understand the need for corporate directors and made no distinction regarding officers and directors, showed difficulty in appreciating the subtleties of the Commission's rules, had little knowledge regarding tax liability and reasons for Jim's tax avoidance methods, and showed a consistent and unwavering tendency to rely on the advice of persons deemed experienced in each area. Yet, the Bureau's case requires that the Court believe that Ron and Pat hatched a plan devised by them and carried out by them in secret, without the assistance or knowledge of any other person. That conclusion is unsustainable for all purposes. Defendants followed other persons' advice, even when the advice was bad. That the Bureau's conclusions do not reflect the obvious nature of Defendants further shows that those proposed conclusions are inconsistent with reality.

231. The Bureau's request for the death penalty is beyond reason or precedent.[115] Having failed to show that Defendants intended to abuse the Commission's processes[116] or to

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[115] *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 800MHz Bands*, 16 FCC Rcd. 4882, Para. 5 (2001), (Memorandum, Opinion and Order) where the Commission refers to reply comments of an interested party claiming, "that license revocation is the 'Death Penalty' of the industry and should not be considered or undertaken lightly."

[116] 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.

deceive the Commission,[117] and, of perhaps greater importance, that Defendants are likely to engage in any future misbehavior,[118] the Bureau has not shown any basis for the Court's ruling in favor of revocation and disqualification.[119] The Bureau has offered not a single case which stands as precedent for such an outcome, whereas Defendants have offered substantial legal authority for the Court's not revoking Defendants' licenses and

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[117] 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) where no lack of candor was found where the filing was misleading, but made without the intent to deceive.

[118] *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; *compare, 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, after Family had been given a second chance to abide by the rules of the Commission, 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.*

[119] 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, Inc.*, 90 FCC 2d 1023 (Rev. Bd. 1982).

disqualifying each. Indeed, case law shows that the Commission is not nearly so cavalier in handing down the death penalty as the Bureau is to recommend same, particularly in view of the paucity of facts upon which the Bureau's case is based.

232. The above being well shown, Defendants request that the Court rule in their favor and allow this family an opportunity to begin repairing the damage visited upon it by the conveniently absent Net Wave.

Respectfully submitted,

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

By_____
Michael L. Higgs, Jr.

By_____
Robert H. Schwaninger, Jr.

Dated: November 7, 2001

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CERTIFICATE OF SERVICE

I, Garret Hargrave, hereby certify that the original and copies of the foregoing Reply to the 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 7th day of November, 2001.

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Garret Hargrave

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

In the Matter of	)	EB DOCKET NO. 00-156
	)	
Carolyn S. Lutz	)	
Licensee of Private Land Mobile Station WPJR763	)	
Dallas/Fort Worth, Texas	)	
	)	
Jim Sumpter	)	
Licensee of Private Land Mobile Station WPJR725	)	
Dallas/Fort Worth, Texas	)	
	)	
Norma Sumpter	)	
Licensee of Private Land Mobile Station WPJR739	)	
Dallas/Fort Worth, Texas	)	
	)	
Melissa Sumpter	)	
Licensee of Private Land Mobile Station WPJS437	)	
Dallas/Fort Worth, Texas	)	
	)	
Jennifer Hill	)	
Licensee of Private Land Mobile Station WPJR740	)	
Dallas/Fort Worth, Texas	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 12, 2001 **Released: September 17, 2001**

By the Chief, Enforcement Bureau:

1. In this Memorandum Opinion and Order, we cancel the licenses for Private Land Mobile Stations WPJR763, WPJR725, WPJR739, WPJS437, and WPJR740 held by Caroline Lutz, Jim Sumpter, Norma Sumpter, Melissa Sumpter, and Jennifer Hill, respectively.

2. These licenses were designated for hearing by the Commission by *Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing*, 15 FCC Rcd 16,326 (2000). Each of these licensees waived his or her right to hearing and requested that the license issued in his or her name be cancelled.[1]

3. Administrative Law Judge Arthur I. Steinberg terminated the hearing with respect to these licensees and certified the matter to the Commission. *Memorandum Opinion and Order*, FCC 00M-58 (released October 26, 2000). Pursuant to Section 0.111(a)(14) of the Commission's rules, 47 C.F.R. § 0.111(a)(14), the Enforcement Bureau is delegated the authority to issue an appropriate order in this

[1] Letter from Carolyn S. Lutz to the FCC dated September 29, 2000; Joint Statement Pursuant to Section 1.92 of the Rules filed by Jim Sumpter, Norma Sumpter, Melissa Sumpter and Jennifer Hill on October 6, 2000. We note that Melissa Sumpter recently married, but her license for station WPJS437 is in her maiden name.

matter. Having reviewed the facts and circumstances relating to these licenses and the statements submitted by the named licensees, we find that it is appropriate to cancel the authorizations in accordance with the requests of the named licensees. We further find that is appropriate to terminate this proceeding as to these licensees.

4. IT IS THEREFORE ORDERED THAT the licenses for Stations WPJR763, WPJR725, WPJR739, WPJS437, and WPJR740 ARE CANCELLED. IT IS ALSO ORDERED that the operation of the stations authorized by these licenses cease within thirty days of the release date of this Memorandum Opinion and Order.

5. IT IS FURTHER ORDERED that the proceeding with respect to these licensees IS TERMINATED.

6. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order SHALL BE MAILED by Certified Mail, Return Receipt requested, to the following:

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