

In re HICKS BROADCASTING OF INDIANA, LLC; Order to Show Cause Why the License for FM Radio Station WRBR(FM), South Bend, Indiana, Should Not Be Revoked; AND PATHFINDER COMMUNICATIONS CORP.; Order to Show Cause Why the License for FM Radio Station WBYT(FM), Elkhart, Indiana, Should Not Be Revoked; AND Applications of MICHIANA TELECASTING CORP. (ASSIGNOR) and PATHFINDER COMMUNICATIONS CORP. (ASSIGNEE); For assignment of the licenses of: WNDU-AM-FM, South Bend, Indiana

MM Docket No. 98-66; File Nos. BAL-960809GQ & BALH-960809GR

FEDERAL COMMUNICATIONS COMMISSION

13 FCC Rcd 10662; 1998 FCC LEXIS 2341; 12 Comm. Reg. (P & F)
347

RELEASE-NUMBER: FCC 98-88

May 18, 1998 Released; Adopted May 13, 1998

ACTION: ORDER TO SHOW CAUSE, HEARING DESIGNATION
ORDER, AND NOTICE OF OPPORTUNITY FOR HEARING

JUDGES:

By the Commission

OPINION:

1. The Commission has under consideration: (1) the above-captioned applications to assign the licenses of WNDU-AM-FM, South Bend, Indiana, from Michiana Telecasting Corp. ("Michiana") to Pathfinder Communications Corp. ("Pathfinder"); (2) an informal objection filed against the proposed assignments by Niles Broadcasting, Inc. ("Niles"), licensee of WNIL(AM) and WAOR(FM), Niles, Michigan;¹ (3) a Letter of Inquiry issued by the staff on March 14, 1997 ("Inquiry Letter") and related pleadings; (4) Pathfinder's request for a permanent waiver of the radio-newspaper cross-ownership rule; (5) Comments regarding Pathfinder's waiver request filed by WSBT, Inc., licensee of WSBT-AM-FM-TV, South Bend; and (6) all related supplemental pleadings.

¹ Niles filed an informal objection against Pathfinder's applications to acquire WNDU-AM-FM on October 29, 1996. On November 2, 1996, Niles filed informal objections against two other pending Pathfinder applications to assign licenses -- KOAS(FM), Broken Arrow, Oklahoma (File No. BALH-960415GE), and WAKX(FM), Holland, Michigan (File No. BALH-961015GL) -- as well as pending applications to renew licenses for WAKX (File No. BRH-960603WF) and three stations licensed to Ft. Wayne, Indiana -- WHWD(AM) (File No. BR-960329B7); WOWO(AM) (File No. BR-960329B8); and WMEE(FM) (File No. BRH-960404ZA) -- all of which contained the same allegations as the informal objection against the WNDU-AM-FM assignment applications.

Pathfinder filed a Motion for Expedited Action on December 18, 1996, explaining that it would incur a substantial financial penalty if the Commission did not grant the WAKX assignment application before the February 28, 1997 termination date of its agreement to purchase the assets of another station involved in a like-kind exchange with WAKX. On February 27, 1997, the staff denied Niles' informal objection against the applications for renewal and assignment of the license of WAKX from Pathfinder to Clear Channel Radio Licenses, Inc. ("Clear Channel"). The staff granted the renewal and assignment applications subject to the condition that consent was "without prejudice to whatever further action the Commission may consider appropriate" in connection with the original informal objection filed against the WNDU-AM-FM assignments. See Letter Ruling re WAKX(FM), Holland, Michigan (MMB released Feb. 27, 1997). This assignment was consummated February 28, 1997.

2. Niles asserts that Pathfinder is not qualified to be a Commission licensee. Niles alleges that Pathfinder's controlling stockholder and president, John Dille III, misrepresented facts to the Commission in an application by Hicks Broadcasting of Indiana, L.L.C. ("Hicks Broadcasting") to acquire the license of WRBR(FM), South Bend, (which was granted by the staff on March 16, 1994); that he was the undisclosed real party in interest to that application; and that he is in de facto control of WRBR(FM) in violation of the Communications Act and the Commission's multiple ownership rules. The informal objection is supported by documents and deposition testimony from a civil proceeding involving Dille and others.

3. After consideration of the extensive record in this matter, including responses to our Letter of Inquiry, we find that substantial and material questions of fact exist that preclude us from finding that grant of the above-captioned applications for the assignment of licenses of WNDU-AM-FM would serve the public interest.² See 47 U.S.C. Section 309(d)(2) (describing the Commission's statutory obligation in acting upon broadcast applications). The record raises questions as to whether Pathfinder, Hicks Broadcasting and their principals have violated Commission rules governing misrepresentation/lack of candor, unauthorized transfer of control and media cross-ownership. For the reasons described herein, we believe that an evidentiary hearing is warranted to determine whether Pathfinder possesses the basic qualifications to acquire stations WNDU-AM-FM, as well as to provide Hicks Broadcasting and Pathfinder with an opportunity to show cause why the licenses of WRBR (which is licensed to Hicks Broadcasting), and WBYT (which is licensed to Pathfinder), should not be revoked. See 47 U.S.C. Section 312.

Background

4. Grandfathered Media Interests. John Dille III is the president and 75% voting stockholder of Pathfinder, a family-owned corporation³ that is the licensee of WTRC(AM) and WBYT(FM), Elkhart, Indiana; WHWD(AM), WOWO(AM), WMEE(FM), and WFWI(FM), Fort Wayne, Indiana; WBYR(FM), Van Wert, Ohio (Ft. Wayne market); and KOAS(FM), Broken Arrow, Oklahoma (Tulsa market). Dille is the president of Truth Publishing Company, Inc. ("Truth") -- another family business⁴ that owns the Elkhart Truth, a daily newspaper published in Elkhart, Indiana -- and which is the licensee of KQLL(AM), Tulsa, Oklahoma and KQLL-FM, Owasso, Oklahoma, as well as an FM translator station in Tulsa. Pathfinder and Truth operate together under a "service mark" named Federated Media, which is not a separate corporate entity. Dille is also a 50% shareholder and director of JAM Communications, Inc., licensee of WQHK-FM, Decatur, Indiana, which operates in the same market as Pathfinder's Fort Wayne stations.

5. Federated Media's business plan, as expressed in recent pleadings, is to consolidate its efforts in its home region of Northern Indiana. In pursuit of this business strategy, Pathfinder has recently sold two stations in Grand Rapids, Michigan (WCUZ-AM-FM)⁵ and one station in Holland, Michigan, WAKX(FM), to Clear Channel Radio Licenses, Inc. ("Clear Channel"). Pathfinder has pending the above-captioned applications to purchase WNDU-AM-FM from Michiana. Applications are also pending for Pathfinder to sell KOAS(FM), and for Truth to sell KQLL-AM-FM, to Clear Channel, in the Tulsa, Oklahoma market.

² Pathfinder requests a permanent waiver of the radio-newspaper cross-ownership rule in connection with the WNDU-FM application because the 1 mV/m contour of WNDU-FM, South Bend, Indiana, encompasses the entire community of Elkhart, Indiana, and the principals of Pathfinder control the Elkhart Truth, a daily newspaper published in Elkhart. See 47 C.F.R. Section 73.3555(d)(2). In the event the issues in the instant proceeding are resolved favorably as to Pathfinder, we will subsequently and separately consider the merits of the waiver request, including WSBT, Inc.'s Comments.

³ Pathfinder's application to acquire WNDU-AM-FM reports that the other owners of Pathfinder's voting stock are Dille's adult son, John F. Dille TV (12.5%); Dille's wife, Anne F. Dille (6.25%); and Dille's adult daughter, Sarah F. Dille (6.25%).

⁴ Pathfinder reports that Dille is a 23.3% stockholder of Truth and has certain voting rights as a trustee of three trusts collectively holding an additional 24.6% of Truth stock; Jayne P. Dille, Dille's mother, votes 44.2% of Truth stock as Executrix of the Estate of John F. Dille, Jr., her late husband; and Anne F. Dille, Sarah F. Dille and John F. Dille IV each hold or are beneficiaries of a trust holding 1.3% of Truth stock.

⁵ The assignment of WCUZ-AM-FM was consummated October 11, 1996, prior to the filing of Niles' informal objections against pending Pathfinder applications. The call sign of WCUZ(AM) was changed to WTKG effective March 28, 1997.

6. Purchase of WRBR. On December 18, 1992, Pathfinder entered into a Joint Sales Agreement (JSA) with Booth American Company ("Booth"), former licensee of WRBR(FM), South Bend, Indiana. The JSA provided for the joint sale of advertising time on WRBR and WBYT(FM),⁶ Pathfinder's FM station licensed to Elkhart (with which WRBR is now collocated). The JSA also provided for Pathfinder to perform certain administrative services for WRBR. It is undisputed that Booth decided to sell WRBR, and Pathfinder was interested in purchasing the station in order to preserve the benefits of the JSA. However, Pathfinder recognized that a waiver of the radio-newspaper cross-ownership rule would be required because John Dille has an attributable interest in the Elkhart Truth, and the 1 mV/m contour of WRBR encompasses the entire community of Elkhart, where the Elkhart Truth is published⁷

7. Pathfinder and Booth negotiated the terms of a deal, including the purchase price, but decided not to move forward or to otherwise pursue Pathfinder's need for a waiver of the radio-newspaper cross-ownership rule. After Booth indicated to Dille that it would begin seeking other buyers for WRBR, Dille approached David L. Hicks ("Hicks"), a broadcaster in Michigan, and discussed the terms of the deal he had worked out with Booth, as well as a proposed ownership structure that included Dille's three adult children as non-controlling minority investors (16.33% each = 49%), with an "arrangement-option-agreement" by the minority owners to acquire Hicks' majority interest (51%). Dille discussed such an arrangement in a memo to Booth dated August 17, 1993. The proposed licensee company -- later named Hicks Broadcasting -- was originally referred to in correspondence as "Newco."

8. Booth and Newco (Hicks Broadcasting) entered into an Asset Purchase Agreement ("APA") dated November 30, 1993, and filed a Form 314 assignment application with the Commission on December 22, 1993. The APA called for a seller-financed purchase price of \$ 660,000, backed up by a guaranty from Hicks and the Dille children totaling \$250,000. Hicks asserted in the application that there were no documents, contracts or understandings relating to future ownership of the station, including options. In response to an oral inquiry from Commission staff, Dille clarified in a February 24, 1994 amendment to the application that he would not finance or guarantee the purchase of the station by Hicks Broadcasting or be involved in the day-to-day operation of WRBR. The Commission granted the application on March 16, 1994. Booth and Hicks Broadcasting closed on the sale of the station on March 31, 1994. Booth's rights and obligations under the JSA with Pathfinder were assigned to and assumed by Hicks Broadcasting at the closing. Pathfinder also began providing financial and accounting services to Hicks Broadcasting in April 1994 pursuant to a separate accounting agreement.

9. At the time of the closing on WRBR, Hicks was an owner of 32% of the stock of Crystal Radio Group, Inc. ("Crystal") and was employed at its stations in Kalamazoo, Michigan. Hicks was terminated by Crystal Radio's board of directors in part because of his involvement in the purchase of WRBR. Hicks filed suit in state court in Kalamazoo, Michigan against Crystal and its shareholders and directors in December 1994.⁸ The allegations in the informal objection filed by Niles are based largely on depositions and documents produced in discovery in the state court proceeding involving Hicks and Crystal, specifically, the depositions of Dille, his children, Hicks and others, and financial documents relating to the operation of WRBR. While Hicks Broadcasting was the licensee of WRBR, Hicks became an employee of Truth on September 1, 1994, and subsequently served as general manager of Pathfinder-owned stations in Michigan from July 1, 1995 until February 28, 1997.

10. Edward J. Sackley III, President and CEO of Crystal, stated in his deposition in the civil case that he first learned from Dille, in a brief encounter at the Crystal offices prior to September 28, 1993, that Hicks "was

⁶ WBYT was known as WLTA until its call sign was changed, effective June 24, 1994.

⁷ Section 73.3555(d) of the Commission's rules, 47 C.F.R. Section 73.3555(d), prohibits the grant of an FM broadcast station license to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in . . . [t]he predicted 1 mV/m contour of an FM station . . . encompassing the entire community in which such newspaper is published."

⁸ Hicks v. Crystal Radio Group, Inc., No. B94-3603-NZ (Michigan Circuit Ct., Kalamazoo Co.).

going to help him acquire" WRBR. Sackley stated that "Hicks proposed to acquire [WRBR] on Dille's behalf and transfer it to Dille at a later date." Hicks and Dille have denied ever making any such statement to Sackley. According to copies of civil trial depositions, documents and canceled checks submitted with Niles' informal objection, Dille provided nearly all of the funds for his children's investment in Hicks Broadcasting, and there is no evidence that the children have repaid him. On November 30, 1993 -- the date that the APA was executed -- Robert A. Watson, the secretary-treasurer of Pathfinder, wrote identical memoranda to each of the three Dille children to inform them that Dille had deposited in their accounts the collective sum of \$ 24,500, and that checks had been written on the children's accounts in the same amount to cover their portion of the \$ 50,000 escrow deposit to Booth. Under the terms of the Asset Purchase Agreement for WRBR, the initial payback of the \$ 660,000 purchase loan from Booth involved six monthly payments of \$ 5,000 each, beginning seven months after closing, and a payment of \$ 105,000 on the first anniversary of the closing. Dille provided his children with the money for their share of the \$ 5,000 payments, as well as the entire \$ 105,000 payment, and later payments of \$ 10,000 (5/1/96) and \$ 4,900 (6/1/96). Dille did so by writing checks to his children, who in turn wrote checks in the same amount to Hicks Broadcasting.

11. Hicks provided his pro rata share of the six \$ 5,000 payments (51% or \$ 2,550 each), and according to Pathfinder, has not been reimbursed by Dille or Dille's children. Hicks also put up a bank letter of credit in the amount of \$ 25,500 representing his portion of the escrow deposit. Pathfinder states that the letter of credit was not supported in any way by Pathfinder, Dille or Dille's children. However, Dille's children indemnified Hicks for this amount, in a Side Letter executed March 31, 1994, which supplemented the Operating Agreement of Hicks Broadcasting. The Side Letter also provided Hicks with a right of contribution relative to the \$ 250,000 guaranty to Booth, such that Dille's children are required to contribute their full 49% of the total guaranty amount before Hicks is obligated to make payments on the guaranty. Pathfinder states that Hicks did not participate in providing shareholder loans to Hicks Broadcasting to cover the \$ 105,000 lump sum payment because it was due at a time when Hicks was engaged in the civil trial litigation with Crystal, which remains ongoing, and that he was "unable to comfortably make a pro rata share of a loan to the company" at that time. Hicks subsequently provided a \$ 10,000 loan to Hicks Broadcasting to make a payment to Booth on April 1, 1996, and he provided a \$ 5,100 loan to Hicks Broadcasting, which was his pro rata share of the \$ 10,000 payment that was due to Booth on June 1, 1996. All Booth payments since that time have been provided from the operations of WRBR, according to Pathfinder. Hicks' personal cash contributions to Hicks Broadcasting therefore total approximately \$ 30,000, and there is no evidence that any part of this amount has been reimbursed by Dille, Dille's children or Pathfinder.

12. Steve Kline, the general manager of WRBR, is also the general manager of Pathfinder station WBYT, with which WRBR has the JSA. Other Pathfinder employees, whose duties are split between Pathfinder's WBYT and Hicks Broadcasting's WRBR, and whose salaries are partially allocated to Hicks Broadcasting, include WRBR's Operations Manager, the employee in charge of Production/Continuity, and the Event Coordinator in the Programming Dept.; the General Sales Manager; the Office Manager (who is also responsible for Traffic); and the Chief Engineer. Pursuant to the April 1994 agreement for financial and accounting services, Pathfinder keeps a cash receipts book and prepares financial statements for Hicks Broadcasting, which does not maintain a separate bank account. Hicks Broadcasting's employees and vendors are paid by Pathfinder with checks written on a checking account that bears Pathfinder's name (but is marked with a stamp as being for Hicks Broadcasting). In connection with these accounting services, Pathfinder has made payments on behalf of Hicks Broadcasting from time to time that exceeded the balance available from and attributable to Hicks Broadcasting. Watson, Pathfinder's Secretary-Treasurer, testified in his deposition in the civil case that Hicks Broadcasting had a net operating loss of \$ 161,684 as of year end 1994, and that Pathfinder funded that loss on an interest-free basis.

13. The staff sent a Letter of Inquiry to Pathfinder and Hicks Broadcasting on March 14, 1997 in order to obtain answers to questions raised by the pleadings in this proceeding. The staff requested responses to 11 questions relating to: (1) Dille's statement that he would not finance the purchase of WRBR; (2) Hicks' representation in the WRBR assignment application that there were "no documents, contracts or understandings relating to future ownership of the station, including options;" and (3) the level of involvement of Dille and Pathfinder in the day-to-day operations of WRBR. Based upon the responses of Pathfinder and Hicks Broadcasting, together with a 59-page reply by Niles, we find that substantial and material questions of fact have been raised regarding whether Pathfinder and Hicks Broadcasting, through Dille and Hicks, made misrepresentations to the Commission or lacked candor; whether Dille and Pathfinder were the real parties in interest in the application to acquire WRBR and are in de facto control of

that station; and whether such alleged control constitutes a continuing violation of our cross-ownership rules.

Misrepresentation/Lack of Candor in WRBR Application

14. Dille's Statement. Niles alleges that Dille falsely represented that he would not be financing the acquisition of WRBR. Niles provides a copy of a letter from Hicks Broadcasting's attorney, (who is also Pathfinder's attorney), to Hicks dated February 17, 1994, in which the attorney states that the individual at the Commission who was processing the WRBR assignment application requested two pieces of information in the form of amendments. According to the attorney, one of those requests was for "a statement from John Dille and his father that they will not be involved in the day-to-day operation of WRBR and will not participate in the financing of the purchase of the station for John's children." The letter indicated that it had been copied on Watson, Pathfinder's Secretary-Treasurer. The attorney stated in the letter that he had "sent a statement to John and his father to sign." On February 24, 1994, Hicks filed an amendment in which Dille stated that "neither I nor my father, John F. Dille, Jr., will finance or guarantee the purchase of [WRBR] by Hicks Broadcasting. Moreover, upon acquisition of the station by Hicks Broadcasting, neither I, nor my father, will be involved in the day-to-day operation of the station."

15. Pathfinder does not dispute that Dille provided all of the funds for his children's investment in Hicks Broadcasting. Dille had provided the funds for the escrow deposit on November 30, 1993, nearly three months prior to filing the amendment. Dille subsequently provided the children's share (49%) of the funds for the six monthly payments of \$ 5,000 each, beginning seven months after closing, and Dille provided the children with Hicks Broadcasting's entire payment of \$ 105,000 due on the first anniversary of the closing, and later payments of \$ 10,000 and \$ 4,900, all of which were amounts due by Hicks Broadcasting to Booth under the terms of the seller-financing agreement. Pathfinder also does not dispute that it continued to make payments to Hicks Broadcasting's creditors and employees on behalf of Hicks Broadcasting even when Hicks Broadcasting had a negative operating balance attributable to it.

16. Pathfinder states that Dille's statement "was made and intended literally, that he would not finance or guarantee the purchase of the station by Hicks Broadcasting [LLC], since Booth American was providing seller financing." Pathfinder states further that "[f]orm 314 does not inquire about the source of funds for an individual investor, and therefore information about the source of the Dille [c]hildren's funds was not required." Pathfinder cites prior cases for the proposition that an applicant not providing information not required or requested does not demonstrate the intention to deceive the Commission necessary for a finding of misrepresentation or lack of candor⁹ and states that if the Dille amendment did not fully address the Commission's concerns, the staff could have requested a further amendment, which it did not do. Pathfinder also argues that family members are permitted under Commission precedent to give or loan funds to other family members for investment in broadcast stations.¹⁰

17. In response to the staff's Inquiry Letter, Pathfinder states that it had been Dille's intention from the start to lend money to his children to fund their investment in WRBR, and that he "was not aware that the FCC staff wanted him to certify that he would not participate in the financing of the purchase of the station for [his] children." Pathfinder states further that although a copy of the February 17, 1994 letter addressed to Hicks with this quoted language notes a "cc" to Watson [Pathfinder's Secretary-Treasurer], "neither John Dille nor Watson recall seeing that letter at the time and did not become aware of it until this proceeding." According to Pathfinder, Dille perceived a clear distinction between making a business investment directly in Hicks Broadcasting and making a parental loan to his children when he filed the February 22, 1994 statement that he would not "finance or guarantee the purchase of the station by Hicks Broadcasting." Pathfinder states that Dille signed the only statement he was aware of, and that he was not presented with

⁹ See, e.g., *Fox River*, 93 FCC 2d 127, 128-29 (1983); *Cannon's Point Broadcasting*, 93 FCC 2d 643, 654 (Rev. Bd. 1983).

¹⁰ See, e.g., *North Idaho Broadcasting*, 8 FCC Rcd 1637 (1993); *Cannon's Point Broadcasting*, 93 FCC 2d 643 (Rev. Bd. 1983); *High Sierra Broadcasting*, 96 FCC 2d 423 (Rev. Bd. 1983). But see *Attribution of Broadcast Interests, Notice of Proposed Rule Making*, 10 FCC Rcd 3606, 3649 (1995), *Further Notice of Proposed Rule Making*, 11 FCC Rcd 19895 (1996) (discussing broadcaster interrelationships including "family relationships"). See discussion of family relationships *infra* para. 21.

any documents or correspondence other than the statement he signed. Hicks Broadcasting's attorney says that he "assumes" that the February 17th letter written by him reflects his conversation with a member of the Commission staff, and that he intended for the February 22nd statement to be responsive to the staff's request.

18. Discussion. Misrepresentation is a false statement of fact made with an intent to deceive the Commission. *Fox River Broadcasting, Inc.*, 93 FCC 2d at 129. Intent to deceive is a "necessary and essential element" of misrepresentation. *Trinity Broadcasting of Florida, Inc.*, 10 FCC Rcd 12020, 12063 (1995); see *Swan Creek Communications, Inc. v. FCC*, 39 F.3d 1217 (D.C. Cir. 1994). Intent to deceive may be found from the false statement of fact coupled with proof that the party making it had knowledge of its falsity. See *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253, 1260 (D.C. Cir. 1991). Intent may also be inferred from motive. See *Joseph Bahr*, 10 FCC Rcd 32, 33 (Rev. Bd. 1994).

19. Lack of candor involves concealment, evasion or some other failure to be fully informative, also with an intent to deceive. See *Fox River*, 93 FCC 2d at 129. The duty of candor requires an applicant before the FCC to be "fully forthcoming as to all facts and information relevant" to its application. *Swan Creek*, 39 F.3d at 1222. Relevant information is defined as information that may be of "decisional significance." *RKO General Inc. v. FCC*, 670 F.2d 215, 229 (D.C. Cir. 1981), cert denied, 456 U.S. 927 and 457 U.S. 1119 (1982).

20. We conclude that Dille's February 22, 1994 statement that he would not 'finance or guarantee the purchase of the station by Hicks Broadcasting [LLC]' presents substantial and material questions of fact as to whether the statement is false and whether he intended to deceive the staff when he submitted the statement. Pathfinder argues that Dille's statement is literally correct because Booth was providing seller financing. This makes the statement true in only one sense, i.e., that Dille did not provide credit to Hicks Broadcasting for the purchase of WRBR.¹¹ However, Pathfinder fails to explain how Dille's actions in providing virtually all of the funds that Hicks Broadcasting used to purchase the station do not constitute "financing." Pathfinder also does not explain how its practice of continuing to make payments to Hicks Broadcasting's creditors on behalf of Hicks Broadcasting when Hicks Broadcasting had a negative operating balance attributable to it does not constitute "financing" the purchase of the station, especially where the seller was one of Hicks Broadcasting's creditors.

21. On the question of intent, we do not agree with Pathfinder that the information that Dille failed to provide was not requested. Pathfinder correctly asserts that Form 314 does not inquire about the source of funds for an individual investor, and that the Commission does not prohibit parents from lending money to their children to invest in broadcast ventures. However, the immediate issue to be determined here is not whether misrepresentations were made on the Form 314 application, but whether Dille truthfully responded to a staff inquiry concerning his involvement in the purchase and operation of WRBR. The Commission is cognizant of the potential influence, as well as control, that a sizable financial contribution can convey to one who makes such a contribution to an applicant. See *Roy M. Speer*, 11 FCC Rcd 14147, 14158, modified, 11 FCC Rcd 18393 (1996) (citing *WLOX Broadcasting Co. v. FCC*, 260 F.2d 712 (D.C. Cir. 1958)). In cases involving the proposed independent ownership of same-market broadcast stations by family members, where the common ownership of such stations would violate our multiple ownership or cross-ownership rules, the staff attempts to determine what financial role, if any, the family member who is not a party to the application may have in the acquisition of the station(s) at issue.¹²

22. We find that a substantial and material question of fact exists as to whether Dille's statement was intended literally, i.e., that he would not finance the purchase of WRBR because the seller was providing financing. It was obvious from the purchase agreement provided with the application that the seller was providing 100% seller financing. If the staff were only concerned with the formal financing arrangement with the seller, there would have been no reason to ask Dille for information concerning his role. If Dille

¹¹ The verb "to finance" has the following three definitions: (1) to supply the funds or capital for; (2) to supply funds to; and (3) to provide credit to. Webster's II New Riverside University Dictionary (1994).

¹² The staff was aware of the existence of the JSA between WBYT and WRBR, which was disclosed in the WRBR assignment application. See discussion of financial implications of JSA *infra* para. 42.

believed that the staff was requesting information that was already in the staff's possession, he did not say so at the time. Neither do we accept Dille's response that the staff could have requested a further amendment if his declaration did not satisfactorily answer their concerns. Dille stated that he would not finance or guarantee the purchase of the station by Hicks Broadcasting. On its face and in the absence of any conflicting evidence, this declaration would certainly appear to answer the staff's question. Since the staff was unaware that Dille had already provided the funds for the escrow payment and that he was going to provide funds to his children for Hicks Broadcasting's payments to the seller of WRBR, there would have been no reason for the staff to request a further amendment, as Pathfinder suggests.

23. Further evidence of an intent to deceive can be reasonably inferred from the fact that Dille knew he was prohibited from holding an attributable interest in WRBR absent a waiver of the newspaper-radio cross-ownership rule. Disclosure of the fact that he was providing all of the funds for his children's investment in Hicks Broadcasting could have caused the staff to expand its inquiry into the level of influence or control that Dille would have in Hicks Broadcasting. Thus, Dille had a clear motive to misrepresent his role in providing funds to his children for the purchase of WRBR.

24. Based on the foregoing, we find that a substantial and material question of fact has been raised concerning whether Dille misrepresented with respect to his February 22nd statement. Because, as discussed below, we also find that a substantial and material question of fact has been raised concerning whether Dille is in de facto control of WRBR, the issue will include whether Dille misrepresented in stating that he would not be involved in the day-to-day operation of WRBR.

25. A lack of candor issue will also be specified with respect to Dille's statement. Even if it is determined that Dille's statement regarding financing for the acquisition of WRBR was not a false statement and thus was not a misrepresentation, the information that Dille was participating in financing the purchase of WRBR by lending all of the funds used by his children as minority investors may have been decisionally significant based upon the totality of the circumstances, and therefore, should have been disclosed. Lack of candor involves concealment, evasion or some other failure to be fully informative, coupled with an intent to deceive. See *Fox River*, 93 FCC 2d at 129. An issue will be specified to determine whether Dille evinced an intent to deceive in failing to disclose that he would provide his children with the actual capital that Hicks Broadcasting used to make payments on the loan to Booth for the purchase of WRBR. As stated above, when Dille signed the statement, he failed to report that he had already provided his children with \$ 24,500 for the escrow deposit to Booth. The lack of candor issue will also encompass Dille's statement that he would not be involved in the day-to-day operation of WRBR.

26. Niles also alleges in its Reply to the responses of Pathfinder and Hicks Broadcasting to the Inquiry Letter that Hicks lacked candor because he received the February 17th letter from his attorney reflecting what the staff requested, and he also signed a covering letter amending the WRBR application with Dille's February 22nd statement. It is not clear when Hicks first became aware that Dille was lending funds to his children for their participation in the purchase of WRBR. In his civil trial deposition, taken December 15, 1995, Hicks twice denies having any knowledge that Dille was providing funds to his children in connection with the purchase of WRBR.¹³ The deposition was taken approximately one year and nine months after the WRBR application was granted by the staff on March 16, 1994. Further, if it is concluded that Dille is, or was, in de facto control of WRBR -- an issue on which we find a substantial and material question exists -- then we must also determine when Hicks became aware of Dille's intention to intervene in the control of the station. If Hicks knew of Dille's intention at the time he submitted the amendment attaching Dille's statement forswearing any intention to be involved in the day-to-day affairs of WRBR, then he would have made a material misrepresentation to, or lacked candor with, the Commission. Appropriate issues concerning Hicks' truthfulness as to the financing and day-to-day operations of WRBR will be specified.

27. Misrepresentation Concerning Option Agreement. Niles alleges that Hicks misrepresented when he filed the WRBR assignment application, which stated that there were no documents, contracts or understandings relating to future ownership of WRBR, including options. Hicks Broadcasting filed its assignment application with the Commission on December 22, 1993, but the possibility of an option for Dille's children to acquire Hicks' majority interest in Hicks Broadcasting was mentioned by Dille in a memo to Booth dated August 17, 1993. Therefore, in the Inquiry Letter, the staff requested information as to the "earliest date that Mr. Hicks reached an understanding with either Mr. Dille or Mr. Dille's children" that Dille's children would have an option to purchase Hicks' interest in Hicks Broadcasting.

28. Pathfinder responds that Hicks and Dille had discussed the idea of an option, right of first refusal or similar type agreement, but that the discussions were preliminary and had not resulted in any understanding

or agreement by the time the assignment application was filed. Pathfinder states that at the time the assignment application was filed, Hicks' attorney was not aware that Hicks and Dille or Dille's children were discussing the concept of an option-type arrangement, and that he did not discuss with Hicks or Dille whether their discussions had reached the stage that they should be reported in the application. Pathfinder also states that Hicks was not aware of Dille's August 17, 1993 memo to Booth, and that it did not reflect Hicks' understanding of the status of discussions up to that time. According to Pathfinder, no understanding or agreement was reached until shortly before closing on the purchase of WRBR on March 31, 1994. Pathfinder notes that the staff was first notified of the existence of the option when a copy of the Operating Agreement for Hicks Broadcasting, L.L.C. was filed on April 29, 1994, along with a copy of the Side Letter, in conjunction with Hicks Broadcasting's Ownership Report, which was required to be filed with the Commission within 30 days of consummation. See 47 C.F.R. Section 73.3615.

29. Discussion. We have reviewed the deposition testimony supplied by Niles, and we find that it raises a substantial question as to whether Hicks and Dille or Dille's children had an understanding about the future ownership of WRBR such that Hicks' statement in the WRBR assignment application concerning future ownership was a false statement. When confronted with a copy of Dille's memo and questioned as to whether he had agreed with Dille prior to August 17, 1993 that Dille's children would have the right to purchase his shares in Hicks Broadcasting, Hicks stated in deposition that "it appeared that way," and that he and Dille had "discussed" a right of first refusal option.¹⁴ But, as Pathfinder points out, Hicks contradicted that statement in deposition testimony nearly two weeks later, stating that as of August 17, 1993, there had been "a discussion," but "no agreement" concerning an option for the Dille children to purchase Hicks' shares.¹⁵ Hicks Broadcasting also points out that the initial draft of the Operating Agreement, which was distributed on March 4, 1994, did not include the relevant provision, Section 7.4, Sale, Assignment, Call Provision or Other Voluntary Transfer of Interest.¹⁶ This provision first appeared in a subsequent draft of the Operating Agreement that was distributed on March 24, 1994.

30. Clearly, discussions concerning an option were held prior to March 1994, with the form of the option evolving from a right of first refusal to an "arrangement-option-agreement" to the actual option clause contained in the Hicks Broadcasting Operating Agreement, which was executed in late March 1994. Because it appears that an understanding concerning the option agreement may have existed as early as August 1993, based upon Dille's memo to Booth and upon Hicks' deposition testimony, an issue will be specified to determine whether Hicks misrepresented or lacked candor in connection with his response in the WRBR assignment application that there were no documents, contracts or understandings relating to future ownership of WRBR, including options.

Real Party in Interest/De Facto Control

31. Niles alleges that Dille was the real party in interest behind the acquisition of WRBR in 1994 and that he is in de facto control of that station. Niles' allegations relate to conduct occurring both before and after the purchase of WRBR by Hicks Broadcasting. Niles bases its allegations partly on deposition testimony from Edward J. Sackley III, President and CEO of Crystal. In his deposition dated April 18, 1995, Sackley stated that he first learned from John Dille, in a brief encounter at the Crystal offices prior to September 28, 1993, that Hicks was going to help him acquire WRBR. Sackley also stated that Hicks later explained to him that Dille was a friend who already owned a newspaper and other stations in the area and could not acquire the South Bend license because it would violate the Commission's cross-ownership rules. Sackley stated that Hicks "proposed to acquire the station on Dille's behalf and transfer it to Dille at a later

¹³ See Deposition of David Hicks, Dec. 15, 1995, at 165-166, 210-211.

¹⁴ See *id.* at 226, 228-29.

¹⁵ Deposition of David Hicks, Dec. 28, 1995, at 258-59.

¹⁶ Section 7.4(b) of the APA ("Call Provision") provides Dille's children with the right to purchase Hicks' entire interest in Hicks Broadcasting at any time, based upon a formula related to the cash flow of WRBR, with the minimum purchase price being \$ 100,000.

date." Hicks and Dille have denied ever making any such statement to Sackley. Sackley stated that he was very concerned about the impact such a transaction might have on Crystal's license since Hicks was the single largest shareholder of Crystal. Sackley called a meeting of Crystal's board, which directed Hicks to obtain an FCC counsel opinion about the impact of the proposed transaction on Crystal.

32. On March 31, 1994, Hicks submitted an opinion letter from his attorney, which according to Sackley, did not address the propriety of Hicks acquiring the South Bend station based on his arrangement with Dille. On June 3, 1994, communications counsel retained separately by Crystal, recommended that Crystal remove Hicks as Chairman and Treasurer. On July 15, 1994, Crystal's board voted to place Hicks on administrative leave pending further investigation of his relationship with WRBR and other allegations.¹⁷ As further evidence that Dille was the real party in interest in the acquisition of WRBR, Niles states that Dille negotiated the terms of purchase. Pathfinder replies that Dille merely acted as a broker and that Hicks modified the deal with Booth American before agreeing to purchase WRBR.

33. Niles also submits deposition testimony from the Dille children indicating a lack of involvement in Hicks Broadcasting. John Dille IV testified that he never discussed with David Hicks what their proposed business relationship would be, and that he had never seen or read the Operating Agreement for Hicks Broadcasting, although he had seen and signed the signature page.¹⁸ Sarah Dille testified that she was not sure if she had ever signed anything that made her an owner of Hicks Broadcasting, but that she signed what her father suggested that she should sign.¹⁹

34. Personnel. Niles alleges that Hicks is under Dille's control. Hicks became a Truth employee on September 1, 1994, working originally for a vinyl sign business owned by Dille, then providing national sales assistance to all Pathfinder stations until July 1995. During this time, Pathfinder states that Hicks was paid with Truth checks, but 51% of his salary was allocated to WRBR and paid out of the revenues attributable to WRBR. Hicks served as General Manager of Pathfinder radio stations in Grand Rapids and Holland, Michigan from July 1995 until February 1997, during which time his salary was allocated 49% to the Michigan stations and 51% to WRBR. Pathfinder reports that effective March 1, 1997, Hicks' salary is allocated 100% to WRBR and that Dille has no plans to hire Hicks for Pathfinder or any other entity in which Dille is involved as long as Hicks remains involved in the ownership of WRBR.

35. The Inquiry Letter requested information concerning all employees of either Pathfinder or Hicks Broadcasting (managerial and non-managerial) involved in WRBR's personnel, programming and finances. Pathfinder responds that Hicks Broadcasting has nine employees (four full-time and five part-time). These include Hicks (full-time), and eight employees in the programming department. In addition, 12 Pathfinder employees have their salaries fully or partially allocated to Hicks Broadcasting. These include five account executives in the Sales department whose salaries are allocated 100% to Hicks Broadcasting, a Chief Engineer whose salary is allocated 33% to Hicks Broadcasting, and six other employees whose salaries are allocated 50% to Hicks Broadcasting: (1) General Manager Steve Kline; (2) Office Manager/Traffic; (3) General Sales Manager; (4) Event Coordinator; (5) Production/Continuity; and (6) Operations Manager. Additional Pathfinder employees provide accounting services to Hicks Broadcasting pursuant to the accounting agreement between the two companies. Kline has stated that WRBR does not maintain any sort of a personnel manual or policies, and that the same Pathfinder personnel policies that apply to employees of WBYT also apply to employees of WRBR.²⁰

36. Pathfinder reports in response to the Inquiry Letter that Steve Kline is the General Manager of Pathfinder station WBYT, and that "he was in charge of the JSA between WBYT and WRBR when WRBR was licensed to Booth American." Pathfinder states that Hicks interviewed Kline and selected him to also serve as the General Manager of WRBR after the closing on WRBR. Pathfinder further states that Kline

¹⁷ Hicks filed the civil suit against Crystal after Crystal's Secretary sent out a notice of a shareholders' meeting to consider an amendment that would have delayed Hicks from exercising his rights under a "Forced Sale Provision" in Crystal's shareholder agreement. According to Pathfinder, summary judgment has been entered in favor of Hicks "on the core issue of the unlawful removal of a forced sale clause by Crystal Radio from a shareholder agreement to which Hicks was a party."

¹⁸ Deposition of John Dille IV, Jan. 30, 1996, at 6.

¹⁹ Deposition of Sarah Dille, Jan. 30, 1996, at 9.

²⁰ Deposition of Steve Kline, Jan. 30, 1996, at 22-23.

was instructed from the beginning as to the restrictions of his dual role, that decisions involving WRBR are to be made by Hicks, and that he should refrain from discussing with or involving Dille in any way with the day-to-day operations of WRBR. Pathfinder asserts that Hicks and Hicks Broadcasting have maintained effective control over the personnel, programming and finances of WRBR through these operating arrangements and that Hicks, who has owned radio stations for 15 years and been involved in broadcasting for more than 35 years, is aware of, and properly executes his duties and responsibilities as the controlling stockholder of the licensee of WRBR. Pathfinder states that its relationship with WRBR has been "carefully structured by the parties to be lawful" and that "this case involves a series of legitimate transactions relating to a JSA and financing, well within established precedent."

37. On April 22, 1997 -- subsequent to the filing of Pathfinder's response and Niles' reply to the Inquiry Letter -- Niles submitted a copy of Steve Kline's deposition in the civil trial. Kline's deposition is inconsistent with Hicks' civil trial deposition on the subject of his hiring by Hicks. Kline states that he was hired by Dille to be the general manager of WBYT and WRBR in September 1993, six months prior to the purchase of WRBR by Hicks Broadcasting.²¹ Kline states that he did not even meet Hicks until "sometime in the summer of 1994," which is at least three months after the purchase of WRBR.²² When confronted at deposition with an inconsistency between the dates and his original claim that Hicks had hired him to be the general manager of WRBR, Kline stated that he was the general manager of WRBR prior to Hicks' involvement in the station, but that he was "confirmed" by Hicks as the general manager.²³ Hicks stated that he and Dille together interviewed Kline to be the general manager of both WBYT and WRBR, and that Kline was not already working for Pathfinder when they interviewed him.²⁴

38. Programming. Kline stated in his deposition that there are "a lot of shared duties in the program department" for WBYT and WRBR, and that the program director is a shared position between the two stations.²⁵ Kline's testimony is inconsistent with Hicks' deposition six weeks earlier in which Hicks stated that Joe Turner programmed WRBR and had no relationship with WBYT.²⁶ Kline stated that Joe Turner was the assistant program director for both stations, and that his time was allocated 80% to WRBR and 20% to WBYT.²⁷ Kline stated that Turner was the assistant to Phil Britten, a Pathfinder employee who was the Program Director of both stations, and that Turner had been his assistant since being hired in July 1995.²⁸ Kline also indicated that news programming for WBYT, WRBR and WTRC(AM), originates from the same location, with essentially the same news staff.²⁹ Niles alleges that Dille effected a format change at WRBR that has resulted in significantly decreased audience share and revenues at Niles' album-oriented/classic rock station, WAOR(FM). WRBR's format changed from oldies to rock in early 1996, and WRBR's audience share has nearly doubled since that time.³⁰

39. Finances. Niles alleges that Hicks Broadcasting is not in control of its own finances. The record reflects that Hicks Broadcasting does not have its own bank account and that Pathfinder provides accounting services for Hicks Broadcasting, which include writing checks to pay employees and outstanding debts of Hicks. The record further establishes that, at times, Pathfinder has made payments on

²¹ Id. at 9-10.

²² Id. at 6.

²³ Id. at 8.

²⁴ Deposition of David Hicks, Dec. 15, 1995, at 213-14.

²⁵ Deposition of Steve Kline, Jan. 30, 1996, at 12.

²⁶ Deposition of David Hicks, Dec. 15, 1995, at 215-16.

²⁷ Deposition of Steve Kline, Jan. 30, 1996, at 12-13.

²⁸ Id. at 18.

²⁹ Id. at 21-22.

³⁰ BIA Publications Radio Analyzer Database (1997).

behalf of Hicks Broadcasting that have exceeded the balance available from and attributable to Hicks Broadcasting. Pathfinder has done so without charging interest to Hicks Broadcasting.

40. The Inquiry Letter requested details as to the types of financial and accounting services that Pathfinder provides for Hicks Broadcasting, as well as the agreement governing those services. Pathfinder reports that it entered into an accounting agreement with Hicks Broadcasting on March 23, 1994, whereby Pathfinder provides general accounting, accounts payable, payroll, and issues monthly financial statements for Hicks Broadcasting. In exchange, Hicks Broadcasting originally paid \$ 705 per month, and since January 1996 has paid \$ 1,000 per month. The accounting agreement is subject to cancellation by either party on 60 days notice. Hicks Broadcasting states that it was logical, efficient and cost effective to use Pathfinder's computer hardware, software and systems already in place, with experienced accounting personnel who were already schooled in radio station operations, and that such functions are entirely ministerial in nature and do not compromise or usurp control of the finances of WRBR. In addition to the accounting agreement, Pathfinder provides certain accounting functions for Hicks Broadcasting under the JSA.

41. The Inquiry Letter also attempted to clarify the periods of time, including dates and lengths of time, that Pathfinder continued to make payments on behalf of Hicks Broadcasting that exceeded the balance available from and attributable to Hicks Broadcasting. Pathfinder reports that there were two such periods: (1) June 1994 through March 1995; and (2) December 1995 through May 1996. During the initial period of 10 consecutive months, Hicks Broadcasting's cumulative negative operating balance ranged from a low of \$ 7,132 (June 1994) to a high of \$ 80,769 (January 1995). During the second period of six consecutive months, Hicks Broadcasting's cumulative negative operating balance ranged from a low of \$ 10,843 (May 1996) to a high of \$ 56,939 (January 1996). As an example of expenses paid during the same period, Pathfinder states that payroll amounts paid by Pathfinder under the JSA and accounting agreement ranged from \$ 27,568.24 in June 1994 to \$ 35,121.65 in May 1996. Hicks Broadcasting's cumulative negative operating balance exceeded the entire payroll amount during 11 months. Hicks Broadcasting has had a positive operating balance since June 1996.

42. As noted in the Inquiry Letter, the JSA provides for Pathfinder to offset up to \$ 5,000 per month of Hicks' expenses in connection with the JSA against Hicks' share of the following month's revenues. This provision of the JSA therefore would not account for the fact that one corporation, Pathfinder, continued to pay the bills of another corporation, Hicks Broadcasting, without charging interest, where Hicks Broadcasting's cumulative negative operating balance rose to \$ 80,000 and exceeded \$ 5,000 for as long as 10 consecutive months. Although the cumulative negative operating balance has apparently been paid in its entirety through WRBR's station revenues, such behavior seems unusual and raises a concern about control over finances. In response to the Inquiry Letter, Pathfinder states that it "has reexamined this practice in light of the concern reflected in the Commission's inquiry and has advised Hicks Broadcasting LLC that it will have a 30-day period in which to eliminate a negative operating balance or WRBR expenses (exclusive of joint expenses under the JSA) will not be paid."

43. Discussion. We find that a substantial and material question of fact exists as to whether Dille is, or has been, in control of WRBR, and whether the licensee, Hicks Broadcasting, has abdicated control, in violation of our governing statute and rules. Section 310(d) of the Communications Act states, in pertinent part:

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.

47 U.S.C. Section 310(d); see also 47 C.F.R. Section 73.3540(a) (prohibiting the voluntary assignment or transfer of control of a broadcast permit or license without prior Commission consent). While there is no exact formula for evaluating whether a party is in de facto, or actual control, see, e.g., Stereo Broadcasters, Inc., 55 FCC 2d 819, 821 (1975), modified, 59 FCC 2d 1002 (1976), we look to whether a new entity has obtained the right to determine the basic operating policies of the station, that is, to affect decisions concerning the personnel, programming or finances of the station. See WHDH, Inc., 17

FCC 2d 856 (1969), aff'd sub nom. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971). A permittee or licensee may delegate certain functions on a day-to-day basis to an agent or employee, e.g., *Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981), but such delegation cannot be wholesale. That is, those parties delegated to a task must be guided by policies set by the permittee or licensee. See *David A. Davila*, 6 FCC Rcd 2897, 2899 (1991). While we permit joint sales agreements between licensees in the same market, we have stated that such activity is only permitted "as long as each licensee retains control of its station and complies with the Communications Act, the Commission's rules and policies and the antitrust laws." See *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2787 (1992), recon granted in part, 7 FCC Rcd 6387 (1992), further recon., 9 FCC Rcd 7183 (1994).³¹ The Commission evaluates real party in interest allegations concerning an application as it does those concerning de facto control of a permittee or licensee. *Univision Holdings, Inc.*, 7 FCC Rcd 6672, 6675 (1992), recon. denied, 8 FCC Rcd 3931 (1993).

44. We believe that a substantial and material question of fact exists as to whether Dille was the real party in interest in the application to acquire WRBR from Booth, and whether he is, or at any time since its acquisition by Hicks Broadcasting, has been, in de facto control of that station. The evidence adduced so far suggests that Dille structured the deal to purchase WRBR on terms that he negotiated, and that all of the members of the nominal licensee company, Hicks Broadcasting, are in substantial relevant respects under his control. The minority owners are his three adult children, and deposition testimony indicates that at least two of them, John IV and Sarah, know little about the licensee company and act at Dille's direction. David Hicks was apparently hand-picked by Dille to be the majority owner of the licensee company, and between September 1, 1994 and March 1, 1997, Hicks was an employee of Truth/Pathfinder, which are both controlled by Dille.

45. With regard to control over personnel, the General Manager of WRBR, Steve Kline, indicates that he was hired by Dille and installed as the general manager of WRBR six months prior to Hicks Broadcasting's purchase of WRBR from Booth, and that he was "confirmed" by Hicks as the General Manager after Hicks Broadcasting's purchase of the station. There is substantial doubt about Hicks' role, however. Hicks' deposition testimony contradicts Kline's, with Hicks stating that he and Dille hired Kline to run both WRBR and WBYT, and that Kline was not already a Pathfinder employee at the time they hired him. Although Kline insists that he was hired in September 1993, Pathfinder states that Hicks hired Kline after the closing on WRBR, which occurred in March 1994.

46. Pathfinder reports that virtually all of the employees who control key aspects of WRBR's operations are Pathfinder employees, including the Chief Engineer, the General Manager, the General Sales Manager, and the Operations Manager. Although Pathfinder asserts that eight employees in the programming department are employees of Hicks Broadcasting including the current Program Director, it appears that these are mainly on-air personalities who operate under the direction of the Program Director for both WBYT and WRBR, or that they did so for a substantial portion of the time that Hicks Broadcasting has been the licensee of WRBR. The five account executives whose salaries are allocated 100% to Hicks Broadcasting operate under the direction of the General Sales Manager, who is a Pathfinder employee. It also appears that any employees of Hicks Broadcasting are subject to the personnel policies set by *Pathfinder*. Cf. *Radio WAVS, Inc.*, 92 FCC 2d 1037, 1044 (1982) (finding that principal of licensee maintained control over personnel where, inter alia, he "personally set the terms of... employment" for a new hire).

47. With regard to control over programming, it appears that Pathfinder personnel, including the General Manager and possibly the Program Director, would be in a position to dictate programming changes. News on WRBR originates from the same source as other Pathfinder stations.

48. With regard to finances, it appears that Pathfinder controls nearly every aspect. Hicks Broadcasting does not have its own bank account, and its employees and creditors are paid with checks written by

³¹ We have invited comment in our pending attribution proceeding as to whether we should attribute JSAs among broadcasters in the same markets, at least under certain circumstances, and as to what factors should make such contractual relationships attributable. *Attribution of Broadcast and Cable/MDS Interests, Further Notice of Proposed Rule Making*, MM Docket Nos. 94-150, 92-51 & 87-154, 11 FCC Rcd 19895,

19899 (1996). We have requested general information in that proceeding concerning the level of involvement in station operations, including programming and finances, and joint sales force utilization that accompany JSAs. *Id. at 19912*.

Pathfinder. There is also evidence that Pathfinder continued to pay the debts of Hicks Broadcasting for as long as 10 consecutive months when Hicks Broadcasting, supposedly a separate corporation, had no balance attributable to it. See *Trinity Broadcasting of Florida, Inc., 8 FCC Rcd 2475, 2479 (1993)* designating for hearing a de facto control issue where "accounting and bookkeeping services" included "advances/loans" with no formal notes or repayment schedules).

49. We note that WRBR has had a positive operating balance since June 1996, and that two of the most troubling aspects of the interrelationships between Pathfinder and Hicks Broadcasting will apparently not be a problem in the future. Hicks will not be employed at Pathfinder stations, so he will be able to devote 100% of his time to running WRBR and his salary will be paid out of the revenues generated by WRBR. Secondly, Pathfinder will no longer continue to pay Hicks Broadcasting's expenses when Hicks Broadcasting has a negative operating balance for more than 30 days.

50. However, based upon the totality of circumstances, we find that Niles has raised a substantial and material question of fact as to whether Dille was the real party in interest behind the application to purchase WRBR, and whether he does in fact control the station, or has done so in the past, as the President and controlling owner of Pathfinder. Control over any one of the areas of personnel, programming and finances would be sufficient for a finding of de facto control. Here, the evidence when taken as a whole, creates a reasonable inference that Dille/Pathfinder maintain a tight grip on all three aspects of WRBR's operations and thus poses substantial questions of fact as to whether an unauthorized transfer of control occurred. See *Roy M. Speer, 11 FCC Rcd 18393, 18415 (1996)* (finding unauthorized transfer of de facto control where controlling shareholder of licensee "absolutely deferred" to Silver King, which controlled finances and personnel of television station by making virtually unrestricted decisions). While Hicks alleges "ultimate" control, Pathfinder's "occupation" is so significant that the credibility of this assertion is strained. Therefore, an issue will be specified to determine in an evidentiary hearing whether Dille/Pathfinder is, or has at any time since Hicks Broadcasting has been the licensee of WRBR, been in de facto control of WRBR and whether, if Hicks Broadcasting ever controlled WRBR, there was an unauthorized transfer of the station.

Multiple Ownership Violations/Other Licenses

51. We will also specify an issue to determine whether Pathfinder is or has been in violation of the newspaper-radio cross-ownership rule if Dille is determined to now be or ever have been in de facto control of WRBR.

52. The Commission makes a determination as to the transferability of commonly-held licenses at the time of designation of one or more of a multiple owner's stations for hearing. See *Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1224 (1986)* ("Character Policy") (subsequent history omitted); *Transferability of Broadcast Licenses, 53 RR 2d 126, 126 (1983)* ("Transferability"). The applicable test is "whether there is a substantial likelihood that the allegations warranting designation of one station for hearing bear upon the operation of other stations." *Transferability, 53 RR 2d at 126*. The question as to whether the alleged behavior is so fundamental to a licensee's operation that it is relevant to its qualifications to hold any station license is a "question of fact which must be resolved by the Commission on a case-by-case basis." *Character Policy, 102 FCC 2d at 1224*.

53. In this case, we find that there is a substantial likelihood that the allegations warranting designation of the Elkhart/South Bend stations for hearing bear upon the operation of other stations controlled by Pathfinder or its principals. The allegations involve the truthfulness and reliability of the controlling stockholder and president of the licensee corporation. We believe that the allegations potentially are serious enough to affect the qualifications of Pathfinder (and other commonly-controlled entities) to be Commission licensees. Under these circumstances, we find it appropriate to prohibit assignments and transfers of existing licenses and acquisitions of additional licenses by Pathfinder (and other commonly-controlled entities) pending the outcome of the hearing. Because the transferability of the other stations turns upon resolution of the allegations concerning the Elkhart/South Bend stations, we believe that the licensee may prefer to await the outcome of a hearing limited to those stations; therefore, we will not automatically designate the other licenses for hearing. Recognizing, however, that our policy ordinarily has been to place any such affected stations into hearing at the time that we place limits on their transferability, *Character Policy, 102 FCC 2d at 1224*, we therefore afford Pathfinder the option, at its election, to include

additional station licenses in the hearing now designated for the Elkhart/South Bend stations. In future cases, we would expect to offer licensees a similar option under similar circumstances. Thus, while departing in this case from our procedures, as announced in the Character Policy Order, we continue our underlying policy of providing "licensees faced with disqualifications questions a[n] ... opportunity to defend themselves at the earliest practicable date." Id.

Ordering Clauses

54. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 312(a) of the Communications Act of 1934, as amended, Hicks Broadcasting of Indiana, L.L.C., IS DIRECTED TO SHOW CAUSE why the license for Station WRBR(FM), South Bend, Indiana should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

[1.] To determine whether Hicks Broadcasting of Indiana, L.L.C. misrepresented facts and/or lacked candor, in its application (including all amendments) to acquire the license for Station WRBR(FM), regarding its present or future ownership or control in violation of Sections 73.1015 and/or 73.3514 of the Commission's Rules.

[2.] To determine whether Hicks Broadcasting of Indiana, L.L.C. abdicated control of Station WRBR(FM) to Pathfinder Communications Corp. and/or its agents or principals in violation of Section 310(d) of the Communications Act of 1934, as amended.

[3.] To determine whether, in light of the evidence adduced under the foregoing issues, Hicks Broadcasting of Indiana, L.L.C. possesses the requisite qualifications to be or remain the licensee of Station WRBR(FM).

55. IT IS FURTHER ORDERED that, pursuant to Section 312(a) of the Communications Act of 1934, as amended, Pathfinder Communications Corp. IS DIRECTED TO SHOW CAUSE why the license for Station WBYT(FM), Elkhart, Indiana should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

[4.] To determine whether John Dille III misrepresented facts and/or lacked candor in the application of Hicks Broadcasting of Indiana, L.L.C. to acquire the license for Station WRBR(FM).

[5.] To determine whether Pathfinder Communications Corp. and/or any of its agents, including, but not limited to John Dille III, was the undisclosed real party-in-interest in the application of Hicks Broadcasting of Indiana, L.L.C. to acquire the license for Station WRBR(FM), in violation of Section 73.3514 of the Commission's Rules.

[6.] To determine whether Pathfinder Communications Corp. and/or its agents, including, but not limited to John Dille III, acquired control of Station WRBR(FM) without Commission authorization in violation of Section 310(d) of the Communications Act of 1934, as amended.

[7.] To determine whether, in light of the evidence adduced under issues 2, 5 and 6, Pathfinder Communications Corp. and/or its agents -- including, but not limited to John Dille III -- owned, operated or controlled interests in violation of Section 73.3555(d)(2) of the Commission's Rules.

[8.] To determine whether, in light of the evidence adduced under the foregoing issues, Pathfinder Communications Corp. possesses the requisite qualifications to be or remain the licensee of Station WBYT(FM).

56. IT IS FURTHER ORDERED that, pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Mass Media Bureau with respect to issues 1 - 8.

57. IT IS FURTHER ORDERED that this Order to Show Cause shall constitute a Bill of Particulars with respect to all foregoing issues.

58. IT IS FURTHER ORDERED that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications of Michiana Telecasting Corp. and Pathfinder Communications Corp. to

assign the licenses of WNDU(AM) and WNDU-FM, South Bend, Indiana ARE DESIGNATED FOR HEARING at a time and location specified in a subsequent Order, upon the following issue:

[9.] To determine whether, in light of the evidence adduced under issues 4 - 8, Pathfinder possesses the basic qualifications to acquire WNDU-AM-FM.³²

59. IT IS FURTHER ORDERED that both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon Pathfinder Communications Corp.

60. IT IS FURTHER ORDERED that, pursuant to Section 1.227 of the Commission's Rules, the above hearings SHALL BE CONSOLIDATED.

61. IT IS FURTHER ORDERED that Niles Broadcasting, Inc. IS MADE A PARTY TO THIS PROCEEDING.

62. IT IS FURTHER ORDERED that the Administrative Law Judge who is appointed to preside in this hearing is directed to conduct the hearing in an expedited manner.

63. IT IS FURTHER ORDERED that, to avail themselves of the opportunity to be heard, the parties to this proceeding, pursuant to Sections 1.91(c), 1.221(c) and 1.221(e) of the Commission's Rules, in person or by attorney, SHALL FILE in triplicate with the Commission within twenty (20) days of the mailing of this Order a written appearance stating that they will appear at the hearing and present evidence on the matters specified in this Order.

64. IT IS FURTHER ORDERED that Michiana Telecasting Corp. and Pathfinder Communications Corp., pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, SHALL GIVE NOTICE in the manner prescribed, and SHALL ADVISE the Commission of the publication of such notice, as required by Section 73.3594(g) of the Commission's Rules.

65. IT IS FURTHER ORDERED that, without regard as to whether the hearing record warrants an order revoking the license of Hicks Broadcasting of Indiana, L.L.C. for Station WRBR(FM), it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER FOR FORFEITURE in an amount not to exceed 250,000 dollars shall be issued against Hicks Broadcasting of Indiana, L.L.C. for the alleged violations of Sections 73.1015 and/or 73.3514 of the Commission's Rules and/or Section 310(d) of the Communications Act of 1934, as amended.

66. IT IS FURTHER ORDERED that, without regard as to whether the hearing record warrants an order revoking the license of Pathfinder Communications Corp. for Station WBYT(FM), it shall be determined, pursuant to Section 503(b) of the Communications Act of 1934, as amended, whether an ORDER FOR FORFEITURE in an amount not to exceed 250,000 dollars shall be issued against Pathfinder Communications Corp. for the alleged violations of Sections 73.1015 and/or 73.3514 and/or 73.3555(d)(2) of the Commission's Rules and/or Section 310(d) of the Communications Act of 1934, as amended.

67. IT IS FURTHER ORDERED that in connection with the possible forfeiture liability noted above, this document constitutes a notice of opportunity for hearing pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules.

68. IT IS FURTHER ORDERED that a copy of each document filed in this proceeding subsequent to the date of adoption of this Order SHALL BE SERVED on the counsel of record appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of such counsel by calling the Complaints and Political Programming Branch at (202) 418-1430. Such service SHALL BE ADDRESSED to the named counsel of record, Complaints and Political Programming Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 8210, Washington, D.C. 20554. Additionally, a copy of each amendment to the above-captioned assignment applications SHALL BE SERVED on the Chief, Audio Services Division, 1919 M Street, N.W., Washington, D.C. 20554.

³² In the event that Pathfinder is found to possess the requisite qualifications, the Administrative Law Judge shall return the assignment application for WNDU-AM-FM to the processing line. See supra note 2.

69. IT IS FURTHER ORDERED that the Office of Public Affairs, Reference Operations Division of the Commission send a copy of this Order by Certified Mail - Return Receipt Requested to:

Hicks Broadcasting of Indiana, L.L.C.
237 Edison Rd.
Suite 200
Mishawaka, IN 46545

Pathfinder Communications Corp.
237 Edison Rd.
Suite 200
Mishawaka, IN 46545

John Dille III
c/o Pathfinder Communications Corp.
237 Edison Rd.
Suite 200
Mishawaka, IN 46545

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South Bend, IN 46634

Niles Broadcasting Co.
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Niles, MI 49120

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas, Secretary