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

In the Matter of Application of:	)	
	)	
BROOKFIELD DEVELOPMENT, INC.	)	FCC File Nos. 0001030441
and	)	0001066599
COLORADO CALLCOM	)	
	)	
For consent for assignment of license for	)	
Private Land Mobile Radio Station WNXS842,	)	
Denver, Colorado	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 2004 **Released: July 23, 2004**

By the Commission:

I. INTRODUCTION

1. We have before us an application for review filed by ACS Investments, Inc. (ACS).[1] ACS seeks review of the May 23, 2003 action by the former Public Safety and Private Wireless Division (Division) of the Wireless Telecommunications Bureau (Bureau)[2] denying ACS's petition for reconsideration of the grant of the above-captioned application (the application) filed by Brookfield Development, Inc. (Brookfield).[3] For the reasons stated herein, we deny the application for review.

II. BACKGROUND

2. On January 16, 2002, the Commission granted Brookfield's application for renewal of its license for Station WNXS842, Denver, Colorado.[4] No petitions for reconsideration were filed and this grant became a final action on February 16, 2002.[5] On September 25, 2002, the Bureau gave public notice of the acceptance for filing of the above-captioned application for consent to assign the license for Station WNXS842 from Brookfield to Colorado Callcom (Callcom).[6] On October 9, 2002, the

[1] ACS Application for Review (filed June 23, 2003) (AFR). ACS is licensee of conventional Special Mobile Radio (SMR) Station WPBZ432, which operates on the same channel pair as Station WNXS842 at Denver, Colorado.

[2] The Commission reorganized the Wireless Telecommunications Bureau effective November 13, 2003, and the relevant duties of the Public Safety and Private Wireless Division were assumed by the Public Safety and Critical Infrastructure Division. *See* Reorganization of the Wireless Telecommunications Bureau, *Order*, FCC 03-291, ¶ 2 (rel. Nov. 25, 2003).

[3] ACS Petition for Reconsideration (filed Nov. 8, 2002) (Petition).

[4] FCC File No. 0000667622 (filed Nov. 16, 2001). Station WNXS842 is authorized as conventional 800 MHz SMR. The base station and associated mobiles operate on frequencies 853.0375 MHz and 808.0375 MHz, respectively.

[5] *See* 47 U.S.C. § 405. *See also* 47 C.F.R. § 1.106(f) (petitions for reconsideration must be filed within thirty days of public notice of the Commission action).

[6] *See* Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Accepted for Filing, *Public Notice*, Report No. 1295 (Sept. 25, 2002) (*Acceptance PN*). On February 3, 2003, the (continued....)

Bureau released a public notice announcing that it granted the above-captioned application on October 1, 2002.[7] On October 10, 2002, Callcom notified the Commission that the assignment from Brookfield to Callcom had been consummated on October 1, 2002.[8] On November 8, 2002, ACS timely filed the Petition. Callcom and Brookfield subsequently filed oppositions to the Petition.[9] On July 28, 2003, ACS filed a Reply to the Opposition to the Petition.[10]

3. ***Petition for Reconsideration***. The Petition stated that the Bureau's grant of consent to the above-captioned application should be "returned to pending status and summarily dismissed on the grounds that the underlying authorization is not valid and can not be assigned."[11] Specifically, the Petition alleged that: (1) the consent to assignment was premature for failure to comply with the public notice and protest provisions of Section 405(a) of the Communications Act of 1934, as amended (the Act), and Section 1.106(f) of the Commission's Rules;[12] (2) Brookfield permanently discontinued operation of Station WNXS842 "sometime in the Spring of 2000" and therefore the license cancelled automatically and could not be renewed;[13] (3) Brookfield and Callcom engaged in the unauthorized use of spectrum because they operated the station either without a license or, assuming that the license did not automatically cancel, beyond the terms and conditions of the license;[14] (4) Brookfield and Callcom engaged in an unauthorized transfer of control without prior Commission approval;[15] (5) Brookfield and Callcom have caused ACS to suffer harmful co-channel interference;[16] and (6) Brookfield and Callcom lack the basic character qualifications to hold a Commission license.[17]

4. ***Division Decision***. On May 23, 2003, the Division denied the Petition.[18] The Division analyzed the arguments of the three core issues presented by ACS, namely, whether: (1) the Bureau erred in granting the assignment application from Brookfield to Callcom; (2) the Bureau erred in granting Brookfield's renewal application; and (3) Brookfield and Callcom engaged in an unauthorized

(...continued from previous page)
Commission consented to the assignment of Call Sign WNXS842 from Callcom to CU Enterprises, Inc. (File No. 0001173040).

[7] Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action, *Public Notice*, Report No. 1309 (Oct. 9, 2002) (*Grant Public Notice*). ACS filed a Motion for Immediate Stay and Request to Set Aside Grant (filed Oct. 9, 2002), which we denied. *See* Letter to Robert J. Keller, Esq., from D'wana R. Terry, Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau (Oct. 23, 2002).

[8] Form 603 Sched. D (Notification of Consummation of Assignment), FCC File No. 0001055152 (filed Oct. 10, 2002). On October 23, 2002, Callcom submitted on FCC Form 601 an application for modification, FCC File No. 0001066599. This application for modification of Station WNXS842 was accepted for filing on October 30, 2002, and granted on December 20, 2002.

[9] *See* Opposition of Colorado Callcom (filed Nov. 21, 2002) (Callcom Opposition) and Opposition of Brookfield Development (filed Dec. 10, 2002) (Brookfield Opposition).

[10] Reply to Oppositions to Petitions for Reconsideration (filed July 28, 2003).

[11] Petition at 9.

[12] *Id.* at 3.

[13] *Id.* at 4-5, 6.

[14] *Id.* at 6.

[15] *Id.* at 8.

[16] *Id*.

[17] *Id.* at 9.

[18] In the Matter of Brookfield Development, Inc. and Colorado Callcom, *Order,* 18 FCC Rcd 10558 (PSPWD 2003) (*Order*).

transfer of control or assignment of license in violation of Section 310(d) of the Act. With regard to the first issue, the Division determined that the Bureau's grant of the above-captioned application only six days after the *Acceptance PN* did not violate the 30-day notice and protest requirements of Section 309 of the Act because that section does not apply to Private Land Mobile Radio Service (PLMRS) authorizations.[19] ACS had alleged that because Callcom had used the facility on a "commercial basis" prior to the assignment, the application should have been treated as a common carrier.[20] The Division rejected this argument because (1) the license for PLMR Station WNXS842 did "not authorize interconnection" and (2) ACS failed to allege or demonstrate that the station was "used to provide a mobile service that made interconnected service available."[21] Citing Section 332(c) of the Act, the Division stated that "a mobile service is a private mobile service if it is not interconnected [to the public switched network], and a private mobile service shall not "be treated as a common carrier for any purpose under this Act."[22]

5. On the second issue, the Division rejected ACS's argument that because Brookfield had discontinued operating Station WNXS842, the license cancelled automatically.[23] ACS claimed that it had not detected any co-channel operations from Brookfield during 2000-2001.[24] ACS also cited hearsay evidence of conversations between Mr. Patrick M. Hilleary—a Brookfield employee and property manager of Republic Plaza—and Mr. Michael Tony Westall—the ACS principal—to show that Brookfield had discontinued operations and that Callcom had used the facilities as a common carrier.[25] However, in light of contrary testimony proffered by Mr. Hilleary,[26] and in the absence of detailed monitoring logs submitted into the record to support ACS's allegations, the Division did not find ACS's arguments persuasive.[27]

6. Lastly, the Division considered and rejected ACS's claims that Brookfield had "sold the channel to Callcom" and that Callcom has been using the channel since that time in violation of Section 310(d) of the Act.[28] Because the Division determined that the allegation did not come from a disinterested party, it was not convinced that ACS had presented specific allegations of fact necessary to establish that grant of Brookfield's renewal application would be *prima facie* inconsistent with the Act or the public interest.[29]

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[19] *Id.* at 10559 ¶ 4.

[20] Petition at 8; AFR at 5.

[21] *Order* at 10560 ¶ 5. The Commission subsequently granted Colorado Callcom's application to modify Call Sign WNXS842 to authorize interconnect and CMRS operation as a conventional SMR station (GX) (FCC File No. 0001066599). *See supra* note 8.

[22] *Id.*

[23] *Id.* at 10561 ¶ 7. The Division also noted that to the extent ACS's Petition challenged the renewal application, it was essentially a late-filed petition for reconsideration of January 16, 2002 grant. *Id.*

[24] Petition at 7.

[25] *Id.* at 8.

[26] Mr. Hilleary's declaration explains that "[i]n July 2002 Brookfield and Callcom executed an Asset Purchase Agreement that included an election of Callcom as manager of the system until such time as the station assignment was complete." Hilleary Declaration at 7.

[27] *Order* at 10561 ¶ 7.

[28] *Id.* at 10561-10562 ¶¶ 8-9.

[29] *Id.* at 10561 ¶ 8.

7. ***Application for Review***. In its AFR, ACS raises two major issues: (1) whether the public notice requirements of Section 309 of the Act apply to PLMRS license applications "with regard to facilities that are *de facto*, operated in commercial mode, and also compete with commercial mobile radio service (CMRS) stations;" and (2) whether the Bureau "properly resolved disputed factual issues regarding permanent discontinuance of operations, unlawful commercial operations, and premature transfer of *de facto* control without an evidentiary hearing."[30] The AFR seeks reversal of the Division's decision to affirm the Bureau's consent to the transfer of control application filed by Brookfield and Callcom; and alternatively, requests that the application be designated for hearing.[31]

III. DISCUSSION

8. Section 309(b) of the Act requires that, if a transfer or assignment of common carrier licenses involves a "substantial change in ownership or control," a 30-day public notice and comment period must be provided.[32] As an initial matter, we note that ACS does not dispute that the license for Station WNXS842 is authorized as PLMRS, and that the public notice requirement of Section 309(b) does not apply to PLMRS. Rather, the gravamen of the AFR is that because Brookfield had operated the PLMRS facilities of Station WNXS842 as a *de facto* commercial service, the Bureau erred by failing to process the assignment application under the 30-day notice and protest requirements applicable to common carriers.

9. Notwithstanding the absence of any allegation or finding that the facilities in question were interconnected with the public switched network, the AFR maintains that the Bureau erred because the facilities operated *de facto* as the "functional equivalent" of a commercial mobile service.[33] To the extent ACS alleged that Callcom had used the station as a common carrier for purposes of conducting commercial activities, the Division correctly rejected these arguments for want of factual substantiation beyond mere speculation or argument.[34] In view of the allegations and counter arguments entered into the record and in light of the totality of the facts considered by the Division, we find no basis to disturb the Division's decision on this issue.

10. Title VI, Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act"),[35] signed into law August 10, 1993, amended Sections 3(n) and 332 of the Act.[36] Specifically, the Budget Act amended Sections 3(n) and 332 of the Act to create a comprehensive regulatory framework for all mobile radio services, including existing common carrier mobile services, private land mobile services, and future mobile radio services. Under revised Section 332, which previously governed private land mobile service, mobile services are classified as either "commercial mobile service" or

[30] AFR at ¶ 1.

[31] AFR at ¶ 4.

[32] *See* 47 U.S.C. § 309(c)(2)(B).

[33] AFR at ¶ 7.

[34] As a procedural matter, the Commission notes that to the extent the AFR relies on a question of fact or law – that is, whether Callcom's operations provided the "functional equivalence" of CMRS – which the Division had not specifically been afforded an opportunity to pass, the AFR is subject to dismissal. *See* 47 C.F.R. § 1.115(c). However, in the interest of completeness, the Commission believes that, because the "functional equivalence" argument raised by ACS inextricably turns on the same purported facts previously considered by the Division, the public interest is served by addressing this issue on the merits.

[35] Pub.L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993), codified as Sections 3(n) and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 3(n) & 332.

[36] *See* 47 U.S.C. §§ 153(n) & 332(c).

"private mobile service."[37] Commercial mobile service providers are treated as common carriers under the Act, except that the Commission may exempt them from provisions of Title II other than Sections 201, 202, and 208.[38]

11. As the Division noted, no where in the record does ACS explicitly allege or establish that Brookfield's facilities were, in fact, interconnected with the public switched network.[39] Section 332(d)(1) of the Act, plainly and explicitly states that "the term 'commercial mobile service' means any mobile service… that is provided for profit and makes *interconnected services* available to the public…as specified by regulation by the Commission."[40] In interpreting the Budget Act, we have previously determined that "if we conclude that a mobile service does not meet the literal definition of a commercial mobile radio service, we will presume that the service is private and it will be regulated as PLMRS unless there is a showing in a specific case that it is the *functional equivalent* of a service that is classified as CMRS."[41] This presumption may be overcome only upon a showing by a petitioner challenging the PLMRS classification that the mobile service in question is the functional equivalent of a commercial mobile radio service.[42] This presumption is codified in Section 20.9(a)(14) of the Commission's Rules.[43]

12. Because ACS does not establish that Brookfield's facilities were at the time in question interconnected with the public switched network, we must presume that the services provided were PLMRS.[44] In determining whether ACS overcame this presumption, we will consider the record in its totality, including "any other relevant evidence or matters that the Commission may officially notice."[45] After a careful review of the record, we find no basis to conclude that the Division erred in its analysis, abused its discretion, or should have as a matter of policy concluded any differently.

13. Our reasoning is as follows. To overcome the PLMRS presumption,[46] ACS must show that the service under review is the functional equivalent of, or a "close substitute" for a commercial mobile radio service.[47] The bulwark of ACS's argument rests on the allegation that "the City of Thornton operated approximately 12 remote stations on Brookfield's channel to monitor and control water irrigation, and that Callcom provided this service to Thornton."[48] Even if assumed true, without further market-specific information or empirical data to ascertain the target market and to evaluate consumer demand, among other factors,[49] we cannot reasonably conclude that Callcom's operations at

[37] *See* 47 U.S.C. §§ 332(c)(1) & (c)(2).

[38] *See* 47 U.S.C. § 332(c)(1). Part I of Title II of the Act governs common carrier regulations generally.

[39] *Order* at 10560 ¶ 5.

[40] 47 U.S.C. § 332(d)(1) (emphasis added).

[41] In the Matter of Implementation of Sections3(n) and 332 of the Communications Act – Regulatory treatment of Mobile Services, GN Docket No. 93-252, *Second Report and Order,* 9 FCC Rcd 1411, 1445-1446 ¶ 76 (1994) (emphasis added) (*Second Report and Order*).

[42] *Id.* at 1447 ¶ 79.

[43] 47 C.F.R. § 20.9(a)(14).

[44] *See Second Report and Order* at 1447-1448 ¶ 80.

[45] *Second Report and Order* at 1447-1448 ¶ 80; 47 C.F.R. § 20.9(1)(14)(B). *See supra* note 34.

[46] *See supra* note 41. We note, however, that PLMRS does not *per se* prohibit commercial service.

[47] *Id.*

[48] Petition at 3. Brookfield categorically denied that the facilities were used for commercial purposes. Brookfield Opposition at 2.

[49] Section 20.9(1)(14)(B) provides:

(continued....)

the time in question were a "close substitute" to, and therefore, a functional equivalent of, CMRS.[50] Because we find that ACS has failed to overcome the statutory presumption that a mobile service is PLMRS, we find no basis to disturb the Division's decision denying ACS's claim of unlawful commercial operation.

14. Next, we turn our attention to the second issue raised by the AFR. In this regard, ACS contends that the Division erred by adjudicating disputed facts regarding its allegations of discontinuance of operations, unauthorized commercial use, and unauthorized transfer of control or assignment of license without an evidentiary hearing.[51]

15. As an initial matter, we note that neither the Act nor the Commission's Rules provide for the filing of petitions to deny against PLMR applications.[52] Because the station subject to the assignment application in question operated as PLMRS, the Division was not required to consider ACS's argument in the same fashion as it addresses petitions to deny.[53] Since this statutory framework for opposing applications does not cover PLMRS, the filing of a petition to deny a private radio license application is not a matter of right, but rather a matter within the Commission's discretion.[54] In light of the overall complexity of facts presented and to ensure closure of the protracted issues at hand, we believe that the public interest is served by exercising our discretion in this particular instance.[55]

16. To obtain an evidentiary hearing, parties challenging an application must satisfy the two-step test established in Section 309(d) of the Act, as amended.[56] Section 309 of the Act provides that any party in interest may oppose the grant of a license application in the broadcasting and common carrier services, as well as certain other specified services not relevant here, if that grant would be inconsistent with the public interest, convenience, and necessity standard set forth in Section 309(a) of the Act.[57] As a threshold matter, Section 309(d)(1) provides that a petition to deny must "set forth specific allegations of fact sufficient to show ... that a grant of the application would be prima facie inconsistent with the public interest, convenience, and necessity."[58] If the Commission determines that

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> A variety of factors will be evaluated to make a determination whether the mobile service in question is the functional equivalent of a commercial mobile radio service, including: consumer demand for the service to determine whether the service is closely substitutable for a commercial mobile radio service; whether changes in price for the service under examination, or for the comparable commercial mobile radio service would prompt customers to change from one service to the other; and market research information identifying the targeted market for the service under review. 47 C.F.R. § 20.9(1)(14)(B).

[50] *See* Application of Quatron Communications, Inc., *Memorandum Opinion and Order,* 15 FCC Rcd 4749, 4753-4754 ¶ 13 (2000).

[51] *See* AFR at ¶ 1.

[52] *See* 47 U.S.C. §§ 309(a), (b), (d).

[53] *See id.*

[54] *See* S&L Teen Hospital Shuttle, *Memorandum Opinion and Order,* 16 FCC Rcd 8153, 8155 n.14 (2001).

[55] *See, e.g., FCC v. WJR, The Goodwill Station, Inc.,* 337 U.S. 265, 283 (1949) ("the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked -- the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceeding, and similar questions -- were explicitly and by implication left to the Commission's own devising").

[56] 47 U.S.C. § 309(d).

[57] *See* 47 U.S.C. §§ 309(a), (b), (d).

[58] 47 U.S.C. § 309(d)(1).

a *prima facie* case has been made, then, and only then, must the Commission take the second step and determine whether a substantial and material question of fact has been presented.[59] If the Commission finds that no substantial or material question of fact has been presented, no evidentiary hearing need be held.[60] The Court of Appeals for the District of Columbia Circuit has reaffirmed this two-step process for determining the sufficiency of a petition to deny requesting an evidentiary hearing.[61]

17. During the first step, we may assume that the specific facts set forth by the complaining party are true, without reference to contrary evidence.[62] Allegations that consist of ultimate, conclusory facts are not sufficient.[63] Similarly, allegations that are not based on personal knowledge, but rather on second-hand information are insufficient.[64] If we determine that the petition establishes a threshold *prima facie* showing, the inquiry proceeds to the second phase. In that phase, the Commission determines whether, on the basis of the application, the pleadings, and other matters which it may officially notice, a substantial and material question of fact is presented. If there are no substantial and material questions, and the Commission is able to find that the application would be in the public interest, the application is granted. If there are substantial and material questions of fact, the application is designated for hearing, pursuant to Section 309(e).[65]

18. After careful review of the record before us, we find that ACS has not established a *prima facie* case pursuant to the first prong of our analysis under Section 309(d) of the Act. ACS merely states that it had "constantly" monitored the channel and had "not noticed any co-channel operations."[66] Yet, as noted by the Division, the Commission has consistently held that in the absence of "any detailed records…such as logs showing the exact duration" or "monitoring studies to support its claim of non-operation," the claims are unsubstantiated and therefore insufficient to establish a *prima facie* case under Section 309(d).[67] Because ACS failed to demonstrate that Brookfield's facilities ceased operation on a permanent basis for over one year,[68] we find that the Division correctly determined that Brookfield's license did not automatically cancel, and, therefore, correctly concluded that ACS's allegation of unauthorized use of facilities must fail as well.[69]

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[59] 47 U.S.C. §§ 309(d)(2) and (e).

[60] 47 U.S.C. § 309(d)(2).

[61] *See, e.g., Astroline Com. Co. Ltd. Partnership v. FCC,* 857 F.2d 1556, 1561 (D.C.Cir.1988) (*Astroline*); *Gencom, Inc. v. FCC,* 832 F.2d 171, 180-81 (D.C.Cir.1987) (*Gencom, Inc.*); *Citizens for Jazz on WRVR, Inc. v. FCC,* 775 F.2d 392, 394 (D.C.Cir.1985) (*Jazz*).

[62] *Astroline,* 857 F.2d at 1561.

[63] *Gencom, Inc.,* 832 F.2d 171, 181 n. 11. *See Bilingual Bicultural Coalition on Mass Media, Inc. v. F.C.C.,* 595 F.2d 621, 629 (D.C.Cir.1978); *see also* Arnold L. Chase, *Decision,* 5 FCC Rcd 1642, 1645 ¶ 19 (1990).

[64] *See* KRPL, Inc., *Letter Order,* 5 FCC Rcd 2823, 2824 (1990).

[65] *See* 47 U.S.C. § 309(e).

[66] AFR at 6.

[67] *Order* at 10561 ¶ 7 n.27. The AFR also alleges harmful interference purportedly caused by the operation of Station WNXS842. However, noticeably absent from the record are any engineering reports or technical studies prepared by either a frequency coordinator or other independent third party contracted by ACS to substantiate these claims. *See* 47 C.F.R. § 1.106(e). This rules states in relevant part, that "[w]here a petition for reconsideration is based upon a claim of electrical interference, ... such petition … must be accompanied by an affidavit of a qualified radio engineer." *Id.*

[68] *See* 47 C.F.R. § 90.157.

[69] *See id.* at 10561 n.26.

19. Lastly, we find no error in the Division's analysis of ACS's allegation of a "premature transfer of de facto control." ACS alleges that in a July 2002 conversation between Messrs. Hilleary and Westall, Mr. Hilleary had stated that Brookfield "sold the channel to Callcom."[70] The AFR contends that the Division erred and "side-stepped" this issue by concluding that Mr. Westall, president of ACS, was not a disinterested party.[71] In reaching its conclusions, the Commission has broad discretion to evaluate the weight of evidence based on the record before it.[72] In this connection, a relevant factor within the exercise of the Commission's discretion is its consideration of whether a declarant is a disinterested witness.[73] We believe that the two-step process elucidated in *Astroline* would be undermined were we merely to assume at face value the veracity of an allegation without weighing the credibility of the declarant.[74] Accordingly, we conclude that the Division correctly considered the overall weight and probity of Mr. Westall's testimony and properly concluded that the statement offered lacked the basic underlying support to sustain a *prima facie* showing.[75]

IV. CONCLUSION

20. Because ACS has not established that the facilities licensed under WNXS842 were either interconnected to the public switched network or provided services functionally equivalent to CMRS, it has not overcome the presumption that the services in question are PLMRS. Additionally, because ACS has not established a basis to reasonably conclude that grant of the underlying application would be *prima facie* inconsistent with the public interest, we conclude that no hearing is required.[76] We therefore find no reason to disturb the Division's decision.

V. ORDERING CLAUSE

21. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405, and Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, that the Application for Review filed on June 23, 2003, by ACS Investments, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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[70] *See* Petition at 5.

[71] AFR at 8.

[72] *Gencom, Inc.* at 181.

[73] *See* Application of Wine Country Radio, *Memorandum Opinion and Order,* 11 FCC Rcd 2333, 2334 ¶ 6 (1996) (citing *Johnson v. United States*, 628 F.2d 187 (D.C. Cir. 1980)).

[74] *Cf.* Application of Rocky Mountain Radio, Inc., *Memorandum Opinion and Order,* 15 FCC Rcd 7166, 7167-7168 ¶ 3 (1999). *See Gencom, Inc.* at 181.

[75] Particularly troubling to the Division was the fact that Mr. Westall's declaration, while attesting to general matters proffered in the Petition, specifically excepted those matters "stated to be made on information and belief…." *Order* at 10562 ¶ 9 n.37. Incidental to the Division's consideration of the probative value of Mr. Westall's testimony was the Division's recognition of conflicting evidence presented by Brookfield. Brookfield Opposition at 3-4.

[76] In the absence of a *prima facie* showing, the Commission need not examine whether a substantial and material question of fact exists under the second prong of the section 309(d) of the Act. *See* Citizens for Jazz on WRVR, Inc. v. F.C.C., 775 F.2d 393, 395 (D.C. Cir. 1985) (noting that a "substantial" question for purposes of this analysis is a question that "arouses sufficient doubt on the point that further inquiry is called for").