

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

In re Application of)	
)	
)	
High I-Q Radio, Inc.)	
)	
Noncommercial Educational FM Station)	Facility ID No. 78344
KOLI(FM), Electra, Texas)	
)	
Application for License to Cover Construction)	
Permit)	File No. BLH-980203KB
)	
Application for Assignment of Construction)	File No. BAPH-980421HW
Permit to Cumulus Licensing Corp.)	

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 2004

Released: April 21, 2004

By the Commission: Commissioner Martin concurring and issuing a statement; Commissioners Capps and Adelstein concurring in part, dissenting in part, and issuing a joint statement.

1. The Commission has before it two applications for review filed by Apex Broadcasting, L.L.C.¹ (“Apex”), regarding the captioned applications of High I-Q Radio, Inc. (“High”), former licensee of station KOLI(FM), Electra, Texas. In the first application for review, filed on October 13, 1998, Apex seeks review of a September 14, 1998, action by the Mass Media Bureau (“Bureau”) which denied Apex’s February 8, 1998, “Petition for Emergency Relief” and its May 20, 1998, Informal Objection to the captioned KOLI(FM) license application (“1998 Letter Decision”).² In the second application for review, filed on September 13, 1999, Apex seeks review of the Bureau’s August 10, 1999, letter decision which both denied Apex’ petition to deny the application to assign the station from High to Cumulus Licensing Corporation (“Cumulus”) and granted the KOLI(FM) license and assignment applications (“1999 Letter Decision”). For the reasons set forth below, we will (1) deny Apex’ October 13, 1998, application for review, (2) grant the September 13, 1999, application for review in part and deny it in part; and (3) issue admonitions to both High and Cumulus.

Factual Background

2. On November 8, 1995, High applied for a construction permit to build a new noncommercial educational (“NCE”) FM station on non-reserved channel 235C2 at Electra, Texas. Electra is located

¹ Apex indirectly controls through various subsidiaries four radio stations licensed to Wichita Falls, Texas: KNIN-FM, KTLT, KWFS(AM), and KWFS-FM. These stations compete with KOLI for listeners and advertisers.

² See *Letter to High I-Q Radio, Inc. and Cumulus Licensing Corporation*, reference 1800B3-MFW (MMB, Sept. 14, 1998). High I-Q Radio, Inc. filed an opposition on October 28, 1998, to which Apex filed a reply on November 9, 1999.

approximately 25 miles from the larger community of Wichita Falls. The Commission granted the application on May 23, 1996.

3. On June 3, 1997, applications were filed which proposed the assignment of three station licenses in the Wichita Falls area to Cumulus. The Commission granted these applications on October 3, 1997. On December 2, 1997, Cumulus closed on the transactions and became the licensee of stations KLUR-FM and KQXC(FM), Wichita Falls and KYYI(FM), Burkburnett, Texas.

4. Shortly after the filing of the referenced assignment applications, Cumulus commenced discussions with High about its Electra permit. By letter dated July 28, 1997, Cumulus proposed to pay Larry Hickerson ("Hickerson"), High's then president, \$10,000 not to sell, offer to sell, or solicit an offer to sell the permit to anyone other than Cumulus for a period of 14 days. Cumulus also proposed that it and High "agree to negotiate promptly and in good faith toward the preparation and execution" of a Memorandum of Understanding ("MOU") in the form attached to the letter. Hickerson signed the letter that day. According to a declaration later submitted by Hickerson, he sought the Electra authorization because he had intended to return to Texas, his home state. However, Hickerson stated that he subsequently developed heart and lung problems in 1997, which caused him to remain in Georgia and resulted in several hospitalizations.³

5. On August 8, 1997, Cumulus' Chairman, Richard Weening ("Weening"), executed the MOU. Hickerson, on behalf of High, signed the MOU three days later. The MOU recited that Cumulus would acquire the equipment necessary to operate the radio station and lease it to High. Cumulus also agreed to loan High sufficient working capital to construct and commence operations. The MOU also provided that, for \$27,600, High would give Cumulus an assignable option to acquire the station's assets. The option would be exercisable for a one-year period beginning with the commencement of station operations. In the event Cumulus exercised the option, it promised to pay \$238,400 for the station's assets upon finality of the grant of an assignment application.⁴ Cumulus would also assume all indebtedness under loans made by Cumulus to High. The MOU further provided that the parties would enter into a time brokerage agreement under which Cumulus would program the station from its commencement of operation and pay High's monthly expenses, plus \$500 per month. The MOU stipulated that High was to file a copy of that agreement with the Commission.⁵

6. By letter dated August 22, 1997, Weening arranged for Jack Sellmeyer ("Sellmeyer") to provide overall engineering services in connection with the construction of the station. Although Weening informed Sellmeyer that his invoices should be sent to Cumulus, Weening also stated that Hickerson was Sellmeyer's client. Further, Weening advised Sellmeyer of Hickerson's plan to do a live morning show and his desire to have installed a "20 channel Pacific Recorder board manufactured by AirWav." With respect to the tower, Weening stated that "the design should be mindful of the fact that this system will likely be relocated For this reason ... every effort should be made to find a used tower." Sellmeyer coordinated the bidding process for the purchase of equipment. Specifically, he requested and received proposals from equipment vendors and worked with Cumulus to place orders.

³ Hickerson subsequently died on April 23, 1998.

⁴ The MOU reflects that a broker hired and paid by Cumulus helped determine the purchase price.

⁵ High did not do so, however, until October 1998. High stated that its failure to file promptly was due to an oversight on the part of its counsel. Moreover, High did not submit the July 1997 letter until July 1999. *See infra*.

Sellmeyer also supervised Jeff Chancey ("Chancey"), a technician in the Wichita Falls area, in the construction of the station. Sellmeyer also averred that he had several telephone conversations with Hickerson regarding station construction and the preparation of license and STL (studio-to-transmitter link) applications.

7. In September 1997, Hickerson negotiated a lease for the transmitter site and, on behalf of High, entered into a three-year lease. Upon execution of the lease, High prepaid \$7,200 for three years' rent. During that same month, Hickerson also worked with and later paid a survey firm \$1,700 to determine the exact tower location.

8. *1997 Extension Application.* On October 22, 1997, High filed an application signed by Hickerson, to extend the KOLI(FM) permit (File No. BMPED-971022JA). Therein, High stated that: "A firm order was placed with Harris Corporation on October 21, 1997, for all necessary transmitting, antenna and studio-to-transmitter link equipment for the station." High also reported that: "The studio and satellite equipment is expected to be ordered from Harris Corporation on October 22, 1997." High also indicated that a tower construction order had been placed. Moreover, High stated: "The lease for the station's studio space has been signed" and "the space has been built out." Finally, High reported that it had entered into a tower site lease and had paid \$7,200 for three years' rent. The application did not disclose Cumulus's role in ordering equipment and constructing the station. The staff granted the extension application on December 29, 1997.

9. *Agreements between High and Cumulus.* On December 1, 1997, High and Cumulus executed an option agreement, a time brokerage agreement ("TBA"), a loan agreement, and a lease agreement. During the pendency of the extension application, none of the agreements were filed with or otherwise disclosed to the Commission. The option agreement and TBA were filed with the Commission in February 1998, and the loan and lease agreements in June 1998.

10. The option agreement recited that Cumulus had previously made a non-refundable payment of \$27,600 to High.⁶ Exercise of the option was solely at Cumulus' discretion. The purchase price was \$238,400, the amount that had been set forth in the MOU. As part of the option agreement, High and Cumulus agreed to the form of the asset purchase agreement that was to be executed upon the option's exercise. Finally, the option agreement stated that the loan and lease agreements would be cancelled and the loan forgiven upon consummation of the asset purchase agreement.

11. The TBA gave Cumulus the right to program the station. High retained the right to preempt or refuse to broadcast any program it deemed contrary to the public interest and to schedule and present public interest programming. High was to retain full authority over station operations and was required to hire a station general manager. Under the terms of the TBA High also was solely responsible for all of the station's expenses. Cumulus was required to reimburse High for itemized expenses on a monthly basis. Reimbursible expenses included, *inter alia*, the general manager's salary, tower, transmitter site and studio space rentals, insurance premiums, telephone and utilities.

12. High's one-year, eight-percent loan was secured by a security interest in all station assets other than the permit. The loan amount included \$8,662.38 for expenses already incurred by High: namely, the three-year lease and the payment due the surveyor. In addition, Cumulus agreed to make additional loans to cover the salaries for a station manager and contract engineer, lease expenses,

⁶ The record in this case does not indicate when the option price was paid by Cumulus to High.

insurance premiums, utility deposits, and hook up fees. High was required to make a written request for funds. High was also to maintain insurance and name Cumulus as the insured. During the period of the loan, High could not, without Cumulus' consent: acquire an interest in any other broadcast station; pay any bonus to any station employee; enter into an employment contract that was not terminable at will; provide any fringe benefit other than regular wages; or enter into any other contract, lease or agreement concerning the station with anyone other than Cumulus, unless the matter was terminable on no more than 30 days notice without penalty or payment.

13. Pursuant to the lease agreement, Cumulus would lease to High an antenna, a transmission line, a transmitter and related equipment, antenna and transmitter space, a main studio and related equipment. High was to pay \$500 per month for the rental of the tower and related equipment, and an additional \$500 per month for the studio. The station's studio and office space was at the same address as that for KLUR-FM, one of the other stations that Cumulus was about to acquire.

14. *Commencement of KOLI(FM) Operation.* KOLI(FM) station construction was completed following Commission grant of the extension application. On January 30, 1998, the station commenced operations as an NCE station. Shortly thereafter, High submitted a covering license application signed by Hickerson (File No. BLH-980203KB).⁷ Therein, High stated that "due to a change in circumstances," it would operate KOLI(FM) as a commercial station. On February 4, 1998, the station commenced airing commercials. High also represented that it would file its ownership report by February 6, 1998.⁸

15. On February 6, 1998, Apex, a competitor in the Wichita Falls market, filed a petition for emergency relief. Specifically, Apex sought revocation of High's program test authority. Apex argued that KOLI(FM) was not authorized to operate as a commercial station and that High had violated the Commission's public file rules. Included with Apex's petition was a promotional document from Cumulus referencing, *inter alia*, the cost of advertising on its "4th station soon to be up and running," an apparent reference to KOLI(FM). On February 19, 1998, High filed an opposition to Apex's petition. In addition to responding to Apex's commercial programming and the public file arguments, High included a declaration from Hickerson and one from James Marks ("Marks"), who identified himself as Cumulus' marketing manager in the Wichita Falls area. Among other things, Marks averred that he responded to a February 2, 1998, inquiry about the location of KOLI(FM)'s public file by stating that the caller would have to call Hickerson in Georgia in order to ascertain the file's whereabouts.⁹

16. On May 20, 1998, Apex filed an informal objection to High's license application, arguing that the "automatic program test authority" ("PTA") provisions in Section 73.1620 apply only when construction is completed in accordance with the terms of the station's license. Because KOLI commenced operation as a commercial station, it was not operating in accordance with its noncommercial educational authorization, claimed Apex, and the staff should revoke KOLI's PTA. Apex also argued that High violated the public inspection file rule, 47 C.F.R. § 73.3526, because the KOLI public inspection file was in Brunswick, Georgia, nearly 1000 miles from Electra, Texas. The allegations and arguments from the informal objection and related pleadings were repeated in a petition to deny the

⁷ See *infra* ¶ 18.

⁸ High did file its ownership report on February 5, 1998. However, it did not include the list of contracts required by Section 73.3615(a)(4) of the Commission's Rules.

⁹ Apex's March 3, 1998, reply raised no new matters.

subsequently filed assignment application.

17. *KOLI(FM) Assignment Application*. On April 21, 1998, Cumulus and High filed an application to obtain Commission consent to assign the KOLI(FM) license.¹⁰ On June 1, 1998, Apex filed a petition to deny the assignment application. In addition to repeating arguments made in its earlier pleadings, Apex also argued that Cumulus and High had engaged in a premature transfer of control based on Cumulus' financial involvement and the alleged role of Marks, a Cumulus employee.¹¹ In support of its claims, Apex submitted copies of web sites prepared by Cumulus for stations KOLI(FM), KQXC and KLUR-FM. Each listed Marks as the station general manager. In addition, the sites for KOLI(FM) and KLUR-FM stated that Jim Nash was the music director and that Jay Phillips was the program director and web site designer.

18. Both High and Cumulus opposed Apex's petition. In addition to supplying the loan and lease agreements between itself and Cumulus, High submitted the declaration of James Driskill ("Driskill"). Driskill identified himself as KOLI(FM)'s general manager; stated that he became KOLI(FM)'s general manager on January 30, 1998; and averred that he was a full-time employee of High and solely compensated by it. In its opposition, High reported that Driskill also served as KOLI(FM)'s music director and as an air personality under the air name "Jim Nash." High further acknowledged that Driskill provided services, "*for no compensation*," (emphasis in the original) as music director to KLUR-FM.¹² High claimed that Driskill had no other connection with KLUR-FM or Cumulus. High further contended that it had controlled and continued to control the station's policy decisions in the areas of programming, personnel, and finances. High noted that, under the TBA, it had sole responsibility for ensuring that programming met the needs of the community of Electra and that it employed Driskill to ensure that High met its programming responsibilities. Regarding personnel and finances, High averred that it had no relationship with Marks and that, in addition to Driskill, KOLI(FM) had a staff employee. High stated that it compensated both of its employees directly. Finally, High argued that the loan and lease agreements imposed no undue burdens. In this regard, High observed that, under the loan agreement, its obligation was merely to repay the sums loaned. Moreover, if Cumulus did not purchase the station and the TBA were terminated, High had the option of purchasing the equipment from Cumulus. In sum, High argued that its arrangement with Cumulus was structured in accordance with Commission precedent¹³ and that it had not prematurely transferred control of KOLI(FM) to Cumulus.

¹⁰ File No. BAPH-980421HW.

¹¹ Apex also contended that High was attempting to sell an unbuilt station for consideration far in excess of its legitimate and prudent expenses in violation of Section 73.3597(c)(2) of the Commission's Rules. However, by *Notice of Proposed Rule Making, 1998 Biennial Regulatory Review*, 13 FCC Rcd 11349, 11360 (1998), the Commission proposed to eliminate the "no profit" rule. Subsequently, by *Report and Order, 1998 Biennial Regulatory Review – Streamlining of Mass Media Rules*, 13 FCC Rcd 23056, 23070 (1998), the Commission eliminated the no profit limitation with respect to the sale of outstanding commercial station construction permits. With respect to noncommercial educational stations, the Commission eliminated the no profit limitation for permits granted prior to the release of the Report and Order. In light of this rule change and considering all of the circumstances, we do not believe it necessary to consider this allegation further.

¹² Opposition at 7, n. 5.

¹³ High relies principally on *Letter to William L. Silva, Esq.*, 9 FCC Rcd 6155 (MMB 1994), *recon. denied*, July 24, 1995, *application for review denied sub nom. Choctaw Broadcasting Corporation*, 12 FCC Rcd 8534 (1997).

19. Cumulus also claimed that the loan and lease agreements comported with Commission precedent. However, Cumulus also noted that Driskill had a three-hour morning show on KOLI(FM), which aired Monday through Friday. Although Cumulus acknowledged that its employees helped Driskill produce his show, it argued that the show's content was under Driskill's control. Finally, Cumulus submitted a declaration from Marks, who identified himself at this point as Cumulus' time brokerage operations manager for KOLI(FM). Marks averred that Driskill did not report to Cumulus on any KOLI(FM) programming matters.

20. Apex's reply alleged that as of June 23, 1998, High still had not arranged for a local telephone number for KOLI(FM). Apex also pointed out that Driskill was listed in the *1998 Broadcasting & Cable Yearbook* as KLUR-FM's music director, and it argued that it was "absurd" to believe that Driskill was insulated from his former employer, Cumulus, merely because he was now employed by High. Apex also contended that the nature of the financial arrangements, coupled with High's non-profit status and lack of income, ensured that Cumulus would acquire the station, either by purchase or by default.

21. *1998 Letter Decision*. By letter dated September 14, 1998, the Bureau denied Apex's informal objection and cautioned High and Cumulus for improperly commencing commercial operations on KOLI(FM). The Bureau took no further action on the issue of High's premature commercial operation, stating that the violation was less egregious than that admonished in a prior staff action.¹⁴ The Bureau also admonished High for violating the Commission's public file rule, Section 73.3527.¹⁵ At the same time, however, the 1998 Letter Decision withheld action on the license and assignment applications pending submission of information relating to the roles of High and Cumulus in constructing and operating KOLI(FM). The letter requested, among other things, that High and Cumulus provide (1) a copy of all attachments to the December 1, 1997, TBA between High and Cumulus; (2) Commission precedent approving the type of negative covenants imposed on High in the December 1997 Loan Agreement; (3) the basis for the \$238,400 purchase price for KOLI(FM) specified in the December 1, 1997, option agreement; (4) the name or names of the persons who constructed and oversaw construction of KOLI(FM); (5) a description of all actions taken by High to construct KOLI(FM); and (6) specific information regarding James Driskill's duties as KOLI(FM) general manager. High and Cumulus responded by letters dated October 26, 1998; Apex submitted comments on the responses on November 6, 1998.

22. Initially, High contended that it had completed the preliminary site work. In this regard, High stated that Hickerson had located the site referenced in the 1995 construction permit application and, in 1997, negotiated the lease, prepaid the rent, and worked with the survey firm to establish the site's boundaries and the precise location of the tower. However, both High and Cumulus acknowledged that the station's facilities were constructed by Sellmeyer and Chancey.¹⁶ Further, both agreed that Cumulus placed numerous construction-related orders and directly paid vendors for these services and equipment.

¹⁴ The Bureau cited *Letter to State of Oregon Acting by and through the State Board of Educations f/b/o Southern Oregon State College and Mr. Thomas F. Erickson (KZRO(FM), Dunsmuir, California)*, reference 1800B3-MFW (Aud. Serv. Div., rel. June 26, 1997) ("KZRO"), *aff'd on other grounds, Fatima Response, Inc.*, 14 FCC Rcd 18543 (1999), *recon. denied*, 15 FCC Rcd 10520 (2000).

¹⁵ 47 C.F.R. § 73.3527.

¹⁶ Cumulus also reported that, as of September 1, 1998, Chancey became a Cumulus employee.

Finally, both acknowledged that Cumulus leased the studio and office space for stations KLUR-FM and KOLI(FM), and, in turn, sub-leased a portion of that space to High. Nevertheless, High argued that Sellmeyer knew that final authority for construction of the station rested with Hickerson,¹⁷ while Cumulus insisted that the station was constructed according to specifications provided by High. High further contended that in July 1997, Hickerson “began negotiations with Cumulus in order to obtain financing for the construction” of the station, which led to the execution of the MOU, a copy of which it attached.¹⁸ According to High, “negotiations continued through the fall of 1997, culminating in the execution” of the option agreement, TBA, loan agreement, and lease agreement in December 1997.

23. With respect to personnel, High averred that Driskill began his KOLI(FM) general manager duties on January 30, 1998, when the station began broadcasting. According to Driskill, he and Hickerson negotiated Driskill’s salary and duties in January 1998. Prior to working for High, Driskill stated that he was the music director for KLUR-FM and reported to Jay Phillips, the station’s operations director. After beginning employment at KOLI(FM), Driskill acknowledged that he “agreed to provide [his] services to station KLUR on an uncompensated basis, assisting Mr. Phillips with music selection.” Driskill further averred that in mid-April 1998, Phillips took primary responsibility for music selection at KLUR-FM and that in July 1998 he [Driskill] “ceased all activities relating to music selection and playlist development for the station.” Driskill declared that, as KOLI(FM)’s general manager, he performed his daily on-air shift and necessary commercial production work, prepared the daily music log, reviewed programming provided by Cumulus, prepared payroll and other expenses for payment and updated the public file. Driskill also stated that he supervised the other KOLI(FM) employee, who answered the telephone, maintained the public service record announcements and paid some bills. According to Cumulus, Driskill officially resigned from its employment, effective February 15, 1998. Finally, Cumulus reported that Chancey, then a Cumulus employee, provided engineering services for High.

24. High’s October 26, 1998, response contains an additional affidavit from Marks. In this affidavit, Marks identified himself as the general manager of Cumulus stations KLUR-FM, KQXC, and KYYI. Marks acknowledged that he was responsible for programming KOLI(FM) under the TBA. According to Marks, Cumulus initially programmed the station without commercials. Upon the filing of the license application, Cumulus began commercial programming.

25. With respect to finances, High submitted copies of all attachments to the TBA. These submissions require Cumulus to reimburse High for salaries, rental payments, utility charges, and insurance premiums. However, no payment amount for airtime was specified in the TBA attachments. In response to the Bureau’s inquiry about certain negative covenants in the loan agreement,¹⁹ High observed

¹⁷ In this regard, High submits a declaration from Sellmeyer, who avers that “[t]hroughout the construction of station KOLI I conferred via telephone with Mr. Larry Hickerson on several occasions.” Sellmeyer also states that he worked with Larry Hickerson to prepare the STL and license applications, that he knew the permittee was High, and that actual final authority for construction rested with Larry Hickerson.

¹⁸ The MOU, in turn, referenced a “letter of intent,” which had been executed two weeks earlier.

¹⁹ The Bureau referenced provisions in the agreement pursuant to which High was not to take any of the following actions without Cumulus’ prior written consent: (1) change its name; (2) enter into any written or oral employment contract unless the contract is terminable at will without penalty; (3) contract with any labor union; or (4) enter into “any contract, lease, or agreement *with anyone other than Cumulus*” unless the contract was terminable upon 30 days’ notice without penalty (emphasis supplied).

that the covenants did not flatly prohibit High from taking the specified actions but merely required Cumulus' consent. In any event, High argued, the covenants in the loan agreement were for the express purpose of protecting Cumulus' investment and did not confer control of KOLI(FM) upon Cumulus. As for the setting of the \$238,400 purchase price for the station, the applicants contended that it was established through arms-length negotiations as facilitated by a broker. The purchase price did not include station equipment, and Cumulus acknowledged that the equipment was purchased "with the contemplation that the Station, and all related assets, would eventually be purchased by Cumulus from High." High further observed that Cumulus had paid approximately \$6 million for its other three Wichita Falls area stations.

26. In its comments filed November 6, 1998, Apex argued that the applicants' submissions compelled the conclusion that a premature transfer of control had occurred. Regarding construction, Apex contended that High had not undertaken any meaningful activity to construct or supervise construction of KOLI(FM). Apex further charged that, contrary to the claim made by High that Driskill had ceased performing any services for Cumulus in July 1998, Driskill continued to provide services to KLUR-FM into October 1998. Regarding Driskill's specific duties, Apex argued that the duties were devoid of substance and were more likely performed for Cumulus' benefit. Thus, according to Apex, Driskill cannot be viewed as a High management-level employee.²⁰ Further, considering that funds for Driskill's salary were provided by Cumulus, Apex argued that Driskill's role must be deemed contrary to the cross interest policy articulated by the Bureau in *Michael R. Birdsill*.²¹ Apex also contended that, contrary to previous representations, High has no financial responsibility for KOLI(FM), because Cumulus paid all expenses. Finally, Apex argued that High's extension and license applications lacked candor inasmuch as they made no mention of Cumulus.

27. *April 30, 1999, Staff Inquiry Letter.* By letter dated April 30, 1999, the staff sought further information from High and Cumulus to assess more fully the allegations related to control of Station KOLI(FM), High's compliance with document filing rules and the main studio rule, and the *bona fides* of High's extension and license applications.²² After receiving two extensions of time, High and Cumulus responded by letters dated July 16, 1999.²³

28. In response to queries about its finances, High acknowledged that it could not demonstrate that it had any liquid assets for construction of KOLI(FM) other than what it received from Cumulus. Indeed, the only pre-Cumulus payment High could verify was for a 1995 engineering charge for preparing High's construction permit application. Moreover, once Cumulus became involved, High could not point to any expense related to KOLI(FM) that Cumulus had not paid directly or indirectly. As for its

²⁰ Apex also pointed out that one of High's own exhibits belied its claims regarding Driskill inasmuch as it was a February 3, 1998, letter from Cumulus' counsel addressed to Marks as "General Manager" of stations including KOLI.

²¹ *Michael R. Birdsill*, 7 FCC Rcd 7891 (MMB 1992).

²² *Letter to High I-Q Radio, Inc. and Cumulus Licensing Corporation*, reference 1800C1-JWS, (Enf. Div., rel. Apr. 30, 1999).

²³ In addition, by letter dated August 24, 1999, Apex submitted further comments on the July 16, 1999, responses of High and Cumulus. To the extent appropriate, Apex's comments will be incorporated into the discussion set forth below.

failure to file the letter of intent with the Commission, High contended that the letter of intent was nothing more than an expression of intent to negotiate and only set forth a procedure for negotiation. As for the MOU, High argued that it merely provided that Cumulus would assist High with station construction and that it merely required High to negotiate in good faith a definitive option agreement but did not constitute a fully negotiated option or purchase agreement.

29. With respect to the extension application, High acknowledged that Cumulus had entered into the referenced lease agreement. High explained that Cumulus had agreed with High to make a portion of Cumulus' space available to High. High also explained that it made no reference to Cumulus in its extension or license applications because it thought none was necessary. High maintained that it answered the questions posed by the applications based on the facts and circumstances as they then existed. High further contended that it filed its ownership report as it stated it would in its license application and that it supplemented its ownership report shortly thereafter.

30. High admitted that the option, the TBA, and the loan agreement were not filed within the time specified by the rules, but argued that they were filed as soon as High recognized its oversight. High attributed this tardy filing to inadvertence. High contended that it was not required to file either the MOU or the letter of intent. Cumulus also conceded that, technically, it should have filed the TBA within 30 days of its execution; however, it contended that, because the TBA did not become effective until January 30, 1998, its filing on February 12, 1998, should be viewed as timely.

31. Regarding construction, Cumulus acknowledged that it contacted Sellmeyer to construct KOLI(FM)'s authorized facilities. According to Sellmeyer, he, Cumulus, and Hickerson agreed to an arrangement where Sellmeyer would submit his bills directly to Cumulus. Sellmeyer and High further claimed that, during construction, telephone conversations between Sellmeyer and Hickerson occurred.

32. With respect to Driskill, High averred that, beginning in January 1998, Driskill and Hickerson spoke about Driskill's potential employment and that, following Driskill's hiring, they spoke about two to three times per week until March 1998. From then until Hickerson's death on April 23, 1998, they spoke about once a week. Subsequently, High stated that Driskill also telephoned High's Treasurer, Zachary Hickerson.²⁴ High did not provide the dates of any of the calls. High's response also reflects that Driskill received a \$100 per month raise from his prior salary upon assuming his new duties, but that he continued to provide services to KLUR-FM, without compensation from Cumulus, through August 1998. High conceded that it neither knew nor approved of Driskill's work for Cumulus. According to Cumulus, Driskill is eligible for re-hire.

33. As for programming, High averred that, on Sundays at 8 a.m., KOLI(FM) aired a 30-minute public affairs program hosted by Driskill, and it provided a list of the topics covered between March 29, 1998 and July 26, 1998. However, High also conceded that "on a few occasions" a Cumulus employee "contributed to the programming" after Driskill had determined that the subject matter was important to

²⁴ Hickerson states that:

in the first month after Larry Hickerson's death, Mr. Driskill spoke with me two to three times per week, assisting me in getting up to speed regarding station operations as well as answering questions regarding the station which were relevant to the settlement of Larry Hickerson's estate. Beginning in approximately June 1998, my contacts with Mr. Driskill have become less frequent, depending on station activity.

July 16, 1999, High response, Letter of Zachary Hickerson, at 3.

the Electra community. With respect to Driskill's morning show, High and Cumulus acknowledged that his daily air shift was simply part of the time brokered by Cumulus.

34. With regard to station expenses, Cumulus conceded that as of March 1998, it had not yet established with High the payment procedures contemplated by the TBA. As a result, Cumulus paid most of the station's expenses directly to third party vendors. However, by July 1998, it appears that High was paying most of the expenses that it was obligated to pay under the TBA although, even then, the telephone and electric bills were addressed to Cumulus. In any event, pursuant to the TBA, Cumulus reimbursed High for the station's expenses paid by High. Finally, notwithstanding the TBA's recitation that High was to maintain insurance for KOLI(FM), it appears that High did not do so.

35. *August 10, 1999, Letter Decision.* By letter dated August 10, 1999, the Bureau granted the petition to deny in part and denied it in part, finding that Apex had not raised a substantial and material question of fact calling for further review regarding the license and assignment applications. The Bureau also granted the license and assignment applications "without prejudice to whatever action, if any, the Commission deems appropriate in light of the matters raised [in the two inquiry letters discussed in greater detail above.]"

Discussion

A. Applications for Review

36. October 13, 1998, application for review. In its October 13, 1998, application for review, Apex argues that the 1998 Letter Decision finding erred in failing to order the termination of KOLI(FM)'s program tests which, it claims, were undertaken in "an intentional and unexcused violation of a clear Commission rule." Section 73.1690(c), states Apex, clearly requires grant of an application on FCC Form 302 before a broadcaster can convert from NCE to commercial operation,²⁵ and "there is absolutely no basis, either in law or in fact, to support the ultimate finding . . . that [High's] commercial operation of its noncommercial permit was the result of an honest mistake."

37. We disagree and affirm the Bureau's decision. Section 399B of the Communications Act of 1934, as amended,²⁶ implemented by Section 73.503 of the Commission's Rules, prohibits NCE broadcast stations from broadcasting announcements that promote the sale of goods and services of for-profit entities in exchange for remuneration. It is undisputed that High, despite holding a permit for KOLI(FM) authorizing NCE FM operations on non-reserved FM Channel 235, commenced commercial operations on February 4, 1998, prior to grant of the license application proposing, *inter alia*, conversion to commercial operation. This operation violated the terms of its authorization and Section 73.503. As noted, High claims to have believed that Section 73.1690 did not apply to KOLI(FM), as by its terms the rule applies only to licensees, not permittees, and it therefore needed only to notify the Commission of its

²⁵ Section 73.1690(c)(9) states, in pertinent part, that "a noncommercial educational . . . FM licensee on Channels 221 to 300 (except Class D stations) on a channel not reserved for noncommercial educational use, may apply to change from educational or commercial *via* a modification of license application, and no exhibits are required with the application. The change will become effective upon grant of the license application." High argued that Section 73.1690(c)(9) did not apply here, because it was only a permittee, not a licensee, of KOLI(FM).

²⁶ 47 U.S.C. § 399B.

commercial operation.²⁷

38. We conclude that the Bureau properly rejected High's contention that Section 73.1690(c)(9) requires NCE *licensees*, but not permittees, to receive approval of a modification of license application prior to converting to commercial operation. As noted by the Bureau, Section 73.1690(c) requires prior Commission approval – *i.e.*, a finding that a conversion to commercial operations would further the public interest – prior to effectuation of the change. Although the rule is phrased in terms of licensees, no rational basis exists for applying the provisions of Section 73.1690(c)(9) to licensees while not applying those provisions to permittees especially when, as here, the permittee is operating pursuant to program test authority.²⁸ Despite this violation, we conclude that Apex has not established a *prima facie* case that High engaged in disqualifying conduct by commencing commercial operations prior to grant of the modification of license application. Permission to change from noncommercial to commercial service on a non-reserved channel is routinely granted, and no basis exists in this record to consider High's request anything but routine. While its commencement of commercial operations was premature, this action appears to be a simple mistake and does not implicate High's basic qualifications.²⁹ Accordingly, we affirm the staff's decision not to pursue the matter further, and we will deny Apex' October 13, 1998, application for review.

39. September 13, 1999, application for review. In its September 13 application for review, Apex contends that the 1999 Letter Decision “does not constitute reasoned decision making,” as required by the Administrative Procedure Act³⁰ and the federal courts. Such “impermissible brevity” prejudiced Apex, it claims, because it is unable to analyze the staff's reasoning. It claims that the 1999 Letter Decision “is utterly silent as to whatever facts it may have considered and the manner in which its ultimate conclusion was reached.” We agree that the Letter Decision did not constitute reasoned decision making. To rectify this deficiency, we have reviewed *de novo* the pleadings that culminated in that ruling. For the reasons set forth below, we affirm the staff's conclusion that Apex has not raised a

²⁷ The staff previously rejected this interpretation in *KZRO*. In fact, however, even prior to the adoption of Section 73.1690(c)(9), the staff required the filing of a license application for consent to convert from NCE to commercial operations.

²⁸ The “plain meaning” of a statute or regulation will not be followed where to do so produces an absurd result in clear violation of the intent of the drafters. *See United States v. American Trucking Associations*, 310 U.S. 534 (1940).

²⁹ At most, the premature commencement of commercial operations would have warranted a forfeiture for violation of Section 73.503 and operating at variance with the KOLI(FM) authorization. *See, e.g., Family Vision Ministries*, 18 FCC Rcd 1418 (2003) (“isolated occurrence” of violation of Section 73.503 did not warrant any sanction); *Isothermal Community College*, 17 FCC Rcd 22,666 (2002) (license admonished for violation of Section 399B of the Act and Section 73.503 of the Commission's rules when it broadcast numerous promotional announcements for a for-profit concert event); and *Russellville Educational Broadcast Foundation*, 14 FCC Rcd 13508 (\$2,500 forfeiture imposed for violation of Section 399B of the Act and Section 73.503 of the Commission's rules when licensee aired over 800 promotional announcements on behalf of for-profit entities over a one-year period); *Minority Television Project Inc.*, 17 FCC Rcd 15646 (EB, rel. Aug. 9, 2002) (\$10,000 forfeiture imposed for numerous and egregious violations of Section 399B of the Act and Section 73.621(e) of the Commission's rules, but finding no other type of sanction to be necessary or justified at the time).

³⁰ 5 U.S.C. § 551 *et seq.*

substantial and material question of fact regarding the license and assignment applications.³¹ We will, however, admonish High and Cumulus for unauthorized transfer of control and further admonish High for its failure to file required contracts, as discussed *infra*.

B. Unauthorized Transfer of Control

40. 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.³²

There is no fixed formula for evaluating whether a party is in *de facto*, or actual, control of a broadcast station.³³ In making such a determination, we traditionally look to whether a new entity has obtained the right to determine the basic operating policies of the station.³⁴ Specifically, we seek to ascertain who determines the station's policies with respect to programming, personnel and finances.³⁵ A licensee may delegate certain functions on a day-to-day basis to an agent or employee,³⁶ but such delegation cannot be wholesale. That is, those persons assigned a task must be guided by policies set by the permittee or licensee.³⁷ Moreover, the standards by which we measure control are equally applicable in situations involving time brokerage agreements.³⁸ Finally, when examining a situation where relevant agreements were entered into prior to or during construction, we also look to see who was in control of station construction.³⁹

³¹ *Serafyn v. FCC*, 149 F.3d 1213 (D.C. Cir. 1998); *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988); *Gencom, Inc.*, 832 F.2d 171, 180-81 (D.C. Cir. 1987); *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 394-95 (D.C. Cir. 1985). The Court of Appeals for the District of Columbia Circuit has held that the Commission need not rigidly follow this two-step process, and can focus on the second step when evaluating a petition to deny. See *Mobile Communications Corp. of America v. FCC*, 77 F.3d 1399, 1409-10 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 823 (1996).

³² 47 U.S.C. § 310 (d). See also 47 C.F.R. § 73.3540.

³³ See, e.g., *Stereo Broadcasters, Inc.*, 55 F.C.C.2d 819, 821 (1975), *modified*, 59 F.C.C.2d 1002 (1976).

³⁴ See *WHDH, Inc.*, 17 F.C.C.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).

³⁵ See *Choctaw Broadcasting Corporation*, 12 FCC Rcd at 8538 (1997).

³⁶ See, e.g., *Southwest Texas Public Broadcasting Council*, 85 F.C.C.2d 713, 715 (1981).

³⁷ See *David A. Davila*, 6 FCC Rcd 2897, 2899 (1991).

³⁸ *Choctaw Broadcasting Corporation*, *supra*.

³⁹ See *Roy M. Speer*, 11 FCC Rcd 18393 (1996).

41. We find that Cumulus, not High, was the entity in control of station construction. Cumulus, in accordance with the July 28, 1997, letter and MOU, acquired equipment and constructed the station. Cumulus contacted and paid Sellmeyer, the engineer who oversaw construction, and supplied and paid the technician who had on-site responsibility for station construction. Cumulus, after receiving proposals from Sellmeyer, also directly contracted with equipment suppliers and paid the invoices. In addition, Cumulus arranged for KOLI(FM) studio space in conjunction with its acquisition of studio space for three other stations. High's documented construction activity consisted of working with the surveyor and finalizing the lease for the land on which the tower was built. Finally, while we recognize that the engineer, Sellmeyer, had periodic conversations with Hickerson and supposedly understood that High was the client, the fact remains that Cumulus retained Sellmeyer and paid his invoices. In sum, it appears that High's role in the construction process was minimal while Cumulus' role was dominant.⁴⁰

42. With respect to programming, the TBA gives Cumulus the right to program the station although High can preempt or refuse to broadcast any program it deems contrary to the public interest. In addition, the TBA gives High the right to schedule and present public interest programming at any time it deems best. On their face, these provisions are similar to those previously approved by the Commission. The TBA of the type employed in this case and the parties' programming decisions under this agreement do not constitute an unauthorized transfer of control.⁴¹

43. As far as personnel are concerned, Apex has failed to rebut High's claim that it hired Driskill in January, 1998, to serve as station general manager. In that capacity, High proffers that Driskill (1) performed one daily on-air broadcast shift;⁴² (2) performed necessary commercial production work; (3) prepared the daily music log; (4) reviewed the programming provided by Cumulus to ensure that it comports with Commission requirements and meets the needs of the residents of Electra, Texas; (5) supervised High's one other KOLI(FM) station employee;⁴³ (6) prepared payroll and other expenses for payment; (7) updated and maintained the KOLI(FM) public inspection file; and (8) performed "any other necessary day-to-day operational activities."⁴⁴ High also claims that Driskill produced a weekly 30-minute public affairs show on Sunday mornings,⁴⁵ and Mr. Driskill states that he also was responsible for ensuring that KOLI(FM) complies with Commission technical standards and for requesting engineering

⁴⁰ *Accord, Roy M. Speer*, 11 FCC Rcd at 18414-17; *Salem Broadcasting, Inc.*, 6 FCC Rcd at 4173.

⁴¹ *See Choctaw Broadcasting Corporation*, 12 FCC Rcd at 8539; *Manahawkin Communications Corporation*, 17 FCC Rcd 342 (2001).

⁴² Cumulus sells the advertising time and provides the material to be aired during Mr. Driskill's program pursuant to the TBA.

⁴³ Driskill supervised Ms. Marti Driskill, who began working at the station on February 16, 1998, as a receptionist. Her primary duties are answering the telephone, maintaining the public service record announcements, and paying some bills. *See High's October 26, 1998 response to staff inquiry letter, Declaration of James Driskill*, ¶ 8.

⁴⁴ *See High's June 11, 1998, Opposition to Petition to Deny, Affidavit of James Driskill*, ¶¶ 5, 6; *High's October 26, 1998, response to staff inquiry letter, Declaration of James Driskill*, ¶¶ 6-8; and *High's July 16, 1999, response to staff inquiry letter, Letter of Zachary C. Hickerson*, at 5.

⁴⁵ High acknowledges that Brad Austin, a Cumulus employee, has contributed to this program "when Mr. Driskill has determined that Mr. Austin's own public affairs programming on behalf of Cumulus is important to the Electra Community." *See High's July 16, 1999, response to staff inquiry letter, Letter of Zachary C. Hickerson*, at 5.

services for the station as necessary.⁴⁶ However, it also is the case that Driskill regularly performed duties for Cumulus well after he resigned from Cumulus' employ and became KOLI(FM)'s general manager in late January 1998.⁴⁷ Moreover, High has failed to establish that Driskill exercised any substantive managerial responsibilities at KOLI(FM). This lack of control is buttressed by Cumulus' substantial financial control over station operations.

44. With respect to finances, for the first several months after KOLI(FM) went on the air, Cumulus paid directly most, or perhaps all, of the station's expenses. Indeed, there is no evidence that High paid *any* station expenses until the summer of 1998. Moreover, station telephone and electric bills were addressed to Cumulus after that time, and there is no indication that High maintained insurance protection, as it was required to under the TBA. Although High maintained a bank account at all times during its tenure as permittee of KOLI(FM), we conclude that High permitted Cumulus to assume key managerial and financial control over KOLI(FM) operations from the time of the letter of intent in July 1997 and did not regain control subsequently.⁴⁸

C. *Material Omissions*

45. High's assertions in the 1997 extension application concerning equipment orders and station construction were truthful. At issue is whether High's failure to disclose its contractual reliance on Cumulus to complete station construction constitutes a "willful material omission" in violation of Section 73.1015. We conclude it does not.

46. A permittee may rely on external technical, financial and legal assistance to construct its authorized station.⁴⁹ In fact, the Commission has concluded that a non-permittee/option holder may be "closely involved in the many facets of the funding and construction" of a new station.⁵⁰ Nothing in the former extension of permit application required the disclosure of the extent to which the permittee was relying on unrelated parties for station construction or the terms of the various related agreements. Although one can conclude that High was wholly dependent on Cumulus to construct KOLI, essentially the same "charge" can be leveled against any permittee that is relying on lenders, equipment suppliers, and other vendors to finance and build its authorized station. On these facts we cannot conclude that the extension application was materially incomplete.

D. *Failure to file contracts*

⁴⁶ See High's October 26, 1998, response to staff inquiry letter, Declaration of James Driskill, ¶ 7.

⁴⁷ For example, Cumulus' web sites for KLUR-FM and KOLI(FM), maintained by KLUR-FM program director Jay Phillips, advertised that Jim Nash, that is, Driskill, was the music director for Cumulus' station KLUR-FM as of May 11, 1998. Consistent with the information on those web sites, Driskill acknowledged that he continued to assist Phillips in the selection of music at KLUR-FM into the summer of 1998. Additionally, Driskill worked for Cumulus' benefit at KOLI(FM) in the past by serving as a Saturday show host, and he continues to work to Cumulus' benefit as the host of a three-hour Cumulus-originated program aired Monday through Friday. The programming for these shows was supplied by Cumulus, and Driskill acted as host of these programs.

⁴⁸ See, e.g., *Ms. Sally Hoskins, President*, 13 FCC Rcd 25317 (MMB 1998).

⁴⁹ *Roy M. Speer*, 11 FCC Rcd at 18415.

⁵⁰ *Manahawkin Communications Corporation*, 17 FCC Rcd at 357, ¶ 24.

47. Section 73.3613 provides in pertinent part that each broadcast permittee is required to file with the Commission within 30 days of their execution, certain agreements which affect the ownership and/or operation of the permittee's station. Specifically, a permittee is required to file, *inter alia*: "(b) [c]ontracts, instruments or documents relating to the present or future ownership or control of the permittee . . . [including] (3) (iii) options to purchase stock and other executory agreements; (5) loan agreements containing provisions restricting the . . . permittee's freedom of operation; and (d) time brokerage agreements. In addition, Sections 73.3615(a)(4)(i) and 73.3615(b) provide that permittees include with ownership reports filed with their license applications "[a] list of all contracts still in effect required to be filed with the FCC by [Section] 73.3613 showing the date of execution and expiration of each contract."

48. As noted above, High executed the MOU on August 11, 1997. That document established the parameters of the High-Cumulus relationship. Specifically, it provided that Cumulus would acquire and own the equipment necessary to operate the radio station and that it would lease the equipment to High. It provided that Cumulus would also loan High the money needed to construct and commence operations. It further provided that High would give Cumulus an assignable option to acquire the station's assets, including the station authorization, and it set the price of the option and described it in detail. The MOU also noted what Cumulus would pay to acquire the station's assets, and it also provided that Cumulus would assume all indebtedness under loans made by Cumulus to High. Moreover, the MOU provided that the parties would enter into a time brokerage agreement. Finally, the MOU called for High to file a copy of the executed document with the Commission. Clearly, both Cumulus and High understood that the MOU was a document that was related to the future ownership of KOLI(FM).⁵¹ As such, it should have been filed no later than 30 days after execution, that is, by September 11, 1997. However, High did not file it until October 26, 1998. We also find that High did not timely file the loan agreement, the option agreement or the TBA, nor did it provide a list of those agreements with its ownership report. Each of the foregoing documents was executed December 1, 1997. The TBA and option agreement were filed in February 1998; the loan agreement was filed in June 1998. All should have been filed within 30 days of their execution as High concedes.

Conclusions/Actions

49. Based upon our review of the facts and circumstances in this case, we conclude that an evidentiary hearing is not appropriate. The Commission is usually hesitant to designate a renewal or assignment application for evidentiary hearing on grounds of technical or legal violations in the absence of misrepresentation or lack of candor.⁵² While the record indicates that Cumulus prematurely assumed control of station KOLI(FM), there is no evidence of any attempt to intentionally mislead the Commission about these matters.⁵³ Further, as noted previously, High's President, Larry Hickerson, is deceased, thus

⁵¹ Arguably, High should also have filed the July 1997 letter of intent within 30 days of its execution because it also constituted a document that related to the future ownership of KOLI. Further, inasmuch as the document was not filed until July 1999, we could impose a forfeiture for its untimely filing. However, we conclude that Section 503(b)(6) also prohibits the imposition of a forfeiture for this violation.

⁵² See, e.g., *Edwin L. Edwards*, 16 FCC Rcd 22236, 22247-8 (2001), and *Duchossois Communications of Maryland, Inc.*, 10 FCC Rcd 6688, 6694 (1995).

⁵³ See *Edwin L. Edwards*, 16 FCC Rcd at 22247-8.

mitigating the potential for future lapses.⁵⁴ For these reasons, we conclude that the violations here do not raise questions about the character qualifications of these parties to be licensees.⁵⁵ Thus, despite the improper actions of the parties, we believe that designation of the subject applications for evidentiary hearing, or the institution of revocation proceedings, would be inappropriate.

50. As discussed above, however, we find that High apparently abdicated control of KOLI(FM) without Commission consent upon the execution of the MOU and that such abdication continued to the date the Commission granted the assignment of the KOLI(FM) permit to Cumulus. Furthermore, High admittedly failed to file the MOU or TBA, loan, and option agreement within 30 days of their execution, as required by Section 73.3613 of the Commission's Rules, and failed to list them in its ownership report as required by Section 73.3615. Additionally, as discussed above, we find that Cumulus apparently obtained control of KOLI(FM) without Commission consent upon the signing of the MOU and that such abdication continued to the date the Commission granted the assignment of the KOLI(FM) permit to Cumulus.

51. Under Section 503(b)(1)(A) of the Communications Act, the Commission may assess a forfeiture against a person who has "failed to comply substantially with the terms and conditions of any license [or] permit"⁵⁶ Section 503(b)(6)(A) disallows the assessment of forfeitures against a person "hold[ing] a broadcast license issued under title III of [the Communications] Act . . . if the violation charged occurred (i) more than 1 year prior to the date of issuance of the required notice or notice of apparent liability; or (ii) prior to the date of commencement of the current term of such license, which ever is earlier."⁵⁷ Under Section 503(b)(6)(B), a forfeiture cannot be imposed on a person not holding a broadcast station license "if the violation charged occurred more than one year prior to the date of issuance of the required notice."⁵⁸ Because the specified violations occurred more than one year ago, while High was the permittee of KOLI(FM), we may not levy a forfeiture against High for the violations discussed above.⁵⁹ With respect to Cumulus, the unauthorized transfer of control ended with the Bureau's August, 10, 1999 grant of the subject assignment application. The simultaneous grant of the license application also forecloses our ability to issue a forfeiture to Cumulus for assuming control of the station KOLI(FM) construction permit without Commission authorization, because the conduct at issue occurred

⁵⁴ See, e.g., *United Broadcasting Company*, 94 F.C.C.2d 960 (1982); *Friendly Broadcasting Company*, 90 F.C.C.2d 225 (1982).

⁵⁵ See, e.g., *Edwin L. Edwards, supra*; *Roy M. Speer, supra* ("serious" unauthorized transfer of control lasting for 42 months did not necessitate designation of applications for hearing where there was no substantial and material question of fact as to whether parties intended to deceive the Commission); *FM Broadcasters of Douglas County, Assignor*, 10 FCC Rcd 10429, 10430 (1995) (11-month unauthorized transfer of control unaccompanied by false responses or deception "did not put in issue the qualifications" of the parties; forfeiture was the appropriate remedy).

⁵⁶ See 47 U.S.C. § 503(b)(1)(A).

⁵⁷ 47 U.S.C. § 503(b)(6)(A)(i)-(ii).

⁵⁸ 47 U.S.C. § 503(b)(6)(B).

⁵⁹ See, e.g., *California State University at Sacramento (KKTO(FM))*, 14 FCC Rcd 10018 (MMB 1999), citing *Roy M. Speer*, 13 FCC Rcd 19911, 19920 (1998).

more than one year ago. Accordingly, we ADMONISH High and Cumulus for their failure to comply with the Commission's rules.

52. In light of the above actions, Apex' October 13, 1998 application for review filed on behalf of Apex Broadcasting, L.L.C. IS DENIED, and its September 13, 1999 application for review IS GRANTED TO THE EXTENT INDICATED HEREIN and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**JOINT STATEMENT OF
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN
CONCURRING IN PART AND DISSENTING IN PART**

*Re: High I-Q Radio, Inc., Noncommercial Educational FM Station KOLI(FM), Electra, Texas, Memorandum
Opinion and Order*

This case is replete with violations of Commission rules, including the unauthorized commencement of commercial operations for a noncommercial permittee; an unauthorized transfer of control of the station; and failure to file required documents with the Commission. We concur in these findings.

Each of these violations would ordinarily be subject to a fine or further enforcement action. Yet, the Order concludes that no further action is warranted on some violations, and that the lengthy delay in this case prevents the Commission from fining the parties for other violations because the statute of limitations has expired. So ultimately, Cumulus, the entity that prematurely assumed control of the station, walks away with a minor warning, all necessary FCC authorizations and a clean slate.

Because we are not convinced that this case raises no major questions for further inquiry, we dissent in part.

**CONCURRING STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

*Re: High I-Q Radio, Inc., Noncommercial Educational FM Station KOLI(FM), Electra, TX,
Application for License to Cover Construction Permit, Application for Assignment of
Construction Permit to Cumulus Licensing Corp., Memorandum Opinion and Order*

I agree with the findings made in this Order, including the unauthorized commercial operation and the premature transfer of control. I am concerned, however, that the Commission's delay in action has rendered us powerless to issue a fine. We need to act in a more timely fashion so that the statute of limitations does not eviscerate our ability to enforce our rules.